HANDBOOK

Service of Civil Process

and Related Sheriff's Office Functions

Revised 8-2015

DEDICATED
TO
VERNON
E.
DANIELS

This training manual is dedicated to the memory of Vernon E. Daniels. Mr. Daniels was a native of Norfolk and lived most of his adult life around the Richmond area. Most of you probably knew Mr. Daniels or at least knew of him. He was certainly a legend in the law enforcement field and specifically in civil process.

He served in the U.S. Air Force during WWII from 1943-1946. He was a retired Special Agent for the FBI working from 1950-1976. After retiring from the FBI, he became a Deputy Sheriff for the Colonial Heights Sheriff's Office from 1977-1978. He also taught for the Department of Criminal Justice Services at John Tyler Community College, for Virginia Sheriff's Offices and the Virginia State Police. He received his degree in accounting and law from the College of William and Mary. He was a partner in the firm of Hobbs, Geisen, Daniels and Associates.

Because of his education, knowledge and legal research skills, the Attorney General's Office asked Mr. Daniels to write a civil process manual. The Department of Criminal Justice Services also asked him to teach civil process to deputy sheriffs across the state. Mr. Daniels took the assignments seriously and created the first civil process manual. He taught many classes for criminal justice academies, community colleges and local sheriff's offices.

We dedicate this manual to his memory with much admiration and respect for his dedication to civil process training in the Commonwealth of Virginia.

Thank you, Vern, you will never be forgotten.

Preface

This handbook will provide convenient reference and guidance regarding the service of civil process and related sheriff's office functions. The handbook is designed to be as concise as clarity and understanding will permit; therefore, legal references (especially the Virginia State Code) are set forth for virtually every item in the book to facilitate legal research of any situation when necessary. A reading of the complete statute (plus any dictum set forth in the code) may help resolve a problem, since the entries in the handbook are basically a "thumb-nail" summary of the statute.

References

1. Virginia State Code (Primary reference source)

2. Fairfax County "Handbook for Deputy Sheriff's."

3. "Legal Aspects of Service of Civil Process in Virginia"
   (Originally prepared by the State Attorney General's Office.)

4. Virginia State Attorney General's Opinions

5. U.S. Supreme Court Decisions

6. Virginia Supreme Court Decisions

7. U.S. Fourth Circuit

Additional copies of this handbook may be obtained through the Virginia Sheriff's Association.

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CHAPTER ONE

GENERAL RULES OF THE COURT

Chapter One of this handbook sets out certain *general* information regarding:

1. How civil process is to be served in the Commonwealth,

2. Certain rules of the courts which relate to serving process,

3. Certain definitions of legal terms which might be helpful to Sheriffs in connection with the service of process,

4. Some general administrative reminders,

5. Certain legislation (statutes) intended to aid and protect the process serving officer, etc.

6. Fees for service is required for some services. The Sheriff shall collect those fees.

General

How Process To Be Served

Process shall be served in the manner set forth in Chapter 8 of Title 8.01, Code of Virginia, and the Rules of the Supreme Court (contained in Volume 2 of the Code of Virginia.) (§8.01-287)

Rules of Supreme Court (Virginia)

The Virginia Supreme Court shall prescribe the form of writs and make general regulations for the practice of law in all courts of the Commonwealth. (§8.01-3; §8.01-286)

Rules by District and Circuit Courts

The District Courts and Circuit Courts may prescribe such rules for their respective districts and circuits as may be reasonable to promote proper order and decorum, provided such rules are consistent with statutory provisions (legislative laws), decided cases, and the Rules of the Supreme Court. (§8.01-4)

General Definitions

Several definitions for terms as used in Title 8.01 are set forth in the Code of Virginia, a few of which are indicated as follows:

1. "**Action**" and "**suit**" may be used interchangeably.

2. "**Decree**" and "**Judgment**" may be used interchangeably.

3. "**Person**" may include individuals, a trust, an estate, a partnership, an association, an order, a corporation, or any other legal or commercial entity.

4. "**Sheriff**" shall include deputy sheriffs.

5. "**Process**" shall include notice.

6. "**Return**" shall include proof of service.

7. "**Statutory agent**" shall include the Commissioner of the Department of Motor Vehicles, the Secretary of the Commonwealth, and the Clerk of the State Corporation Commission. (§8.01-2; §8.01-285)

Copies of Process

The clerk of the court issuing any process, unless otherwise directed, shall deliver to the Sheriff, or other official, as many copies thereof as there are persons to be served. (§8.01-291) You can send papers back unserved.

Retention and Destruction of Sheriff's Records

Every Sheriff shall maintain in his office all official receipt books, canceled checks, and bank statements, until they are **audited** by the Auditor of Public Accounts. Such records must be retained for **three years** after audited by any individual or entity authorized by §15.2-1615 to inspect them and thereafter may be destroyed in accordance with retention regulations established pursuant to the Virginia Public Records Act (§42.1-76). (§15.2-1614)

Malicious Bodily Injury to Law Enforcement Officers

If any person **maliciously** causes bodily injury to another with intent to maim, disfigure, disable or kill, and knowing, or having reason to know that such person is a law enforcement officer or firefighter engaged in the performance of his public duties, that person shall be **guilty of a felony punishable by imprisonment for a period of not less than five years nor more than thirty years** and, subject to subdivision (g) of §18.2-10, a fine of not more than $100,000. Upon conviction of this offense, the sentence shall include a *mandatory minimum term of imprisonment of two years (with no suspension of sentence in whole or in part.*)

If any person unlawfully, but not maliciously, causes bodily injury to another, knowing or having cause to know that such person is a law enforcement officer or firefighter engaged in the performance of his public duties, shall be guilty of a **Class 6 Felony**. Upon conviction of this offense, the sentence shall include a mandatory term of imprisonment of **one year**.

This statute specifically includes full time employees of Sheriff's Offices, but contains the statement "who is responsible for the prevention or detection of crime and the enforcement of the penal, traffic, or highway laws of this Commonwealth." (§18.2-51.1)

FEES FOR SERVICE OF PROCESS

For services rendered by the Sheriff, the Sheriff is required to charge a fee in some cases. This section of the manual addresses the duties of the Sheriff to collect those fees, services for which he may not charge a fee, and the amount of fees to be collected. As to those cities or counties who have High Constables, §17.1-272 governs the fees collected.

Fees collected by High Constable

Establishment and disposition of fees collected by certain high constable. — Notwithstanding any provision of law to the contrary, including a general or special act, the City of Norfolk, may, by duly adopted local ordinance, establish fees for the service of process by the office of the high constable. The office of the high constable in such city shall publish a schedule of such fees by January 1 of each year. Copies of the schedule shall be forwarded to the Clerk of the Supreme Court of Virginia. Only in the City of Norfolk, shall high constables execute all processes, warrants, summonses and notices in civil cases before the general district court of the city to the exclusion of the sheriff of the city. Any fees, collected by the office of the high constable for such process, shall be deposited in the treasury of the city wherein such office is situated for use in the general operation of city government. (1998, c. 872; 2007, c. 813.) (§17.1-273)

DUTIES OF THE SHERIFF

NOTE: A October 24, 1983 Attorney General opinion states the Sheriff has **no duty** to service federal process. (1983-84 Va. Op. AG 328)

Fees and mileage allowances

A. Every sheriff, and every sheriff's deputy, shall, however, continue to collect all fees and mileage allowances provided by law for the services of such officer, other than such as he would have been entitled to receive from the Commonwealth or from the county or city for which he is elected or appointed and fees and mileage allowances provided for services in connection with the prosecution of any criminal matter in the circuit courts. However, no fee shall be charged for serving any public orders, for summoning or impaneling grand juries, or for services in elections except as provided under Title 24.2

B. All fees and mileage allowances accruing in connection with any civil or criminal matter shall be collected by the clerk of the court in which the case is heard and paid by him into the treasury of the county or city in which the case is heard. All fees collected by or for every sheriff and deputy shall be paid into the treasury of the county or city for which he is elected or appointed, on or before the tenth day of the month next succeeding that in which the same are collected. The treasurer of each county and city shall credit such amounts in excess of such fees received in fiscal year 1994 to the account of the Commonwealth to be remitted to the State Treasurer along with other funds due to the Commonwealth.

C. In any case in which the sheriff makes a levy and advertises property for sale and by reason of a settlement between the parties to the claim or suit he is not permitted to sell under the levy, the sheriff is not entitled to any commissions, but in addition to his fees for making the levy and return, he shall be entitled to recover from the party for whom the services were performed the expenses incurred for advertisement of the proposed sale of the property. (§ 15.2-1609.3(c))

D. When, after distraining or levying on tangible property the officer neither sells nor receives payment and either takes no forthcoming bond or takes one which is not forfeited, he shall, if not in default, have in addition to the $1for a bond, if one was taken, a fee of twelve dollars. If the fee is more than one-half of what his commission would have amounted to if he had received payment, he shall, whether a bond was taken or not, receive a fee of at least one dollar and so much more as is necessary to equal the one -half. (§15.2-1609.3 (d))

SERVICES FOR WHICH THE SHERIFF CANNOT CHARGE

Services rendered in Commonwealth's cases. — No clerk, sheriff or other officer shall receive payment out of the state treasury for any services rendered in cases of the Commonwealth, whether in a court of record or a court not of record, except as allowed by statute. Localities shall be exempt from paying fees for services rendered by a clerk or other court officer for cases, whether in a court of record or a court not of record, when the locality is a party to a case commenced in a court serving that locality or in any other jurisdiction when the localities have a reciprocal waiver of fees agreement. Sheriffs may, in writing, grant a waiver of the sheriff's fee to one or more localities. (Code 1950, § 14-98; 1964, c. 386, § 14.1-87; 1971, Ex. Sess., c. 155; 1998, c. 872; 2007, c. 800.) (§17.1-266)

Services for which sheriff may not charge. No sheriff shall charge for serving any public orders, nor for summoning and impaneling grand juries, nor for any services in elections except as provided under Title 24.2 of this Code. (§15.2-1609.3)

Persons allowed services without fees or costs. Any person, who is a resident of this Commonwealth, who, on account of his poverty is unable to pay fees or costs may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees to them therefor, except what may be included in the costs recovered from the opposite party. (§17.1-606)

Fees for services of district court judges and clerks and magistrates in civil cases. Fees in civil cases for services performed by the judges or clerks of general district courts or magistrates in the event any such services are performed by magistrates in civil cases shall be as provided in this section, and, unless otherwise provided, shall be included in the taxed costs and shall not be refundable, except in case of error or as herein provided.

For all court and magistrate services in each distress, detinue, interrogatory summons, unlawful detainer, civil warrant, notice of motion, garnishment, attachment issued, or other civil proceeding, the fee shall be $30. No such fee shall be collected (i) in any tax case instituted by any county, city or town or (ii) in any case instituted by a school board for collection of overdue book rental fees. Of the fees collected under this section, $10 of each such fee collected shall be apportioned to the Courts Technology Fund established under § 17.1-132.

The judge or clerk shall collect the foregoing fee at the time of issuing process. Any magistrate or other issuing officer shall collect the foregoing fee at the time of issuing process, and shall remit the entire fee promptly to the court to which such process is returnable, or to its clerk. When no service of process is had on a defendant named in any civil process other than a notice of motion for judgment, such process may be reissued once by the court or clerk at the court's direction by changing the return day of such process, for which service by the court or clerk there shall be no charge; however, reissuance of such process shall be within three months after the original return day.

The clerk of any district court may charge a fee for making a copy of any paper of record to go out of his office which is not otherwise specifically provided for. The amount of this fee shall be set in the discretion of the clerk but shall not exceed $1 for the first two pages and $.50 for each page thereafter.

The fees prescribed in this section shall be the only fees charged in civil cases for services performed by such judges and clerks, and when the services referred to herein are performed by magistrates such fees shall be the only fees charged by such magistrates for the prescribed services. (§16.1-69.48:2)

FEES FOR SERVICE

For return when no levy made, etc. Whenever on any decree of judgment in a civil case any fieri facias issued by the clerk of any court is placed in the hands of any officer and no levy is made or forthcoming bond is taken thereon, and a return is made by the officer, the officer so making a return thereon shall be allowed a fee of twelve dollars for making the return. (§17.1-272 (5))

No Commissions when no sale under levy; expenses in such cases. In any case in which such officer makes a levy and advertises property for sale and by reason of a settlement between the parties to the claim or suit the officer is not permitted to sell under such levy, such officer shall not be entitled to any commission, but shall in addition to his fees for making the levy and return, he shall be entitled to recover from the party for whom the services were performed the expenses incurred by such officer in and about the advertisement of the proposed sale of the property. (§15.2-1609.3 (c))

Fee when no sale made under levy. When, after distraining or levying on tangible property the officer neither sells nor receives payment and either takes no forthcoming bond or takes one which is not forfeited, he shall, if not in default, have in addition to the $1 for a bond, if one was taken, a fee of $12. If the fee is more than one-half of what his commission would have amounted to if he had received payment, he shall, whether a bond was taken or not, receive a fee of at least $1 and so much more as is necessary to equal the one-half. (§15.2-1609.3 (d))

Fee for levy on cash, etc., by writ of fieri facias. When a levy is made upon current money, bank notes, goods or chattels of a judgment debtor pursuant to §8.01-478, the officer shall be allowed a fee of twelve dollars. (§17.1-272)

Process and service fees generally.

A. The fees for process and service in the following instances shall be $12:

1. Service on any person, firm or corporation, order, notice, summons or any other civil process, except as herein otherwise provided, and for serving on any person, firm, or corporation any process when the body is not taken and making a return thereof, except that no fees shall be charged for service pursuant to §.2.2-4022. (*Administrative agencies*. ***Subpoenas, depositions and requests for admissions.*** *The agency or its designated subordinates shall have power to, and on request for any party to a case shall, issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence.*)

2. Summoning a witness or garnishee on an attachment.

3. Service on any person of an attachment or other process under which the body is taken and making a return thereon.

4. Service of any order of court not otherwise provided for, except that no fees shall be charged for protective orders issued pursuant to Chapter 11 (§ 16.1-226 et seq.) of Title 16.1.

5. Making a return of a writ of fieri facias where no levy is made or forthcoming bond is taken.

6. Summoning a witness in any case in which custody or visitation of a minor child or children is at issue.

B. The fees for process and service in the following instances shall be $25:

1. Service and publication of any notice of a publicly-advertised public sale.

2. Service of a writ of possession, except that there shall be an additional fee of $12 for each additional defendant.

3. Levying upon current money, bank notes, goods or chattels of a judgment debtor pursuant to § 8.01-478.

4. Service of a declaration in ejectment on any person, firm or corporation, except that there shall be an additional fee of $12 for each additional defendant.

5. Levying distress warrant or an attachment.

6. Levying an execution.

C. The process and service fee for serving any papers returnable out of state shall be $75, except no fees shall be charged for the service of papers in connection with the prosecution of any misdemeanor or felony domestic violence offense, or in connection with the filing, issuance, registration, or service of a protective order or a petition for a protective order. A victim of domestic violence, stalking, or sexual assault shall not bear the costs associated with the filing of criminal charges against the offender, and no victim shall bear the costs associated with the filing, issuance, registration, or service of a warrant, protective order, petition for a protective order, or witness subpoena, issued inside or outside the Commonwealth.

D. The fees set out in this section shall be allowable for services provided by such officers in the circuit and district courts. (§17.1-272)

NOTE: A November 20, 1987 Attorney General opinion allows a ***separate fee for serving the writ of fieri facias and another fee for the actual levying of property***. (1987-88 Va Op. AG 72)

NOTE: A November 20, 1987 Attorney General opinion ***allows a service fee*** under §14.1-97 (§14.1-97 was repealed but§17.1-272 now covers it) ***for service of capias when issued for FTA*** (§8.01-508) Summons to Answer Interrogatories. (1987-88 Va Op. AG 72)

NOTE: A November 20, 1997 Attorney General opinion ***allows a fee for service of the Notice to Vacate*** as required under §8.01-470 prior to eviction. (1997 Va AG 22)

NOTE: A July 27, 1987 Attorney General opinion ***allows a separate fee to charged for separate pleadings***, except in the case of Circuit Court Notice of Motion for Judgment and Subpoena in Chancery under Rules of Supreme Court, Rules 3:3 and 2:5. These rules require that a Notice be attached to the Motion for Judgment and Subpoena for Chancery be attached to the Bill of Complaint, and constitutes one paper. The opinion bases its opinion on §14.1-105 which changed to §17.1-272 (87-88 VA AG 128)

NOTE: A January 25, 1996 Attorney General opinion ***allows service fee for each person being served regardless if they are being served at the same address***. (1996 Va AG 20)

Commission on forthcoming bond. A. The commission to be included in a forthcoming bond, when one is taken, shall be five percent. Such commission shall not be received unless the bond is forfeited or paid, including the commission, to the plaintiffs. Of whatever interest accrues on such bond, or the execution of judgment thereon, the officer shall be entitled to his proportionable share, on account of his fees included in such bond.

B. In cities of a population of 100,000 or more, however, the commission to be included in a forthcoming bond when one is taken, shall be 10% on the first $100 of the money for which the distress or levy is and 2% on the residue. Such commission shall not be received unless the bond is forfeited or paid, including the commission, to the plaintiffs. Of whatever interest may accrue on such bond, or the execution of judgment thereof, the officer shall be entitled to his proportionate share, on account of his fees included in the sale. Any officer in any such city receiving payment in money or selling goods shall receive the like commission of 10% on the first $100 of the money paid or proceeding from the sale and 2% on the residue; except that when such payment or sale is on an execution on a forthcoming bond, his commission shall only be one-half what it would be if the execution were not on such bond. (§17.1-274)

Sheriffs authorized to serve certain notices; fees thereof. The sheriff of any county or city, upon request, may deliver any notice to a tenant on behalf of a landlord or lessor under the provisions of §55-225 or §55-248.31. For this service, the sheriff shall be allowed a fee not to exceed twelve dollars. (§55-248.31:1)

Fees and costs relating to judgments by confession. The following fees and costs, and no other shall be taxed by the clerk as and for the costs of a proceeding under §§8.01-432 through §8.01-440; For the sheriff serving each copy of the order entering judgment, twelve dollars. (§17.1-275 (14))

Fee for effort to serve when person cannot be found. Whenever a sheriff shall be required to serve a declaration in ejectment or an order, notice, summons, or other process in a civil case and make return thereon and shall after due effort and without fault be unable to locate such person or make service of such process in some method provided by law, there shall be paid to such officer the same fee provided by law for serving an order, notice or other process and making return thereof, to be taxed as other costs are, in any pending case. When such service is required in a proceeding not pending in a court then the service shall be paid for by the party at whose instance it is had, But no such fee shall be paid unless such officer when he returns such paper un-executed shall make and file therewith an affidavit setting forth the fact that he has made diligent effort to execute such paper and without avail. (§17.1-268)

Sheriff not required to collect sales tax on property sold under execution issued by a court. Section §58-441.6(m), Code of Virginia (1950), as amended, provides an exclusion from the tax for "an occasional sale." This is defined as "a sale of tangible personal property not held or used by a seller in the course of an activity for which he is required to hold a certificate of registration. . . ." A sheriff is not a "retailer" engaged in the "business" of making "sales at retail" as defined in §§58-441.2 and 58-441.3. Therefore, he is not a "dealer" as defined in 58-441.12 and is not required to register under §58-441.16. It is my opinion, therefore, that a sheriff is not required to collect sales tax upon the sale of property under an execution issued by a court. AG Op 72-73 @ 444. *While these codes have changed, they can be still be found under §§58.1-602 through 58.1-639, in particular, §58.1-609.1 (7) which exempts governmental agencies.*

Service of Notices of Overdrafts with Accompanying Fee and Service of Trespass Notice and Pay or Quit Notices

According to an Attorney General's Opinion (83-84 Va. AG 329), "I am of the opinion that it is the duty of the sheriff to serve notices not to trespass and notices of overdrafts. These notices are intimately connected with court proceedings and must be served before actions may be commenced...Absence of statutory authority, sheriff's may not receive fees for serving these notices." ***The sheriff is still allowed to collect a fee for pay or quit notices.***

Sheriffs cannot collect a commission under distress warrant. (2003 Va AG 172)

According to an Attorney General's opinion, the sheriff "is not entitled to the five percent commission authorized under § 8.01-499 for serving a distress warrant on behalf of the local treasurer for the collection of delinquent taxes, which subsequently are paid to the treasurer's office." ***Note: §8.01-499 changed to 10 per cent commission***.

Sheriffs Responsible For Collecting Fees

This opinion addresses when fees were delineated under Va Code § 14.1-105. That code has been repealed and replaced with § 15.2-1609.3, "Fees and Mileage Allowances". This opinion and code section states, "every sheriff, and every sheriff's deputy shall collect all fees...provided by law." (83-84 Va. AG 327)

CHAPTER TWO

CRIMES - - LIABILITIES

Chapter Two is divided into **two sections**. The first section deals with *actions* by officers in serving civil process, either *positive* acts **or** acts of *omission*, which would constitute **crimes** under the laws of this Commonwealth. It is the purpose of this chapter to **prevent** any officer from unknowingly straying into a criminal situation.

When officers make errors in the service of civil process, and parties to the civil action involved suffer some wrong or financial loss, penalties may be invoked upon the erring officer. These penalties may take the form of fines, financial responsibility and suits against the officer and/or his department. It is **essential** that the officer be aware of the types of errors which could result in penalty.

Crimes
(By Officers)

Classes of Criminal Offenses

In the Commonwealth of Virginia **felonies** are divided into **six (6) classes**; **misdemeanors** are divided into **four (4) classes**. (§18.2-9)

Punishment for Conviction of Felonies

Class 1 - Death, or imprisonment for life and, subject to a fine of $100,000 or less.

Class 2 - From life imprisonment to not less than 20 years and subject to a fine of $100,000 or less.

Class 3 - Twenty (20) years to not less than five (5) years and, subject to a fine of $100,000 or less.

Class 4 - Ten (10) years to not less than two (2) years and, subject to a fine of not more than $100,000.

Class 5 - Ten (10) years to not less than one (1) year, with fine up to $2,500, or both.

Class 6 - Five (5) years to not less than one (1) year, with fine up to $2,500, or both.

Except as specifically authorized in subdivision (e) or (f), or in Class 1 felonies for which a sentence of death is imposed, the court shall impose either a sentence of imprisonment together with a fine, or imprisonment only. However, if the defendant is not a natural person, the court shall impose only a fine. (§18.2-10)

Punishment for Conviction of Misdemeanors

Class 1 - Not over 12 months in jail, and/or $2,500 fine, or both.

Class 2 - Not over 6 months in jail, or $1,000 fine, or both.

Class 3 - Not over $500 fine.

Class 4 - Not over $250 fine. (§18.2-11)

Bribes

If any officer should take any money, or other thing of value, for omitting to do, or delaying to perform any duty regarding service of process, or other duty, he shall be guilty of a **Class 2 Misdemeanor**. (§18.2-440)

§18.2-438 deals with criminal bribes which is classified as a **Class 4 Felony**.

Contempt of Court

Judges may issue attachments for contempt and punish them summarily in the following situations:

1. Misbehavior in the presence of the court, or so near the court as to interrupt the administration of justice.

2. Violence, or threats of violence, to a judge, officer of the court, juror, witness, or party to the action before the court, while in the court or proceeding to or from court.

3. Vile, contemptuous or insulting language, to the judge, or published of the judge.

4. Misbehavior of any officer of the court in his official capacity.

5. Disobedience to any judgment, decree, or order of the court by any officer, juror, witness, or other person. (§18.2-456)

In situations of contempt in either a General District or a Circuit Court, the maximum penalties which can be imposed are a $250 fine, 10 days in jail, or both. (§18.2-458)

Extortion

If an officer knowingly demands or receives a greater fee or compensation than is allowed or provided by law for the performance of any official duty, he shall be guilty of a **Class 4 Misdemeanor**. (§18.2-470)

False Entries or Destruction of Records

If a clerk of any court, or **other public officer**, fraudulently make a false entry, erase, alter, secrete or destroy any record in his keeping, or belonging to his officer, he shall be guilty of a **Class 1 Misdemeanor**. (The officer would forfeit his office and be forever barred from again holding an office of honor and trust in the Commonwealth, in addition to the punishment for a Class 1 misdemeanor.) (§18.2-472) Also see Rules of Supreme Court, Rule 1:8 and 7A:9.

Forgery of Process

Any person who, for the purpose of collecting money, shall knowingly deliver, mail, or cause to be used, **any paper** intended to simulate a warrant, process, writ, notice of execution lien, or notice of motion for judgment, shall be guilty of a **Class 4 Misdemeanor**. (§18.2-213)

Improper Summoning of Juror

If any Sheriff, or other officer through favor or ill will, summon any juror with intent that such juror shall find a verdict for or against either party in a court action, he shall be guilty of a **Class 3 Misdemeanor**, and forfeit his office, and be forever incapable of holding any office of honor, profit or trust, under the Constitution of Virginia. (§18.2-465)

§ 18.2-465.1. Penalizing employee for court appearance or service on jury panel. — Any person who is summoned to serve on jury duty or any person, except a defendant in a criminal case, who is summoned or subpoenaed to appear in any court of law or equity when a case is to be heard or who, having appeared, is required in writing by the court to appear at any future hearing, shall neither be discharged from employment, nor have any adverse personnel action taken against him, nor shall he be required to use sick leave or vacation time, as a result of his absence from employment due to such jury duty or court appearance, upon giving reasonable notice to his employer of such court appearance or summons. No person who is summoned and appears for jury duty for four or more hours, including travel time, in one day shall be required to start any work shift that begins on or after 5:00 p.m. on the day of his appearance for jury duty or begins before 3:00 a.m. on the day following the day of his appearance for jury duty. Any employer violating the provisions of this section is guilty of a **Class 3 misdemeanor**. (1981, c. 609; 1985, c. 436; 1988, c. 415; 2000, c. 295; 2002, c. 423; 2004, c. 800; 2005, c. 931.)

Liabilities (Of Officers)

Failure to Make Return; Improper Return - Re Monies Received

With regard to **sales** conducted by an officer, the law has been changed and now requires that an accounting be made to the court **forthwith**, rather than the former 30 days, unless a definite time period is specified by law (relating to the particular type of court action) or order of the court. Forthwith is interpreted to mean as soon as reasonably possible after the sale, preferable the next day. (§8.01-499 and §8.01-510)

Proceedings again officer failing to make or making improper return.

If an officer fail to make due return of any execution issued from a court not of record, he may, on motion of the plaintiff and after 10 days' notice, be fined from time to time by the judge of such court in an amount ***not less than 5 nor more than 25 dollars for each offense.*** And if an officer make such return upon an execution issued from a court not of record as would, on a motion against the officer, authorize judgment to be entered against him for all or any part of the amount of such execution issued, or his personal representative, may, on a motion before the judge of such court after like notice obtain such judgment against the officer, his sureties and others as could be given by a court of record if the execution had issued therefrom. Section 16.1-106 with respect to appeals in civil actions shall apply to such judgment. Notwithstanding the provision of this section any such officer may be proceeded against as proved in Chapter 16 (§15.2-1600 et seq.) Of Title 15.2, or a motion for judgment may be brought as authorized in §8.01-227. (§16.1-101)

Va. Supreme Court Ruling on Improper Service

The Va. Supreme Court found that the sheriff is liable for misfeasance when substituted service was obtained rather than personal service. The sheriff was informed that the respondent was deathly ill by a relative and requested the alternate service. The Supreme Court states that it is not incumbent upon a litigant to compel the performance of a duty imposed by the state upon an officer, but it is incumbent upon the office to perform such duty in the mode prescribed by law or else properly account for his non-performance of duty, if he would avoid liability. (Narrows Grocery Co. v. Bailey, 161 Va. 278, 170 S.E. 730 (1933)

Judgment against officer for money due from him.

If any officer or his deputy makes a return upon any order, warrant or process by which it appears that he has received any sum of money by virtue of such process..., he fails to make a return thereof, the person entitled to such sum of money may, by motion to the court to which, or to the clerk's office of which process... was returnable, recover against such officer and his sureties and against his and their person representatives **the amount so received, with interest thereon at the *annual rate of fifteen percent* from the time such process was returnable till payment**....§15.2-1622

Illegal Seizure of Persons

A 1999 Attorney General opinion (1999 Va. AG 207) sets boundaries when detaining a person at a road-stop. This opinion states it would exceed an officer's authority, especially in collection of taxes.

Monies Received After Return Date

If an officer receives money or property under an **execution after the return date thereof,** he is liable to make a proper accounting to the court, just as though they had been received before the return date. (§16.1-102)

Must Provide Receipts

Every officer shall give a receipt to each person who pays him money, or from whose property the officer makes taxes, levies, militia fines or officer's fees, and for failure to do shall forfeit $4.00 to that person. (§15.2-1621)

Handling Process Sent by Mail

Any Sheriff may transmit process by mail to another Sheriff (or the court, or other proper authority), and a **receipt from the post office obtained at the time of mailing** shall be prima facia evidence that the process was received by the addressee. Any Sheriff may avoid fine or forfeiture (even when proof of mailing is presented) by making oath that he did not receive process mailed to him, and has no knowledge of it being received by any of his personnel. (§15.2-1620)

Officer to Notify Person Entitled to Money (From Sale)

An officer receiving money under an execution (sale), or other legal process, shall notify **in writing**, **within 30 days**, the person entitled to receive the money, if known. Failure to comply, without good cause, shall result in a fine to the officer of not more than $50.00, or less than $20.00, for each offense. (§8.01-500)

Officer to Deposit Money In Bank

Whenever an officer shall receive or collect any money for the Commonwealth, or any city, town, county or person, he shall deposit that money in a bank within a reasonable time. He may withhold as much money as may be necessary for payment of fees or necessary expenses. He shall **not deposit such money in his personal account**, or knowingly intermingle it with personal funds, or he shall be deemed guilty of a **misdemeanor**. If the money is deposited in an official account, and the bank should fail or become insolvent, the officer will not be responsible for the loss of the deposited funds.

Any such officer who deposits any such money in his personal account, knowingly intermingles any of the same with his personal funds, or otherwise violates any of the provisions of this section shall be guilty of a misdemeanor. However, prosecuting hereunder shall not preclude criminal prosecution under any other section of this code. (§17.1-271)

Forthcoming Bond Re Attachment Action

When an officer has **levied** on property under an Attachment action, and he permits the property to remain in the hands of the defendant upon receipt of a forthcoming bond from the defendant, if the plaintiff files exception with the court as to the **sufficiency** of the forthcoming bond, and the court upholds the plaintiff's claim, the officer must obtain a **new** forthcoming bond from the defendant **with proper surety**, or the **officer will be liable to the plaintiff**, as for a breach of such bond. (§8.01-554)

Penalty for Officers

Any officer failing to comply with the duties imposed upon him by the prevision of this article (Article 7-fees) shall forfeit to the Commonwealth not less than $25 nor more than $500 for each such failure, such forfeiture to be enforced by the attorney for the Commonwealth in the Circuit Court having criminal jurisdiction in his city or county. (§17.1-291)

Violation of 4th Amendment (Expectation of Privacy and Search and Seizure) (1999 Va Ag 32), Johnson v. Commonwealth 26 Va. App 674, 496 S.E. 2nd 143 (1998), Gateway 2000, Inc. v. Daniel Limoges, 592 N.W. 2nd 591 (S.D. 1996)

Private processor is considered a law enforcement officer for purpose of serving process, but not for charges against citizens for interfering with the duties of a law enforcement officer. When serving process, sheriff deputy is acting in the same capacity as private process server.

With regard to expectation of privacy at a business, regardless of the nature of the search, entering a business area where there is a justifiable expectation of privacy, in order to serve process would be considered unreasonable under the 4th Amendment. The officer serving process would be liable for trespass under § 18.2-119.

The protection of the dwelling against entry for the service of process is in the outer door only, and it is optional with the owner to take it by closing the door against the officer, or to waive it by allowing him to enter. If the officer once gains entrance through the outer door without force or fraud, the privilege is gone, and he may force open any other door if necessary to make complete service of his process. The sheriff's entry by force or threat of arrest to serve process would constitute "breaking and entering."

Alteration of process prohibited.

§ 16.1-79. Actions brought on warrant. — A civil action in a general district court may be brought by warrant directed to the sheriff or to any other person authorized to serve process in such county or city, requiring the person against whom the claim is asserted to appear before the court on a certain day, not exceeding sixty days from the date of service thereof, to answer the complaint of the plaintiff set out in the warrant. After the warrant has been issued and delivered for service it ***shall not be altered, nor any blank filled, except by order of the court***. (1956, c. 555; 1991, c. 26.) See 1990 VA AG 132, 133

MISCELLANEOUS DUTIES

Transportation of Commissioners during condemnation hearings

Pursuant to §25.1-231, the court shall direct commissioners, in the custody of the sheriff or sergeant or one of his deputies, to view the property described in the petition with the owner and the petitioner, or any representative of either party, and none other, unless otherwise directed by the court; and upon motion of either party, the judge shall accompany the commissioners upon such view.

Disposal of Unclaimed property and firearms or other weapon in possession of Sheriff or Police.

§ 15.2-1719. Disposal of unclaimed property in possession of sheriff or police. — Any locality may provide by ordinance for (i) the public sale in accordance with the provisions of this section or (ii) the retention for use by the law-enforcement agency, of any unclaimed personal property which has been in the possession of its law-enforcement agencies and unclaimed for a period of more than 60 days, after payment of a reasonable storage fee to the sheriff or other agency storing such property. No storage fee shall be charged or accounted for if such property has been stored by and is to be retained by the sheriff's office or other law-enforcement agency. As used herein, "unclaimed personal property" shall be any personal property belonging to another which has been acquired by a law-enforcement officer pursuant to his duties, which is not needed in any criminal prosecution, which has not been claimed by its rightful owner and which the State Treasurer has indicated will be declined if remitted under the Uniform Disposition of Unclaimed Property Act (§ 55-210.1 et seq.). Unclaimed bicycles and mopeds may also be disposed of in accordance with § 15.2-1720. Unclaimed firearms may also be disposed of in accordance with § 15.2-1721.

Prior to the sale or retention for use by the law-enforcement agency of any unclaimed item, the chief of police, sheriff or their duly authorized agents shall make reasonable attempts to notify the rightful owner of the property, obtain from the attorney for the Commonwealth in writing a statement advising that the item is not needed in any criminal prosecution, and cause to be published in a newspaper of general circulation in the locality once a week for two successive weeks, notice that there will be a public display and sale of unclaimed personal property. Such property, including property selected for retention by the law-enforcement agency, shall be described generally in the

notice, together with the date, time and place of the sale and shall be made available for public viewing at the sale. The chief of police, sheriff or their duly authorized agents shall pay from the proceeds of sale the costs of advertisement, removal, storage, investigation as to ownership and liens, and notice of sale. The balance of the funds shall be held by such officer for the owner and paid to the owner upon satisfactory proof of ownership. Any unclaimed item retained for use by the law-enforcement agency shall become the property of the locality served by the agency and shall be retained only if, in the opinion of the chief law-enforcement officer, there is a legitimate use for the property by the agency and that retention of the item is a more economical alternative than purchase of a similar or equivalent item.

If no claim has been made by the owner for the property or proceeds of such sale within 60 days of the sale, the remaining funds shall be deposited in the general fund of the locality and the retained property may be placed into use by the law-enforcement agency. Any such owner shall be entitled to apply to the locality within three years from the date of the sale and, if timely application is made therefor and satisfactory proof of ownership of the funds or property is made, the locality shall pay the remaining proceeds of the sale or return the property to the owner without interest or other charges or compensation. No claim shall be made nor any suit, action or proceeding be instituted for the recovery of such funds or property after three years from the date of the sale. (1982, c. 163, § 15.1-133.01; 1994, c. 144; 1997, c. 587; 2010, c. 333.)

§ 15.2-1721. Disposal of unclaimed firearms or other weapons in possession of sheriff or police. —Any locality may destroy unclaimed firearms and other weapons which have been in the possession of law-enforcement agencies for a period of more than 120 days. For the purposes of this section, "unclaimed firearms and other weapons" means any firearm or other weapon belonging to another which has been acquired by a law-enforcement officer pursuant to his duties, which is not needed in any criminal prosecution, which has not been claimed by its rightful owner and which the State Treasurer has indicated will be declined if remitted under the Uniform Disposition of Unclaimed Property Act (§ 55-210.1 et seq.).

At the discretion of the chief of police, sheriff, or their duly authorized agents, unclaimed firearms and other weapons may be destroyed by any means which renders the firearms and other weapons permanently inoperable. Prior to the destruction of such firearms and other weapons, the chief of police, sheriff, or their duly authorized agents shall comply with the notice provision contained in § 15.2-1719.

In lieu of destroying any such unclaimed firearm, the locality may donate the firearm to the Department of Forensic Science, upon agreement of the Department.

1990, c. 324, § 15.1-133.01:1; 1997, c. 587; 2015, c. 220.

CHAPTER THREE

SERVICE OF CIVIL PROCESS

Chapter Three is devoted to the *fundamental* mechanics and techniques of service civil process. It endeavors to provide an awareness of the **purpose** of civil process, and how to handle it in the Sheriff's Office as well as serve it properly on natural persons, businesses, and special authorities such as registered agents, statutory agents, etc.

SERVICE OF CIVIL PROCESS

Purpose of Service

The purpose of service of civil process is to provide timely notice to a person or legal entity (business or organization) of pending legal action in which they are somehow involved. The notice may be in the form of a variety of legal documents, and must be served in accordance with the law as it pertains to the particular document used.

Obtain Process From Courts Daily

Every court served by a Sheriff's Office, including the Juvenile court, **must** be contacted *daily* to determine whether there is any process to be served. Contact by telephone is permissible, but should be made only with a **regular employee** of the Clerk of the Court's Office.

Failure to make return of service of process *by anyone authorized to serve process* under § 8.01-293 within the time specified in this section shall not invalidate any service of process or any judgment based thereon. In the event a late return prejudices a party or interferes with the court's administration of a case, the court may, in its discretion, continue the case, require additional or substitute service of process, or take such other action or enter such order as the court deems appropriate under the circumstances. (Code 1950, § 8-49; 1954, c. 545; 1977, c. 617; 1978, c. 831; 2002, c. 65; 2004, c. 627.) (§8.01-294)

Court Clerk Shall Maintain Process Book (Records)

The Clerk of the **Circuit Court** shall keep a process book, or file, or automated system wherein all data regarding each process issued by the court shall be noted, and when process is turned over to the Sheriff for service, shall insure that appropriate notation is made. (§17.1-215)

Plaintiff Must Furnish Full Name & Address of All Defendants

On the commencement of every court action, the plaintiff **must** furnish (in writing) to the Clerk (or other issuing officer) the full name and last known address of each defendant (party to be served) or, if unable to do so, must furnish such salient (necessary) facts as are calculated to identify and locate each defendant with reasonable certainty. (§8.01-290; §17.1-214) 2007 Va. AG 27 ***If the information is not provided, the deputy may return the process to court unserved based upon insufficient information to serve.***

Clerk Must Furnish Sufficient Copies

The Clerk issuing process must furnish the Sheriff with as many copies of the process as there are parties required to be served. (§8.01-291)

Notice Must Be Mailed to Defendant (Before Judgment) When Service is Made on Another Person

When process is served on someone **other than the defendant** (substituted service), **no judgment shall be rendered against that defendant** ***unless*** the person who accepted the service files an affidavit with the court, confirming that a copy of the process was mailed to the defendant at his last known address **at least 10 days prior** to the date that judgment was scheduled to be rendered. (§8.01-315)

When the process is ***posted,*** the party causing the service (plaintiff) must mail a copy of the process to the defendant **no less than 10 days prior to the court date**, and file a certificate of such mailing with the Clerk of the

Court. The person (Sheriff) who either served a family member, **or** posted the process, shall **note the date and manner of service on that process**. (§8.01-296(2b), (2c)

Statewide Service of Process

Process from any court in the Commonwealth may be directed to any Sheriff of, and executed in, any county, city, or town in the Commonwealth. (§8.01-292)

Process Sent Sheriff by Mail

Any Sheriff may transmit by mail (with his return thereon) any process which came to him from any source, ***to another Sheriff*** (in whose bailiwick the process is rightly to be served, but was mis-directed to him by the court, or issuing source), and the ***post office receipt*** obtained at the time of mailing shall be **prima facia evidence** of receipt of the process by the addressee (Sheriff's Office to which forwarded). A Sheriff may protect himself from any fine (regarding lost process), by **making oath** that he did not receive the process, and has no knowledge of it being received by his office. §15.2-1620

Territorial Jurisdiction

Any Sheriff's Office **may** serve process in it's own political sub-division (county or city) *and* in any **adjacent** county or city. (**No Sheriff** is *required* to serve process *outside* his own political sub-division, and as a practical matter, service of process in adjacent bailiwick should be confined to the fringe areas of the mutual borders on those occasions when it is done. (§8.01-295) ***As a courtesy, you may want to notify the adjacent Sheriff's Office of the process you delivered.*** *See also 80-81 Va. AG 322*

Service of Process Outside of Jurisdiction

If, during the trial of any civil case in any court, the **judge should feel** a particular **witness** is necessary **from any city or county** in the Commonwealth, the judge may direct the Sheriff (or any Deputy) to proceed to that city or county, serve a witness subpoena upon that person, and bring that person to the court. The court shall allow a reasonable compensation for the required travel (and any expenses incurred). (§8.01-409)

Service of Process Outside The State

A **personal** service of a process on a **non-resident** person ***outside*** the Commonwealth may be made by any Sheriff or any person authorized to serve process (see §8.01-293) in the jurisdiction where the party is located. When the court can exercise jurisdiction over the non-resident pursuant to §8.01-328.1, such service shall have the same effect as personal service on the non-resident within Virginia. Such service when non jurisdiction can be exercised pursuant to §8.01-328.1 or service in accordance with the provisions of sub section 2a of §8.01-296 shall have the same effect as order of publication. (§8.01-320)

Process Received in Proper Time is Good

Process **received** by the party to be served within the time prescribed by law (if any, **except process commencing actions for divorce or annulment**) ***shall be sufficient*** even though it was not served, or accepted, as provided by Chapter 8 of Title 8.01 of the Virginia Code. (§8.01-288)

Process Must be Held 21 days; Multiple Attempts for service.

This will serve as guidance, but you should consult your local city or state attorney for advice. The sheriff is required to make a diligent attempt for service within a 21 day period. To return before the 21 day period without a sufficient reason for not found violates § 8.01-316 , Palmer v. Owens, 19 Cir. L154619 (1998).

Who May Serve Process

§ 8.01-293

A. The following persons are authorized to serve process:

1. The sheriff within such territorial bounds as described in § 8.01-295;

2. Any person of age 18 years or older and who is not a party or otherwise interested in the subject matter in controversy. However, in any case in which custody or visitation of a minor child or children is at issue and a summons is issued for the attendance and testimony of a teacher or other school personnel who is not a party to the proceeding, if such summons is served on school property, it shall be served only by a sheriff or his deputy; (see § 16.1-264 (b)) or

3. A private process server. For purposes of this section, "private process server" means any person 18 years of age or older and who is not a party or otherwise interested in the subject matter in controversy, and who charges a fee for service of process.

Whenever in this Code the term "officer" or "sheriff" is used to refer to persons authorized to make, return or do any other act relating to service of process, such term shall be deemed to refer to any person authorized by this section to serve process.

B. Notwithstanding any other provision of law (i) only a sheriff or high constable may execute an order or writ of possession for personal, real or mixed property, including an order or writ of possession arising out of an action in unlawful entry and detainer or ejectment; (ii) any sheriff, high constable or law-enforcement officer as defined in § 9.1-101 of the Code of Virginia may serve any capias or show cause order; and (iii) only a sheriff, the high constable for the City of Norfolk or Virginia Beach or a treasurer may levy upon property.

Code 1950, §§ 8-52, 8-54; 1954, c. 543; 1960, c. 16; 1968, c. 484; 1977, c. 617; 1981, c. 110; 1986, c. 275; 1996, cc. 501, 608; 1997, c. 820; 2002, c. 342; 2004, cc. 210, 588; 2011, c. 766.

In any situation in which it might not be proper for the Sheriff to serve process, it may be directed to, and served by, **any deputy** of such Sheriff. (§15.2-1616).

Under §15.2-1704, police officers are prohibited from serving CIVIL process with the exception of Temporary Detention Orders, Emergency Custody Orders and Protection Orders. However, a town police officer, after receiving training, may with the concurrence of the local sheriff, also serve civil papers, and make return thereof, only when the town is the plaintiff and the defendant can be found within the corporate limits of the town.

NOTE: A 1995 Attorney General opinion states the Sheriff and the High Constable's Office may serve as one office simultaneously. §14.1-105.1 creates the office of the High Constable. The code creating the High Constable changed to §17.1-273 but the wording remained the same. (1995 Va AG 42)

Service of Process Saturdays, Sundays, & Holidays

Process may be legally served on Saturdays and holidays. (§2.2-3301) However, **NO CIVIL PROCESS** shall be served on Sunday except in cases of persons **escaping out of custody**, or otherwise expressly provided by law. (§8.01-289)

Execution of an **Attachment and Detinue Seizure Order** on Sunday is permitted. (§8.01-542 & 8.01-114)

Execution of **Distress Warrant** on Sunday is permitted. (§55-235)

Service of Process on Convict

1. **As a Defendant**: When a convict is a defendant in a civil action process may be served upon him if he is confined in a local or regional jail, or a state correctional institution. The process may be served upon the officer in charge of the place of confinement. (§8.01-297)

NOTE: While this following code does not prevent you from serving a convict, it is interesting to note there are restrictions on suits against prisoners. It follows:

Restrictions on suits against prisoners. No action or suit on any claim or demand, except actions to establish a parent and child relationship between a child and a prisoner and actions to establish a prisoner's child support obligation, shall be instituted against a prisoner after judgment of conviction and while he is incarcerated, except through his committee. However, in any suit for divorce instituted against a prisoner, the court shall appoint a committee prior to any determination as to the property of the parties under § 20-107.3. (§53.1-223) ***This does not apply to habitual offender adjudication***.

2. **As a Witness**: Whenever any party in a civil action in any circuit court in this Commonwealth requires as a witness in his behalf, an inmate in a state or local correctional facility as defined in § 53.1-1, the court, on the application of such party or his attorney may, in its discretion and upon consideration of the importance of the personal appearance of the witness and the nature of the offense for which his is imprisoned, issue an order to the Director of Corrections to deliver such witness to the sheriff of the jurisdiction of the court issuing the order. If authorized by the court, the clerk of the circuit court or a deputy clerk may issue these orders on behalf of the court. The sheriff shall transport the inmate to the court to testify as such witness, and after he has testified and been released as such witness, the sheriff shall return the witness to the custody of the Department. If necessary the sheriff may confine the inmate for the night in any convenient local correctional facility. The party seeking the convict as a witness shall be required to pay any expenses incurred by the Sheriff. (§8.01-410)

NOTE: The type of inmate being served makes no difference with regard to service. The fact that the inmate being served is a federal inmate does not prevent the sheriff from serving the summons. BUT, when serving a federal inmate, the serving deputy needs to make a notation on the return that in order to transport the inmate, the U.S. Marshall's office must give permission and the inmate may not be available on the court date given. If it is a criminal process that is being served, the deputy may want to consult with the U.S. Marshall's Office first to ensure that any case they have pending is not jeopardized by service.

Service of Process on Natural Persons

When no specific mode of service is prescribed (by law or the court), service of process upon a natural person may be accomplished in three (3) ways:

1. **Personal Service**: Personal service is actually handing a copy of the process to the person named therein. (If a person should refuse to accept service, the process may be dropped at his feet and the officer's return will indicate that personal service was made.)

2. **Substituted Service**

A. **On Family Member**: One type of substituted service involves service of process upon a member of the immediate family of the person named in the process. The officer must insure that the person he serves is:

1. a member of the family (husband or wife, parent, child, brother, or sister),
2. a regular member of the household (not just visiting), and
3. 16 years of age or older.

Additionally, the officer must explain the **nature** of the process to the person served.

> An AG opinion states the person must be a **blood relative** in order to substitute service on member of family. (1999 Va. AG 31)

B. **Posting on Door**: Another type of substituted service is to post (attach) the process on the door which appears to be the **normal means of entry or exit** of the abode of the person named in the process. (Used to be that the document had to be posted on the **front door regardless** of where they entered the dwelling. This changed in 1990.) The officer may use a thumb tack, tape, or rubber band (or other means) to attach the process to the door. The officer should also note on the process left on the door the **date of posting**. §8.01-296

> In the interest of protecting the property of others, it would be unwise to use thumb tacks to post services.

NOTE: According to 2007 Va. AG 27, ***No specific obligation for process server to ascertain that residence is actual abode of person to be served prior to posting service***; good faith and due diligence require server to make reasonable inquiry when it appears that residence might not be actual abode. Server may not always rely solely on address supplied by party requesting such service.

3. **Publication**: Under certain circumstances notice of process may be accomplished through publication; however, this is *not a process* normally handled by the Sheriff's Office. See §8.01-316 for particulars as to service by publication.

NOTE: In effecting the service of process the officer does not have a **choice** as to which method he may use. **Personal service is the preferred type**, and the officer should make reasonable effort to effect personal service in every instance. If personal service cannot be reasonably effected, the officer should then attempt to effect service upon a family member, and should only post process upon the door as a last resort. (§8.01-296)

Service of Process on Businesses

1. § 8.01-304. How process served on copartner or partnership.

Subject to § 8.01-286.1, process against a copartner or partnership may be served upon a general partner, and it shall be deemed service upon the partnership and upon each partner individually named in the action, provided the person served is not a plaintiff in the suit and provided the matter in suit is a partnership matter.

Provided further that process may be served upon a limited partner in any proceeding to enforce a limited partner's liability to the partnership. Code 1950, § 8-59.1; 1950, p. 455; 1977, c. 617; 2005, c. 866.

> Officers should ask if person is general or limited partner.

NOTE: Although process addressed to a person at his place of business requires **personal service**, it has become widespread practice to serve process for ***attorneys* and *doctors*** upon their secretaries (or receptionists). The probability of challenge of such service may be reasonably remote; however, some Sheriff's Offices have sought to protect themselves in this situation by requesting the attorneys or doctors to provide their offices with a letter of consent for such service. This notation has been placed in this portion of the handbook since lawyers and doctors so often operate in partnership arrangements.

2. **Corporations**

Domestic Corporation is one organized under the laws of this Commonwealth, and usually having its headquarters, or main offices, in the Commonwealth. **Personal** service of process upon ***any officer, director, or the registered agent*** of the corporation, is deemed service upon the corporation; or by substituted service on stock corporations in accordance with § 13.1-637 and on nonstock corporations in accordance with § 13.1-836. (§8.01-299)

Foreign Corporation is one organized under the laws of some other state (or foreign nation), but doing business in the Commonwealth. Subject to § 8.01-286.1, service of process on a foreign corporation may be effected in the following manner:

1. By **personal** service on any officer, director or on the registered agent of a foreign corporation which is authorized to do business in the Commonwealth, and by personal service on any agent of a foreign corporation transacting business in the Commonwealth without such authorization, wherever any such officer, director, or agents be found within the Commonwealth;

2. By substituted service on a foreign corporation in accordance with §§ 13.1-766 and 13.1-928, if such corporation is authorized to transact business or affairs within the Commonwealth;

3. By substituted service on a foreign corporation in accordance with § 8.01-329 where jurisdiction is authorized under § 8.01-328.1, regardless of whether such foreign corporation is authorized to transact business within the Commonwealth; or

4. By order of publication in accordance with §§ 8.01-316 and 8.01-317 where jurisdiction in rem or quasi in rem is authorized, regardless of whether the foreign corporation so served is authorized to transact business within the Commonwealth. (Code 1950, § 8-60; 1977, c. 617; 1991, c. 672; 2005, c. 866.) (§8.01-301)

NOTE: A. If the person upon whom there is a suggestion of liability (**garnishment**s) as provided in § 8.01-511 is a corporation, the ***summons shall be served upon an officer, an employee designated by the corporation other than an officer of the corporation,*** or***, if there is no designated employee or the designated employee cannot be found, upon a managing employee of the corporation other than an officer of the corporation.*** If the judgment creditor or his attorney files with the court a certificate that he has used due diligence and that (i) no such officer or employee or other person authorized to accept such service can be found within the Commonwealth or (ii) such designated or managing employee found is also the judgment debtor, then such summons shall be served on the registered agent of the corporation or upon the clerk of the State Corporation Commission as provided in §§ 13.1-637, 13.1-766, 13.1-836 and 13.1-928. However, service on the corporation shall not be made upon a designated or managing employee who is also the judgment debtor. If the corporation intends to designate an employee for service, the corporation shall file a designation with the State Corporation Commission.

B. If the person upon whom there is a suggestion of liability as provided in § 8.01-511 is a limited liability company, the summons shall be served upon a member, manager, or employee designated by the limited liability company for the purpose of such service or, if there is no designated member, manager, or

employee, or the designated member, manager, or employee cannot be found, upon a managing employee of the limited liability company. If the judgment creditor or his attorney files with the court a certificate that he has used due diligence and that (i) no such member, manager, or employee or other person authorized to accept such service can be found within the Commonwealth or (ii) such designated member, manager, employee, or managing employee found is also the judgment debtor, then such summons shall be served on the registered agent of the limited liability company or upon the clerk of the State Corporation Commission as provided in § 13.1-1018. However, service on the limited liability company shall not be made upon a designated member, manager, employee, or managing employee who is also the judgment debtor. If the limited liability company intends to designate a member, manager, or employee for service, the limited liability company shall file a designation with the State Corporation Commission.

C. For the purposes of this section, "managing employee" means an employee charged by the corporation or the limited liability company, as applicable, with the control of operations and supervision of employees at the business location of such corporation or limited liability company where process is sought to be served. (Code 1950, § 8-441.2; 1974, c. 561; 1977, c. 617; 1980, c. 514; 1997, c. 395; 1998, cc. 723, 737; 2004, c. 231; 2006, c. 912.) (8.01-513)

NOTE: May want to look to §13.1-637 which allows for service of a RA by leaving with a designated person or service by fax. See next page for "Service of Process on RA."

Municipal Corporation

Process shall be served on municipal and county governments, and quasi-governmental bodies or agencies, by *personal* service, as follows:

1. If the case be against a **city** or **town**, on its city or town **attorney** (where one exists), otherwise on its mayor, manager, or trustee.

2. If the case be against a **county**, on its county attorney (if one exists), otherwise, on its Commonwealth attorney.

3. If the case be against any sub-division or other governmental entity created by the Commonwealth, then on the director, commissioner, chief administrative officer, attorney, or any member of the governing body of such entity.

4. If the case be against a supervisor, county officer, employee or agent of the county board, arising from official actions of such person, then on the person so named, *and* on each county supervisor *and* the county attorney (if one exists), otherwise on the *clerk* of the county board.

NOTE: Service of process under this statute may be made by leaving a copy with the **person in charge** of the office of any officer designated in paragraphs 1-4. (§8.01-300)

Corporation Operated by Trustee or Receiver

When a corporation is being operated by a trustee or receiver, process for the corporation may be served upon either, or upon *any* trustee or receiver if there be more than one. (§8.01-303)

Unincorporated Association, Order, or Common Carrier

Process may be served on *any* officer, trustee, director, staff member, or other agent of any of the above types of organizations. (§8.01-306)

NOTE: While §§ 19.2-76 does not affect the manner of service upon a corporation when serving a warrant, capias or summons, it does protect individuals who are acting as agents for partnerships and corporations. It reads: **Execution and return of warrant, capias or summons; arrest outside county or city where charge is to be tried.** A law-enforcement officer may execute within his jurisdiction a warrant, capias or summons issued anywhere in the Commonwealth. A warrant or capias shall be executed by the arrest of the accused, and a summons shall be executed by delivering a copy to the accused personally.

If the accused is a corporation, partnership, unincorporated association or legal entity other than an individual, a summons may be executed by service on the entity in the same manner as provided in Title 8.01 for service of process on that entity in a civil proceeding. However, if the summons is served on the entity by delivery to a registered agent or to any other agent who is not an officer, director, managing agent or employee of the entity, such agent shall not be personally subject to penalty for failure to appear as provided in §§19.2-128, nor shall the agent be subject to punishment for contempt for failure to appear under his summons as provided in §§19.2-129.

The law-enforcement officer executing a warrant or capias shall endorse the date of execution thereon and make return thereof to a judicial officer. The law-enforcement officer executing a summons shall endorse the date of execution thereon and make return thereof to the court to which the summons is returnable.

Whenever a person is arrested upon a warrant or capias in a county or city other than that in which the charge is to be tried, the law-enforcement officer making the arrest shall either (i) bring the accused forthwith before a judicial officer in the locality where the arrest was made or where the charge is to be tried or (ii) commit the accused to the custody of an officer from the county or city where the charge is to be tried who shall bring the accused forthwith before a judicial officer in the county or city in which the charge is to be tried. The judicial officer before whom the accused is brought shall immediately conduct a bail hearing and either admit the accused to bail or commit him to jail for transfer forthwith to the county or city where the charge is to be tried.

Service of Process on Registered Agents

A. Each corporation shall continuously maintain in this Commonwealth:

1. A registered office that may be the same as any of its places of business; and

2. A registered agent, who shall be:

a. An individual who is a resident of this Commonwealth and either an officer or director of the corporation or a member of the Virginia State Bar, and whose business office is identical with the registered office; or

b. A domestic or foreign stock or nonstock corporation, limited liability company or registered limited liability partnership authorized to transact business in this Commonwealth, the business office of which is identical with the registered office; provided such a registered agent (i) shall not be its own registered agent and (ii) shall designate by instrument in writing, acknowledged before a notary public, one or more natural persons at the office of the registered agent upon whom any process, notice or demand may be served and shall continuously maintain at least one such person at that office. Whenever any such person accepts service, a photographic copy of such instrument shall be attached to the return.

B. The sole duty of the registered agent is to forward to the corporation at its last known address any process, notice or demand that is served on the registered agent. (Code 1950, § 13.1-9; 1956, c. 428; 1975, c. 407; 1976, c. 4; 1985, c. 522; 1993, c. 113; 2000, c. 162; 2001, cc. 517, 541.) (§13.1-634)

§ 13.1-637. Service on corporation. —

A. A corporation's registered agent is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the corporation. The registered agent may by instrument in writing, acknowledged before a notary public, designate a natural person or persons in the office of the registered agent upon whom any such process, notice or demand may be served and may, by instrument in writing, authorize service of process by facsimile by the sheriff, provided acknowledgment of receipt of service is returned by facsimile to the sheriff. Whenever any person so designated by the registered agent accepts service of process or whenever service is by facsimile, a photographic copy of the instruments designating the person or authorizing the method of service and receipt shall be attached to the return.

B. Whenever a corporation fails to appoint or maintain a registered agent in this Commonwealth, or whenever its registered agent cannot with reasonable diligence be found at the registered office, then the clerk of the Commission shall be an agent of the corporation upon whom service may be made in accordance with § 12.1-19.1.

C. This section does not prescribe the only means, or necessarily the required means, of serving a corporation. (Code 1950, §§ 13-12, 13-14, 13.1-11; 1956, c. 428; 1985, c. 522; 1986, c. 622; 1991, c. 672; 1995, c. 411; 2001, cc. 517, 541.)

Resignation of Registered Agents

A registered agent may resign his agency by filing a statement of resignation with the State Corporation Commission, with a certification that he has also mailed a copy of his resignation to the corporation he represented, by certified mail. The agency appointment will be considered terminated on the **31st day after the date on which the resignation was filed**. (§13.1-636)

> You will need proof of resignation to attach to the return of service.

Statutory Agents

Statutory agents are basically **registered agents for the public**, and may be served (in certain situations) when a party to a civil action cannot be found within the Commonwealth. When certain actions at law may involve a former Virginia resident who is classified a "non-resident," service of process for that non-resident party may be made upon a statutory agent (as prescribed by law for the situation involved), and that service shall have the effect (same legal force) of being served **personally** upon that party. (§8.01-312)

Non-Resident Defined

A non-resident, for the purposes of §8.01-308 - Service on the Commissioner of the Department of Motor Vehicles, or §8.01-309 - Service on the Secretary of the Commonwealth, is any person who was a resident of the Commonwealth when the accident specified in §8.01-308 or §8.01-309 occurred, but who has continually lived outside the Commonwealth for at least 60 days preceding the date that process is served upon the statutory agent involved. (§8.01-307)

All three (3) Virginia statutory agents, the Commissioner of the Department of Motor Vehicles, the Secretary of the Commonwealth, and the Clerk of the State Corporation Commission (see §13.1-637) are located in Richmond, Virginia.

Commissioner for the Department of Motor Vehicles

The Commissioner for the Department of Motor Vehicles is the statutory agent upon whom process for a *non-resident* may be served, when the non-resident was involved in a **motor vehicle accident** in the Commonwealth. (§8.01-308)

A motor vehicle is defined as any vehicle designed for self-propulsion, or any vehicle designed to be drawn by a motor vehicle, as opposed to devices designed to be drawn by human or animal power, or to run upon stationary rails or tracks. (§8.01-307)

This does not mean the employer must make the employee available, but cannot refuse to accept subpoena.

Secretary of the Commonwealth

The Secretary of the Commonwealth is the statutory agent upon whom process may be served when a *non-resident* has been involved in an **aircraft accident** within the Commonwealth. (§8.01-309) As to service of process brought by action of warrant or motion for judgment, see §8.01-329.

Clerk of the State Corporation Commission

The clerk of the State Corporation Commission is the statutory agent for any unincorporated association, order, common carrier that has its principal offices outside Virginia and transacts business or affairs in the Commonwealth. (§8.01-306)

How Service Made on Commissioner or Secretary

Service is made by leaving a copy of such process together with a fee of $15.00 for each party to be served, in the hands, or in the office of DMV Commissioner or the Secretary of the Commonwealth in case involving operation of a motor vehicle or aircraft in Virginia by a non-resident (§8.01-310)

Service on Statutory Agent Re Possible Judgment

Whenever process served on a statutory agent is notification of a court action which could result in a judgment against the party named therein, **no judgment award can be rendered unless** the statutory agent mails a copy of the process (by registered or certified mail) to the last known address of the party, to reach the party **at least 10 days prior to the date of the court action**. The statutory agent must also file an affidavit of compliance (with this procedure) with the clerk of the court from which the process was issued. (§8.01-315)

Service of Process on Attorney After General Appearance

When an attorney has entered a general appearance for any party, any process for that party which relates to the same action may thereafter be served upon that attorney, and shall have the same effect as personal service on the party. However, in any proceeding in which a **final decree, or order**, has been entered, service on the attorney **shall not be sufficient** to constitute notice to the party regarding any proceeding for contempt, and *personal service* would be required upon the party.

The attorney can file an objection to being served by filing a motion regarding the service, **within 5 days after service**, in which case the court will enter an order specifying the manner of service. (§8.01-314)

Service of Process on Witness or Juror

A subpoena for a witness may be served in accordance with the rules for service on a natural person (§8.01-296). In addition, a witness may be served at his **place of employment** either in person or by leaving a copy of the subpoena with the witness's supervisor, even **outside** the officer's regular jurisdiction. (§8.01-298)

In the case of a juror, by mailing a summons to the person being served, at least seven days prior to the day he is summoned to appear. Code 1950, § 8-58; 1954, c. 366; 1973, c. 439; 1977, c. 617; 1979, c. 444.

Service of Confessed Judgments

Va. State Code §8.01-438 requires that confessed judgments be returned to court 10 days after service and must be served 60 days from the date of entry of the confessed judgment. Deputies would be wise to serve these as soon as they get them. ***Failure to serve within 60 days after entry would void the judgment.***

Process Requiring Personal Service

1. Out of State process

2. Capias

3. Show Cause Order, with the exception of Civil Show causes. As with any process, the Judge can order personal service, even for civil process.

4. Restraining Orders

5. Injunctions

6. Bench Warrants

7. Attachment Summons on Co-Defendant (Business)

8. Garnishment Summons on Co-Defendant (Business)

9. Process for any person who is a party to the suit being served at a place of business/employment

10. Officers (or management personnel) of corporations (when the corporation is the defendant

11. Registered Agent of a corporation

12. Partner (when action is against the partnership)

13. Officers and Agent of unincorporated Orders, Associations, and common Carriers

14. Although Juvenile Summonses for support do not require personal service, the time in which it is served is important. Under §16.1-278.18, support CAN start at the time the notice has been served upon the defendant, not the day of court. Personal Service is no longer required. (§16.1-264)

15. Decree

16. Civil & Criminal Summonses - this would include running red light summons §19.2-233

17. Foreign Support Orders from JDRC §20-88.70

NOTE: The above list is *not all inclusive* of the types of civil process, but does cover the most common situations.

Time Period For Return After Process Served

The return must be made to the court **no more than 72 hours** after service is completed. (The basic purpose of this requirement is to promote prompt return to the court after service of process has been made. The number of persons to be served in a single action, or functions to be performed, or return date set by the court can all bear upon when return can actually be effected.)

Failure to make a return of service of process within the 72 hour period shall not invalidate any service of process or any judgment based thereon. (§8.01-294)

Time Period for Service

Different periods of time are permitted by law for **the service or execution of process** according to the type of legal action involved. A list (not inclusive) of some of these, with the required time of return, is set forth below:

1. **Attachment**: Return shall be made within **30 days** from the date of issuance. (§8.01- 541; §8.01-559)

2. **Distress Warrants**: Return shall be made within **90 days**. (§55-237)

3. **Garnishment Summons**: Return shall be made within **90 days** to the issuing court, whether that court be a general district or circuit court, except that in the instance of a wage garnishment, the summons shall be returnable not more than 180 days after the date of issuance. **Often you will see a return date given by the court, which will be the date that it must be returned to the court.** (§8.01-514)

4. **Indemnifying Bonds**: Return shall be made within **21 days** t*o the circuit court with jurisdiction over the location in which the property levied upon is resides.* **This is not to be confused with the court issuing the document**. (§8.01-368)

5. **Writ of Fieri Facias**: Return shall be made within **90 days** to the court from which it was issued, except that in the instance of a wage garnishment, the summons shall be returnable not more than 180 days after the date of issuance. (§16.1-99)

6. **Writ of Possession**: For **Writ of Possessions in *Detinue***, the return shall be made within **90 days** from date of issuance to the court from which it was issued. For **Writ of Possession in Unlawful *Detainer***, returns shall be made within **30 days** to the court of issuance. (§16.1-99; §8.01-471)

7. **Sales**: When a sale is made under any order, warrant, or process, and no particular time for a return is designated, the return shall be made **forthwith.** (Forthwith means as soon as possible.) (§8.01-499)

8. **Warrant in Debts, Motions for Judgments (GDC),**: must be served 5 days before court date, not including the day of court. (§16.1-80)

9. **Subpoena for Witness and Production of Documents**: There is no time restriction as to how soon a notice of subpoena has to be served upon the respondent. Can be served up to the day and hour of hearing. However, a sheriff shall not be required to serve an attorney-issued subpoena that is not issued at least five business days prior to the date *production of the record and subpoena duces tecum* is desired. The subpoena shall be returnable within 20 days of proper service. This does not apply to subpoena for witness. (§8.01-407, 8.01-413, 16.1-89, 16.1-265)

10. **Confessions of Judgment**: The officer who serves the order shall make return thereof within ten days after service to the clerk. The clerk shall promptly file the order with the papers in the case. The failure to serve a copy of the order within 60 days from the date of entry thereof shall render the judgment void as to any debtor not so served. (§8.01-438).

11. **Jury Summonses**: Must be served 7 days prior to appearance in court. § 8.01-298

12. **Summons for Unlawful Detainers**: Must be served 10 days before the court date. §8.01-126

Deputy's Return (Information To Be Included)

When process has been served, a return must be made to the appropriate court (usually the court which issued the process) in order that the court may know:

1. the process was served, and

2. the service was in accordance with the law and court procedure. (§8.01-325)

The return must be executed by the person (usually a deputy sheriff) who served the process, on the **original copy** of the process. The deputy must sign his own name *and* the Sheriff's name to the return (since the deputy acts for the Sheriff), and show the date (and in some cases, i.e., posted service and executing levies, the exact time) service was made. The **manner of service** (personal or substituted) must be indicated. When substituted service is made upon a member of the family of the person named in the process, the **return must include**, in addition to the items above, the following:

1. the person named in the process was not at his regular place of abode,
2. the person served was at the regular place of abode, i.e., is not a temporary visitor or guest,
3. the relationship to the person named as recipient on the process,
4. that the person served was 16 years of age or above, and
5. that the nature of the process was explained to the person on whom it was served.

When substituted service is effected by posting or left with a member of the family, the original and **the copy left should bear a notation as to the date and manner in which it was served. (§8.01-296; §8.01-325)**

If service is made by any other person qualified under §8.01-293, whether service made in or out of the Commonwealth, his affidavit of such qualifications; the date and manner of service and the name of the party served; and stamped, typed, or printed on the return of process, an annotation that the service was by a private server, and the name, address, and telephone number of the server.

Failure To Make Return

If an officer fails to make a return (or makes an improper return) he may be subject to fine, having a judgment rendered against him, or other penalty. After failing to make a return, the deputy can be fined, after 10 days notice, from time to time by the judge of such court in an amount not less than five nor more than twenty dollars for each offense. (§16.1-101)

Return is not conclusive Proof of Service. You can be subpoenaed about your return.

Return Not Conclusive Proof of Service

When service of process is made by a Sheriff or Deputy Sheriff, the return is considered to be **prima facia proof of service** of the facts contained in the return, but is subject to challenge in court. When service of process is made by a qualified person other than a Sheriff or Deputy Sheriff (as defined in §8.01-293 - see caption "Who May Serve Process") the return is considered merely **evidence of service**. (§8.01-326, 8.01-326.1)

Arrest Under Civil Process Defined

The terms "arrest under civil process" and "civil arrest" are synonymous and mean the apprehending and detaining of a person. (§8.01-327.1)

Persons Privileged From Arrest Under Civil Process

In addition to the exemptions made by §§ 30-4, 30-6, 30-7, 30-8, 19.2-280, and 44-97, the following persons shall not be arrested, apprehended, or detained under any civil process during the times respectively herein set forth, but shall not otherwise be privileged from service of civil process by this section:

1. The President of the United States, and the Governor of the Commonwealth at all times during their terms of office;

2. The Lieutenant Governor of the Commonwealth during attendance at sessions of the General Assembly and while going to and from such sessions;

3. Members of either house of the Congress of the United States during the session of Congress and for fifteen days next before the beginning and after the ending of any session, and during any time that they are serving on any committee or performing any other service under an order or request of either house of Congress;

4. A judge, grand juror or witness, required by lawful authority to attend any court or place, during such attendance and while going to and from such court or place;

5. Members of the National Guard while going to, attending at, or returning from, any muster or court-martial;

6. Ministers of the gospel while engaged in performing religious services in a place where a congregation is assembled and while going to and returning from such place; and

7. Voters going to, attending at, or returning from an election. Such privilege shall only be on the days of such attendance. 1977, c. 617; 2015, c. 221. (§8.01-327.2)

Persons Exempt From Arrest

If a person comes into the state (Commonwealth) in obedience to a subpoena to testify, he/she ***shall not be subject to arrest***, civil or criminal, regarding matters which arose **before** coming into the state under the summons.

If a person **passes through** this state while going to another state in obedience to a summons to attend and testify, he/she ***shall not be subject of arrest,*** or the service of process, civil or criminal, regarding matters which arose before coming into the state under the summons. (§19.2-280)

Use care when serving a person outside a courtroom.

CHAPTER FOUR

BONDS

Chapter Four deals exclusively with bonds. It discusses the official bond, but largely deals with the types of bonds encountered in the service of process (and follow up actions) such as the indemnity bond, the forthcoming bond and suspending bonds. It further provides detailed information relating to each of those bonds as they apply to specific civil actions, such as attachment, detinue, rental actions (distress), etc.

Bonds

Bonds Required for Officer

Bonds are required by law for many Commonwealth officers and employees, including Sheriffs and Sheriff's deputies. The bonds must be payable to the Commonwealth, and shall be in sufficient surety as may be required by any court, board or officer (as may be appropriate). (§15.2-1527; §49-12)

This is the Sheriff's *official* bond which is distinguished from other bonds.

New or Additional Bonds for Officers

New or additional bonds may be required whenever the court (or other appropriate authority) may feel that the public interests so demand. The officer (in the case of Sheriff) shall be summoned before the court at least 10 days before any order for a new or additional bond, to show cause against the same. When an order is issued by the court, the officer shall have not less than 10 days, nor more than 30 days, to obtain the required bond. If the officer fails to comply, his office shall be deemed vacated. (§49-13)

Indemnity Bonds (General)

Whenever an officer may be required to **seize** property in the course of a legal action, he may require that the party initiating the action provide a bond sufficient to indemnify (protect) the officer (and the interest of all other parties to the action) against all costs and claims which might result from the seizure.

The Commonwealth shall not be required to give an indemnifying bond under the provisions of this section. Code 1950, § 8-229; 1968, c. 490; 1972, c. 327; 1977, c. 617; 2005, c. 690; 2012, c. 206. (§8.01-367)

The indemnity bond is **the most important** bond to the Sheriff and deputies because it protects both.

In 2005 a change was made to §8.01-367 to allow for Blanket Bonds. It reads "If the officer has performed more than one levy for a single plaintiff, the officer MAY permit the plaintiff to give a single indemnifying bond for such levies, provided that any such bond shall be in a penalty amount no less than the aggregate sum of the penalty amounts of the bonds required had the levies been bonded individually."

Please note the code uses the word MAY which gives the Sheriff discretion of its use. Furthermore, the code indicates the use of the "indemnity bond" and that form should be used and not a Blanket Bond form. Sheriff's may want to have their bonds reviewed by their city or county attorneys to ensure compliance with contract law.

A 2012 changed codified that "the Commonwealth shall not be required to give an indemnifying bond under the provisions of this section."

Fieri Facias, Attachment and Warrant of Distress Seizures

When an officer is required to levy, *he may deem* and that an indemnifying bond be provided by the plaintiff, **payable to the officer**, *with a condition to indemnify* the officer against all damages he (and other affected

parties) may sustain as a result of seizure and sale of the property. The bond amount required is determined by the document in hand.

1. For a **Writ of Fieri Facias and Distress Warrants**, the bond amount is **equal to the value of the property**.

2. For an **Attachment**, the bond amount is **double the value of the property**. (§8.01-367)

Attachment Action - Bonds

In an attachment action where the plaintiff merely desires a *levy* prior to judgment by the court, the plaintiff must furnish bond to the court at the time of initiating the attachment action. Bond shall be in a value **equal** to the property to be levied upon (except in the event plaintiff posts a property bond, which must be **double** the value of the property to be levied). (§8.01-537.1)

If the plaintiff desires property to be *seized* under an attachment prior to judgment by the court, the officer must file a certificate with the court indicating the **officer's appraisal of the property**, and bond must be furnished by the plaintiff in **double** the officer's certified value. The officer's certificate of value is subject to review by the court.

The Sheriff may hire an appraiser at the expense of the plaintiff.

Detinue Action - Bond

In a detinue action where the plaintiff desires a **levy on property**, **prior to judgment** by the court or have the property (in the hands of the defendant) **seized** prior to judgment by the court, a plaintiff's forthcoming bond is required in a penalty of **double** the fair market value of the property claimed, with condition to return the property to the defendant in event of adverse ruling by the court, and to cover all costs and damages to the officer, and any other parties affected, as a result of the seizure. The bond must be in the form of either surety, cash or property. If pretrial levy only is requested and a surety or cash bond has been posted, the amount of the bond will be at least equal to the fair market value of the property to levied. If a property bond has been posted, the amount of bond shall be double the fair market value of the property to be levied. (§8.01-115 and §8.01-537.1)

Return of Indemnity Bond

When an indemnity bond is required under a fieri facias, attachment, or warrant of distress, the bond shall be returned to the court by the officer within **21 days**. (§8.01-368)

Effect of Indemnity Bond

The effect of the indemnity bond is to **bar any claimant**, or purchaser of the property covered by the bond, from taking any action against the officer who levied thereon. (§8.01-369, 8.01-370) (See Wheeler v. City Savings, 156 Va. 402, 157 S.E. 726 (1931))

The indemnity bond makes the officer immune from suit.

Premium on indemnifying bond taxed as costs.

§ 17.1-627. In case of any attachment or any levy pursuant to a judgment, where the attaching or judgment creditor is required to give bond to indemnify and save harmless the officer executing such attachment or levy, the clerk shall

tax in the costs of the proceeding wherein such attachment is had or judgment is entered the reasonable cost of such bond, such costs to be recovered as provided in § 17.1-601.
Code 1950, § 14-195.1; 1954, c. 470; 1964, c. 386, § 14.1-199; 1998, c. 872.

Forthcoming Bonds

Forthcoming Bond in Fi-Fa or Distress Warrant Levy

When a levy is made on property of the debtor under a Writ of Fieri Facias or Warrant of Distress, the *debtor* (defendant) **may retain possession** of the property **until the time of sale** by providing a forthcoming bond in the name of the creditor (plaintiff), with sufficient surety to cover the amount due the creditor, **plus** any fees and costs involved, and with condition that the property be available on the day of sale. (Sufficient surety usually means **double** the value of the property involved.) (§8.01-526)

These are sometimes referred to as "redelivery bonds."

Forthcoming Bond in Attachment Levy

When a levy is made under an attachment, the property levied on may be retained by the defendant (or be returned to him if already seized), by providing a forthcoming bond (payable to the plaintiff) in a penalty of **double the value of the property**, or **double the amount claimed in the attachment** (defendant's option), with condition to cover all costs and damages which might result to the officer (or any other party), and to make the property available for sale when so ordered by the court. In the event either party (plaintiff or defendant) should make complaint that the bond is either excessive or inadequate, the court may fix the amount of the bond. (§8.01-553)

Exception to Forthcoming Bond in Attachment Levy

When the forthcoming bond in an attachment levy has been returned to the court, the **plaintiff** has **30 days to file an exception as to the sufficiency of the bond.** If the plaintiff's claim is upheld by the court, the *officer* must obtain a new bond from the defendant *with property surety*, or *the officer will be liable to the plaintiff* under his official bond. (§8.01-554)

Forthcoming Bond in Detinue Levy (Seizure)

When a *seizure* is made under a **detinue action** the defendant may have the seized property returned to him (until final judgment of the court), by providing a forthcoming bond (payable to the plaintiff) in a penalty of **double** the value of the property, with condition to pay all damages and costs which might accrue to the officer (or any other party) as a result of the return of the property, **and** with condition to have the property available to comply with the final judgment of the court. (§8.01-116)

Detinue actions usually involve "conditional sales contracts."

Forthcoming Bond in Warrant of Distress Levy

When a tenant's goods have been levied on under a Warrant of Distress, if the tenant gives an **affidavit** that he cannot afford a forthcoming bond, but does have a valid defense, **or** a right to remove the action to the Circuit Court, the officer may leave the goods in the possession of the tenant. However, if the action is for an amount in *excess of $1,000* and the tenant wishes to *remove it to the Circuit Court*, then the **officer must be given** a

forthcoming bond by the tenant in an amount **double** the amount in controversy in order to retain possession of his levied goods.

If the goods be perishable, or expensive to keep, the court may order the goods sold and **later** distribute the proceeds in accordance with the determined rights of the parties. (§55-232)

A Distress is a pre-judgment levy on behalf of the landlord for non-payment of rent. If the officer refuses to take a forthcoming bond from the tenant, he opens himself to liability. Do not confuse this with a Treasurer's Distress.

The Commonwealth does not have to provide a bond to protect the officer.

Forthcoming Bond When Injunction Involved

When the court has issued a temporary injunction (court order) against the removal of property from the Commonwealth, the **court may order the Sheriff** (or other officer) **to seize the property** until further action by the court, *unless* **the party** in possession of the property **obtains a forthcoming bond** in an amount of penalty as the court may prescribe. (§8.01-630)

When Forthcoming Bond Forfeited

When the conditions of a forthcoming bond are not performed, the officer after the bond is forfeited, shall return the bond to the court with the execution or warrant. The clerk of the court shall endorse the date of return on the bond it shall then have the **force of a judgment against all obligor.** (§8.01-527)

Forthcoming Bond When Sale Suspended (Suspending Bonds)

When a sale of property seized under a Writ of Fieri Facias or Warrant of Distress has been **suspended**, the claimant of the property (in dispute) may arrange to have the property remain in such possession as it was before the levy, by providing a **forthcoming bond** in a penalty **double the value** of the property, and with condition that the property be available for whatever disposition the court may later order. (**NOTE** - In this situation the third party claimant would put up **both** the **suspending bond** and the **forthcoming bond** (when the third party claimant desires that the property in dispute remain in the same possession as before the levy). §8.01-371)

Forthcoming Bond When Property Perishable or Expensive to Keep

When a sale of property seized under a Writ of Fieri Facias or a Warrant of Distress is *suspended*, the property is perishable or expensive to keep, the court may order the property sold forthwith (immediately) (regardless of whether or not a forthcoming bond has been provided), and will distribute the proceeds pf sale in accordance with it's final judgment as to the equities of the parties. (§8.01-372)

When Forthcoming Bond Not Taken

In certain situations no forthcoming bond may be taken by the officer:

1. On an *execution* on a forthcoming bond.

2. On an execution on a judgment against a Treasurer or Sheriff, or their deputies, for money received by virtue of their offices; on any such officer for money paid, or a judgment rendered for a default in office.

3. On *any execution* on which the clerk of the court is required by law, or ordered by the court, to endorse that **"no security is to be taken"**. (§8.01-531)

Suspending Bonds

When Suspending Bond Obtained

The sale of any property levied on under a Writ of Fieri Facias or a Warrant of Distress shall be **suspended** (delayed) at the instance of **any claimant** (*third party* claiming the levied property or any part thereof), who will provide the officer with a *suspending bond*, with good security, in an amount **double the value** of the claimed property, and payable to the officer. The third party claimant is **barred** from making any further claim to the property if:

1. he fails to provide a suspending bond, or

2. fails to have his claim adjudicated within 30 days after providing the suspending bond. (§8.01-370)

Indemnity .....protects the Sheriff (payable to the Sheriff).
Forthcoming....protects the Plaintiff (payable to the Plaintiff).
Suspending.....protects the 3rd Party Claimants

A Review of the Bonds

The suspending bond stops all time frames.

If the 3rd party claimant fails to have a hearing within 30 days, the sheriff can then proceed with sale by setting a new date for sale.

Third Party Claims

How Claim Tried

Circuit Court

When a Writ of Fieri Facias or a Warrant of Distress, issued by *a Circuit Court*, has been levied on property and a **third party** makes claim to that property, the third party may **suspend** (delay) any **sale** of that property by providing the officer handling the execution with a his claim. The officer handling the execution (if no forthcoming bond is provided to him - §8.01-367), may also petition the court to try the third party's claim, and likewise, the plaintiff to whom the judgment and execution were awarded by the court has a legal right to petition the court to try the third party's claim. (§8.01-365)

District Court

When an execution on a judgment of a General District Court, or a Warrant of Distress is *levied* on property, and some person (third party) other than the party against whom the process was issued, claims such property (or some part thereof), either:

1. the third party claimant,

2. the officer having the process, or

3. the party (plaintiff) who had the process issued, may apply to the General District Court to try the claim, provided it does not exceed the maximum jurisdictional limit of the court.

If the above conditions are met, the court may issue summons to the parties involved, to be served within **5 days** after issuance, and also order any sale of the disputed property delayed until after the return date of the summons. (§16.1-119; §16.1-120).

When No Forthcoming Bond Given

When an execution has been issued by a **Circuit Court** (as indicated above) and a third party makes a claim to the property levied on under that execution, the court may order a sale of the property and specify disposition of the proceeds *before* a decision as to the rights of the parties, **if no forthcoming bond** has been given. (§8.01-366)

Officer May Require Indemnifying Bond

When a Fieri Facias, Attachment, or Warrant of Distress is to be levied on property, the officer handling the execution **may require** that an indemnifying bond (with proper surety) be provided by the plaintiff. *Then* if a third party should make claim to any, or all, of the property levied on the officer may proceed to sell the property **unless** the third party gives the officer a suspending bond. (§8.01-367)

Return of Indemnifying Bond

When an indemnifying bond has been taken by an officer in the above situation, he must return the bond **within 21 days** to the Circuit Court of the county or city where the property is located. (§8.01-368)

Effect of Indemnifying Bond

When the indemnifying bond has been returned to the court by the officer, the claimant or purchaser of the property in dispute shall be barred from any action against the officer (provided the bond was in a proper amount of security). (§8.01-369)

Forthcoming Bond by Third Party Claimant

When a third party claimant has had a sale suspended (by providing a suspending bond), but desires that possession of the property remain as it was **before levy**, the third party claimant may also provide a forthcoming bond to achieve that purpose (until final judgment by the court). (§8.01-371)

Sale Despite Bond When Property Perishable

When property levied upon under an execution is perishable or expensive to keep, the court can order it sold **before** a decision is made on the rights of the parties (whether a forthcoming bond, suspending bond, or both have been provided) and apply the proceeds after final judgment as to the equities of the parties. (§8.01-372)

When Property Sells For More Than Claim

When property, the sale of which has been indemnified, sells for more than enough to satisfy the execution, the officer must pay the surplus into the court to which the indemnifying bond was returned. The court will distribute the surplus according to it's judgment as to the equities of the parties. (§8.01-373)

There are two other codes which relate to surplus at sales. See the surplus section under "Sales."

CHAPTER FIVE

COMMONWEALTH CLAIMS

On occasion the Commonwealth itself becomes the plaintiff in civil actions. The laws pertaining to this situation sometimes dictate procedures which differ from those employed when private citizens are parties to a civil action. The basic statutes relating to Commonwealth claims are set forth in this chapter.

Commonwealth Claims

State Comptroller Initiates Proceedings

All proceedings to enforce payment of money due the Commonwealth are initiated by the State Comptroller. (§8.01-196) ***The State Comptroller is located in Richmond.***

Who May Be Proceeded Against

Any person indebted to, or liable to the Commonwealth in any way, may be proceeded against by the Commonwealth. (§8.01-198)

Execution May Be Against Real Estate

On a Writ of Fieri Facias upon a judgment in favor of the Commonwealth, the officer may levy upon, and sell, **real estate.** (§8.01-201) ***When the Commonwealth is the plaintiff, real estate is subject to levy.***

Note: The words "**real estate**" must be incorporated in the writ form.

To Whom Execution Directed

An execution on behalf of the Commonwealth from the Circuit Court of the City of Richmond, may be directed (if the State Comptroller sees fit) to any Sheriff in the Commonwealth. (§8.01-202) Execution is sent to Sheriff **where subject lives**.

Personal Property Liable Before Real Estate

Every Writ of Fieri Facias (as set forth under §8.01-201 above) shall be levied **first** on the goods and chattels (personal property) of the defendant, but if the personal property is not sufficient to satisfy the judgment, then the officer shall levy upon the real estate of the defendant. (§8.01-203)

Notice of Sale of Real Estate

When a levy is made upon real estate, the officer must post sale notices as to the time and place of sale, at such public places as the officer shall deem expedient, **and at the front door of the courthouse** (in the jurisdiction where the real estate is located). The date of sale shall be not less than **60 days**, nor more than **90 days** from the date of posting notice. **The sale shall take place either at the premises, or the front door of the courthouse**, whichever the officer shall deem most advisable. (§8.01-204)

How Sale Made

The sale shall be by **public auction**, and **only** so much of the real estate as necessary to meet the judgment. If only a part (of the real estate) needs to be sold, it shall be laid off in one parcel as the defendant may direct, or if the defendant gives no direction, shall be laid off as the officer may deem best. (§8.01-205)

Terms of Sale

If the real estate is **not purchased for the Commonwealth**, the purchaser shall be given 6 months credit upon posting proper bond. The bond shall be returned by the officer to the court from which the execution issued, and the clerk shall endorse the date of return upon the bond. (§8.01-206)

Who to Collect Purchase Money

On or before maturity date of the bond indicated above (§8.01-206), the officer who made the sale shall obtain the bond from the clerk of the court and collect the money due. The officer shall convey the land to the purchaser by deed, and shall pay all costs of the execution, sale, survey (if one required), any taxes or levies on the land, and the amount due to the Commonwealth. If there be any residue (money left over), the officer shall pay it to the defendant. (§8.01-207)

You may want to consult your city or commonwealth attorney for the best method of selling.

NOTE: There are two other codes relating to surplus at sales. See surplus under the section on "Sales."

When Officer Making Sale Has Died

When the officer who made the sale of the real estate has died (or is no longer in office) before time to collect the money and deed the property to the purchaser, the required actions may be performed by his successor in office. (§8.01-208)

Bond to Have Force of Judgment

When the bond taken at the time of sale of the real estate (see §8.01-206) becomes payable and is forfeited, it shall have the effect of a judgment against all obligers who are alive. Execution may be issued on the bond, and the officer may sell for ready money and real estate of the obligers he may levy upon; however, no forthcoming bond could be accepted by the officer since this is a situation where the clerk of the court would endorse on the execution "no security is to be taken". (§8.01-209) (**Also see section on forthcoming bonds,** §8.01-527; §8.01-531)

Judgment Prevails Against Deceased Obligers

When a bond is taken from a purchaser of real estate (under a Commonwealth claim - see §8.01-206) and is forfeited, the bond (after endorsement by the clerk of the court) has the force of a judgment, even though an *obligor* under that bond is **deceased**, person representative. (§8.01-210)

When Venditioni Exponas Issued Sheriff of Adjacent County

When an officer makes a return on an execution in behalf of the Commonwealth, indicating that the defendant's goods or real estate remain **unsold for lack of bidders** (or similar reason), the **State Comptroller** may require the clerk of the court from which the execution was issued, to **issue a Writ of Venditioni Exponas to the Sheriff of an adjacent county** (or jurisdiction). The writ shall command the Sheriff to go get the unsold goods from the officer who made the levy, and sell them. (§8.01-211)

Items cannot be sold in original jurisdiction but in another or adjacent jurisdiction. The items are sold to the highest bidder regardless of the amount bid.

For Writs of Venditioni Exponas relating to Executions, see §8.01-485, as to Distress Warrants, see §55-237.

Officer Must Deliver Unsold Property to Other Sheriff

The officer who made the levy on the property under the execution, **must** surrender the property levied on to the Sheriff of the adjacent jurisdiction (under the Writ of Venditioni Exponas), or the court which issued the Writ may give judgment against the officer for the entire amount of the judgment, plus interest. (§8.01-212)

Where Sale to be Held

The Sheriff with the Writ of Venditioni Exponas may sell the **personal property** indicated above, either in the county where it is located, or remove it to the courthouse of his own county and sell it there. Any costs involving removal of the property shall be against the defendant. (§8.01-213)

Where Real Estate to be Sold

The Sheriff with the Writ of Venditioni Exponas has the same option with regard to selling the real estate as with the personal property of the defendant. (§8.01-214)

Return When No Sale Due to Prior Encumbrance

When an officer fails to levy upon an execution in favor of the Commonwealth, he shall include full particulars in his return as to the nature of the prior encumbrance, in whose favor it is recorded, the amount, and the court in which it is recorded (or from which the other execution issued). (§8.01-215)

> If prior liens have left no equity, for example in the case of real estate which has two or three mortgages, the sheriff should consult his city or county attorney before selling. The sheriff may also want the attorney to attend the sale.

Priority of Lien by Commonwealth for Taxes

A. 1. In the event of any distribution of an employer's assets, taxes, interest and penalty then or thereafter due shall be a lien against such assets, prior to all claims of lien and general creditors. Taxes accruing by reason of an employment for an employer who is a receiver, trustee or other fiduciary shall be a lien against all the assets in the custody or control of such receiver, trustee or other fiduciary, prior and paramount to all other claims of lien and general creditors.

2. Nothing in this article shall be construed in derogation of any prior lien of the Commonwealth or any of its political subdivisions, nor any mortgage, deed of trust or other lien duly perfected prior to the date the taxes or any part thereof first accrued. However, no such lien in favor of the Commonwealth or any of its subdivisions, nor any mortgage, deed of trust or other lien shall in any case be preferred, paramount or prior to the lien for taxes due by any such receiver, trustee or other fiduciary upon payrolls earned in the employment of such receiver, trustee or other fiduciary.

B. 1. Any taxes, interest or penalty imposed by this chapter shall be a lien upon the assets of the business of any employer, subject to this chapter's provisions, who leases, transfers or sells out his business, or ceases to do business. Such employer shall be required, by the next reporting date as prescribed by the Commission, to file with the Commission all reports and pay all taxes due with respect to wages payable for employment up to the date of such lease, transfer, sale or cessation of the business. Such employer's successor in business shall be required to withhold sufficient of the purchase money to cover the amount of the taxes due and unpaid until such time as the former owner

or employer produces a receipt from the Commission showing that the taxes have been paid, or produces a certificate from the Commission that no taxes are due.

2. If the purchaser of a business or successor of such employer fails to withhold purchase money or any money due to such employer in consideration of a lease or other transfer and the taxes are due and unpaid after the next reporting date, as set forth in subdivision 1 of this subsection, such successor shall be personally liable to the extent of the assets of the business so acquired for the payment of the taxes accrued and unpaid on account of the operation of the business by the former owner or employer.

3. Whenever the purchaser or successor of such employer files with the Commission a written request for a statement showing the amount of any tax due by such employer, unless such statement is furnished to such purchaser or successor within ninety days from the date such written request was filed, such purchaser or successor shall not be liable for any tax or taxes due by such employer, and the lien created by this section shall thereupon be released and discharged. (Code 1950, § 60-80; 1968, c. 738, § 60.1-96; 1977, c. 445; 1986, c. 480.) (§60.2-523)

CHAPTER SIX

JURORS

Because it is the Sheriff who summons jurors (especially in civil cases), this chapter endeavors to set forth the fundamental laws of the Commonwealth regarding:

1. How jurors are drawn,
2. How jurors are served,
3. Who may serve as jurors,
4. Who are disqualified as jurors,
5. Who are exempt as jurors,
6. Who may claim exemption as jurors, and
7. The penalty for improperly summoning a juror.

Jurors

How Names Drawn

The clerk of the court, in the presence of the judge (or a Commissioner appointed by the judge), shall thoroughly mix the ballots in a box and then draw as many ballots as deemed necessary (directed by the judge) for the trial of all cases for the pending term of court. (§8.01-348)

List of Jurors Prepared

The clerk of the court shall prepare a list in alphabetical order of the names drawn, and deliver an attested copy of the list to the Sheriff. The list must be available in the Clerk's Office for inspection by counsel. (§8.01-351)

How Jurors Summoned

In addition to the rules for **service of process upon natural persons** (§8.01-296), a juror may be served at his **place of employment**. Service may be lawfully effected by leaving a copy of the summons for the juror with the **person in charge** at the juror's place of employment. Service may also be effected by **mailing** a copy of the summons (by regular mail) so as to reach the juror at least **7 days** prior to the date the juror must appear. (§8.01-298)

Notice to Jurors

After jurors have been initially summoned for a particular term of Court, notification as to what day they shall appear at court shall be given ***by the Sheriff*** (according to instructions of the judge or clerk of the court). The notice may be verbal (a telephone call) and no specific period of notice is set out by statute. Generally **3 days** is considered reasonable notice; however, the **judge** (at his discretion) could excuse a juror for lack of sufficient notice when a hardship might be worked upon the juror. Upon request, either the clerk of the court or the Sheriff, shall make available to counsel a list of the **jury panel** for trial, at least 3 business days before the trial.

NOTE - Only the judge can lawfully ***excuse*** a juror. If any juror indicates a problem when notified by the Sheriff to appear, that juror should be advised that they have been notified of their obligation to appear and must seek any relief directly from the court (judge). (§8.01-353)

Who Liable to Serve as Jurors

All citizens **over 18 years of age**, who have been residents of the Commonwealth for **one year**, and of the county, city, or town in which they reside for **6 months**, shall be liable to serve as jurors. **No person shall be deemed incompetent to serve on any jury because of blindness, or partial blindness.**

Military personnel are not considered residents by reason of being stationed within the Commonwealth. (§8.01-337)

Qualifications for jurors:

1. Live in Virginia 1 year prior to
2. Live in jurisdiction for preceding 6 months
3. Non-felon
4. Age 18 or older

5. Citizen of US

Who Disqualified to Serve as Jurors

(*This,* and the following **two statutes**, are included in this handbook **only** for informational purposes. **No Sheriff**, or any of his personnel, may lawfully excuse a juror, unless such authority has been expressly granted by the court. The information set forth in the indicated statutes reveals the circumstances under which a juror might have a basis for dismissal consideration. **DO NOT TELL ANY JUROR** he/she has a lawful basis for dismissal - merely *suggest* to that juror that they contact the court when the situation would so warrant. (§§ 8.01-338, 341, 342, 345)

The following persons are **disqualified** to serve as jurors:

1. Persons who have adjudicated mentally incompetent.
2. Persons who have been convicted of **treason** or a **felony**.
3. Persons under a disability as defined in §8.01-2(6) (§8.01-338)

The following persons are disqualified to serve as jurors under §8.01-2(6):

1. Convicted of a felony.
2. An infant.
3. Drug addict or alcoholic. (§37.2-100)
4. Incapacitated person as defined under (§37.2-100)
5. Incompetent ex-service person. (§37.1-1016)
6. Any person incapable of taking proper care of his person or estate. (§8.01-2(6))

Who Exempt From Jury Service

The following persons shall be *exempt* from serving on juries in civil and criminal cases:

1. The President and Vice-President of the United States.
2. The Governor and Lt. Governor of the Commonwealth.
3. The members of both houses of Congress.
4. The members of the General Assembly, while in session.
5. Licensed practicing attorneys.
6. The judge of any court and members of the State Corporation Commission and magistrates .
7. Sheriff, deputy sheriffs, State Police, and police in counties, cities and towns.
8. The superintendent of the penitentiary and his assistants and the persons composing the guard.

9. Superintendents and jail officers as defined in §53.1-1, of regional jails. (§8.01-341)

Who May Claim Exemption from Jury Service

The following persons may *claim* exemption from jury service: (§8.01-341.1)

1. Mariners **actually employed** in the maritime service.

2. One who has legal custody and is responsible for a child 16 years of age or younger, requiring continuous care.

3. One who is responsible for a person with physical or mental impairment requiring continuous care.

4. Any person **over 70** years of age.

5. Any person whose spouse is summoned to serve on the same jury panel.

6. Any person who is the only person performing service for a business, commercial or agricultural enterprise and whose services are so essential to the operations of the business, commercial or agricultural enterprise that such enterprise must close or cease to function if such person is required to perform jury duty. (§8.01-341.1)

7. Any person employed by the Office of the Clerk of the House of Delegates, the Office of the Clerk of the Senate, the Division of Legislative Services, and the Division of Legislative Automated Systems, however, this exemption shall apply only to jury service starting (i)during the period beginning 60 days prior to the day any regular session commences and ending 30 days after the day of adjournment of such session and (ii) during the period beginning seven days prior to the day any reconvened or special session commences and ending seven days after the day of adjournment of such session.

8. Any general registrar, member of a local electoral board, or person appointed or employed by either the general registrar or the local electoral board, except officers of election appointed pursuant to Article 5 (§ 24.2-115 et seq.) of Chapter 1 of Title 24.2; however, this exemption shall apply only to jury service starting (i) during the period beginning 90 days prior to any election and continuing through election day, (ii) during the period to ascertain the results of the election and continuing for 10 days after the local electoral board certifies the results of the election under § 24.2-671 or the State Board of Elections certifies the results of the election under § 24.2-679, or (iii) during the period of an election recount or contested election pursuant to Chapter 8 (§ 24.2-800 et seq.) of Title 24.2. Any officer of election shall be exempt from jury service only on election day and during the periods set forth in clauses (ii) and (iii)

9. Any member of the armed services of the United States or the diplomatic service of the United States appointed under the Foreign Service Act (22 U.S.C. § 3901 et seq.) who will be serving outside of the United States at the time of such jury service. Code 1970, § 8-208.6:1; 1977, c. 458; 1987, c. 256; 1997, c. 693; 1999, c. 153; 2004, c. 106; 2005, c. 195; 2011, cc. 389, 708; 2012, c. 98.

Deferral of Jury Service for Occupational Inconvenience

The court, on it's on motion may limit person's jury service to particular dates during a term of court, where service would otherwise cause the person particular occupational inconvenience. (§8.01-341.2)

In the past the court had no option but to excuse the person for the *entire term of court* in such situations, in favor of having the person serve at the next term of court.

Improper Summoning of Juror

If any Sheriff, or other officer, **through favor or ill will**, summon any juror *with intent* that such juror shall find a verdict for or against either party in a court action, he shall be guilty of a **Class 3 Misdemeanor**. (Also see "Crimes by Officers") (§18.2-465)

CHAPTER SEVEN

ACTIONS AT LAW

The officer serving civil process is under a legal mandate to advise the party served as to the general nature of the process served upon him. In order for the officer to be able to comply with this mandate, he must have a general understanding of the nature and/or purpose of the particular **type of civil action** involved. This chapter endeavors to provide the officer with a basic understanding of various civil actions, as well as the particular procedures requisite to each type of action.

Officers are to be particularly careful **NEVER** to impart **legal advice** to parties of a civil action, but it is necessary that the officer possess a certain level of legal understanding in order to properly perform his duties.

ATTACHMENT PROCEEDING

An attachment is a pre-judgment action. The sheriff would be wise to review all the paperwork for completion and familiarize himself with the grounds should the deputy find the grounds for the attachment have not been met.

General

An **attachment** proceeding is a civil suit in which a plaintiff is suing to seize specific property in which the defendant has an interest, in order to satisfy a ***potential judgment*** in favor of the plaintiff. An attachment is used when the plaintiff believes that ***normal process of law*** will not be sufficient to recover debts owed him because the defendant is:

(1) about to leave the Commonwealth, or

(2) likely to otherwise dispose of the property so that there will not be sufficient property left to satisfy a judgment in favor of the plaintiff. §8.01-534

To Whom Attachment Directed

An attachment may be directed to any sheriff of any county or city in the Commonwealth, and any property of the defendant located anywhere in the Commonwealth may be levied upon. (§8.01-541) The levy may be made by the officer of the city or county in which the attachment was issued, or by the officer of the city or county in which the property is located. (§8.01-548)

Service Of Summons

Summonses are issued as part of the attachment process and served by the sheriff upon both the co-defendant and the principal defendant. Service may be effected according to the rules for service of process on natural persons (§8.01-296), and on corporations (§8.01-299, 300, and 301). (§8.01-546)

When Attachment Lien Effective

The plaintiff's lien shall become effective from the time the officer *makes a levy* upon the defendant's property. (§8.01-557)

Bond Required Before Levy

The plaintiff shall give a bond **at the time of initiating the attachment action**. This bond shall be in the amount of:

1. **At least the fair market value** of the property *to be levied upon*, or

2. A **cash bond** (at the plaintiff's option) *equal to the fair market value* of the property to be levied upon, or

3. A **property bond in double the fair market value** of the property will be levied upon.

4. All bonds (whatever type given) must contain a condition to pay all costs and/or damages which might arise for wrongful attachment.

5. The fact that acceptable bond has been given shall be:

   a. Endorsed on the attachment (by the clerk), or

   b. a certificate of bond be given the serving officer by the clerk. In this case, the serving officer shall return the bond certificate with the attachment. (§8.01-537.1)

Bond When Officer To Seize Property Under An Attachment

Before taking possession of property under an attachment, the officer shall ***make his certificate*** of the fair market value of the property to be seized, and shall not take possession of the property until a bond is given him in a penalty of **double the value** of the property as stated in his certificate.

The officer's certificate of value shall be filed in the clerk's office of the court to which the attachment is returnable, and shall be subject to review by that court. (§8.01-551)

How Attachment To Be Levied

An attachment shall be levied as follows:

1. On **tangible personal property** in possession of a *principal* defendant:

    a. As at common law

    b. By delivering a copy of the attachment to the principal defendant

    c. By taking possession of the property (when possession is required)

Tangible personal property can be defined as property that one can touch.

2. On **tangible personal property** of any defendant other than a principal defendant:

    a. By delivering a copy of the attachment to the person indebted to the principal defendant

    b. By taking possession of the property (when possession is required)

3. On **real estate:**

    a. By the officer making an endorsement on the attachment in the following form: **"Levied on the following real estate of defendant (or defendants) _____, to wit: ___(here describe the property) _ ___, this the ___ day of _____, 200_, at _ o'clock**. Signed Officer (§8.01-550)

When levying upon real estate the following wording must be included on the return. Description of property can be the street address or legal description.

Levy Must Be Made Without Force Or Trespass

In levying under an attachment, the officer **does not have the authority to break and enter the premises of the defendant to effect the levy** (§8.01-550), as he does when levying under an execution order of the court (such as a Writ of Fieri Facias or a Writ of Possession). (§8.01-491)

If the officer is able to enter the premises without committing a trespass he may levy on the property there, and it shall be a lawful levy even if the officer does not make an inventory of the property levied upon at that time. (§8.01-550)

§ 8.01-538. Attachment of ships, boats and other vessels of more than twenty tons. — No attachment against any ship, boat, or other vessel of more than twenty tons, shall issue unless the plaintiff or someone in his behalf, shall first establish, to the satisfaction of the court in which he files his petition for attachment that he has a reasonable expectation of recovering an amount exclusive of all costs, equal to at least one-half the damages demanded in the petition for attachment. Reasonable notice of appearance before the court shall be given the owner, agent or master of said vessel, and at the time of the appearance the court shall determine the amount of such reasonable expectation of recovery and the amount of bond necessary to secure the release of the vessel if and when a writ be levied in accordance with this section.

No attachment issued in violation of the provisions of this section shall create a valid lien upon the property sought to be attached, and no levy made under authority thereof shall be of any effect. (Code 1950, § 8-524.1; 1954, c. 254; 1977, c. 617.)

When Prior Lien On Property To Be Attached

When an officer receives an attachment for property already in his possession by reason of a prior attachment (or other legal process), the new attachment shall be considered a levy upon the property and constitute a lien **from the exact time it was received by the officer.** (§8.01-558)

When Property Levied Upon Is Perishable Or Expensive To Keep

When property levied upon and seized by an officer under an attachment is perishable, or expensive to keep, the court may order the property to be sold **forthwith**, under such terms as the *court* may direct. (§8.01-561**)**

Forthcoming Bond By Defendant

Any property levied on or seized under an attachment may be retained by, or returned to, the defendant (or other person in whose possession it was) upon their **giving bond,** with condition to have the property **forthcoming** at such time and place as the court may require. The bond shall be either in double the value for which the attachment was issued, or double the value of the property, at the option of the person giving it.

In the alternative, the ***principal defendant*** may give bond with condition to perform the judgment of the court, thereby releasing from attachment the *whole* of any estate attached. The bond shall be either in double the value for which the attachment was issued, or double the value of the property levied upon, at the option of the person giving it.

Upon motion of any party of interest in the attachment, the court may review the amount of the bond, and if it be considered either inadequate or excessive, may *fix* the amount of the bond to conform with the equities of the case. (§8.01-553)

Return Of The Attachment

The officer must return the attachment to the clerk of the court within **30 days from its date of issue**. His return must show the time, date, and manner of service or (execution), on each person and parcel of the property, and contain a list and description of all property levied upon. (§8.01-541; §8.01-559)

Principal Defendant May Claim Homestead Exemption

The principal defendant, if a "householder" and qualified under the Homestead Act, may claim his exemption against an attachment and the court shall render a judgment against the defendant only for the excess, if any, beyond the exemption to which the principal defendant is entitled. (§8.01-563)

Real Property Sold Last Under Attachment

No real estate shall be sold under an attachment until all other property and money subject to the attachment has been exhausted, and then only so much thereof as is necessary to pay the judgment. (§8.01-572)

When Attachment May Be Issued (And Served)

An attachment may be issued and **executed on any day, including Saturdays, Sundays, and holidays**. (§8.01-542)

When Attachment Returned Not Served

When for any reason an attachment is returned ***not served*** upon the principal defendant, further attachments and summonses may be issued by the clerk of the court ***until service is obtained*** on the principal defendant. (§8.01-544)

Exemption Claims Form Must Accompany Summons

A copy of an exemption claims form (which also serves as a request for hearing on a claimed exemption) must be attached to , and served with the attachment summons (to all parties). (§8.01-546.1)

> The court must schedule a hearing in 30 days or within 10 days if the defendant files for a hearing on exemption claim.

DETINUE PROCEEDINGS

General

Detinue is a form of civil legal action in which the plaintiff seeks to **recover possession of specific personal property**. It was not originally a method for collecting debts, but has now become a well accepted action for that purpose. Detinue is an action initiated by the plaintiff ***before*** judgment by a court as to the rights of the parties. It is often used by creditors to recover possession of property sold under conditional sales contracts (time payment plans), such as automobiles, home appliances, etc.

In a detinue action, the plaintiff (creditor) may **elect** to (1) merely have the defendant (debtor) served with a summons (Warrant in Detinue) to appear in court and have a trial to decide the issue of rightful possession, or (2) have the **sheriff immediately seize** (Detinue Seizure Order) the disputed property (which requires the posting of a bond by the plaintiff) and then hold the property pending the outcome of the court's judgment.

Action In Detinue

> In the case of a Detinue Seizure Order (seizure before judgment granted by court), the deputy CANNOT use force or trespass to execute. See Williams v. Matthews, 1994 Va. Appeals Court Case, which states the sheriff has NO AUTHORITY TO BREAK AND ENTER to execute a Detinue Seizure Order.

In an action in detinue the plaintiff seeks to recover possession of personal property unlawfully withheld from the plaintiff. A ***judge or magistrate may issue*** a warrant in detinue directed to the sheriff commanding him to **seize** the property for which the action is brought (or a specific portion thereof), and deliver it to the plaintiff ***pending the outcome of litigation.***

The order commanding the seizure of property shall be issued and served ***together with*** the form for requesting a hearing on a claim of exemption (§8.01-546.1) by the defendant. If action is in the form of Detinue Seizure Order, requiring immediate execution, order can be executed on any day of the week, including Sundays. (§8.01-114)

Bond Required For Detinue Seizure

No order for detinue seizure (§8.01-114) ***shall be issued*** until the plaintiff, or someone for the plaintiff, shall execute a bond in a penalty **of at least double the estimated fair market value** of the property involved, on the condition that the property so seized be redelivered to the defendant, if the right of possession be adjudged

against the plaintiff, and to pay all costs for damages which may accrue to the defendant, or any other person, by reason of the seizure. (§8.01-115)

Forthcoming Bond In Detinue

In an action of ***detinue seizure*** the defendant (debtor) may retain possession of the disputed property (or have the property returned if already seized), by executing a bond, payable to the plaintiff, in a penalty **at least double the estimated value of such property**, with a condition to pay all costs and damages which might accrue to any person by reason of the retention (or return), and to have the property forthcoming (available) to respond to any judgment or order of the court regarding the property. (§8.01-116)

Exception To Sufficiency Of Bonds

In a detinue action ***either party*** may file exception as to the sufficiency of the bonds involved (seizure or forthcoming), and the court before which action is pending will make such order regarding the bonds as may be just and reasonable. (§8.01-117)

Detinue Hearing

Within ***30 days after the issuance*** of a detinue warrant (§8.01-114), ***or promptly upon application of either party,*** the court shall conduct a hearing. The purpose of the hearing is basically to determine the sufficiency of the plaintiff's basis for a detinue action, *or* to determine the validity of the defendant's claim of exemption. The notice of exemptions form now ***required*** to be furnished to the defendant with the detinue warrant, becomes a request for a hearing if it is returned to the court by the defendant indicating any basis for exemption. (§8.01-119)

Final Detinue Judgment

When final judgment is rendered by the court, the property will be distributed according to the rights of the parties as determined by the court. If judgment is in favor of the plaintiff, ***the defendant shall have the option of paying the plaintiff the balance due on the property, or returning the property to the plaintiff.*** The defendant shall have up to **30 days** after judgment to make that election.

When the disputed property is an animal (as defined in §3.1-796.66), the court may order the return of the animal to the prevailing plaintiff without regard to any alternative method of recovery. (§8.01-121)

If the plaintiff doesn't have a place to store the items, the sheriff can obtain a place for storage and the plaintiff must pay the storage fees.

NOTE: Attorney General Opinion (1997 Va. AG 16) states two methods for obtaining judgment and has only one option of payout.

SEE §8.01-470 AS TO NOTICE REQUIRED BEFORE BREAKING AND ENTERING.

See First Virginia Bank v. Sutherland (217 Va. 588, 231 S.E.2d 706 (1977) as to payment for storage fees which must be made prior to repossessing the property. Storage lien amount has changed from $75.00 to $500. This is paid by the plaintiff. See also § 43-34, 46.2-644.(1) relating to garageman's lien.

Cannot Break and Enter to Execute

Pursuant to Williams v. Matthews (248 Va. 277), the Sheriff does not have the authority to break and enter a dwelling house, without the occupant's permission, for the purpose of seizing personal property **before trial**, in execution of a court ordered *ex parte* in accord with such statutes.

If mobile Home Is The Property To Be Repossessed: In the case of a repossession of a mobile home where there are tenants occupying the dwelling, the following procedure may be helpful in executing the writ. Give plenty of notice of the repossession date to allow the tenants to move on their own. Go by a few times to reinforce they need to get out. If the tenants refuse to move on their own, the mobile home will be removed from the lot on the

scheduled date. Occupant's property is not placed to the curb. Think of this as though you are repossessing a car. When repossessing a car, we do not empty the contents and place to the curb. This is no different. The owner can contact the plaintiff to recover his personal property.

In order for the mobile home to be removed, the code requires a permit from the locality where the mobile home is located before it can be moved. §58.1-3520. In addition, the company who will be transporting the mobile home on a highway must also have a permit to prior to removing. §46.2-653.

Costs Re Seizure Charged To Plaintiff

The legal charges, if any, for keeping seized property while in possession of the officer (sheriff), shall be paid by the ***plaintiff,*** and certified by the officer to the court. (§8.01-122)

GARNISHMENT PROCEEDINGS

It is the deputy's duty to serve the process, not to determine if the person is employed at the given address. The employer has the duty to inform the court of any problems with compliance of the garnishment.

General

When a creditor has obtained a judgment against a debtor, and knows of money in the possession of some third party to which the debtor is entitled (usually an employer), the creditor may seek to obtain such money (or as much as may be allowed under the Homestead Act; §34-29) through an action of garnishment. In such procedure, the third party (garnishee) becomes a co-defendant in the action. §8.01-511

Garnishment **and** ***attachment*** are both legal procedures through which a creditor may reach property of the debtor which is in the hands of a third party, but the garnishment proceeding has a definite advantage over attachment (as far as the creditor is concerned) when ***wages of the debtor*** are concerned. An attachment would only apply to whatever wages were due the debtor when the attached was obtained, whereas a garnishment would apply to all wages which would become due to the debtor during the entire period of the garnishment. A garnishment remains in effect for a period of 90 days, and in the case of wage garnishment it's 180 days, (whether issued by a general district court or a circuit court) and is renewable for repeated periods until the entire obligation of the debtor has been satisfied.

Service Of Garnishment Summons

The clerk of the court shall furnish the serving officer as many copies of the garnishment summons as may be necessary to serve all parties involved in the matter. Attached to the garnishment summons (all copies) must be a copy of a "Notice of Exemptions and Claim for Exemption Hearing" form. The officer will ***serve the co-defendant (employer)*** first, so the co-defendant will receive notice prior to the defendant debtor. §8.01-511

On the same date that the officer serves the co-defendant (employer), he should **mail** a copy of the garnishment summons and the Notice of Exemptions form to the defendant debtor.

NOTE - At the time the creditor files his petition for garnishment, he is required to furnish the clerk of the court an envelope (with proper postage attached) addressed to the last known address of the defendant debtor. The clerk will

place a copy of the garnishment summons and the Notice of Exemptions form in the envelope and give the envelope to the serving officer.

In the event the serving officer is not able to effect personal service upon the defendant debtor, mailing the documents (as indicated above) will ***satisfy the mailing requirement of §8.01-296(2b).*** In the event the serving officer is not able to effect either personal service on the defendant debtor **or** substituted service on a member of the debtor's family, then the **mailing will constitute service on the debtor.** (§8.01-511)

No Summons Issued Unless Notice Of Exemptions Attached

No summons in garnishment shall be issued *unless* a Notice of Exemptions and Claim for Exemption Hearing form is attached. **Both** documents shall be served upon the garnishee *and* the judgment debtor. The judgment debtor shall be served promptly *after* service on the garnishee. In 2012, the General Assembly amended this code that prohibited the exemption if the debt were for spousal and child support payments. (§8.01-512.4)

In 2007 the General Assembly allowed child support payments be exempt under garnishment §20-108.1.

Service On Debtor At Place Of Employment

The defendant debtor may be served in accordance with §8.01-296 (Service of Process on Natural Persons), and he may also be lawfully served at his place of employment.

Service upon the debtor at his place of employment is not recommended as a regular procedure, but may be utilized when expedient and good judgment is exercised.

When Garnishee Cannot Identify Debtor

The creditor is required to make reasonable effort to furnish the full name, proper address and social security number of the judgment debtor at the time of obtaining garnishment process. In the event the creditor is not able to comply, and the co-defendant (garnishee) is unable to identify the debtor due to lack of social security number, full name or multiplicity of similar names, the ***garnishee*** should report such problem to the court, and shall have no liability to the judgment creditor. (§8.01-511) ***See 2003 Va. AG 15 (02-142) as to no liability incurred by sheriff if service is made out of order when judgment debtor and garnishee are not in the same jurisdiction for service.***

A 2012 change to § 8.01-511 allows the creditor to proceed with issuance of the Garnishment without the debtor's social security number as long as the creditor has used due diligence to obtain same. In addition, the code changed to "If the judgment debtor does not reside in the city or county where the judgment was entered, the judgment creditor may have the case filed or docketed in the court of the city or county where the judgment debtor resides and such court may issue an execution on the judgment, provided that the judgment creditor (a) files with the court an abstract of the judgment rendered, (b) pays fees to the court in accordance with § 16.1-69.48:2 or subdivision 17 of § 17.1-275, and (c) files in both courts any release or satisfaction of judgment."

Garnishment Service On A Corporation

§ 8.01-513. Service upon corporation or limited liability company. —When the co-defendant (garnishee) is a corporation, the judgment creditor shall have garnishment process issued for service upon an officer of the corporation, an employee designated by the corporation other than an officer of the corporation, or, if there is no designated employee or the designated employee cannot be found, upon a managing employee of the corporation other than an officer of the corporation. If the judgment creditor or his attorney files with the court a certificate that he has used due diligence and that no such officer or employee or other person authorized to accept service can be found within the Commonwealth or such designated or managing employee found is also the judgment debtor, then such summons shall be served on the registered agent of the corporation or Clerk of the State Corporation

Commission. Personal service must be effected upon a registered agent. Service upon the Clerk of the State Corporation Commission (in Richmond) may be made upon the Clerk in person, or by merely serving it at his office. However, service on the corporation shall not be made upon a designated or managing employee who is also the judgment debtor. If the corporation intends to designate an employee for service, the corporation shall file a designation wit the State Corporation Commission. For the purposes of this section, "managing employee" means an employee charged by the corporation wit the control of operations and supervision of employees at the business location of the corporation where process is sought to be served. (§8.01-513)

Federal authorities can refuse to accept some processes. However, processes relating to spouse or child support are usually accepted.

Garnishment Debt May Be Paid Before Return Date

Any person summoned (including the debtor) may, before the return date of the summons, pay the amount required (to satisfy the judgment) to the clerk of the court from which the summons was issued, and must be given a receipt for such payment. (§8.01-520)

Commonwealth Employees Subject To Garnishment

Employees of the Commonwealth, except state officers (or persons otherwise exempt by law), are subject to garnishment. (§8.01-522)

County, City and Town Officers And Employees Subject To Garnishment

Officers and employees of cities, counties and towns in the Commonwealth are subject to garnishment. (§8.01-524, 525)

Benefits Not Subject To Legal Process

The payments in weekly or monthly installments to the holder of any policy of industrial sick benefit insurance shall not be subject to the lien of any attachment, garnishment proceeding, writ of fieri facias, or to levy or distress in any manner, for any debt due by the holder of the policy. (§ 38.2-3549)

Accident And Sickness Benefits Not Subject To Legal Process

The installment payments to the holder of any accident and sickness insurance policy or certificate shall not be subject to the lien of any attachment, garnishment proceedings, writ of fieri facias, or to levy or distress in any manner for any debt due by the holder of the policy or certificate.

Federal Employees Subject To Garnishment

Federal employees are subject to garnishment (which makes the United States government the co-defendant). Service of process on the co-defendant may be made on the managing employee (personal service) of the Federal Agency with which the defendant is employed. If the defendant is a member of the armed forces, service may be made upon the chief fiscal officer of the military post to which the defendant is assigned. (§8.01-523)

If no appropriate agency manager can be located, process for the co-defendant may be served upon the United States Attorney. (§8.01-523)

NOTE - This statute (§8.01-523) was enacted pursuant to the provisions of 42 U.S.C.A. (Federal Code) 652b, 659, and 660 which relate to maintenance and support of a spouse or child.

Service of Garnishment on U.S. Postal Service

According to 39 C.F.R. Part 491, the garnishment must be served at the Postal Rate Commission, c/o Manger, Payroll Processing Branch, 2825 Lane Oak Parkway, Eagan MN 55121-9650. This code also says that employees of the local post office cannot accept nor forward any garnishment to the appropriate party. "Process addressed to, delivered to, or in any manner given to any employee, other than the Authorized Agent or his designee, may, at the sole discretion of the employee, be returned to the issuing court marked "Not Effectively Served." A copy of or reference to these regulations may be included.

Return Of Garnishment Summons

Garnishment summons are returnable not more than **90 days** from the date of issuance by either the General District or the Circuit Court, except that in the instance of a wage garnishment, the summons shall be returnable not more than 180 days after the date of issuance. (§8.01-514)

The form for Garnishment Summons has been modified to include the Writ of Fieri Facias at the bottom of the form. This eliminates the need to issue a separate execution. **A 2011 Attorney's General opinion (2011 Va. AG S-10) states when the box "levy not requested" is checked, the deputy makes a return stating same on the return for the FiFa portion.**

Interrogatory Proceedings

Definition

When a creditor has obtained a judgment against a debtor, he may make application to the court to summons the debtor before the court (or a commissioner appointed by the court) to answer questions (interrogatories) as to his personal estate and any real estate he may own (either in or out of the Commonwealth). If the execution creditor requests that the summons require the execution debtor to appear before a like court of the county or city in which the execution debtor resides, or of a county or city contiguous thereto, the case may be filed or docketed in accordance with the requirements of § 8.01-506.2 prior to issuance of the summons. (§8.01-506)

The purpose of the interrogatory proceedings is to determine what assets the debtor has, and may be levied on, in satisfaction of the creditor's judgment. It is a procedure available **after judgment,** and is only available to the creditor if no previous interrogatory action has been brought against the debtor by the same creditor, in the preceding 6 months. (§8.01-506)

> If the plaintiff is a corporation, the attorney representing the corporation is the only one permitted to ask questions under interrogatory and request issuance. (§16.1-88.03)

Procedure

When a creditor has obtained a judgment against a debtor, he may make application to the court to summons the debtor before the court (or a commissioner appointed by the court) to answer questions (interrogatories) as to what assets (personal and real) he may possess, and which may be levied on in satisfaction of the creditor's judgment. If certain requirements (§8.01-506) are met by the creditor, the court will issue the summons.

Service of Interrogatory Summons

Service of the interrogatory summons may be made upon the defendant (debtor) in accordance with the rules of service of process upon a natural person (§8.01-296). If personal service is effected, the defendant should be apprized of the consequences for failure to appear (may be arrested), or to comply with the summons. (§8.01-508).

If the defendant appears before a commissioner appointed by the court, the commissioner will make a report of the interrogatory proceedings to the court. (§8.01-507.1)

§801-506 requires a Writ of Fieri Facias be issued simultaneously with the Interrogatory Summons. The issuance of this Writ establishes a lien on intangibles and gives the authority of the judge at the time of the hearing, to have the debtor remove all items from his pockets and rings from his fingers.

Failure of Defendant (Debtor) to Comply

If the defendant fails to:

1. appear in compliance with the interrogatory summons, or
2. refuses to answer questions, or
3. gives evasive answers to questions, or
4. refuses to convey property when so ordered, the judge (or commissioner) may issue a writ directed to the Sheriff, to arrest and detain the defendant until the required conditions are met. (§8.01-508; §8.01-327.1)

If the deputy takes the extra time to explain consequences of failing to appear, usually this will eliminate the need to go out with a subsequent show cause summons or capias.

Conveyance of Property by Defendant (Debtor)

Failure to appear is considered contempt of court which is punishable with a $250 fine and/or jail.

Any property of the defendant, including real estate located in or out of the Commonwealth, may be ordered conveyed by the defendant to the officer to whom the Writ of Fieri Facias was delivered after judgment against the defendant. (§8.01-507)

Sale of Defendant's (Debtor's) Estate

The court may make any order it deems right as to the sale of the defendant's estate (conveyed to the officer) (§8.01-510).

The officer to whom the estate was conveyed shall (unless otherwise directed by the court) sell the property, both real and personal, as in any other execution sale. *(See section on Executions - Chapter 8)*. Where some of the property conveyed to the officer is evidence of debts owed to the defendant, the officer may collect payments on those debts for 60 days. At the end of 60 days the officer must make his return to the court (with proper accounting for sales and monies received) and will turn over to the clerk of the court all evidence (documents) of remaining debts owed to the defendant. (§8.01-510). Subsequently, when proper indemnifying bond has been furnished, the officer may sue to enforce any remaining liabilities to the estate. (Also, **any interested party** could bring suit, at his own expense, and sue in the officer's name.) (§8.01-492, 497, & 510)

Use of Interrogatories to Discover Debtor's Assets

Once a judgment has been rendered for a plaintiff, interrogatory proceedings may be utilized to **discover** what assets the defendant (debtor) might possess. (In the past interrogatory proceedings could not be utilized until an *execution* (i.e., Writ of Fieri Facias, etc.) had been issued, on the theory that **no lien** existed before execution. (§8.01-506)

> The form for Interrogatories Summons has been modified to include the Writ of Fieri Facias at the bottom of the form. This eliminates the need to issue a separate execution. **A 2011 Attorney's General opinion (2011 Va. AG S-10) states when the box "levy not requested" is checked, the deputy makes a return stating same on the return for the FiFa portion.**

Distress Actions

Warrant of Distress for Rent

When rent is **past due** a landlord (***landlord distress***) may obtain a warrant of distress. This is an action **before** judgment by the court, and is a means by which the landlord can have the Sheriff levy on the goods (personal property) of the tenant (and later sell them to make the money due the landlord). The landlord must wait 10 days after levy has been made to petition for a sale, during which period the tenant may contest the action in the court where the property is located.

NOTE: The primary code sections concerning Distress Warrants for rent were last updated by the Virginia General Assembly in 1932.

> The Distress Warrant is one of the most powerful civil process documents which can be executed by the Sheriff. Many states have outlawed this process citing violation of due process of law rights under the 14th Amendment. Virginia, however, still has this process.

What Goods Subject to Levy

An officer levying under a Warrant of Distress may levy on **any goods** of the tenant his assignee (person to whom the tenant has transferred property), or **under tenant** (tenant of the tenant and also know as roommate), which are found on the premises, or which were removed from the premises within 30 days prior to levy. (§55-231)

> Any property inside and outside the dwelling is subject to levy regardless of ownership.

When Goods Subject to Prior Lien

When the goods of the tenant, his assignee, or under tenant, levied upon in the above situation were subject to a lien **before being brought on the premises**, the distress levy can only reach the tenants, etc, **equity** in those goods. When liens were placed on those goods **after** they were brought on the premises (or during the 30 day period prior to the distress levy even if removed from the premises), the distress levy shall give the landlord a lien on those

goods for an amount not to exceed 6 months rent when the premises are in a city or town, and not to exceed 12 months rent when the premises are used for farming or agriculture. (§55-231)

Purchasers & Prior Lienor Liens Inferior to Landlord's

When a lien is created on goods of the tenant which are **already on the premises**, and the lienor (or anyone who may have purchased those goods from the tenant or lienor) desires to remove those goods, they can only do so upon making payment to the landlord of an amount not to exceed 6 months rent when the property is located in a city or town, or 12 months rent when the premises are used for farming. The lienor (or purchaser) would have the option of paying the landlord the amount of rent in arrears at the time of removing the goods, and giving security to the landlord for what will become due, payment and security together not to exceed the above indicated maximums

If the goods are taken **by an officer under an execution**, when the officer sells the goods he must pay the landlord the amount of rent in arrears from the proceeds of the sale, and must sell a sufficient portion of the goods under future credit (taking bonds from the purchasers) to cover what will become due to the landlord, payment and credit not to exceed the above indicated maximums. The officer will deliver the above bonds to the landlord. (§55-233)

How Goods of Undertenant May be Removed

An undertenant, a lienor of goods of the undertenant, or a purchaser of such goods, may only remove the goods from the premises by making payments to the landlord in like manner as set forth above (§55-233; Purchasers and Lienor's Liens Inferior to Landlord's). The same procedure as set forth above applies to an officer taking the goods under an execution. (§55-234)

When Force May be Used to Execute Levy

An officer acting under a Warrant of Distress, or an Attachment for rent, may (when there is need) break and enter any house or close (in the daytime) in which there may be goods liable to the distress or attachment. The officer may break and enter any house or close in the **day or night time** when goods liable to the distress or attachment have been fraudulently or clandestinely removed from the tenant's premises. The officer may also levy on property found in the personal possession of the person liable for the unpaid rent. (§55-235) See 80-81 Va. AG 48 regarding breaking and entering. You would still have to announce your intent to enter.

Officer May Require Indemnity Bond Before Levy

When an officer is required to levy under a Writ of Fieri Facias, an Attachment, or a Warrant of Distress, he may demand that an indemnifying bond be provided by the plaintiff, *payable to the officer*, in an amount **equal** to the value of the property in the case of a Writ of Fieri Facias or Warrant of Distress, and **double** the value in the case of an attachment. However, a 2012 change to this code to prohibits the requirement of a bond from any Commonwealth agency. (§8.01-367)

Forthcoming Bond by Tenant

See the entry entitled "**Forthcoming Bond in Warrant of Distress Levy.**" (§55-232)

Return of Distress Warrants

Any officer who executes a Warrant of Distress, under order of the court after hearing and judgment for the landlord, shall make a return to the court of issuance within **90 days**, such return to indicate the officer's actions and proceedings, and an accounting for monies received in any sale. If the officer's return reveals that any property levied on remains unsold, the clerk of the court may issue a Writ of Venditioni Exponas for the sale of that property. (§55-237)

As to Writs of Venditioni Exponas for Commonwealth Claims, see §8.01-211, as to Executions, see §8.01-485.

Distress Warrant by Treasurer

Unlike distress by landlord, the Treasurer's Distress is for non-payment of taxes. While the rules of levy are similar they differ when it comes to secured parties, etc.

1997 Va AG 203-Priority of Lien and Notice of Sale

"It is also my opinion that the term "priority," as used in § 58.1-3942(C), means that a secured party whose security interest is perfected prior to any distraint for taxes shall be paid first out of any proceeds from the sale of the distrained property, ***unless the taxes for which the property was distrained were specifically assessed against the distrained property.*** If the delinquent taxes are specifically assessed against the distrained property, the proceeds of the distress sale must be paid first toward delinquent taxes and any remainder toward secured interests**.** ***Finally, it is my opinion that a secured party with a lien on distressed property is required to receive notice of a distress sale as provided in §§ 58.1-3942(B) and 8.01-492"***

A 2012 revision to the code §58.1-3942 requires the Sheriff to provide a receipt or bill of sale to the purchaser of a vehicle.

"Sheriff may use treasurer's distress letter to seize money or property located within jurisdiction and in contiguous county or city. Deputy sheriff may enforce collection of, and is required to collect, delinquent tax described in distress letter issued by treasurer. ***Sheriff must post notice of time and place of distress property sale at least 10 days before sale at place near residence of owner if he resides in county or city and at two or more public places in sheriff's jurisdiction.*** **Sheriff may not be required to pay back distress property sale moneys when delinquent taxpayer later claims tax assessment was erroneous. Sheriff has no authority to file suit against delinquent taxpayer upon receipt of distress letter/warrant from local treasurer.** ***Sheriff may not require local treasurer to provide indemnity bond for liability arising from distress. Availability of sovereign immunity defense to sheriff is determined on case-by-case basis by court assessing whether alleged act of liability involved exercise of judgment and discretion."***

1999 Va. AG 207-Authority to seize property for taxes doesn't extend to seizure of persons.

"Broad authority to seize property for delinquent taxes does not extend to seizure of persons. Stopping automobile and detaining person at roadblock constitutes seizure of person. Within limitations imposed by Fourth Amendment, law-enforcement officers may set up roadblocks as exercise of their statutory authority to stop vehicles to inspect equipment or verify registration and licenses. No authority to detain person at roadblock to verify payment of personal property taxes or to detain person for being delinquent in payment of personal property taxes."

§ 58.1-3941. What may be distrained for taxes. — Any goods or chattels, money and bank notes in the county, city or town belonging to the person or estate assessed with taxes, levies or other charges collected by the treasurer may be distrained therefor by the treasurer, sheriff, constable or collector. ***Property subject to levy or distress for taxes shall be liable to levy or distress in the hands of any person for taxes, penalties and interest thereon, except that any highway vehicle as defined herein purchased by a bona fide purchaser for value shall not be liable to levy or distress for such taxes unless the purchaser knew at the time of purchase that the taxes had been specifically assessed against such vehicle."***

"Property on which taxes were specifically assessed, whether assessed per item or in bulk shall be subject to distress after it passes into the hands of a bona fide purchaser for value."

"As used in this section, "highway vehicle" means any vehicle operated, or intended to be operated, on a highway. The term shall not include: (i) farm machinery, including farm machinery designed for off-road use but capable of movement on roads at low speeds; (ii) a vehicle operated on rails; (iii) machinery designed principally for off-road use; (iv) self-propelled equipment manufactured for a specific off-road purpose, which is used on a job site and the movement of which on any highway is incidental to the purpose for which it was designed and manufactured; or (v) a vehicle operated on the highway and exempt from registration requirements pursuant to §§ 46.2-663 through 46.2-667 and 46.2-669 through 46.2-683. (Code 1950, § 58-1001; 1971, Ex. Sess., c. 155; 1983, c. 498; 1984, c. 675; 1996, c. 323; 1997, cc. 496, 731; 2005, c. 59.)"

§ 58.1-3942. Security interests no bar to distress. —

A. No security interest in goods or chattels shall prevent the same from being distrained and sold for taxes or levies assessed thereon, no matter in whose possession they may be found.

B. ***Prior to such sale for distress, the treasurer, sheriff, constable or collector, or other party conducting the sale shall give notice to any secured party of record as his name and address shall appear on the records of the Department of Motor Vehicles, the Department of Game and Inland Fisheries, the State Corporation Commission, or in the office of the clerk of any circuit court where the debtor has resided to the knowledge of the party to whom the tax is owing during a one-year period prior to the sale. Notice shall also be given to any secured party of whom the party to whom the tax is owing shall have knowledge.***

C. ***A security interest perfected prior to any distraint for taxes shall have priority over all taxes***, except those specifically assessed either per item or in bulk against the goods and chattels so assessed. Taxes specifically assessed either per item or in bulk against goods and chattels shall constitute a lien against the property so assessed and shall have priority over all security interests. For purposes of this section, a merchant's capital tax shall be deemed to be specifically assessed against all inventory in the merchant's possession at the time of distraint, or at the time such inventory is repossessed by the holder of a security interest therein. For purposes of this section, taxes specifically assessed in bulk means an assessment against the specific class of property distrained.

D. ***The title conveyed to the purchaser of goods and chattels at a sale for taxes specifically assessed either per item or in bulk against such goods and chattels distrained shall be free of all claims of any creditor, including the claims of any secured party of record, provided that notice was given to such creditor as required by subsection B.*** The person conducting the sale shall apply the proceeds of the sale first to unpaid taxes and then the claims of secured parties of record, in the order of their priority, before delivering any sum remaining to the person or estate assessed with taxes.

E. Notwithstanding any provision of this section to the contrary, no highway vehicle as defined in § 58.1-3941 purchased by a bona fide purchaser for value from the ***person or estate assessed with taxes shall be liable to levy or distress for such taxes unless the purchaser knew at the time of purchase that the taxes had been specifically assessed against such vehicle.*** (Code 1950, § 58-1009; 1966, c. 559; 1981, c. 153; 1983, c. 498; 1984, c. 675; 1990, c. 553; 1996, c. 732; 1997, c. 731; 1999, c. 299; 2001, c. 801; 2005, c. 59.)"

§ 58.1-3945. *Where land lies partly in one county and partly in another*. — When taxes or levies are assessed on a tract of land lying partly in one county or city and partly in another county or city the treasurer of the county or city in which the taxes or levies are so assessed may distrain on the part of the land lying in the other county or city in the same manner as if such part was in his own county or city. (Code 1950, § 58-1007; 1984, c. 675.)

§ 58.1-3946. *When owner a nonresident of county, city or town where land lies.* ***— When property subject to taxation is located in a county, city or town different from that in which the owner of such property resides, or when a person assessed with any taxes, levies and other charges before paying the same removes from the county, city or town in which the assessment was made, the treasurer shall have the same remedies for the collection of all such taxes, levies and other charges in all respects as if the person owing the same resided in the officer's own***

county, city or town; or the treasurer may transfer to the treasurer of the county, city or town in which such person resides the tickets for taxation and levies and the statements for other charges against such person or property and the last-named officer shall proceed to collect the same and pay the proceeds to the former officer. (Code 1950, § 58-1008; 1984, c. 675; 2002, c. 64.)

1997 Va. AG 202-203-Can a mobile home be distrained when it's been repossessed

"You ask whether a mobile home may be distrained pursuant to § 58.1-3941 of the Code of Virginia when it has been repossessed and subsequently sold to a bona fide purchaser for value who had no knowledge of an existing personal property tax lien on the mobile home.

Section 58.1-3941 ***provides that taxable property "shall be liable to levy or distress in the hands of any person." The word "shall" is primarily mandatory in its effect. The only exception to such levy or distress is "any highway vehicle as defined in § 58.1-2101 purchased by a bona fide purchaser for value."*** Section 58.1-2101 ***defines the term "highway vehicle" to mean "any vehicle operated, or intended to be operated, on a highway.***" The term, "operate," however, is not defined in § 58.1-2101. In the absence of any statutory definition, the term should be given its plain and ordinary meaning, given the context in which it is used. ***The term "operate" is generally defined to mean "to work, perform, or function, as a machine does; to work or use a machine, apparatus, or the like."***

In my opinion, it is clear that a mobile home is not a "highway vehicle" within the meaning of § 58.1-2101, because such vehicle is not operated, and is not intended to be operated, on a highway. Consequently, a mobile home, which has been repossessed and subsequently sold to a bona fide purchaser for value who was unaware of an existing personal property tax lien on the mobile home, may be distrained pursuant to § 58.1-3941."

Be advised that § 58.1-2101 was repealed but the definition for highway vehicle falls under § 58.1-3941.

2003 Va AG 172-Sheriff not entitled to 10% commission.
According to an Attorney General's opinion, the sheriff "is not entitled to the five percent commission authorized under § 8.01-499 for serving a distress warrant on behalf of the local treasurer for the collection of delinquent taxes, which subsequently are paid to the treasurer's office." ***Note: §8.01-499 changed to 10 per cent commission.***

§ 17.1-266. Services rendered in Commonwealth's cases. — No clerk, sheriff or other officer shall receive payment out of the state treasury for any services rendered in cases of the Commonwealth, whether in a court of record or a court not of record, except as allowed by statute. Localities shall be exempt from paying fees for services rendered by a clerk or other court officer for cases, whether in a court of record or a court not of record, when the locality is a party to a case commenced in a court serving that locality or in any other jurisdiction when the localities have a reciprocal waiver of fees agreement. Sheriffs may, in writing, grant a waiver of the sheriff's fee to one or more localities. (Code 1950, § 14-98; 1964, c. 386, § 14.1-87; 1971, Ex. Sess., c. 155; 1998, c. 872; 2007, c. 800.)

EVICTIONS

STEP 1. 5 Day Notice

When a tenant's **rent is in arrears**, the landlord may give the tenant a **5 day notice** (the most frequently utilized option) to pay the amount due or eviction action will be taken. This notice is not prepared by a court, but rather by the landlord or his attorney. It may be **served** upon the tenant **by the Sheriff**, or presented to the tenant

5 Day Notice: is used when rent is delinquent.
30 Day Notice: is used for breach of lease.

by the landlord, or mailed to the tenant by the landlord (by registered or certified mail) to make it legally binding upon the tenant. (§55-248.31:1)

The service of the five day notice by the Sheriff shall be in accordance with the rules for service of process on a natural person (§8.01-296). A copy of the notice should be served upon **all** defendants involved, and the Sheriff's return placed on the original copy and given to the landlord or his attorney. (§8.01-296; §55-225)

STEP 2. Summons in Unlawful Detainer

After the five day period of notice has expired and the landlord has not received satisfaction, the landlord may obtain a **Summons in Unlawful Detainer** by giving **statement under oath** to the judge (or a magistrate or clerk) that the tenant retains possession of the premises unlawfully. The judge (or magistrate or clerk) will issue a summons against all persons named in the landlord's affidavit, ***which shall be served on those persons at least 10 days before the return date.***

The Summons in Unlawful Detainer is an action taken *before judgment* by the court, and the above summons directs the defendants (tenants) to appear for a hearing. The Summons in Unlawful Detainer is the legal process to cover any situation in which the possession of any house, land or tenement is unlawfully detained by the person(s) in possession thereof. (§8.01-124; §8.01-126; §8.01-296)

STEP 3. Writ of Possession in Unlawful Detainer

When judgment has been awarded in favor of the landlord under a Warrant in Unlawful Detainer procedure, the landlord may then obtain a Writ of Possession from the court. The writ is the **authority** of the **Sheriff** to **remove the tenant** from the premises (and the tenant's belongings and restore possession of the premises to the landlord. The execution of the writ of possession by the sheriff should occur within 15 calendar days from the date the writ of possession is received by the sheriff, or as soon as practicable thereafter, but in no event later than 30 days from the date the writ of possession is issued. The execution of the writ shall be effective against the tenants named in the writ and their authorized occupants, guests or invitees and any trespassers in the premises.

At the same time the landlord obtains the Writ of Possession, he may **also obtain a Writ of Fieri Facias** to cover any damages or costs. (§8.01-470) ***All exemptions would have to be considered.***

Appeal From Unlawful Detainer Judgment

The tenant shall have the right to appeal the judgment of the district court. The appeal **must** be taken **within 10 days** and security given by the tenant (for rent due, etc.) as required by court. Unless otherwise specifically provided in the court's order (judgment), no writ of execution (Writ of Possession) shall issue until the expiration of the 10 day appeal period. (§8.01-129; §8.01-470)

How Often a Tenant May Invoke Right to Possession

In cases of unlawful detainer, the tenant may invoke the rights granted by this section no more than one time during any twelve-month period of continuous residency in the rental dwelling unit. (§55-243)

Exception To The 10 Day Appeal Period

Appeal from judgment of general district court. An appeal shall lie from the judgment of a general district court, in any proceeding under this article, to the circuit court in the same manner and with like effect and upon like security as appeals taken under the provisions of §16.1-106 et seq. except as specifically provided in this section. The appeal shall be taken within ten days and the security approved by the court from which the appeal is taken. Notwithstanding the provisions of §16.1-106 et seq. the bond shall be posted and the writ tax paid within ten days of the day of the judgment. Unless otherwise specifically provided in the court's order, no writ of execution shall issue

on a judgment for possession until the expiration of this ten-day period, except in cases of judgment of default for the nonpayment of rent where the writ of execution shall issue immediately upon entry of judgment for possession, if requested by the plaintiff. When the appeal is taken by the defendant, he shall be required to give security also for all rent which has accrued and may accrue upon the premises, but not more that one year's rent, and also for all damages that have accrued for may accrue from the unlawful use and occupation of the premises for a period not exceeding three months. Trial by jury shall be had upon application of any party. §8.01-129

Notice to Tenant

The Sheriff, under a Writ of Possession, must give a tenant **written notice** as to the date and time eviction **at least 72 hours before the eviction** is to take place. This notice must also include the rights afforded to tenants in §§ 55-237.1 and 55-248.38:2, with a copy of the writ attached. Such notice would have to be prepared by the Sheriff since no such notice (form) is furnished by the court. ***According to 8.01-470, the notice may be "served in person or by posting a copy of such process at the front door or at such other door as appears to be main entrance of such property." The code use to authorize service according to §8.01-296 which provides for posting at the abode. This changed to posting at the property. Because this is an Unlawful Detainer action, the word property infers real property which would allow for posting of the notice at a business.***

Notice of 3 to 5 days is usually deemed sufficient, but the time period is discretionary with the Sheriff. In the event of inclement or extreme weather conditions, or other unforeseen circumstances at the time set for eviction which would work undue hardship upon the tenant, the Sheriff may re-set the date.§8.01-470 and §16.1-88.

The notice to vacate must provide the tenant with his bill of rights. It is wise to incorporate it by citing the entire code rather than paraphrasing. § 55-237.1

NOTE: A November 20, 1997 AG opinion states that if first 72 Hour Notice has been postponed, an additional 72 Hours Notice must be given again before evicting the tenant. 1997 Va. AG 22

Notice to Landlord

The Sheriff should coordinate the eviction with the landlord to insure that the **landlord** will be prepared to remove the tenant's possessions from the premises, if necessary. In the event the landlord does not make such preparation, or fails to comply with reasonable conditions imposed regarding the eviction, the Sheriff may cancel the eviction.

Officer May Break and Enter

If on the date of eviction the officer should find the premises locked, he has the authority under the Writ of Possession, to break and enter the premises **in the daytime**, after notice to the tenant (if he be on the premises,) to restore possession to the landlord. If the landlord has a key, entry may be made with the key, or a locksmith may be obtained to effect the entry. (§8.01-470)

Removal of Defendant's Property

There are two methods of evicting a person and their personal property. The first being moving the property to nearest public right of way. The second is what is termed as a "lock-out" where the property remains in the dwelling is considered stored until the tenant recovers their property.

Moving to the Public Right of Way

When it is necessary to remove the property of the defendant (tenant) from the premises, such property must be deposited at the nearest **public right of way**. (As indicated above, consideration for delaying the eviction might be proper in situations of inclement weather). In the event the jurisdiction in which the Sheriff serves has provided a storage facility, the Sheriff may have the property taken to that facility. Should such owner fail or refuse to pay such costs within 30 days from the date of placing the property in storage, the sheriff shall, after due notice to the owner and holders of liens of record, dispose of the property by publicly advertised public sale. The proceeds from such sale shall be used to pay all costs of removal, storage, and sale, all fees and liens, and the balance of such funds shall be paid to the person entitled thereto. Should the cost of removal and storage exceed the proceeds realized from such sale the county or city shall reimburse the sheriff for such excess, except that any such excess costs related to the disposal of a manufactured home shall be paid by the owner of the real property from which the manufactured home was removed. In the event the sale of the property does not cover the costs of moving and storage, the jurisdiction (either city or county) must reimburse the Sheriff's Office the amount of the unrecovered expenses. (§8.01-156)

In the case of a manufactured home and with consent of the lot owner, storage may be upon the manufactured home lot.

> **NOTE: In order for the mobile home to be removed, the code requires a permit from the locality where the mobile home is located before it can be moved. §58.1-3520. In addition, the company who will be transporting the mobile home on a highway must also have a permit to prior to removing. (§46.2-653).**

Notwithstanding the provisions above of § 8.01-156, when personal property is removed from a residential premises and placed at the curb, the tenant shall have the right to remove his personal property from the public way during the twenty-four hour period after eviction. Upon expiration of that twenty-four hours, the landlord shall remove, or dispose of any such personal property remaining in the public way.

Highway Defined

In 1987-88 Va. AG 448 - The Attorney General defines the term "highway" - public way. Read the opinion in its entirety along with the Va. AG opinion.

Supreme Court decision of Furman v. Call, 234 Va. 437, 362 S.E. 2d 709 (1987). In § 46.2-100), the term defines "highway" as the entire width between the boundary lines of every way or place of whatever nature open to the use of the public for purposes of vehicular travel in this Commonwealth, including the streets**,** alleys and publicly maintained parking lots in counties, cities , towns and for law enforcement purposes, the entire width between the boundary lines of all private roads or private streets which have been specifically designated 'highways' by an ordinance adopted by the governing body of he county, city or town in which such private roads or streets are located**.**

Lock-outs

At the landlord's request, the sheriff shall cause such personal property to be placed into a storage area designated by the landlord, which may be the dwelling unit. The tenant shall have the right to remove his personal property from the landlord's designated storage area at reasonable times during the twenty-four period after eviction from the premises or as such other reasonable times until the landlord has disposed of the property as provided herein. During that twenty-four hour period and until the landlord disposes of the remaining personal property of the tenant, the landlord and the sheriff shall not have any liability for the loss of such personal property.

Any property remaining in the landlord's storage area upon the expiration of the twenty-four hour period after eviction may be disposed of by the landlord as the landlord sees fit or appropriate. (§§ 55-237.1 and 55-248.38:2)

Definition of Dwelling Unit and Exceptions to Requirement of Eviction Process

§ 55-225.8. Residential dwelling units subject to this chapter; definitions; exceptions; application to certain occupants.

A. As used in this chapter, the following definitions apply:

"Authorized occupant" means a person entitled to occupy a dwelling unit with the consent of the landlord, but who has not signed the rental agreement and therefore does not have the financial obligations as a tenant under the rental agreement.

"Dwelling unit" or "residential dwelling unit" means a single-family residence where one or more persons maintain a household, including a manufactured home. Dwelling unit or residential dwelling unit shall not include:

1. Residence at a public or private institution, if incidental to detention or the provision of medical, geriatric, educational, counseling, religious, or similar services;

2. Occupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization;

3. Occupancy in a hotel, motel, extended stay facility, vacation residential facility, boardinghouse, or similar lodging as provided in subsection B;

4. Occupancy by an owner of a condominium unit or a holder of a proprietary lease in a cooperative;

5. Occupancy under a rental agreement covering premises used by the occupant primarily in connection with business, commercial, or agricultural purposes; and

6. Occupancy in a campground as defined in § 35.1-1.

"Guest or invitee" means a person, other than the tenant or person authorized by the landlord to occupy the dwelling unit, who has the permission of the tenant to visit but not to occupy the premises.

"Interior of the dwelling unit" means the inside of the dwelling unit, consisting of interior walls, floor, and ceiling, that enclose the dwelling unit as conditioned space from the outside air.

"Landlord" means the owner or lessor of the dwelling unit or the building of which such dwelling unit is a part. "Landlord" also includes a managing agent of the premises who fails to disclose the name of such owner, lessor, or sublessor. Such managing agent shall be subject to the provisions of § 16.1-88.03.

"Managing agent" means a person authorized by the landlord to act on behalf of the landlord under an agreement.

"Mold remediation in accordance with professional standards" means mold remediation of that portion of the dwelling unit or premises affected by mold, or any personal property of the tenant affected by mold, performed consistent with guidance documents published by the United States Environmental Protection Agency, the U.S. Department of Housing and Urban Development, the American Conference of Governmental Industrial Hygienists (the Bioaerosols Manual), Standard Reference Guides of the Institute of Inspection, Cleaning and Restoration for Water Damage Restoration and Professional Mold Remediation, or any protocol for mold remediation prepared by an industrial hygienist consistent with said guidance documents.

"Notice" means notice given in writing by either regular mail or hand delivery, with the sender retaining sufficient proof of having given such notice, which may be either a United States postal certificate of mailing or a certificate of service confirming such mailing prepared by the sender. However, a person shall be deemed to have notice of a fact

if he has actual knowledge of it, he has received a verbal notice of it, or from all of the facts and circumstances known to him at the time in question, he has reason to know it exists. A person "notifies" or "gives" a notice or notification to another by taking steps reasonably calculated to inform another person whether or not the other person actually comes to know of it. If notice is given that is not in writing, the person giving the notice has the burden of proof to show that the notice was given to the recipient of the notice.

"Readily accessible" means areas within the interior of the dwelling unit available for observation at the time of the move-in inspection that do not require removal of materials, personal property, equipment, or similar items.

"Tenant" means a person entitled only under the terms of a rental agreement to occupy a dwelling unit to the exclusion of others. Tenant shall not include (i) an authorized occupant, (ii) a guest or invitee, or (iii) any person who guarantees or cosigns the payment of the financial obligations of a rental agreement but has no right to occupy a dwelling unit.

"Visible evidence of mold" means the existence of mold in the dwelling unit that is visible to the naked eye by the landlord or tenant in areas within the interior of the dwelling unit readily accessible at the time of the move-in inspection.

For any term not expressly defined herein, terms shall have the same meaning as those defined in § 55-248.4.

B. No guest who is an occupant in a hotel, motel, extended stay facility, vacation residential facility, boardinghouse, or similar lodging shall be construed to be a tenant living in a dwelling unit as defined in this section if such person does not reside in such lodging as his primary residence. Such guest shall be exempt from this chapter and the innkeeper or property owner, or agent thereof, shall have the right to use self-help eviction under Virginia law, without the necessity of the filing of an unlawful detainer action in a court of competent jurisdiction and the execution of a writ of possession issued pursuant thereto, which would otherwise be required under this chapter. For purposes of this chapter, a hotel, motel, extended stay facility, vacation residential facility, boardinghouse, or similar transient lodging shall be exempt from the provisions of this chapter if overnight sleeping accommodations are furnished to a person for consideration if such person does not reside in such lodging as his primary residence.

C. If a person resides in a hotel, motel, extended stay facility, vacation residential facility, boardinghouse, or similar transient lodging as his primary residence for fewer than 90 consecutive days, such lodging shall not be subject to the provisions of this chapter. However, the owner of such lodging establishment shall give a five-day written notice of nonpayment to a person residing in such lodging and, upon the expiration of the five-day period specified in the notice, may exercise self-help eviction if payment in full has not been received.

D. If a person resides in a hotel, motel, extended stay facility, vacation residential facility, boardinghouse, or similar transient lodging as his primary residence for more than 90 consecutive days or is subject to a written lease for more than 90 days, such lodging shall be treated as a dwelling unit and be subject to the provisions of this chapter.
2008, c. 640; 2012, cc. 705, 788; 2013, cc. 279, 712; 2015, c. 394.

Retaliation by Landlord

§ 55-225.18. Retaliatory conduct prohibited.
A. Except as provided in this section, or as otherwise provided by law, a landlord may not retaliate by increasing rent or decreasing services or by bringing or threatening to bring an action for possession or by causing a termination of the rental agreement pursuant to § 55-222 or 55-248.37 after he has knowledge that (i) the tenant has complained to a governmental agency charged with responsibility for enforcement of a building or housing code of a violation applicable to the premises materially affecting health or safety; (ii) the tenant has made a complaint to or filed a suit against the landlord for a violation of any provision of this chapter; (iii) the tenant has organized or become a member of a tenants' organization; or (iv) the tenant has testified in a court proceeding against the landlord. However, the provisions of this subsection shall not be construed to prevent the landlord from increasing rents to that charged on similar market rentals nor decreasing services that shall apply equally to all tenants.

B. If the landlord acts in violation of this section, the tenant is entitled to the applicable remedies provided for in this chapter, including recovery of actual damages, and may assert such retaliation as a defense in any action against him for possession. The burden of proving retaliatory intent shall be on the tenant.

C. Notwithstanding subsections A and B, a landlord may terminate the rental agreement pursuant to § 55-222 or 55-248.37 and bring an action for possession if:

1. Violation of the applicable building or housing code was caused primarily by lack of reasonable care by the tenant or a member of his household or a person on the premises with his consent;

2. The tenant is in default in rent;

3. Compliance with the applicable building or housing code requires alteration, remodeling or demolition that would effectively deprive the tenant of use of the dwelling unit; or

4. The tenant is in default of a provision of the rental agreement materially affecting the health and safety of himself or others.

D. The landlord may also terminate the rental agreement pursuant to § 55-222 or 55-248.37 for any other reason not prohibited by law unless the court finds that the reason for the termination was retaliation.
2015, c. 408.

Filing of Bankruptcy Petition Means Automatic Stay of Evictions and Sheriff's Sales.

"The law places no duty on you to protect the rights of either party in a bankruptcy proceeding. Generally, violation of the automatic stay does not warrant a judgment of contempt where defendants act in good faith and under state law. Actual notice of the filing is a prerequisite of a contempt citation."

"Even though violations of the automatic stay may occur in circumstances which do not result in a contempt proceeding against you or the creditor, it is desirable that the stay be observed in circumstances where the fact of its existence is communicated to you." (82-83 Va. AG 30)

The bankruptcy code changed in 2006. If the debtor files bankruptcy before the landlord receives his writ of possession, the stay would apply. However, if the Sheriff receives the writ before the debtor files bankruptcy, the eviction can go forward. It would be wise to consult your county or city attorney if in doubt as to how to proceed.

Sale of Mobile Home After Eviction

Right to sell home upon eviction

A resident who has been evicted from a manufactured home park shall have ninety days after judgment has been entered in which to sell the home or remove the home from the park. Such resident shall be responsible for paying the rental amount and for regular maintenance of the home lot during the period between the date of eviction and the sale of the home or the removal of the home from the park. Such right to keep the manufactured home in the park shall be conditioned upon the payment of all rent accrued prior to the date of judgment and prospective monthly rent as it becomes due. During such term, a secured party shall be liable for such charges as provided in § 55-248.44:1. The park shall have a lien on the home to the extent such rental payments are not made. Any sale of the home shall be subject to the rights of any secured party having a security interest in the home, and the lien granted to the park under this section shall be subject to any such security interest. § 55-248.50:2.

If the mobile home must be moved, the deputy may want to check if it contains asbestos. Many older homes do and there are special procedures which must be followed before removal.

Sale of Manufactured Home under §8.01-156,

If during an eviction, a manufactured home or mobile home is stored on the lot with the permission of the land owner, the Sheriff may sell, at public auction, the manufactured home after it has been stored for 30 days. An order from the court authorizing the sale of the manufactured home would be needed. § 8.01-156

CHAPTER EIGHT

EXECUTIONS

In several types of civil actions the Sheriff is ordered to **execute** (perform)g the judgment of the court. This execution responsibility demands a reasonable knowledge of liens, levies, and sales, **and** the laws relating to each. This chapter deals specifically with this purpose.

EXECUTIONS

General

Executions involve the actual recovery of property or money to which a person has a legal claim **after** judgment has been rendered in their favor by a court. An execution is an **order from the court to the Sheriff to carry out the judgment of the court**. The *Writ of Fieri Facias* is the most frequently utilized form for an execution; however, the *Writ of Possession* and the *Warrant of Distress* may also be employed, depending on the nature of the legal action upon which the judgment was made. (the Warrant of Distress is discussed under "Distress Actions" in Chapter 7 and will not be repeated in this chapter.)

Definition of Terms

1. **LIEN**: When a court renders a judgment for a plaintiff in a civil action, that judgment becomes a *legal claim* for the plaintiff against the defendant.

2. **LEVY**: A levy, as made by a Sheriff in furtherance of an execution order of a court, involves the **placing** of the plaintiff's legal claim (judgment) upon *specific property* of the defendant, preparatory for future sale of that property to satisfy the judgment, in the event the defendant fails to do so **prior to the sale**.

3. **SALE**: Under Virginia law, all sales of *levied property must* be by **public auction** (unless some legal exception applies). When a Sheriff *levies* upon property of the defendant in response to an execution order, he notifies the defendant that the property will be sold at a future time **unless** the judgment is satisfied beforehand, and advises the defendant as to time frame involved.

Writ of Fieri Facias

Upon a judgment for **money**, the clerk of the court shall issue a Writ of Fieri Facias (Fi-Fa), upon request of the judgment creditor (plaintiff), **after 21 days** have expired from the date of judgment by the court, *if* the judgment remains unsatisfied. (§8.01-466)

Writ of Possession

Upon a judgment for the recovery of **specific property** (real or personal), a Writ of Possession may be issued for the specific property, *and* there may also be issued, in some cases, a Writ of Fieri Facias for money damages. An officer executing a Writ of Possession and having probable cause to believe the property is in a locked building, may, in the **day time** and after notice to the defendant, break and enter such building to recover the property. (§8.01-470)

> In 1995, a Writ of Fieri Facias was merged with the Writ of Possession in Detinue form. It is now titled **Writ of Possession and Fieri Facias in Detinue**. This allows the sheriff after determining the specific personal property is not available, to levy upon other personal property, if the court has given an alternate value. This simplified the process. You are, however, reminded that the fee for such service as a Writ of Fieri Facias has not been collected and it is incumbent upon you to collect this fee pursuant to § 15.2-1609.3.

Executions Against Corporations

Executions may be issued against corporations just as against natural persons.

Writs on Judgment for Personal Property

When a judgment is for **personal** property, the judgment creditor (plaintiff) may have the **option** of a Writ of Fieri Facias for the value of the property **plus** any costs or damages, or a Writ of Possession for recovery of the specific property. (§8.01-472)

What Writ of Fieri Facias to Command

The Writ of Fieri Facias **commands** the officer to make the amount of money in the judgment from the goods and chattels of the defendant. (§8.01-474)

Be sure to check the Writ to see if the box "no levy requested" has not been checked. If it is, it is because a Notice of Lien has been issued which may be served by a private process server. You don't want to inventory on a Writ which hasn't given you the authority to do so.

Additional Executions

After an execution has been issued on a judgment, the plaintiff (creditor) may obtain **additional executions** (even though the *first* execution has not expired) until the judgment is satisfied **in full**. (§8.01-475)

Execution on Intangibles, i.e., Stocks and Bonds

Under §8.8A-112, requires the Sheriff to take possession of stocks, bonds, and dividends in order to execute the Writ.

Fraudulent Removal, Etc. Of Levied Property

Any fraudulent removal, etc. of levied property constitutes a larceny. (§ 18.2-101)

Return on Writ of Fieri Facias

When making a **return** upon a Writ of Fieri Facias, the officer must:

1. Indicate whether the amount of money of the judgment has been or can not be made.

2. Indicate whether there be only a **part** which can not be made.

3. Include a statement of the amount of money received, his fees and charges, and the amount paid (or to be paid) to the party entitled.

4. Indicate whether he made a levy, and if so, the date and time.

5. State the date he received payment or satisfaction of the execution, and

6. if there is more than one defendant, indicate the one(s) from which he received payment or satisfaction. (§8.01-483)

Penalty for Serving Fieri Facias When No Judgment Exists

ANYONE who causes a notice of lien under a Writ of Fieri Facias to be served upon a debtor when there has been *no judgment* against the debtor, shall pay the debtor **$350**. **ANYONE** who serves notice of lien upon a debtor *before* the issuance of a Writ of Fieri Facias, or *after the return date* of such a Writ, shall be liable to the debtor for **$350 plus** any damages. (§8.01-504)

Collection of Fines (Military)

For the purpose of collecting any fines or penalties imposed by a court martial, the military judge whenever one sits on such court and otherwise the president of the court, or the summary court officer, shall within 15 days after the fines or penalties have been imposed and approved, make a list of all persons fined, describing them distinctly, and showing the sums imposed as fines or penalties on each person, and shall draw his warrant, under his official signature, directed to any Marshall of the court or to the Sheriff, Sargeant., and any policeman of any city or county, as the case may be, thereby commanding him to levy such fines or penalties, together with the costs of the goods and chattels of such delinquent, and the warrant shall there upon have the force and effect of fieri facias, but such delinquent shall not be entitled to the benefit of any exemption law of this Commonwealth, as against such warrant and the lien thereof.

In default of sufficient personal property to satisfy the same, the officer executing the same shall make report accordingly to the drawing authoring of the warrant which may then require the fined person to show whether or not he possesses sufficient property to satisfy the fine and if such property is found to exist and the fined person fails to deliver it over, the executing officer shall be ordered to take the body of the delinquent and convey him to the jail of the city or county in which he may be found, whose jailor shall closely confine him without bail until the fine or penalty and jailer's fees be paid. No such imprisonment shall extend beyond the period of ten days. (§ 44-53)

General Rule as to Recovery of Costs on Final Judgment

§ 17.1-601. General rule as to recovery of costs on final judgment. — Except when it is otherwise provided, the party for whom final judgment is given in an action or motion shall recover his costs against the opposite party. When the action is against two or more and there is a judgment for, or discontinuance as to, some, but not all of the defendants, unless the court enter of record that there was reasonable cause for making defendants those for whom there is such judgment, or as to whom there is such discontinuance and shall order otherwise, they shall recover their costs. (Code 1950, § 14-175; 1964, c. 386, § 14.1-178; 1998, c. 872.)

LIENS

When Fieri Facias Lien Begins on Property Capable of Being Levied on

The lien on a Writ of Fieri Facias on property capable of being levied on, (where person lives) shall begin **from the time levy is actually effected** by the officer, **not** from the time the officer receives the Writ of Fieri Facias. (§8.01-478)

When Fieri Facias Lien Begins on Property Not Capable of Being Levied On

Every Writ of Fieri Facias shall become a lien from the time it is **delivered to the sheriff or other officer** or anyone authorized to serve process as allowed under §8.01-293, against property of the judgment debtor ***not capable of being levied on***, and which is in the debtor's possession, or to which the debtor may become entitled before the return date of the Writ. (§8.01-501)

> Property not capable of being levied upon would consist of bonds, notes, stocks, debts of all kinds, choses in action to which the debtor may be entitled, and property of the debtor outside the officer's bailiwick.

When Fieri Facias Lien Ceases

If property ***capable of being levied on*** under a Writ of Fieri Facias is not levied on **before the return date** of the Writ, the lien shall cease as of the return date. (§8.01-479)

Enforcement of Fieri Facias Lien After Return Date

Property **levied on** under a Writ of Fieri Facias, ***on or before the return date*** of the Writ, may be advertised and sold within a **reasonable time after the return date**. (§8.01-479)

> See 81-82 Va AG 231 which says the lien survives the return day. This means that a sale can be held even after the return date of the levy.

Prior Lien to Writ of Fieri Facias

If there is a **prior lien** upon property, the property ***may nevertheless be levied on anyway*** under a Writ of Fieri Facias. At the time of sale of the property, if the prior lien is due and payable, the prior lien shall be satisfied by the officer (Sheriff) and the residue (the amount obtained *above* the prior lien) applied toward satisfaction of the judgment. If the prior lien is not due at the time of sale, the officer may sell the property **subject to** the prior lien (which means the officer sells only the debtor's **equity** in the property, and the buyer must satisfy the prior lien when it becomes due). (§8.01-480)

Duty to Disburse After Taking Indemnifying Bond

Wheeler v. City Corp., 156 Va. 402, 157 S.E. 726 (1931) - Read case in its entirety. ***This is an important case for deputies and Sheriffs. It covers disbursement of proceeds and the purpose of the indemnity bond:*** "The purpose of an indemnity bond is to relieve the officer of liability not only from the seizure and sale of property claimed by a third party, but in paying proceeds from the sale of such property to the execution creditor. The execution creditor is the interested party. He demands that the officer proceed; the sale is for his benefit. If the officer takes from him the proper indemnifying bond with ample security and then proceeds to seize, sale and pay the money received to the execution creditor, he is discharged his duties to all parties."

Territorial Extent of Execution Lien

The lien under a Writ of Fieri Facias **shall only extend** to the territorial jurisdiction of the officer executing the Writ with regard to **property capable of being levied on**, but the lien shall extend throughout the Commonwealth regarding property **not capable of being levied on.** (§8.01-481)

LEVIES

Officer Must Endorse Time of Levy on Fieri Facias

Every Writ of Fieri Facias **must be endorsed when it is received** in the Sheriff's Office with the **EXACT** time and date of receipt. The officer *executing the levy* under the Writ of Fieri Facias **must place a second endorsement** on the Writ showing the **EXACT** time and date he effected the levy. (§8.01-487)

Officer to Leave Copy of Writ Where Levy Made

An officer making a **levy** shall **serve a copy of the Writ** (and any attachments - such as notice of exemptions) to the judgment debtor, or other responsible person at the premises where the levy is made. If no such person is present, then a copy of the Writ, and any attachments, *shall be posted* on the front door of such premises. (§8.01-487.1)

Levying Several Writs of Fieri Facias

When several Writs of Fieri Facias (on the same debtor) are delivered to the officer (Sheriff) **on the same day**, they shall be levied and satisfied **IN THE ORDER RECEIVED**. When several Writs of Fieri Facias are delivered to the Sheriff *at the same time* (on the same day) they shall be endorsed with the same time and shall be satisfied **ratably** (all creditors will share equally). **However**, when the officer requires an *indemnity bond* as a prerequisite to a sale, and some of the creditors give bond and others do not, the proceeds of the sale shall then be paid to the creditors giving bond, in the **order** in which their liens attach. (§8.01-488) See Wheeler v. City Savings 156 Va. 402, 157 S.E. 726 (1931)

On What Property Fieri Facias To Be Levied

The Writ of Fieri Facias may be levied on the **goods and chattels** (tangible, moveable personal property) of the judgment debtor, *and* also on his current money and bank notes, **except** as may be exempt under the Homestead Act (See Title 34 to Code of Virginia). (§8.01-478) See §8.8A-112 as to levies upon stocks, bonds, and dividends or previous page under "Execution on Intangibles, i.e. Stocks, Bonds."

§59.1-148.4 Sale of firearms by law enforcement agencies prohibited; exception §59.1-148.3 and § 19.2-386.29
§ 59.1-148.4. Sale of firearms by law-enforcement agencies prohibited; exception. — A law-enforcement agency of this Commonwealth shall not sell or trade any firearm owned and used or otherwise lawfully in its possession except (i) to another law-enforcement agency of the Commonwealth, (ii) to a licensed firearms dealer, (iii) to the persons as provided in § 59.1-148.3 or (iv) as authorized by a court in accordance with § 19.2-386.29. (1994, c. 467; 2004, c. 995.)

Power To Sell

The "reasonable time" after return day, within which an officer's power to sell property levied upon continues, is a reasonable fact dependent upon the reasonable circumstances of each case. (Palais v. DeJarnette,) See section on Writs of Venditioni Exponas.

Growing Crops Not Subject To Levy

No growing crop of any kind, not severed, shall be subject to levy. (§8.01-489) ***Unsevered growing crops are considered real property.***

> Note: For sale of unbranded timber; Sheriff's sale of unbranded timber; Recovery by owner; disposition of proceeds, see §59.1-115.

Levy Upon Alcoholic Beverages

Unopened alcoholic beverages may be levied upon. However, sale of alcohol has to be in compliance with §4.1-212 of the Virginia State Code. See section under "Sales" for further information.

Levying and Seizing Automobiles

Any time a Sheriff seizes an automobile under a Writ of Fieri Facias, he must notify DMV by a form they provide. DMV must also be notified when the automobile has been released by the Sheriff. The filing of the form with DMV freezes the title and transfer cannot be made without permission of the Sheriff.

> **Note:** Attorney General Opinion (2001 Va. AG 158) clarifies that the sheriff does **NOT** have to notify DMV on a levy on a motor vehicle pursuant to a writ of fieri facias that is not accompanied by his actual seizure of the vehicle. This opinion further states that a vehicle levied on, but NOT seized by the sheriff and then sold by the debtor, may not be sold at a sheriff's auction.

Levying upon an automobile with two (2) or more owners.

Pursuant to 82-83 Va. AG 71 a vehicle that has two or more owners cannot be sold. There is nothing to prohibit the deputy from levying upon the vehicle but that is as far as it goes. Once levy has been made, one of the owners can go to the court and try title. Levying will allow the plaintiff to record his lien with DMV.

Levy of execution.

A levy made by virtue of an execution, fieri facias, or other court order, on a motor vehicle, trailer, or semitrailer for which a certificate of title has been issued by the Department, shall constitute a lien, subsequent to security interests previously recorded by the Department and subsequent to security interests in inventory held for sale and perfected as otherwise permitted by law, when the officer making the levy reports to the Department on forms provided by the Department, that the levy has been seized by him. If the lien is thereafter satisfied or should the motor vehicle, trailer, or semi trailer thus levied on and seized thereafter be released by the officer, he shall immediately report that fact to the Department.

Any owner who, after the levy and seizure by an officer and before the officer reports the levy and seizure to the Department, shall fraudulently assign or transfer his certificate of title to be assigned or transfer his title to or interest in a motor vehicle, trailer, or semitrailer or cause its certificate of title to be assigned or transferred or cause a security interest to be shown on its certificate of title shall be guilty of a Class 1 misdemeanor. (§ 46.2-644)

AG opinion regarding notification to DMV if vehicle not physically seized. "For a levy to constitute a lien on the title of a motor vehicle by virtue of a sheriff's execution of a writ of fieri facias on such vehicle, §46.2-644 specifically require that the sheriff make levy on and take possession of the motor vehicle. The sheriff must also report the levy and seizure of the vehicle to the Department on forms provided by the Department when he has not physically taken possession of the vehicle. Therefore, I must conclude that §46.2-644 does not require the sheriff to notify the Department of a levy made on a vehicle pursuant to a writ of fieri facias that is not accompanied by physical seizure of the vehicle." 2001 Va. AG 158

"Reading § 46.2-644 as a whole, when a sheriff has levied on and seized a vehicle,13 any sale of such vehicle by the debtor is "fraudulent," and such debtor "shall be guilty of a Class 1 misdemeanor." Section 46.2-644 does not, however, provide for any such criminal penalty when the sheriff levies by virtue of a fieri facias on a vehicle but does not physically take possession of the vehicle. "'While in the construction of statutes the constant endeavor of the courts is to ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity. When the sheriff levies on but does not seize a vehicle, he is not required to report such levy to the Department. Consequently, the certificate of title on the vehicle maintained by the Department will not show a lien resulting from the fieri facias. A bona fide purchaser of such vehicle, therefore, has no notice of a lien and obtains title to the vehicle free from any such lien. ***I must, therefore, conclude that a vehicle levied on but not seized and subsequently sold by the debtor may not be sold at sheriff's auction."***

Levying and Seizing Boats and Watercrafts:

Levy of execution, etc. A levy made by virtue of an execution, fieri facias or other proper court order, upon a watercraft for which a certificate of title has been issued by the Department, shall constitute a lien, subsequent to security interests previously recorded by the Department and subsequent to security interests in inventory held for sale and perfected as otherwise permitted by law, when ***the officer making the levy reports to the Department at its principal office, on forms provided by the Department, that the levy has been made and that the watercraft levied upon is in the custody of the officer.*** Should the lien thereafter be satisfied or should the watercraft levied upon and seized thereafter be released by the officer, he shall immediately report that fact to the Department at its principal office. Any owner who, after such levy and seizure by an officer and before the report is made by the officer to the Department, fraudulently assigns or transfers his title to or interest in the watercraft, or causes the certificate of title to be assigned or transferred, or causes a security interest to be shown upon such certificate of title, shall be guilty of a Class 1 misdemeanor. A copy of this form is in the appendix. § 29.1-733.14

Priority of Interest in Motor Vehicles, Trailers, and semi-trailers when Shown on Certificate: This gives tax liens priority over secured lien-holders. (§ 46.2-640)

Levying & Selling Automobile Exempt under Poor Debtor's Exemption

Exemption could apply to proceeds from sale of vehicle. – Where debtor's claim of exemption was properly noticed long before sale of vehicle, the debtor's exemption could apply to proceeds from sale of the vehicle, even if the vehicle itself was subject to an exemption. In re Fenesay, 156 Bankr. 22 (Bankr. E.D. Va. 1993)

No Unreasonable Levy Permitted

In no case shall officers make an **unreasonable levy.** (Officers should make every effort to value property levied on at a **fair market value**. The officer is under an obligation to levy on sufficient property of the debtor to make the amount of the judgment; **however**, the officer is not expected to tie up *excessive amounts* of the debtors property for this purpose. **The officer is entitled to engage an appraiser if necessary**. The appraiser's fee is a reasonable cost incurred in the execution of the judgment, and may be added to the cost of the judgment.

If an officer levies upon livestock, he must see that proper care is provided, and the costs of water, grazing, milking, etc. is also reasonable cost in the execution of the judgment. (§8.01-490)

Considerations To Be Made When Deciding Unreasonable Levy.

Use this as an example in determining excessive levy.

In May 1993, on a levy against R. K. Windsurf Shop, the plaintiff's attorney requested the Sheriff of Virginia Beach make an unreasonable levy. The judgment amount was approximately $6,000.00. The attorney wanted to levy and seize about $25,000.00 worth of property and was prepared to post a $50,000.00 bond. Plaintiff's attorney explained there were perfected liens filed with the court amounting to $19,000.00 and provided documentation to support this. The attorney argued that he needed to seize enough property to pay off the perfected liens and cover his client's judgment. After consulting the City Attorney's office, we decided that, in most cases, a levy/seizure of this type was excessive and unreasonable. However, with the additional information and supporting documentation, the City Attorney's office stated this was not an "unreasonable" levy.

The defendant and the defendant's attorney were present at the time of the levy/seizure. During the process, both attorney's argued about the excessiveness of the levy, and the defendant's attorney requested we stop the seizure on the grounds of excessive levy. The deputy executing the writ stated the only thing that would stop this seizure was an order from a judge. Both attorneys left the scene and consulted a Circuit Court judge. The judge refused to stop the seizure and both attorneys returned to the place of seizure to watch the completion of the seizure.

Later, a sheriff's sale was scheduled but the defendant paid off the judgment and seized property was returned to the judgment debtor.

NOTE: For another example to help in determining excessive levy, read Horbach v. Traverse Technologies Inc. 19 Cir. M85602, 35 Va. Cir. 249 (1994) (Fairfax). Each case is different, so seek the advice of your county/city attorney for guidance. This is only an example. Each case is different and if you have trouble making a determination, you should consult your city or county attorney.

Officer May Break & Enter Dwelling House to Effect Levy

An officer levying under an execution may, if need be, break open the outer doors of a dwelling house **in the daytime**, *after* first demanding admittance of the occupant, to make a levy. The officer may also levy on personal property in possession of the judgment debtor when such property is in **OPEN VIEW**. (§8.01-491)

As a practical matter, property levied upon is usually left in the possession of the debtor (unless circumstances would dictate otherwise) until the time of sale. (§8.01-490)

Mechanic's Lien On Livestock:

§43-32 of the Code of Virginia governs liens for keeper's of livery stables and marinas. This code use to cover mechanic liens and garagemen liens but has not changed to § 43-33 and § 46.2-640

§ 46.2-640. Priority of security interests shown on certificates of title. — The security interests, except security interests in motor vehicles, trailers and semitrailers which are inventory held for sale and are perfected under §§ 8.9A-401 through 8.9A-527, shown upon such certificates of title issued by the Department pursuant to applications for same shall have priority over any other liens or security interests against such motor vehicle, trailer, or semitrailer, however created and recorded. The foregoing provisions of this section shall not apply to liens for taxes as provided in § 58.1-3942, liens of keepers of garages to the extent given by § 46.2-644.01 and liens of mechanics for repairs to the extent given by § 46.2-644.02 if the requirements therefor exist, provided the garage keeper or mechanic furnishes the holder of any recorded lien who may request it with an itemized sworn statement of the storage charges, work done, and materials supplied for which the lien is claimed. (Code 1950, § 46-73; 1958, c. 541, § 46.1-73; 1966, c. 558; 1977, c. 382; 1983, c. 397; 1984, c. 396; 1989, c. 727; 1999, c. 299; 2009, c. 664.)

Levying Upon Property In A Self-Service Storage Facility

§ 55-418. Lien. —

A. The owner shall have a lien on all personal property stored within each leased space for rent, labor, or other charges, and for expenses reasonably incurred in its sale pursuant to this chapter. Such lien shall attach as of the date the personal property is stored within each leased space, and, to the extent the property remains stored within such leased space, as hereinafter provided, shall be superior to any other existing liens or security interests to the extent of $250 or, if the leased space is a climate-controlled facility, $500. In addition, such lien shall extend to the proceeds, if any, remaining after the satisfaction of any perfected liens and the owner may retain possession of such proceeds until the balance, if any, of such charges is paid.

B. In the case of any watercraft which is subject to a lien, previously recorded on the certificate of title, the owner, so long as the watercraft remains stored within such leased space, shall have a lien on such watercraft as provided for herein to the extent of $250 or $500 if the leased space is a climate-controlled facility. In addition, such lien shall extend to the proceeds, if any, remaining after the satisfaction of any recorded liens and the owner may retain possession of such proceeds until the balance, if any, of such charges is paid.

C. The rental agreement shall contain a statement, in bold type, advising the occupant of the existence of such lien, and that the personal property stored within the leased space may be sold to satisfy the lien if the occupant is in default.

D. In the case of any motor vehicle that is subject to a lien, previously recorded on the certificate of title, the owner, so long as the motor vehicle remains stored within such leased space, shall have a lien on such vehicle in accordance with § 46.2-644.01. (1981, c. 627; 1984, c. 717; 1999, c. 149; 2005, c. 275; 2009, c. 664.)

When Officer Who Levied Dies Before Sale

When an officer has *levied* on property under an execution and **dies before the sale**, a **Writ of Venditioni Exponas** may be directed to the Sheriff (or other officer) in the city or county where the property is located. That officer may then sell the property and account for the proceeds as though he had made the levy. (§8.01-486)

SALES

Sale of Property

In any case in which an officer has levied on property (other than an attachment) (or when ordered to sell by the court), he shall fix a time and place for sale, and **post notice** of the **sale at least 10 days** in advance thereof. Notice of the sale should be posted:

1. near the residence of the owner of the property to be sold, and
2. at **two or more public places** in the city or county.

At the time of the sale the officer shall sell the property for each to the highest bidder. In the event the property to be sold is perishable, or expensive to keep, the court (from which the execution was issued) may order it sold in *less* than the normal 10 day period. (§8.01-492) *Manufacturers Hanover Trust Co. v. Koubek, 240 Va. 276*

NOTE: When Sheriff's sales are **poorly attended**, two results can be anticipated:

1. bids will be low, and

2. the judgment probably will not be satisfied. Poor attendance is generally attributable to **inadequate advertising**. Three posted notice will satisfy the statutory requirements, *but* will frequently not suffice to draw a good crowd. Newspaper advertising is a legitimate cost of sale and would usually be a superior form of advertising to posting notices. When the posting of notices is the only form of advertising utilized, a *large number of postings* is suggested. Advertising in a newspaper is NOT considered as notice of sale. See Newport News Shpbldg Emp C.U. v. B&L;Body, 241 Va. 31, 400 S.E.2d 512 (1991)

When Writ of Venditioni Exponas May Issue

When the return on an execution order (usually a Writ of Fieri Facias) indicates that **property remains unsold (either for *want of bidders* or of *insufficient bid*)**, then a Writ of Venditioni Exponas may be issued and *another sale* be held. § 8.01-485 The **advertisement** for the new sale **must** indicate that under a previous sale Exponas relating to Commonwealth Claims, see §8.01-211, as to Distress Warrants, see §55-237. See 82-83 VA Ag 73 ***Speaks of reasonable time when returning Writ for cause of abandonment of the levy by the plaintiff.*** See also 1981-82 Va. Op. Atty. Gen. 231 ***which states sheriff's records of fieri facias writs "must be maintained for a period of twenty years after judgment, unless it is judicially determined that the writ has been abandoned."***

Suit By Officer to Recover Estate Under Writ of Fieri Facias

When the Writ of Fieri Facias is a *lien on an estate*, or a lien on a *liability due the estate*, the officer (Sheriff) handling the execution may *enter suit* for recovery of the same, in his own name, or in the name of any other officer designated by the court. No officer shall be bound to bring such suit *unless bond*, with sufficient surety, be given to indemnify him against all costs which may be incurred. (§8.01-497)

Resale of Property When Purchaser Defaults

If a purchaser fails to comply with the terms of sale at an auction, the officer may resell the property forthwith (if possible) or sell it under a new advertisement. If the property **brings less** on the second sale, the first purchaser shall be liable to the creditor for so much as may be required to satisfy him, and to the debtor for the balance. (§8.01-497)

Any Sale Surplus to be Paid to Debtor

When an officer has received money under an execution, any **surplus** after satisfying the execution must be paid to the debtor. If the debtor accepts the surplus without complaint that enough of his property was sold to *create* a surplus, then the debtor is deemed to have waived complaint in that regard. (§8.01-495)

> **NOTE: There are two other codes relating to surplus at sales, see surplus under the section on "Sales." They are §8.01-373 which requires surplus to be paid into the court and §8.01-207 which requires payment of surplus to the debtor.**

Officer Not Required To Go Out Of Jurisdiction To Pay Money

When an officer receives money under an execution, and the person to whom it is payable resides in a city or county ***outside the officer's jurisdiction***, the officer is not required to go to that location to pay the money. (§8.01-496)

Officer to Notify Person to Receive Money

An officer receiving money under an execution, or other legal process, **SHALL** *notify in writing, within 30 days,* the person entitled to received the money, if that person is known. If the officer fails to comply, without good cause, he shall be fined not less than $20.00 nor more than $50.00 for each offense. (§8.01-500)

Selling Officer (And Employees of Jurisdiction) Not to Bid or Purchase

NO OFFICER of any city, town, or county, *or employee* of such city, town, or county, shall *directly or indirectly, bid on or purchase,* property sold under a Writ by an officer. Violations of this statute constitutes a Class 1 Misdemeanor. (§8.01-498)

See 1987-88 Va. Op. AG 69 for interpretation.

Sales Commission

An officer receiving money under this chapter shall make return thereof **forthwith** to the court. After deducting from such money a commission of **10 percent on the money paid or proceeding from the sale and his necessary expenses and costs .** (§ 8.01-499 and § 17.1-274)

> **NOTE:** Also see § 15.2-1609.3 (c) - In any case in which a sheriff makes a levy and advertises property for sale and by reason of a settlement between the parties to the claim or suit is not permitted to sell under the levy, the sheriff is not entitled to any commissions, but in addition to his fees for making the levy and return, he shall be entitled to recover from the party for whom the services were performed the expenses incurred for advertisement of the proposed sale of the property.

Adjournment of Sale (Day to Day)

When there is not time to complete any sale, the officer may adjourn the sale from day to day until it is completed. (§8.01-493)

Return and Accounting for Sale

The officer handling a sale must make a return (accounting thereof) **forthwith** (as soon as reasonably possible) to the clerk of the court. (§8.01-499)

Notice of Sale

Notice of sale must be specific. It must include the date, time and terms of sale. Notice must be posted in three *public* locations within the jurisdiction of the levying officer. Printing in a newspaper is **not** considered notice of sale. See Newport News Shpbldg Emp C.U. v. B&L;Body, 241 Va. 31, 400 S.E.2d 512 (1991) § 8.01-492

Sale of Vehicles

If the property being sold is an automobile, the deputy must obtain the odometer reading prior to releasing the property to the purchaser. This is needed for the bill of sale and transfer of title. (§ 46.2-629)

Bill of Sale Of Titled Property

Any transfer by operation of law of the title or interest of an owner in and to a motor vehicle, trailer, semi-trailer registered under the provisions of this chapter to anyone as legatee or distributee or as surviving joint owner or by an order in bankruptcy or insolvency, execution sale, sales as provided for in § 43-34, repossession on default in the performance of the terms of a lease or executory sales contract or of any written agreement ratified or incorporated in a decree or order of a court of record, or otherwise than by the voluntary act of the person whose title or interest is so transferred, the transferee shall apply to the Department for a certificate of title. The Department shall cancel the registration of the motor vehicle and issue a new certificate of title to the person entitled to it. (§ 46.2-633)

Sale of Alcoholic Beverages

Unopened alcoholic beverages may be sold at auction. However, pursuant to §4.1-212 which states that such sales shall be made only to persons who are licensed or hold a permit to sell alcoholic beverages in the Commonwealth or to persons outside the Commonwealth for resale outside the Commonwealth and upon such conditions or restrictions as the ABC Board may prescribe.

It may be wise for the deputy to contact the ABC Board prior to the sale date so that arrangements can be made to have a representative there for the sale to issue the required permits at the time of sale.

Sheriff's Sale on Private Property

The Attorney General opinion states that the sheriff may hold public sale of personal property seized under a writ of fieri facias or distress warrant on the private property of the debtor. (2001 Va. AG 20)

Use Care To Prevent Puffierng and By-Bidding

Puffer - A person employed by the owner of property which is sold at auction to attend the sale and run up the price by making spurious bids. (Black's Law Dictionary, Sixth Ed.)

By-bidding - In the law relating to sales by auction, this term is equivalent to "puffing." The practice consists in making fictitious bids for the property under a secret arrangement with the owner or auctioneer for the purpose of misleading and stimulating other persons who are bidding in good faith. (Black's Law Dictionary, Sixth Ed.)

See Va. Supreme Court decision, Edwards v. Gwynn, 157 Va. 528, 1959 S.E. 205 (1931).

Interference of Bidding Process; Sheriff's Authority

In *Smith v. Swoope*, 351 F. Supp. 159, D.C. Va., Nov. 13, 1972, the complaint alleging deprivation under color of law of plaintiff's rights, privileges and immunities secured by the U.S. Constitution. The District Court, Chief Judge Dalton, held that where the plaintiff acted in an improper manner at a judicial sale of his automobile and was warned several times by both the sheriff and the auctioneer and his actions chilled the bidding and the contempt charge on which the plaintiff was ultimately found guilty flowed from the same set of actions for which he initially was arrested, there was probable cause for the sheriff to make arrest for breaching the peace and interfering with a law enforcement officer in the discharge of his lawful duties and the plaintiff was not entitled to recover damages.

Reversal of Sheriff's Sale

In Va. Supreme Court decision of *Manufacturers Hanover Trust v. Koubek* (240 Va. 276, 396 S.E. 2d 669 (1990)), the court ruled the execution sale of personal property was reversed because the parties imposed conditions

of the sale which resulted in the ***elimination of potential bidders*** and the predetermination of the sale price, thereby changing the nature of the sale from a public auction to a private sale.

Statutory Rate of Interest on Payoffs and Proceeds from Sale.

§ 6.2-302 Judgment rate of interest. —

A. The judgment rate of interest shall be an annual rate of six percent, except that a money judgment entered in an action arising from a contract shall carry interest at the rate lawfully charged on such contract, or at six percent annually, whichever is higher.

B. If the contract or other instrument does not fix an interest rate, the court shall apply the judgment rate of six percent to calculate prejudgment interest pursuant to § 8.01-382 and to calculate post-judgment interest.

C. The rate of interest for a judgment shall be the judgment rate of interest in effect at the time of entry of the judgment on any amounts for which judgment is entered and shall not be affected by any subsequent changes to the rate of interest stated in this section. (1987, cc. 622, 623, 630, § 6.1-330.54; 1991, c. 508; 2004, c. 646; 2005, c. 455; 2010, cc. 550, 794.)

Sheriff May Use Stockbroker to Sell Stock & Bonds

Pursuant to an Attorney General Opinion (1997 Va. AG 18), the Sheriff is permitted to hire a stockbroker to sell off stocks and bonds to the highest bidder.

CHAPTER NINE

HOMESTEAD ACT, POOR DEBTOR'S EXEMPTION & BANKRUPTCY

The homestead act limits the *extent* to which creditors may recover on unmet obligations of a debtor, and to prevent a creditor from stripping a debtor in the process. This act very positively comes into play in the execution of a courts judgment, and especially with regard to levies and sales of the debtor's property.

The Poor Debtor's Act prevents levying upon specific property enumerated in the Act, which is automatic, unlike the Homestead Act.

Since **bankruptcy** also limits the execution of civil judgments against a debtor, some general information regarding bankruptcy is included in this chapter.

The Homestead Act

General

The purpose of the Homestead Act is to prevent a creditor from stripping a judgment debtor of *everything* he owns in satisfaction of a legal obligation. The act *exempts* certain items from seizure by the creditor - essentially those items necessary for the reasonable existence of a person and family.

The Homestead Act is available to everyone who *qualifies* as a **householder**.

The Homestead Act is a **privilege**, but **not an automatic right**, and must be *claimed* by the debtor in order to be enforced.

The Homestead Act, like any privilege or right, may be *waived* by the debtor, which would then allow otherwise exempt items to be seized in satisfaction of their debts.

Householder Defined

A household **may be any person**, married or unmarried, who maintains a **separate residence or living quarters**. It is *not necessary* that any other persons reside with the household, or be dependent upon him. (§34.1) ***A juvenile can be considered a householder.***

Injunction To Restrain Seizure of Exempt Property

The *householder* may obtain an injunction to enjoin (prevent) the seizure and sale of any property *exempt* under the Homestead Act, and to prevent **wages** exempt from being garnished by a judgment creditor. (§34-2)

How Real Estate Set Apart as Exempt

Real estate set apart as aforesaid may be sold and conveyed as other real estate held by the householder and the proceeds invested in other property, or it may in like manner be exchanged for other property, but in no case shall the purchaser be bound to see to the application of the purchase money. (Code 1919, § 6535.) § 34-9

Exemption Created

Every householder is permitted under the Homestead Act to **hold exempt under §§ 23-38.81, 34-26, 34-27, 34-29, and 64.2-311 from levy**, distress, or garnishment, his real or personal property (or a combination of both) to a value not exceed $5,000 or, if the householder is 65 years of age or older, not exceeding $10,000 in value. . (§34-4)

§ 34-28.1. Personal injury and wrongful death actions exempt; exceptions.

§ 34-28.2. Spousal and child support exempt.

§23-38.81 relates to prepaid tuition contracts and ABLE savings accounts for persons with disabilities.

§64.2-311 **Homestead allowance.** A. In addition to any other right or allowance under this article, a surviving spouse of a decedent who was domiciled in the Commonwealth is entitled to a homestead allowance of $20,000. If there is no surviving spouse, each minor child of the decedent is entitled to a homestead allowance amounting to $20,000, divided by the number of minor children.

B. The homestead allowance has priority over all claims against the estate, except the family allowance and the right to exempt property.

C. The homestead allowance is in lieu of any share passing to the surviving spouse or minor children by the decedent's will or by intestate succession; provided, however, if the amount passing to the surviving spouse and minor children by the decedent's will or by intestate succession is less than $15,000, then the surviving spouse or minor children are entitled to a homestead allowance in an amount that when added to the property passing to the surviving spouse and minor children by the decedent's will or by intestate succession, equals the sum of $15,000.

D. If the surviving spouse claims and receives an elective share of the decedent's estate under §§ 64.2-302 through 64.2-307, the surviving spouse shall not have the benefit of any homestead allowance. (1981, c. 580, § 64.1-151.3; 1990, c. 831; 2001, c. 368; 2012, c. 614; 2014, c. 532 .)

Additional Exemption for Veterans

Any veteran residing in the Commonwealth having a service connected disability of 40% or more, as rated by the Veteran's Administration, shall be entitled to an additional exemption of his real or personal property, to an amount not to exceed $10,000. (§34-4.1)

Debts to Which Exemption Does Not Apply

The Homestead Exemption shall not apply to:

1. Debts for the purchase of property which has not been paid for and taxes.(§ 34-3)

2. Spousal or child support obligations. (§34-5)

How Exemption of Real Estate Secured

The householder secures his allowed exemption of real estate by *filing a deed of homestead* (a written description of the property claimed for exemption) and having it *recorded.* (§34-6)

How Exemption of Personal Property Secured

The householder secures his allowed exemption of personal property by describing the property claimed for exemption in writing, with a cash valuation of the property included, and having the writing recorded. (§34-13 & §34-14)

When Exemption May be Set Apart

Property claimed for exemption may be set apart by the householder at **any time before it is subjected to sale** under legal process, or if such creditor process does not require sale of property, before it is turned over to the creditor, provided:

1. If the householder files a **voluntary** petition in bankruptcy he can set it apart on or before the 5th day after the date set for the meeting held pursuant to 11 USC 341, but not thereafter.

2. If any **involuntary** petition in bankruptcy is filed against him, he may set it apart any time before the expiration of the period within which he is required to file his schedules. (§34-17)

A claim of homestead exemption to protect garnished wages may be filed by the debtor after the garnishment summons is served on the employer but prior to or upon the return date of the garnishment summons and shall be considered by the garnishing court.

Waiver of Exemption

If any person shall declare in a bond, bill, note or other instrument (contract) that he waives his homestead exemption rights, then he may not claim exemption in regards to that creditor. *However,* any such waiver shall not

apply to §34-26 (specifically exempt items); §34-27 (items exempted to householder engaged in agriculture); and §34-29 (portions of wages specifically exempt from garnishment). (§34-22)

When Homestead Waived, Judgments & Executions To So State

Whenever a judgment or decree is rendered on an instrument waiving the homestead, or upon a demand against which the homestead cannot be claimed, the court shall include in it's judgment or decree words to such effect. (§34-25)

The Poor Debtor's Exemption

Exempt Articles Enumerated

§ 34-4. Exemption created.

Every householder shall be entitled, in addition to the property or estate exempt under §§ 23-38.81, 34-26, 34-27, 34-29, and 64.2-311, to hold exempt from creditor process arising out of a debt, real and personal property, or either, to be selected by the householder, including money and debts due the householder not exceeding $5,000 in value or, if the householder is 65 years of age or older, not exceeding $10,000 in value. In addition, upon a showing that a householder supports dependents, the householder shall be entitled to hold exempt from creditor process real and personal property, or either, selected by the householder, including money or monetary obligations or liabilities due the householder, not exceeding $500 in value for each dependent.

For the purposes of this section, "dependent" means an individual who derives support primarily from the householder and who does not have assets sufficient to support himself, but in no case shall an individual be the dependent of more than one householder. (Code 1919, § 6531; 1918, p. 487; 1975, c. 466; 1977, c. 496; 1978, c. 231; 1990, c. 942; 1997, cc. 785, 861; 2009, c. 387.)

§34-5 Exceptions to Exemptions –The property exemptions created under this Code shall not be claimed against the following debts:

1. For the purchase price of such property or any part thereof. If the property purchased and not paid for is exchanged for or converted into other property by the debtor, such last named property shall not be exempted from the payment of such unpaid purchase money.

2. For spousal or child support obligations. (Code 1919, § 6531; 1918, p. 487; 1956, c. 637; 1986, c. 218; 1990, c. 942; 1991, c. 256; 2010, c. 550.)

§ 34-26. Poor debtor's exemption; exempt articles enumerated.
In addition to the exemptions provided in Chapter 2 (§ 34-4 et seq.), every householder shall be entitled to hold exempt from creditor process the following enumerated items:

1. The family Bible.

1a. Wedding and engagement rings.

2. Family portraits and family heirlooms not to exceed $5,000 in value.

3. (i) A lot in a burial ground, and (ii) any preneed funeral contract not to exceed $5,000.

4. All wearing apparel of the householder not to exceed $1,000 in value.

4a. All household furnishings including, but not limited to, beds, dressers, floor coverings, stoves, refrigerators, washing machines, dryers, sewing machines, pots and pans for cooking, plates, and eating utensils, not to exceed $5,000 in value.

4b. Firearms, not to exceed a total of $3,000 in value.

5. All animals owned as pets, such as cats, dogs, birds, squirrels, rabbits and other pets not kept or raised for sale or profit.

6. Medically prescribed health aids.

7. Tools, books, instruments, implements, equipment, and machines, including motor vehicles, vessels, and aircraft, which are necessary for use in the course of the householder's occupation or trade not exceeding $10,000 in value, except that a perfected security interest on such personal property shall have priority over the claim of exemption under this section. A motor vehicle, vessel or aircraft used to commute to and from a place of occupation or trade and not otherwise necessary for use in the course of such occupation or trade shall not be exempt under this subdivision. "Occupation," as used in this subdivision, includes enrollment in any public or private elementary, secondary, or career and technical education school or institution of higher education.

8. Motor vehicles, not held as exempt under subdivision 7, owned by the householder, not to exceed a total of $6,000 in value, except that a perfected security interest on a motor vehicle shall have priority over the claim of exemption under this subdivision.

9. Those portions of a tax refund or governmental payment attributable to the Child Tax Credit or Additional Child Tax Credit pursuant to § 24 of the Internal Revenue Code of 1986, as amended, or the Earned Income Credit pursuant to § 32 of the Internal Revenue Code of 1986, as amended.

10. Unpaid spousal or child support.

The value of an item claimed as exempt under this section shall be the fair market value of the item less any prior security interest.

The monetary limits, where provided, are applicable to the total value of property claimed as exempt under that subdivision.

The purchase of an item claimed as exempt under this section with nonexempt property in contemplation of bankruptcy or creditor process shall not be deemed to be in fraud of creditors.

No officer or other person shall levy or distrain upon, or attach, such articles, or otherwise seek to subject such articles to any lien or process. It shall not be required that a householder designate any property exempt under this section in a deed in order to secure such exemption.
Code 1919, § 6552; 1934, p. 371; 1936, p. 322; 1956, c. 637; 1970, c. 428; 1975, c. 466; 1976, c. 150; 1977, cc. 253, 496; 1990, c. 942; 1992, c. 644; 1993, c. 150; 2001, c. 483; 2002, c. 88; 2011, cc. 761, 835; 2015, c. 686.

§ 34-28.2 Spousal and child support exempt. The debtor’s right to receive spousal or child support, to the extent reasonably necessary for the support of the debtor or any dependent of the debtor, shall be exempt from creditor process.

Other Articles Exempt When Engaged in Agriculture (§34-27)

If the householder is engaged in agriculture, in addition to the articles exempt in §34-26, he may also exempt:

1. A pair of horses or mules with the necessary gearing.

2. One wagon or cart.

3. One tractor (not exceeding $3,000.00 in value).

4. Two plows.

5. One drag

6. One harvest cradle.

7. One pitchfork.

8. One rake.

9. Two iron wedges.

10. Fertilizer and Fertilizer material not exceeding the value of $1,000.00.

§ 34-3. Articles not exempt from taxes or levies or for their purchase price.

The exemptions under §§ 34-4, 34-4.1, 34-26, 34-27, 34-29, and 64.2-.311 shall not extend to distress or lien for state or local taxes or levies, nor to levy, distress, or lien for the purchase price of any articles claimed as exempt or any part of the price thereof nor for fines and damages or either arising from trespass by animals under § 55-306 as to such animal so trespassing. If an article purchased and not paid for is exchanged or converted into other property of the debtor, such property shall not be exempt from payment of the unpaid purchase money debt. (Code 1919, § 6563; 1990, c. 942; 1996, c. 323.)

Maximum Portion of Disposable Earnings Subject to Garnishment

§34-29, **Maximum portion of disposable earnings subject to garnishment.**

(a) Except as provided in subsection (b) and (b1), the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed the lesser of the following amounts:

1. Twenty-five percentum of his disposable earnings for that week, or

2. The amount by which his disposable earnings for that week exceed forty times the federal minimum hourly wage prescribed by 206 (a)(1) of Title 29 of the United States Code in effect at the time earnings are payable.

(b) The restrictions of subsection (a) do not apply in the case of:

1. Any order of any court for the support of any person.

2. Any order of any court of bankruptcy under Chapter X111 of the Bankruptcy Act.

3. Any debt due for any State of federal tax.

(b1) In the case of earnings for any pay period other than a week, the State Commissioner of Labor and Industry shall, by regulation, prescribe a multiple of the federal minimum hourly wage equivalent in effect to that set forth in this section.

1. Sixty percent of such individual's disposable earnings for that week; or

2. If such individual is supporting a spouse or dependent child other than the spouse or child with respect to whose support such order was issued, fifty percent of such individual's disposable earnings for that week.

The fifty percent specified in subdivision (b1)(2) shall be fifty-five percent and the sixty percent specified in subdivision (b1)(1) shall be sixty-five percent if and to the extent that such earnings are subject to garnishment to enforce an order for support for a period which is more than twelve weeks prior to the beginning of such workweek.

(c) No court of the Commonwealth and no state agency or officer may make, execute, or enforce any order or process in violation of this section.

The exemptions allowed herein shall be granted to any person so entitled without any further proceedings.

(d) For the purposes of this section

1. The term "**earnings**" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program, provided that in no event shall funds that have been deposited by or for an individual for more than thirty days be considered earnings.

2. The term "**disposable earnings**" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld, and

3. The term "**garnishment**" means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.

(e) Every assignment, sale transfer, pledge or mortgage of the wages or salary of an individual which is exempted by this section, to the extent of the exemption provided by this section, shall be void and unenforceable by any process of law.

1. No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness.

2. A depository wherein earnings have been deposited on behalf of and traceable to an individual shall not be required to determine the portion of such earnings which are subject to garnishment.

Wages of Minor Exempt from Garnishment (§34-33)

The wages of a minor shall not be liable to garnishment or otherwise liable to the payment of the debts of parents.

Accident and Sick Benefits

Accident and sick benefits are not subject to legal process. (§38.2-3406 and §38.2-3549)

Bankruptcy

Bankruptcy - General

Bankruptcy is a proceeding under **Federal** laws in which **a person or a business** declares themselves unable to meet their existing obligations and

1. petitions the bankruptcy court to take what assets they have (if any) and distribute them (as far as they will go) among the creditors, and then legally cancel any unsatisfied portion of those obligations (Chapter 7), **or**

2. petitions the bankruptcy court to grant them *time to re-organize* themselves in the prospect of being able to meet their obligations in a reasonable period, but be basically excused from making payments on those obligations during the reorganization time frame (Chapter 13 and 11). (11 USC 341)

Bankruptcy Supersedes Most Civil Actions Against Debtor

Since bankruptcy is a **Federal** action, it takes precedence over most civil claims against the debtor, even those which have been brought to a judgment in the state courts. Generally speaking about the only debts which are not affected by bankruptcy are:

1. Fines or awards assessed against the debtor for some criminal action.

2. Alimony payments.

3. Maintenance or support payments (usually for children).

Since bankruptcy generally supersedes civil claims against a debtor, the Sheriff is placed in a difficult position when he goes to serve a civil process, or take action (such as a levy) toward execution of a state court judgment, and is confronted by a claim by the debtor (defendant) that the debtor has filed bankruptcy.

It should be noted that merely filing for bankruptcy is not an automatic guarantee that the debtor's petition will be accepted by the bankruptcy court. There are conditions which the debtor must meet, and documentation which the debtor will be furnished if the bankruptcy court does accept his petition. When a Sheriff is faced with a *debtor's claim of having filed bankruptcy*, the Sheriff should require appropriate documentation from the debtor before making his *return* on the process of the state court. In the event the debtor is **unable** to furnish appropriate documentation, the Sheriff should:

1. Seek immediate legal counsel with the Commonwealth Attorney, or city or county attorney (as may be appropriate) as to how to proceed, or

2. Serve the process or make the levy so as to protect the plaintiff's interest in the state civil action, and then seek immediate legal counsel. (The service or the levy could always be canceled if it is later determined that the debtor's claim of bankruptcy is valid.)

NOTE: 1982-83 Va. Op. AG 30 states ".....even though violations of the automatic stay may occur in circumstances which do not result in a contempt charge proceeding against you or the creditor, it is desirable that the stay be observed in circumstances where the fact of its existence is communicated to you.....where the action is one for the collection of debt and you have reliable information that a petition has been filed, the stay should be observed. .....you can note the existence of the bankruptcy proceeding on your return and the creditor can protect his rights by seeking relief from the appropriate court."

Who Can File Bankruptcy

Any person (or business) who resides in, does business in, or has property in this country.

How Often Can One File Bankruptcy

One may not file bankruptcy more often than every **six years**. A discharge in bankruptcy cannot be granted if one has been granted a discharge in a bankruptcy case filed in the last six years (or in a Chapter 13 bankruptcy case filed in the last six years, **unless 70% or more** of the debts were paid off in the Chapter 13 case.)

Is There More than one Type of Bankruptcy

There are four (4) basic types of bankruptcy:

1. **Chapter 7 Bankruptcy**: This is the situation where the debtor turns over his assets to the referee in bankruptcy for distribution to the creditors, and any unsatisfied portion of the debts is legally canceled.

2. **Chapter 11 Bankruptcy**: This is the situation where a *business* cannot meet it's obligations and petitions the bankruptcy court to grant the business time to reorganize in the prospect of being able to meet it's obligations in a reasonable time, but is basically excused from making payments on those obligations during the re-organization period.

3. **Chapter 13 Bankruptcy**: This is similar to Chapter 11 above, but involves personal reorganization as opposed to a business.

4. **Chapter 12 Bankruptcy**: This bankruptcy is utilized by farmers. Probably the only place you will see this type of bankruptcy is in rural areas, and in the Mid-West.

> In 1991, the U.S. Supreme Court gave consumers who are deeply in debt a new legal right to try to work their way out of bankruptcy without losing almost all control over their financial affairs.
>
> In the past, any consumer who had unsecured debts over $100,000 could not use Chapter 13 for re-organization, which forced them to use Chapter 7 liquidation. However, with the U.S. Supreme Court passing law to allow **individuals**, not just businesses, to use Chapter 11 for re-organization, the court gave individuals more control over their financial affairs. Under this new Chapter 11, consumers do not have to turn over spendable income, nor have their property taken away.

What Happens to the Bankrupt Debtor's Property (Assets)

The trustee in bankruptcy takes possession of **all** the bankrupt debtor's **non-exempt** property and converts it into cash. The cash is distributed to the debtor's creditors who have filed approved claims (usually on a percentage basis), and to cover administrative costs of the bankruptcy proceedings).

What Assets of the Debtor does the Trustee in Bankruptcy Take

The trustee in bankruptcy looks for the following assets of the debtor:

1. Cash
2. Bank Deposits
3. Pre-Paid Rents
4. Landlord and Utility/Security Deposits
5. Accrued by unpaid earnings, vacation pay due the debtor
6. Tax refunds due debtor
7. Sporting Goods (such as skis, fishing gear,

A debtor files bankruptcy: guns, boats, cameras, etc., not exempt items.)

Where Does a Debtor File Bankruptcy in the office of the clerk of the U. S. Bankruptcy Court in the district (federal) where the debtor lives or maintains his principal place of business. The debtor must have been in the district for 180 days, or must file in the district where he has resided for the greatest portion of the past 180 days.

What Debts Are Not Discharged Under Federal Bankruptcy Law

Title 11 USC 523 (a)(1) lists the types of debts **not discharged** in bankruptcy:

1. Certain taxes & customs duties.

2. Debts for money, services, etc., obtained through fraud.

3. Debts not listed by debtor in time for creditor to file a claim.

4. Debts for fraud or defalcation (embezzlement) while acting in a fiduciary capacity; for embezzlement; or for larceny.

5. Debts to a spouse or child for alimony or support.

6. Debts for willful and malicious injury to another.

7. Debts for certain fines payable to government agencies.

8. Debts for additional loans.

Debts which could have been listed in a previous bankruptcy, but which the debtor chose to waive.

Can a Debtor Waive Discharge of a Debt under Bankruptcy

The debtor *may waive* his right to discharge of any particular debt, **provided** the bankruptcy court accepts his *written waiver*, or the court should conclude that actions of the debtor have indicated waiver of any particular debt.

Once the debt is waived, it is waived forever and cannot be claimed in a following bankruptcy.

Bankruptcy Debtor is Required to File List of Exempt Property

The debtor is required to file a list of the property he claims as exempt (Schedule B-4), and any exemptible property not listed is deemed by the court to have been waived. If a **homestead exemption** is claimed under state law, and if the state requires the exemption to be filed in order to be valid (Virginia law does), then the debtor must have filed the exemption with the appropriate city or county official *before* the bankruptcy petition was filed.

Bankrupt Debtor's Claim for Exempt Property

If the laws of the *state* do not preclude (Virginia's laws do) the use of the exemptions set forth under 11 USC 522(d) (Federal law exemptions), then the debtor may **choose** to claim his exemptions under 522(d) or his state laws, whichever would be most beneficial to the debtor.

Virginia "opted out" of the federal exemption scheme, and as a result Virginia debtors who file bankruptcy may only assert the Virginia exemptions allowed under it's Homestead Act (which basically are *less* than the Federal exemptions allowed under 11 USC 522(d)). (§34.3-1)

Service of process on debtor/defendant prohibited once bankruptcy filed

This is an Attorney General's opinion.

"You ask whether (1) a warrant in debt for 1984 personal property taxes may be served upon an individual who has filed a petition in bankruptcy under the United States Bankruptcy Code, 11 U.S.C.A. § 101 *et seq.* (West Supp. 1985), (the "Bankruptcy Code"), and (2) a warrant in debt to collect 1984 personal property taxes may be served on an individual under the facts described above where the individual has listed the personal property tax in his "claim to creditors." For the reasons set forth below, I answer each of these questions in the negative."

"With certain exceptions listed in § 362(b), § 362(a) of the Bankruptcy Code provides that the filing of a petition in bankruptcy imposes an automatic stay against litigation, lien enforcement, and other actions to collect a debt from the filing debtor. The stay applies to all entities, a term which includes governmental units. *See* 11 U.S.C.A. § 101(14)."

"The warrant in debt to which you refer is an action to collect delinquent 1984 personal property taxes in a court proceeding authorized by § 58.1-3953 of the Code of Virginia. Thus, the service of a warrant in debt constitutes an action to collect a tax debt of the debtor. Such actions are subject to the automatic stay provisions of § 362(a) in the absence of an exemption. None of the exemptions listed is applicable here.[1] Accordingly, ***I conclude that the stay provisions apply and you should not serve a warrant in debt on an individual who has filed a petition in bankruptcy.***[2]" 85-86 Va AG 262

Automatic Stay

It would be wise to consult your county or city attorney as to whether you should proceed to evict someone after they have filed bankruptcy. The code changed in 2006 to give exceptions to those who have previously obtained their eviction writ before the debtor filed. See highlighted sections of the code.

11 U.S.C. § 362 — Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of —

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a corporate debtor's tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay —

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) —

(A) of the commencement or continuation of a civil action or proceeding —

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

[(5) Repealed. Pub. L. 105-277, div. I, title VI, Sec. 603(1), Oct. 21, 1998, 112 Stat. 2681-866;]

(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in section 555 or 556) under any security agreement or arrangement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract, or of any contractual right (as defined in section 555 or 556) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;

(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in section 559) under any security agreement or arrangement or other credit enhancement forming a part of or related to any repurchase agreement, or of any contractual right (as defined in section 559) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of —

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under chapter 537 of title 46 or section 109(h) of title 49, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under chapter 537 of title 46;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement, or of any contractual right (as defined in section 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer —

(A) to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or is subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing;

(21) under subsection (a), of any act to enforce any lien against or security interest in real property —

(A) if the debtor is ineligible under section 109(g) to be a debtor in a case under this title; or

(B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(24) under subsection (a), of any transfer that is not avoidable under section 544 and that is not avoidable under section 549;

(25) under subsection (a), of —

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361) for the secured claim of such authority in the setoff under section 506(a);

(27) under subsection (a) of this section, of the exercise by a master netting agreement participant of any contractual right (as defined in section 555, 556, 559, or 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in section 555, 556, 559, or 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such master netting agreements to the extent that such participant is eligible to exercise such rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue; and

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act pursuant to title XI or XVIII of such Act).

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), (f), and (h) of this section —

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of —

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

(3) if a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) —

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary) —

(i) as to all creditors, if —

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to —

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded —

(aa) if a case under chapter 7, with a discharge; or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

(4)(A)(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary) —

(i) as to all creditors if —

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay —

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if —

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later —

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that —

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, and defraud creditors that involved either —

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

(e)(1) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(2) Notwithstanding paragraph (1), in a case under chapter 7, 11, or 13 in which the debtor is an individual, the stay under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless —

(A) a final decision is rendered by the court during the 60-day period beginning on the date of the request; or

(B) such 60-day period is extended —

(i) by agreement of all parties in interest; or

(ii) by the court for such specific period of time as the court finds is required for good cause, as described in findings made by the court.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section —

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h)(1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2) —

(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

(2) Paragraph (1) does not apply if the court determines, on the motion of the trustee filed before the expiration of the applicable time set by section 521(a)(2), after notice and a hearing, that such personal property is of consequential value or benefit to the estate, and orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee. If the court does not so determine, the stay provided by subsection (a) shall terminate upon the conclusion of the hearing on the motion.

(i) If a case commenced under chapter 7, 11, or 13 is dismissed due to the creation of a debt repayment plan, for purposes of subsection (c)(3), any subsequent case commenced by the debtor under any such chapter shall not be presumed to be filed not in good faith.

(j) On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

(k)(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

(l)(1) Except as otherwise provided in this subsection, subsection (b)(22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that —

(A) under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and

(B) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

(2) If, within the 30-day period after the filing of the bankruptcy petition, the debtor (or an adult dependent of the debtor) complies with paragraph (1) and files with the court and serves upon the lessor a further certification under penalty of perjury that the debtor (or an adult dependent of the debtor) has cured, under nonbankrupcty1 law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought by the lessor, subsection (b)(22) shall not apply, unless ordered to apply by the court under paragraph (3).

(3)(A) If the lessor files an objection to any certification filed by the debtor under paragraph (1) or (2), and serves such objection upon the debtor, the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the certification filed by the debtor under paragraph (1) or (2) is true.

(B) If the court upholds the objection of the lessor filed under subparagraph (A) —

(i) subsection (b)(22) shall apply immediately and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's objection.

(4) If a debtor, in accordance with paragraph (5), indicates on the petition that there was a judgment for possession of the residential rental property in which the debtor resides and does not file a certification under paragraph (1) or (2) —

(A) subsection (b)(22) shall apply immediately upon failure to file such certification, and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating the absence of a filed certification and the applicability of the exception to the stay under subsection (b)(22).

(5)(A) Where a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been obtained by the lessor, the debtor shall so indicate on the bankruptcy petition and shall provide the name and address of the lessor that obtained that pre-petition judgment on the petition and on any certification filed under this subsection.

(B) The form of certification filed with the petition, as specified in this subsection, shall provide for the debtor to certify, and the debtor shall certify —

(i) whether a judgment for possession of residential rental housing in which the debtor resides has been obtained against the debtor before the date of the filing of the petition; and

(ii) whether the debtor is claiming under paragraph (1) that under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment of possession was entered, and has made the appropriate deposit with the court.

(C) The standard forms (electronic and otherwise) used in a bankruptcy proceeding shall be amended to reflect the requirements of this subsection.

(D) The clerk of the court shall arrange for the prompt transmittal of the rent deposited in accordance with paragraph (1)(B) to the lessor.

(m)(1) Except as otherwise provided in this subsection, subsection (b)(23) shall apply on the date that is 15 days after the date on which the lessor files and serves a certification described in subsection (b)(23).

(2)(A) If the debtor files with the court an objection to the truth or legal sufficiency of the certification described in subsection (b)(23) and serves such objection upon the lessor, subsection (b)(23) shall not apply, unless ordered to apply by the court under this subsection.

(B) If the debtor files and serves the objection under subparagraph (A), the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the situation giving rise to the lessor's certification under paragraph (1) existed or has been remedied.

(C) If the debtor can demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied, the stay provided under subsection (a)(3) shall remain in effect until the termination of the stay under this section.

(D) If the debtor cannot demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied —

(i) relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to proceed with the eviction; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's certification.

(3) If the debtor fails to file, within 15 days, an objection under paragraph (2)(A) —

(A) subsection (b)(23) shall apply immediately upon such failure and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating such failure.

(n)(1) Except as provided in paragraph (2), subsection (a) does not apply in a case in which the debtor —

(A) is a debtor in a small business case pending at the time the petition is filed;

(B) was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;

(C) was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition; or

(D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A), (B), or (C), unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business debtor in good faith and not for the purpose of evading this paragraph.

(2) Paragraph (1) does not apply —

(A) to an involuntary case involving no collusion by the debtor with creditors; or

(B) to the filing of a petition if —

(i) the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed; and

(ii) it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time.

(o) The exercise of rights not subject to the stay arising under subsection (a) pursuant to paragraph (6), (7), (17), or (27) of subsection (b) shall not be stayed by any order of a court or administrative agency in any proceeding under this title.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2570; Pub. L. 97-222, Sec. 3, July 27, 1982, 96 Stat. 235; Pub. L. 98-353, title III, Secs. 304, 363(b), 392, 441, July 10, 1984, 98 Stat. 352, 363, 365, 371; Pub. L. 99-509, title V, Sec. 5001(a), Oct. 21, 1986, 100 Stat. 1911; Pub. L. 99-554, title II, Secs. 257(j), 283(d), Oct. 27, 1986, 100 Stat. 3115, 3116; Pub. L. 101-311, title I, Sec. 102, title II, Sec. 202, June 25, 1990, 104 Stat. 267, 269; Pub. L. 101-508, title III, Sec. 3007(a)(1), Nov. 5, 1990, 104 Stat. 1388-28; Pub. L. 103-394, title I, Secs. 101, 116, title II, Secs. 204(a), 218(b), title III, Sec. 304(b), title IV, Sec. 401, title V, Sec. 501(b)(2), (d)(7), Oct. 22, 1994, 108 Stat. 4107, 4119, 4122, 4128, 4132, 4141, 4142, 4144; Pub. L. 105-277, div. I, title VI, Sec. 603, Oct. 21, 1998, 112 Stat. 2681-886; Pub. L. 109-8, title I, Sec. 106(f), title II, Secs. 214, 224(b), title III, Secs. 302, 303, 305(1), 311, 320, title IV, Secs. 401(b), 441, 444, title VII, Secs. 709, 718, title IX, Sec. 907(d), (o)(1), (2), title XI, Sec. 1106, title XII, Sec. 1225, Apr. 20, 2005, 119 Stat. 41, 54, 64, 75, 77, 79, 84, 94, 104, 114, 117, 127, 131, 176, 181, 182, 192, 199; Pub. L. 109-304, Sec. 17(b)(1), Oct. 6, 2006, 120 Stat. 1706; Pub. L. 109-390, Sec. 5(a)(2), Dec. 12, 2006, 120 Stat. 2696.)

FOOTNOTES

1 So in original. Probably should be “nonbankruptcy”.

FORMS

NOTICE OF LEVY OF EXECUTION

To: Department of Game and Inland Fisheries
Boat Section
P. O. Box 11528
Richmond, VA 23230-1528

Date of Levy: _____

Reason for Levy: _____

Note: Copy of Writ or Court Order must accompany this form.

Va Registration/Title Number: _____

Description of Watercraft: _____

Make: _____ Year Built: _____ Length: _____

Hull Identification Number: _____

Owner/Owners' Name: _____

Address: _____

Signature of Reporting Official

Title:

Date:

RELEASE:

The above Levy was released on the day of , 20__ .

Signature of Reporting Official

Title:

Date:

www.dmvNow.com
Virginia Department of Motor Vehicles
Post Office Box 27412
Richmond, Virginia 23269-0001

VSA 62 (09/10/2012)

REPORT OF LEVIED AND SEIZED VEHICLE

(Code of Virginia § 46.2-644)

Purpose: Authorized officials use this form to report a levied and seized motor vehicle, trailer or semitrailer.
Instructions: The official making the vehicle seizure must complete all sections of this form and return it to DMV Titling Work Center at the above address.

COURT INFORMATION		
COURT NAME	PLAINTIFF NAME	DEFENDANT NAME

LEVIED AND SEIZED VEHICLE INFORMATION						
VEHICLE IDENTIFICATION NUMBER (VIN)	YEAR	MAKE	MODEL	BODY TYPE	COLOR	PLATE NUMBER

CERTIFICATION			
AUTHORIZED OFFICIAL NAME	DATE OF VEHICLE SEIZURE (mm/dd/yyyy)	SHERIFF SERVICES REQUIRED? ☐ YES ☐ NO	
AUTHORIZED OFFICIAL TITLE	AGENCY		
AUTHORIZED OFFICIAL ADDRESS	CITY	STATE	ZIP CODE

I certify and affirm that all information presented in this form is true and correct, that any documents I have presented to DMV are genuine, and that the information included in all supporting documentation is true and accurate. I make this certification and affirmation under penalty of perjury and I understand that knowingly making a false statement or representation on this form is a criminal violation.

AUTHORIZED OFFICIAL SIGNATURE	DATE (mm/dd/yyyy)

BIDDER'S LIST

Bidder's #	Name	Address	SSN
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			

NOTICE TO BIDDERS: If you are interested in being added to a bidders list, please indicate by placing a star next to your name. If you have an e-mail address, please indicate that as well.

Style of Case:

Date of Sale:

TERMS OF SALE

Read	Pursuant to a Writ of Fieri Facias placed in my hands in the case of *(Insert Plaintiff name*) vs. (*Insert Defendant name*) I will attempt to auction off the list of inventory levied upon by my office.
Read	The sale will be conducted as follows:
Read	Are there any individuals who are interested in purchasing just one or two items? If not, then everything will be sold as a lot. If yes, then the single items of interest will be sold first. The remaining items will be sold as a lot.
	There will be two sales performed. The first sale will be for the entire lot. The second sale will consist of selling individual items first, then the remaining items. Whichever sale brings in the most money will be the final sale**. ONLY TO BE READ IN THIS CIRCUMSTANCES.**
	As required by Virginia State Code, alcohol must be sold only to those persons who are licensed or hold a permit to sell alcoholic beverages in the Commonwealth or to persons outside of Virginia for resale outside of Virginia. Anyone interested in purchasing alcohol may see the ABC representative to secure a permit prior to the beginning of the sale. **ONLY TO BE READ WHEN SELLING ALCOHOL.**
Read	All property is sold as is. No warranties apply.
Read	All property will be sold to the highest bidder for cash. Anyone wishing to make arrangements for any other manner of payment needs to consult the deputy prior to starting of the sale.
Read	The bid must be a reasonable bid. The Sheriff's Office reserves the right to refuse a bid.
Read	Bids are to be made in dollar amounts only.
Read	All items are sold subject to any and all liens.
Read	All property must be removed immediately as the conclusion of the sale.
Read	If the property sells and bidder fails to pay up at the conclusion of the sale, the Sheriff may immediately resell the property If upon resell, the property brings in less than the first bid, the first bidder will be liable for the difference.

SHERIFF'S SALES CHECK-OFF SHEET

At all times when a deputy is required to check the status, the deputy is required to put his initials and the date of checking.

Style of Case: _____

Atty for Plaintiff (name & phone number): _____

_____

Sale date: _____

Bond posted? (Circle one) Yes No N/A

Bond filed with Circuit Court on: _____

Amount of Bond: _____

Amount of Judgment: _____ Date of Judgment: _____

PREPARATORY INFORMATION BEFORE SALE

Checked for Bankruptcy: _____

Checked with SCC for status as corporation: _____

Checked with City Business License: _____

If a vehicle levied upon, ran and printed 10-28: _____

Vehicle comes back in defendant's name? Yes No

Any co-owners and if yes, who? Yes No

_____

Were liens indicated? Yes No

If yes, was lienholder contacted for payoff?

_____

How much is the payoff? _____

Odometer reading at sale: _____

Anytown Sheriff's Office
Notification of Service

STYLE OF CASE:
RETURN DATE:
INDIVIDUAL(S) TO BE SERVED:
ADDRESS:

_____

DATE OF SERVICE:
TYPE OF SERVICE OBTAINED: CIRCLE ONE (1)

PERSONAL FAMILY OFFICE POSTED NOT FOUND

SERVED BY: _____
Deputy Sheriff

Front side of card

Anytown Sheriff's Office
P. O. Box 6200
Anytown, VA 12345

Postage
Required

Back side of card

A stack of these cards are left in General District Court so Attorneys and plaintiff can be notified of service.

Sheriff's Office
P.O. Box 0000
Anytown, VA 12345
757-632-0000

BILL OF SALE

COMMONWEALTH OF VIRGINIA
CITY OF ANYTOWN

Pursuant to § 43-34 or § 8.01-492 Va. State Code, between *your Sheriff's name*, Sheriff of the City of Anytown, party of the first part, and (Purchaser's name)**,** party of the second part,

WITNESSETH: That in consideration of the sum of **(Amt pd. Spelled out)** in hand paid, the said party doth bargain, sell & convey unto the party of the second part, one (year and **model of vehicle),** by me sold on an order issued out of the name of City and *Court name* on the(sale date) day of 20 , vehicle sold at public auction to the party of the second part, for the sum of **$ amt pd , he** being the highest bidder. Public sale notices posted at Va. Beach Farmer's Market, Va. Beach Courts Building, Lobby of Civil Process & **address of sale ,** all within the City of Va. Beach.

VIN # **Odometer Reading**: **miles**

Witness my hand this _____

_____
Your Sheriff's Name, Sheriff, City of Anytown, VA

State of Virginia
City of Virginia Beach

I, Clerk/Deputy Clerk of the Circuit Court of the City of Anytown, Virginia, do certify that *Your Sheriff's Name*, Sheriff of aforesaid city and state, whose name as such is signed has acknowledged same before me.

Given under my hand this _____

_____
Clerk/Deputy Clerk
Anytown Circuit Court

LEVY PAYOFF FORM

Style of Case: _____

V.

_____

Breakdown of monies collected on levy payoffs or sales. Complete **every item**, even if a zero or n/a is applicable.

Judgment Principal: _____

Total Interest: _____

Number of Days: _____

Interest Rate: _____

Interest Amount per Day: _____

Date Calculated: _____

Court Costs: _____

Sheriff's levy fee, if not included in court costs: _____

Ad fee: _____

Bond Premium: _____

Sheriff's commission as of date calculated: _____

Total as of date calculated: _____

The statutory rate at this time is 6% on the judgment principal § 6.2-302. Interest is not to be calculated on court costs, attorney fees, etc. pursuant to 2004 Va AG 26. Contractual interest is figured the same way.

COMMONWEALTH OF VIRGINIA
CITY OF ANYTOWN

Your Sheriff's Name, Sheriff
Telephone 757-623-0000

To: _____
_____

You are hereby notified that a levy judgment (fieri facias) has been issued against you re:_____ vs. _____ to wit:

I will be present at the above address between _____o'clock and _____ o'clock on _____. Failure to have someone present may require me to break and enter the execution of this levy as set forth in the Code of Virginia as amended.

_____
Deputy

Break & Enter Notice

This is used for detinue process. Some agencies do not use written notices.

OUT OF STATE WORKSHEET

Date Received: _____

Service Deputy: _____

State: _____

Style of Case: _____

Return Date: _____

Name of Person to Serve: _____

Address: _____

Date and Time Served: _____

Descriptive Information:

SSN: _____

Skin Color: _____

DOB: _____

Sex: _____

Height: _____

Weight: _____

Hair: _____

Eyes: _____

How Identified: _____

Active Duty: Yes No

Not Found/Reason:

_____

_____

Pertinent Service Information: _____

Date & Times Attempted: _____

SHERIFF'S SALE

PURSUANT TO AN EXECUTION IN MY HANDS, ISSUED IN THE CASE OF

_____

VS.

_____

I WILL PROCEED TO SELL AT PUBLIC AUCTION, ON THE PREMISES,

AT _____

ON
_____

AT _____ O'CLOCK, THE FOLLOWING PROPERTY, TO WIT:

Your Sheriff's Name
Sheriff of Anytown, VA 12345

Terms to be announce at the time of sale.
This sign is property of the Anytown Sheriff's Office.
Removal prior to the sale date is a violation of City Code 23-28.

COMMONWEALTH OF VIRGINIA
Anytown Sheriff's Office
Your Sheriff's Name, Sheriff

Deputy: _____

Office 757-623-2000

Voice Mail: 757-6200, Box 9925

OFFICE STAFF HOURS:
Mon-Fri 7:00 a.m - 7:00 p.m.
Saturday 7:00 a.m.- 4:00 p.m.

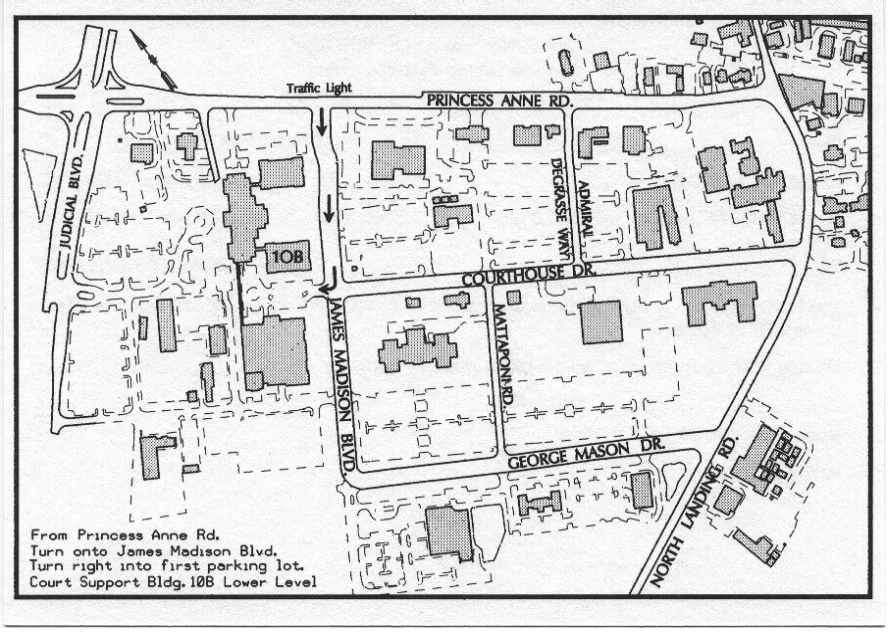
To: _____**OR CURRENT RESIDENT**

We have received a legal process for the above named individual. Please call this office on receipt of this card.

Deputy may be reached at above office number between _____ _____ A.M. P.M.

Voice mail is at 24 hour number.

FRONT



BACK

These are callback cards. Some use their business cards for that.

Sheriff's Office
City of Anytown, Virginia
P. O. Box 0000
Anytown, VA 12345
757-632-0000

Date

Chief Deputy Clerk
Anytown Circuit Court
Municipal Center
Anytown, VA 12345

RE: Bond Release in the matter of:
Style of case Case #

Dear Sir:

Would you please release the original indemnifying bond in the above styled case. It was filed with your court (date original sent to court) pursuant to a Writ of Fieri Facias, issued by the city/court writ issued from.

The plaintiff will take no further action on this levy and has expressed his wish to abandon the writ.

Thank you in advance and be assured of our continued cooperation in all matters of mutual concern.

Very truly yours,

Supervisor or Sheriff name, Supervisor
Civil Process Division
Anytown Sheriff Office

This is used to request the release of a bond that has been filed in the Circuit Court

ANYTOWN SHERIFF'S OFFICE
P. O. Box 6200
Anytown, VA 12345

DEFENDANT BOND
IN DETINUE ACTION

Know All Men by These Presents, That we_____ _____are held and firmly bound unto ***Your Sheriff's Name, Sheriff*** of the City of Anytown, in the just and full sum of $_____ Dollars, to be paid to the said , to which payment we bind ourselves and our heirs, executors, and administrators, jointly and severally; and we hereby waive the benefit of our homestead exemptions, respectively, as to this obligation. Sealed with our seals and dated this _____ day of _____, Two thousand and six.

The condition of the above obligation is such that whereas the above named in an action of detinue, now pending in the _____ Court of the County or City of _____, wherein _____ is plaintiff and _____ is defendant, did on the _____ day of _____, 200 , have the clerk of the said court to issue an order or _____, directing the Sheriff of the said county or city, commanding him to seize and take into his possession _____ _____, then in the possession of the said; and whereas ***Your Sheriff's Name, Sheriff*** of the City of Anytown, by virtue of said order or _____, did, on the _____ day of _____, 2009, seize the said property, and deliver the same to the said _____, and whereas the said _____ desires to have the said property returned to him; and whereas the said _____ has tendered the aforesaid _____ as his surety in such bonds as the law requires, with condition to pay all costs and damages which may be awarded against him in said action, and all damages which may accrue to any person by reason of the return of said property to him, and also to have the property forthcoming to answer any judgment or order of the court respecting the same.

Now, therefore, if the aforesaid obligors, either of them shall pay all costs and damages which may be awarded against the defendant in said action, and all damages which may accrue to any person by reason of the return of said property to the defendant, and shall also have the property forthcoming to answer any judgment or order of the court respecting the same, then the above bond to be void, otherwise to remain in full force and virtue.

Defendant _____

Surety _____

FORTHCOMING BOND TO RELEASE OR RESTORE PROPERTY SEIZED UNDER ATTACHMENT, WRIT OF FIERI FACIAS, OR DISTRESS WARRANT

Plaintiff V *Defendant*

Case #:

KNOW ALL MEN BY THESE PRESENTS, that we, and , are held and firmly bound unto in the just and full sum of , to be paid to the said , to which payment we bind ourselves, and our heirs, executors and administrators, jointly and severally; and we hereby waive the benefit of our homestead exemption as to this obligation. Sealed with our seals and dated this day of , 2009.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that whereas the said did, on the day of , 2009, obtain from , clerk of the court of the county or city of , an attachment, writ of fieri facias, or distress warrant; and whereas the said did, on the day of , 2009, give bond with surety, approved by the said clerk, in a penalty double the fair value of the property on which the attachment, writ of fieri facias, or distress warrant is levied, with condition to pay all costs and damages which may be awarded against him, or sustained by any person by reason of his suing out the attachment, writ of fieri facias, or distress warrant; and whereas the said attachment, writ of fieri facias, or distress warrant came to the hand of *Your Sheriff's Name, Sheriff* of the City of Anytown, to be served and levied, who by virtue thereof, levied on, and seized the following property found in the possession of the said , to wit:

and the said desiring to retain in or have returned to his possession so levied on and seized, hath tendered the above-bound as his surety in such bond, for the forthcoming thereof as the law in such case requires.

Now, therefore, if the above obligors, or either of them shall pay all costs and damages which may be awarded against the defendant in said action, and all damages which may accrue to any person by reason of the return of said property to the defendant, and shall also have the

property forthcoming to answer any judgment or order of the court respecting the same, then the above bond to be void, otherwise to remain in full force and virtue.

Third-party claimant, Co-Defendant, Defendant

_____

Surety

_____

SURETY/INDEMNITY BOND

CITY OF ANYTOWN, VIRGINIA

SHERIFF

Know All Men by These Presents, That we, (plaintiff) *and (bonding co/insurance co name)*

are held and firmly bound unto ***Your Sheriff's Name, Sheriff of the City of Anytown, VA.*** in the sum of bond amt (spelled out) **Dollars**, to the payment whereof, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. And we hereby waive the benefit of our several homestead exemptions as to this debt.

WITNESS our hands and seals this day of 2009.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That whereas (plaintiff name) has sued out a *Writ of Fieri Facias* against the goods and chattels of (defendant name) upon a judgment obtained in his/her favor on the (date) day of (month)(year), before (Court judgment obtained in) of the City of Virginia Beach, which writ, with the legal costs attending the same, amounts to the sum of (judgment amt), and is directed to the said *Your Sheriff's Name*, as Sheriff of the City of Anytown, VA. And whereas, the said ***Your Sheriff's name, Sheriff*** by virtue of the said writ to him directed, has been required to levy and has levied the same on the following property, to wit:

List of Inventory

And a doubt arising whether the said property is liable to such levy, the said ***Your Sheriff's Name, Sheriff*** has required of the said (plaintiff) a bond with good security to indemnify him the said **Your Sheriff's Name, Sheriff** pursuant to the statute in such case made. Now, if the above-bound (bonding co/insurance co name)

shall indemnify the said ***Your Sheriff's Name, Sheriff*** as aforesaid, against all damages which he may sustain in consequence of the seizure or sale of the property on which the said execution has been levied, and shall, moreover, pay to any claimant or claimants of said property all

damage which he or they may sustain in consequence of such seizure or sale, and shall also warrant and defend to any purchaser or purchasers of the said property, such estate or interest therein as shall be sold under the said execution, then the above obligation to be void; otherwise to remain in full force and virtue.

_____

Principal

_____

Surety

ANYTOWN SHERIFF'S OFFICE
Post Office Box 6200
Anytown, VA 23456
757-623-0000

SUSPENDING BOND

Know All Men by These Presents, That we_____

_____

are held and firmly bound unto *Your Sheriff's Name, Sheriff* of the City of Anytown, in the sum of $_____ Dollars to the payment whereof well and truly to be made to the said Sheriff. Aforesaid we bind ourselves and our heirs jointly and severally, firmly, by these presents. And we hereby waive the benefit of our homestead exemptions, respectively, as to this obligation. Sealed with our seals and dated this _____ day of _____, 2013.

The condition of the above obligation is such that whereas _____ obtained in due form of law, on the _____ day of _____, 2009, from _____ _____ directed to Your Sheriff's Name, Sheriff of the said City , for taking the goods and chattels of _____ to satisfy the said _____ the sum of $_____ Dollars, and the costs. And whereas _____ deputy for the said Your Sheriff's Name, Sheriff and by virtue of the said _____ has levied upon the following property to satisfy the same, to wit:

_____

_____

_____

_____

claims the chattels so levied on as her/his property, and desires that the sale thereof shall be suspended until the claim thereto can be adjusted. Now, if the said _____ shall pay to all persons who may be injured by suspending the sale of the levied goods and chattels until the claim to the

said property can be adjusted, such damages as he/she or they may sustain by such suspension, then the above obligation is to be void, otherwise it is to remain in full force and virtue.

Third Party Claimant

_ _____

Bonding Company Name

_ _____

Agent's Signature

_____


Attorney General Opinions

AG Op. CIVIL REMEDIES AND PROCEDURE: CERTAIN INCIDENTS OF TRIAL, 2004 Va. AG 26 (04-028)

CIVIL REMEDIES AND PROCEDURE: CERTAIN INCIDENTS OF TRIAL (JUDGMENT OR DECREE FOR INTEREST).

Costs of recovery, such as court costs and attorneys' fees; legal or contractual interest accrued prior to judgment; and statutory penalties for nonpayment of debt generally are not included in term ‘principal sum awarded’ and do not accrue interest.

DATE: August 2, 2004

SDATE: 20040802

REQUESTOR: The Honorable Barbara J. Gaden, Judge, City of Richmond General District Court

CITE: 2004 Va. AG 26

Issue Presented

You ask whether the term “principal sum awarded,” as used in § 8.01-382, includes not only the original amount of the obligation sought to be recovered, but also the costs of recovery, such as court costs and attorneys' fees. You further ask whether the term includes legal or contractual interest accrued prior to judgment; and finally, you ask whether “principal sum awarded” includes statutory penalties imposed for nonpayment of debt. Section 8.01-382 generally provides that “interest on any principal sum awarded” may be awarded in actions at law or suits in equity.

Response

It is my opinion that costs of recovery, such as court costs and attorneys' fees; legal or contractual interest accrued prior to judgment; and statutory penalties imposed for nonpayment of debt are not included in the term “principal sum awarded,” and, therefore, do not accrue interest pursuant to § 8.01-382.

Applicable Law and Discussion

The first sentence of § 8.01-382 provides that, “[i]n any action at law or suit in equity, the verdict of the jury, or if no jury the judgment or decree of the court, may provide for interest on any principal sum awarded, or any part thereof, and fix the period at which the interest shall commence.”

1. Costs and Attorneys' Fees Typically Do Not Accrue Interest

You ask how to determine the meaning of the term “costs.” The term “costs” is not defined in the Virginia Code; however, the Court of Appeals of Virginia has defined “costs” as [Page 27]

> “[a] pecuniary allowance, made to the successful party (and recoverable from the losing party), for his expenses in prosecuting or defending an action or a distinct proceeding within an action. Generally, ‘costs’ do not include attorney fees unless such fees are by a statute denominated costs or are by statute allowed to be recovered as costs in the case.”[1]

As a general rule, interest will not be allowed on an amount recovered as costs,2 as no statute in Virginia permits the accrual of interest on court costs.3 In Virginia, “[t]he general principle is, that costs are considered as an appendage to the judgment, rather than a part of the judgment itself; that they are considered, in some sense, as damages, and are always entered, in effect, ‘as an increase of damages by the court.’”4 A 1991 opinion of the Attorney General addresses the issue whether interest accrues on court costs or attorneys' fees.5 The prior opinion determined that interest does not accrue on either attorneys' fees or other costs awarded on a judgment for the balance of a note.6 The 1991 opinion also states that there is no express statutory provision for the accrual of interest on either costs or attorneys' fees awarded to the prevailing party in any type of action.7

In light of the foregoing, it is my opinion that neither costs nor attorneys' fees are included in the “principal sum awarded,” to which interest is applicable under § 8.01-382.

2. Legal or Contractual Interest Accrued Prior to Judgment
Does Not Accrue Postjudgment Interest

You also ask whether legal or contractual interest accrued prior to judgment is part of the “principal sum awarded.” No express statutory authority provides for the accrual of interest on legal or contractual interest accrued prior to judgment. As a general principal, interest should not bear interest absent such an expression of legislative intent.8 Moreover, “[t]he interest the law allows on judgments is not an element of ‘damages’ but a statutory award for delay in the payment of money due.”9 As a result, allowing postjudgment interest also to accrue on an award of prior interest would permit the compounding of interest and, therefore, provide an inappropriate windfall to the prevailing party. It is my opinion, therefore, that postjudgment interest generally does not accrue on prejudgment interest, regardless of whether such prejudgment interest is legal or contractual in nature.

3. Statutory Penalties Imposed for Nonpayment of Debt Do Not Accrue Interest

Finally, you ask whether “principal sum awarded” includes statutory penalties imposed for nonpayment of debt. No express statutory authority provides for the accrual of interest on statutory penalties imposed for nonpayment of a particular debt. Moreover, I have not found any relevant Virginia case law or other authority addressing this issue. Similar to costs, attorneys' fees and prejudgment interest, however, such penalties do not appear to be part of the “principal sum awarded.” A [Page 28] “statutory penalty” is defined generally as “[a] penalty imposed for a statutory

violation; esp[ecially], a penalty imposing automatic liability on a wrongdoer for violation of a statute's terms without reference to any actual damages suffered."10 Since such penalties are separate and distinct from the "principal sum" awarded, i.e., damages, it is my opinion that "statutory penalty" amounts are not included in the term "principal sum awarded" and, therefore, do not accrue interest pursuant to § 8.01-382.11

Notwithstanding the foregoing, interest may accrue on attorneys' fees, court costs and/or penalties imposed by statute if such are expressly included in the "judgment" pursuant to statute and/or other applicable authority. For example, interest may accrue on unpaid fines and costs in certain criminal matters.12

Conclusion

Accordingly, it is my opinion that costs of recovery, such as court costs and attorneys' fees; legal or contractual interest accrued prior to judgment; and statutory penalties imposed for nonpayment of debt generally are not included in the term "principal sum awarded" and therefore do not accrue interest pursuant to § 8.01-382.

FOOTNOTES

1 O'Loughlin v. O'Loughlin, 23 Va. App. 690, 693, 479 S.E.2d 98, 99 (1996) (quoting Black's Law Dictionary 312 (5th ed. 1979)). Section 17.1-624 denominates an attorney's fees as costs, insofar as it directs a clerk of court to assess costs against the nonprevailing party in certain types of cases and to "include therein . . . the fee of such party's attorney, if he has one." See 1991 Op. Va. Att'y Gen. 23, 24, 1991 Va. AG 23, 24 (citing § 14.1-196, predecessor to § 17.1-624).

2 Ashworth v. Tramwell, 102 Va. 852, 859, 47 S.E. 1011, 1013 (1904) (citation omitted).

3 Scott v. Doughty, 130 Va. 523, 527, 107 S.E. 729, 730 (1921). An exception to this general rule occurs when a party against whom costs have been assessed enjoins the collection of the judgment on grounds that do not affect its validity or furnish any foundation for retraining the plaintiff prosecuting to judgment his claim. See Shipman v. Fletcher's Adm'r, 95 Va. 585, 589-91, 29 S.E. 325, 327 (1898). While it may be proper to stay payment of the judgment in such instances, the nonprevailing party would be liable for interest on the assessed costs from the time the injunction was granted. See id. at 591, 29 S.E. at 327.

4 M'Rea v. Brown, 16 Va. (2 Munf.) 46, 47-48 (1811) (citation omitted), quoted in 1991 Op. Va. Att'y Gen., supra note 1, at 23.

5 1991 Op. Va. Att'y Gen., supra note 1, at 23.

6 Id. at 24. The 1991 opinion distinguishes judgment entered for the balance of the note (i.e., "principal sum awarded") from the court's ability to "tax" court costs and attorney fees in addition thereto. Id. at 23-24. The opinion

discerns that interest accrues on the former, and not the latter. Id. The opinion also assumes that the note itself was silent regarding whether interest accrues on an award of court costs or attorney fees. Id. at 23.

7 Id. at 24.

8 See Stuart, Buchanan & Co. v. Hurt, 88 Va. 343, 344-45, 13 S.E. 438, 438-39 (1891).

9 Nationwide Mut. Ins. Co. v. Finley, 215 Va. 700, 702, 214 S.E.2d 129, 131 (1975) (citing Am. Auto Ins. Co. v. Fulcher, 201 F.2d 751, 757 (4th Cir. 1953)).

10 Black's Law Dictionary 1154 (7th ed. 1999).

11 While statutory penalties are not subject to post or prejudgment interest, statutory damages can be. Statutory penalties are wholly punitive in nature and aimed at punishment. Id. Statutory damages, however, may be compensatory in nature and aimed at compensating defendants for damages incurred. See Feltner v. Columbia Pictures Telev., Inc., 523 U.S. 340, 352 (1998). The term "principal sum" includes damages. See Air Separation v. Underwriters at Lloyd's of London, 45 F.3d 288, 291 (9th Cir. 1995) (interpreting 28 U.S.C. § 1961). Thus, a principal sum can encompass monetary sums awarded based on a statutory damage provision. See Sid & Marty Krofft Telev. Prods., Inc. v. McDonald's Corp., 1983 U.S. Dist. LEXIS 20074, at *18 (C.D. Cal. Jan. 12, 1983) (awarding defendant postjudgment interest on $1,044,000 judgment based on statutory damage provision).

12 Section 19.2-340 assigns the character of a "civil judgment" to fines imposed or costs taxed, which is sufficient to trigger the application of § 8.01-382. See Op. Va. Att'y Gen.: 1987-1988 at 305, 307, 87-88 Va. AG 305, 307; 1986-1987 at 187, 188, 86-87 Va. AG 187, 188; 1985-1986 at 136, 137, 85-86 Va. AG 136, 137; 1978-1979 at 142, 143, 78-79 Va. AG 142, 143

Opinion of the Attorney General 2004 Va. AG 26, 26-28, 04-028, ___ (2004)

AG Op. CRIMINAL PROCEDURE: ARREST, 1990 Va. AG 132

CRIMINAL PROCEDURE: ARREST.

CIVIL REMEDIES AND PROCEDURE: COMMENCEMENT, PLEADINGS, AND MOTIONS.

COURTS NOT OF RECORD: JURISDICTION AND PROCEDURE (1) IN CIVIL MATTERS AND (2) IN CRIMINAL MATTERS. [Page 133]

Statutory provisions for courts to amend warrants and other process support conclusion that legislature did not intend such amendments to be made by nonjudicial officers. Corrections to warrants and other process may not be made by sheriff's department; may be made by issuing authority prior to issuance or, if errors noticed after document served, corrections may be made by court in which warrant will be tried, or to which process is returnable.

DATE: October 12, 1990

SDATE: 901012

REQUESTOR: The Honorable Gary W. Waters, Sheriff for the City of Portsmouth

CITE: 1990 132

You ask whether a sheriff's department that receives from a local court or magistrate a warrant or other process containing apparent errors in the information identifying the subject to be served may correct such errors before serving the warrant or process.

I. *Applicable Statutes*

Section 19.2-71 of the Code of Virginia provides that process for the arrest of a person charged with a criminal offense may be issued by a judge, clerk of court, or any magistrate. Section 16.1-129.2 provides that, upon the trial of a warrant, the general district court may, on its own motion or at the request of counsel for either side, "amend the form of the warrant in any respect in which it appears to be defective."

Section 16.1-79 provides that civil warrants issued and delivered to an officer for service may not be altered, and that no blank therein may be filled, except by order of the court. Section 8.01-277 provides for amendment by the issuing court to cure defects in any civil process, when such defects have been raised by motion to quash.

II. *Changes to Be Made Only by Appropriate Judicial Officer*

Sections 8.01-277 and 16.1-129.2 indicate, and prior Opinions of this Office conclude, that changes or corrections to warrants should be regarded as amendments. *See* Att'y Gen. Ann. Rep.: 1975-1976 at 87, 75-76 Va. AG 87A; 1954-1955 at 220.

It is an accepted principle of statutory construction that a statute stating the manner in which something may be done or the entity that may do it also evinces the legislative intent that it not be done otherwise. *See Grigg v. Commonwealth,* 224 Va. 356, 297 S.E.2d 799 (1982); *Christiansburg v. Montgomery County,* 216 Va. 654, 222 S.E.2d 513 (1976); 1986-1987 Att'y Gen. Ann. Rep. 130, 131, 86-87 Va. AG 130, 131. The provisions in §§ 16.1-79, 16.1-129.2 and 8.01-277 for courts to amend warrants and other process support the conclusion that the General Assembly did not intend such amendments to be made by nonjudicial officers. I am of the opinion, therefore, that corrections to warrants and other process may not be made by the sheriff's department.

If a sheriff or deputy sheriff becomes aware of an error or omission made in a warrant or other court process at the time of issuance, he or she should bring it to the immediate attention of the issuing authority, so that it may be promptly corrected. Errors noticed in such a document before it has been served may be corrected by returning the process to the issuing authority. When such errors are noticed only after the document has been served, they should be brought to the attention of the court in which the warrant will be tried, or to which the process is returnable, so that they may be corrected by the court.[1]

FOOTNOTES

[1] While you did not inquire about changes to a summons issued by a sheriff or deputy sheriff under § 19.2-74, I note that such a summons may be amended by the issuing officer before it is served. After service upon the defendant, however, such a summons may be amended only by the court to which it is returnable. 1990 Va. AG 132

AG Op. CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT, 2001 Va. AG 40 (01-073)

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (COUNTY AND CITY OFFICERS).

COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, ETC.

Duty of county sheriff to enforce local ordinance requiring vehicle owners to display current county decals.

DATE: September 27, 2001

SDATE: 010927

REQUESTOR: The Honorable Gail S. Berry, Treasurer for Greene County

CITE: 2001 Va. AG 40

You inquire regarding the duty of the Greene County sheriff to enforce an ordinance requiring owners of vehicles to display current county decals. [Page 41]

You advise that payment for vehicle decals in Greene County is due annually on February 15 and represents a major source of income for the county. County residents must display the current county vehicle decal after February 15 of each year. You advise that the sheriff will no longer enforce the decal ordinance. You express concern that, without this enforcement mechanism, your office may not collect sufficient revenues for the county.

The powers and duties of a treasurer are set out generally in Article 2, Chapters 31[1] and 39[2] of Title 58.1 of the *Code of Virginia.* The treasurer is responsible for collecting taxes and other revenues payable into the treasury of the locality served by the treasurer.[3] Prior opinions of the Attorney General conclude that it is the duty of a county treasurer to issue local automobile licenses and collect the fees authorized by local ordinance.[4]

A sheriff is an independent constitutional officer whose duties "shall be prescribed by general law or special act."[5] A sheriff may appoint one or more deputy sheriffs to discharge the duties of his office.[6] A 1980 opinion of the Attorney General notes that, in the absence of a statute providing otherwise, the authority of a sheriff is coextensive with his county.[7] The Supreme Court of Virginia has commented that, as a general rule, the duties of a sheriff and his deputies are regulated and defined by statute.[8] The Court has also stated:

> The sheriff is an officer of the court subject to its orders and directions. He is also a conservator of the peace and charged with the enforcement of all criminal laws within his jurisdiction. It is his duty, as well as the duty of the other police officers of the county and city, to investigate all violations of law and to serve criminal warrants.[9]

Also among the general duties of county sheriffs within the county he serves are: (a) enforcement of local ordinances and state laws;[10] (b) service of process for the courts within his county;[11] (c) maintenance of order in the courtroom and assistance of the court generally;[12] and (d) operation of the jail.[13]

I must, therefore, conclude that it is the duty of the office of the Greene County sheriff to enforce the county ordinance requiring vehicle owners to display current county decals.

FOOTNOTES

[1] VA. CODE ANN. §§ 58.1-3123 to 58.1-3172.1 (Michie Repl. Vol. 2000 & Supp. 2001).

[2] VA. CODE ANN. §§ 58.1-3910 to 58.1-3939 (Michie Repl. Vol. 2000 & Supp. 2001).

[3] Sections 58.1-3127, 58.1-3910 (Michie Repl. Vol. 2000).

[4] *See* Op. Va. Att'y Gen.: 1984-1985 at 357, 358, 84-85 Va. AG 357, 358; 1969-1970 at 298, 69-70 Va. AG 298; 1955-1956 at 221.

[5] VA. CONST. art. VII, § 4; *see also* VA. CODE ANN. § 15.2-1600(A) (Michie Repl. Vol. 1997) (requiring counties and cities to elect sheriffs).

[6] VA. CODE ANN. § 15.2-1603 (Michie Repl. Vol. 1997).

[7] 1980-1981 Op. Va. Att'y Gen. 322, 322, 80-81 Va. AG 322, 322; *see also* 16 M.J. *Sheriffs* § 2 (2000).

[8] *See Hilton v. Amburgey*, 198 Va. 727, 729, 96 S.E.2d 151, 152 (1957); *Narrows Grocery Co. v. Bailey*, 161 Va. 278, 284, 170 S.E. 730, 732 (1933).

[9] *Commonwealth v. Malbon*, 195 Va. 368, 371, 78 S.E.2d 683, 686 (1953).

[10] *See* VA. CODE ANN. § 15.2-1609 (Michie Repl. Vol. 1997); *Malbon*, 195 Va. at 371, 78 S.E.2d at 685-86.

[11] *See, e.g.*, VA. CODE ANN. §§ 16.1-79, 16.1-99 (Michie Repl. Vol. 1999) (authorizing sheriffs to serve warrants and writs of fieri facias in civil actions).

[12] *See, e.g.*, VA. CODE ANN. § 53.1-120 (Michie Repl. Vol. 1998) (authorizing sheriffs to designate deputies to provide courthouse and courtroom security); *Near v. Commonwealth*, 202 Va. 20, 30, 116 S.E.2d 85, 92 (1960).

[13] *See, e.g.*, Watts's Case, 99 Va. 872, 877, 39 S.E. 706, 707 (1901 2001 Va. AG 40

AG Op. COUNTIES, CITIES AND TOWNS: POLICE AND PUBLIC ORDER, 2001 Va. AG 77 (00-078)

COUNTIES, CITIES AND TOWNS: POLICE AND PUBLIC ORDER — LOCAL CONSTITUTIONAL OFFICERS, ETC.

CIVIL REMEDIES AND PROCEDURE: PROCESS.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (COUNTY AND CITY OFFICERS).

Interjurisdictional law-enforcement authority of sheriff's office to go beyond locality served by sheriff is limited to activities prescribed by statute. Officer properly engaged in activity so prescribed beyond territorial limits of his locality is authorized to act in same manner and is subject to same limitations as would apply to law-enforcement officer of extraterritorial locality responding to such activities.

DATE: May 17, 2001

SDATE: 010517

REQUESTOR: The Honorable Robert E. Maxey Jr., Sheriff for Campbell County

CITE: 2001 Va. AG 77

You inquire whether the law-enforcement authority of your office to go beyond Campbell County is limited to matters directly associated with the circumstances set forth in § 15.2-1724[1] of the *Code of Virginia.* You also ask whether the authority of your office under the circumstances set forth in § 15.2-1724 is limited to assisting law-enforcement officers of the other locality or whether the sheriff's office has authority to act independently beyond the county.

A sheriff is an independent constitutional officer whose duties "shall be prescribed by general law or special act."[2] A 1980 opinion of the Attorney General notes that, in the absence of a statute providing otherwise, the authority of a sheriff is coextensive with his county.[3] The Supreme Court of Virginia has commented that, as a general rule, the duties of a sheriff and his deputies are regulated and defined by statute.[4] The Court has also stated:

> The sheriff is an officer of the court subject to its orders and directions. He is also a conservator of the peace and charged [Page 78] with the enforcement of all criminal laws within his jurisdiction. It is his duty, as well as the duty of the other police officers of the county and city, to investigate all violations of law and to serve criminal warrants.[5]

Prior opinions of the Attorney General conclude that, in the absence of a constitutional or statutory provision to the contrary, a sheriff has exclusive control over the day-to-day operations of his office and the assignment of his personnel.[6] Furthermore, a 1985 opinion of the Attorney General notes that, although a sheriff's powers and duties

are limited to those prescribed by statute, he is free to discharge those powers and duties in a manner he deems appropriate.[7] The opinion further notes that a sheriff has discretionary authority with respect to personnel policies, cooperative agreements with federal agencies, and policies governing the use of vehicles by the sheriff's personnel.[8]

Generally, in the absence of a statute providing otherwise, the authority of a sheriff is coextensive with his county.[9] In a 1978 opinion, the Attorney General concludes that, "as a general rule a county law-enforcement officer has no authority to make an arrest outside his jurisdiction, except in his status as a private citizen to arrest for a felony, affray or breach of the peace."[10] A 1974 opinion also concludes that a county deputy sheriff has no statutory authority to arrest for a misdemeanor committed in his presence within the boundaries of an independent city located outside the county of his sheriff.[11] The General Assembly has enacted no statute altering the conclusions of these opinions. With the exception of certain specific situations, therefore, the status of a county sheriff outside his locality is that of a private citizen.[12] Another 1978 opinion concludes that, as a general proposition, a private citizen may only effect an arrest for felonies, affrays or breaches of the peace committed in his presence.[13]

Section 15.2-1724 authorizes law-enforcement officers to go beyond their territorial limits "[w]henever the necessity arises . . . for the enforcement of [the drug] laws" or "during any emergency resulting from the existence of a state of war, internal disorder, or fire, flood, epidemic or other public disaster."[14] The language in § 15.2-1724 limits its application to exceptional situations of great and immediate necessity. The 1978 opinion considers whether the authority granted to a sheriff in § 8.01-295 to execute civil process "throughout the political subdivision in which he serves and in any contiguous county or city" also permits the sheriff to arrest, without a warrant, a person who unlawfully interferes with such service.[15] The opinion concludes that § 8.01-295 implies that a sheriff remains clothed with those powers of his office incidental to perfecting service of process outside his usual jurisdiction, including the authority to arrest, without a warrant, a person who unlawfully interferes with or obstructs the sheriff's performance of that duty.[16] The General Assembly has taken no action to alter the conclusion of the 1978 opinion. The Supreme Court of Virginia has stated that "[t]he legislature is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view."[17] [Page 79]

Sections 8.01-295 and 15.2-1724 both contemplate a sheriff performing limited official duties beyond the boundaries of his locality. Moreover, § 15.2-1724 strongly implies that a sheriff remains clothed with those powers of his office incidental to the enforcement of drug laws outside his jurisdiction or an emergency arising outside his jurisdiction due to an act of war, internal disorder, fire, flood, epidemic or other such public disaster. "[T]he primary objective of statutory construction is to ascertain and give effect to legislative intent."[18] Analysis of legislative intent includes appraisal of the subject matter and purpose of the statute, in addition to its express terms.[19] The purpose underlying a statute's enactment is particularly significant in construing it.[20] Moreover, statutes should not be interpreted in ways that produce absurd or irrational consequences.[21]

I must, therefore, conclude that § 15.2-1724 limits the interjurisdictional law-enforcement authority of the sheriff's office beyond Campbell County to matters directly and incidentally related to the circumstances set forth in that statute. It is also my opinion that an officer properly engaged in one of the activities enumerated in § 15.2-1724

beyond the territorial limits of his locality is authorized to act in the same manner and is subject to the same limitations as would apply to a law-enforcement officer of the extraterritorial locality.

FOOTNOTES

[1] "Whenever the necessity arises (i) for the enforcement of laws designed to control or prohibit the use or sale of controlled drugs as defined in § 54.1-3401 or laws contained in Article 3 (§ 18.2-344 et seq.) of Chapter 8 of Title 18.2, (ii) in response to any law-enforcement emergency involving any immediate threat to life or public safety, (iii) during the execution of the provisions of § 37.1-67.01 or § 37.1-67.1 relating to orders for temporary detention or emergency custody for mental health evaluation or (iv) during any emergency resulting from the existence of a state of war, internal disorder, or fire, flood, epidemic or other public disaster, the police officers and other officers, agents and employees of any locality . . . may, together with all necessary equipment, lawfully go or be sent beyond the territorial limits of such locality . . . to any point within or without the Commonwealth to assist in meeting such emergency or need, or while enroute to a part of the jurisdiction which is only accessible by roads outside the jurisdiction. . . .

> "In such event the acts performed for such purpose by such police officers or other officers, agents or employees and the expenditures made for such purpose by such locality . . . shall be deemed conclusively to be for a public and governmental purpose, and all of the immunities from liability enjoyed by a locality . . . when acting through its police officers or other officers, agents or employees for a public or governmental purpose within its territorial limits shall be enjoyed by it to the same extent when such locality . . . within the Commonwealth is so acting, under this section or under other lawful authority, beyond its territorial limits.
>
> "The police officers and other officers, agents and employees of any locality . . . when acting hereunder or under other lawful authority beyond the territorial limits of such locality . . . shall have all of the immunities from liability and exemptions from laws, ordinances and regulations and shall have all of the pension, relief, disability, workers' compensation and other benefits enjoyed by them while performing their respective duties within the territorial limits of such locality . . . ."

VA. CODE ANN. § 15.2-1724 (Michie Repl. Vol. 1997).

[2] VA. CONST. art. VII, § 4; VA. CODE ANN. § 15.2-1600(A) (Michie Repl. Vol. 1997) (requiring counties and cities to elect sheriffs).

[3] 1980-1981 Op. Va. Att'y Gen. 322, 322, 80-81 Va. AG 322, 322.

[4] *See Hilton v. Amburgey*, 198 Va. 727, 729, 96 S.E.2d 151, 152 (1957) (citing *Narrows Grocery Co. v. Bailey*, 161 Va. 278, 284, 170 S.E. 730, 732 (1933)).

[5] *Commonwealth v. Malbon*, 195 Va. 368, 371, 78 S.E.2d 683, 686 (1953); *see also* Op. Va. Att'y Gen.: 1985-1986 at 255, 85-86 Va. AG 255; *id.* at 54, 55, 85-86 Va. AG 54, 55; 1976-1977 at 257, 76-77 Va. AG 257. A county sheriff generally has the following duties within his county: (a) enforcement of county ordinances and state laws (*see Malbon*, 195 Va. at 371, 78 S.E.2d at 685-86); (b) service of process for the courts within his county (*see, e.g.*, VA. CODE ANN. §§ 16.1-79, 16.1-99 (Michie Repl. Vol. 1999)); (c) maintenance of order in the courtroom and assistance of the court generally (*see, e.g.*, VA. CODE ANN. § 53.1-120 (Michie Repl. Vol. 1998); *Near v. Commonwealth*, 202 Va. 20, 30, 116 S.E.2d 85, 92 (1960)); and (d) operation of the jail (*see, e.g., Watts's Case*, 99 Va. 872, 877, 39 S.E. 706, 707 (1901)).

[6] Op. Va. Att'y Gen.: 1997 at 60, 61, 1997 Va. AG 60, 61; 1989 at 71, 72, 1989 Va. AG 71, 72; 1985-1986, *supra*, at 55; 1984-1985 at 285, 285, 84-85 Va. AG 285, 285; 1976-1977 at 250, 251, 76-77 Va. AG 250, 251.

[7] 1984-1985 Op. Va. Att'y Gen. 73, 73, 84-85 Va. AG 73, 73.

[8] *See id. See, e.g.*, Op. Va. Att'y Gen.: 1983-1984 at 323, 83-84 Va. AG 323 (authority to appoint and remove deputies); 1982-1983 at 462, 463-64, 82-83 Va. AG 462, 463-64 (authority over personnel policies); 1978-1979 at 238, 78-79 Va. AG 238 (authority to enter into agreement with federal agency for provision of law-enforcement services on land of concurrent jurisdiction); 1976-1977 at 250, 76-77 Va. AG 250 (authority to assign duties to deputies; official use of department vehicle and claim for mileage expense); 1973-1974 at 39, 40, 73-74 Va. AG 39, 40 (authority over vehicles assigned to sheriff's office); *id.* at 322 (authority to request reimbursement for personal car used in performance of official business).

[9] 1980-1981 Op. Va. Att'y Gen. *supra* note 3, at 322.

[10] 1978-1979 Op. Va. Att'y Gen. 15, 15, 78-79 Va. AG 15, 15; *see also* 1976-1977 Op. Va. Att'y Gen. 202, 203, 76-77 Va. AG 202, 203.

[11] 1973-1974 Op. Va. Att'y Gen. 273, 274, 73-74 Va. AG 273A, 274.

[12] *See, e.g.*, Op. Va. Att'y Gen.: 1996 at 113, 1996 Va. AG 113 (concluding that, when court issues capias on indictment, county deputy sheriff may enter city to execute capias, without requiring assistance of law-enforcement officer from city); 1978-1979, *supra* note 10, at 15 (stating that § 8.01-295 implies that sheriff remains clothed with powers of his office incidental to perfecting service of process outside his usual jurisdiction).

[13] *See* 1978-1979 Op. Va. Att'y Gen. 13, 14, 78-79 Va. AG 13, 14.

[14] Section 15.2-1724(i), (iv).

[15] 1978-1979 Op. Va. Att'y Gen. *supra* note 10, at 15.

[16] *Id.*

[17] *Deal v. Commonwealth*, 224 Va. 618, 622, 299 S.E.2d 346, 348 (1983).

[18] *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

[19] *See Vollin v. Arlington Co. Electoral Bd.*, 216 Va. 674, 222 S.E.2d 793 (1976).

[20] *See VEPCO v. Prince William Co.*, 226 Va. 382, 388, 309 S.E.2d 308, 311 (1983).

[21] *McFadden v. McNorton*, 193 Va. 455, 461, 69 S.E.2d 445, 449 (1952); *see* 1993 Op. Va. Att'y Gen. 192, 196, 1993 Va. AG 192, 196, and opinions cited therein. 2001 Va. AG 77

AG Op. CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS, 2003 Va. AG 15 (02-142)

CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS OF RECOVERY — GARNISHMENT — PROCESS. [Page 16]

COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (COUNTY AND CITY OFFICERS).

No duty imposed on circuit court clerk to ensure that garnishment summons is served on garnishee before it is served on judgment debtor.

DATE: February 13, 2003

SDATE: 030213

REQUESTOR: The Honorable Edward Semonian, Clerk, Circuit Court of the City of Alexandria

CITE: 2003 Va. AG 15

Issue Presented

You ask whether a clerk of the circuit court has a responsibility to ensure that a garnishment summons is served on the garnishee before it is served on the judgment debtor as required by § 8.01-511.

Response

It is my opinion that § 8.01-511 does not impose a duty on a clerk of the circuit court to ensure that a garnishee is served with a garnishment summons before it is served on the judgment debtor.

Background

In cases involving a financial institution garnishment, you advise that violation of the service requirement of § 8.01-511 may result in a loss of recovery by the judgment creditor when the garnishee and judgment debtor are located in separate jurisdictions. With a bank account garnishment, if the judgment debtor is served first, he has an opportunity to withdraw his funds prior to receipt of the service by the financial institution garnishee. When the garnishment is first served on the garnishee, as required by statute, the garnishee freezes the judgment debtor's accounts before the debtor is served. Thus, the judgment debtor is prevented from withdrawing his funds.[1]

Applicable Law and Discussion

Article VII, § 4 of the Constitution of Virginia provides that the duties of a circuit court clerk "shall be prescribed by general law or special act." Section 17.1-214 provides:

> The clerk of the circuit court from whose office may be issued any process,. . . or any order or decree to be served on any person, shall, unless the party interested, or his attorney, direct otherwise, deliver the same to the sheriff of the county or city for which the court is held, if it is to be executed therein, and if it is to be executed in any other county or city, shall enclose the same to the sheriff thereof, properly addressed, put it in the post office and pay the postage thereon.

Section 8.01-511 provides that "[t]he summons and the notice and claim for exemption form required pursuant to § 8.01-512.4[2] shall be served on the garnishee, and shall be served on the judgment debtor promptly after service on the garnishee."

Section 17.1-214 requires a circuit court clerk to deliver process to the sheriff of his locality for service. When a person is located outside the clerk's locality, it is the [Page 17] clerk's responsibility to mail the process to the appropriate sheriff for service.[3] Section 8.01-511 directs the order in which the service of process is to be accomplished.

When only one jurisdiction is involved, the order of service generally is not an issue because one person is charged with serving the process. Problems arise when the judgment debtor and garnishee are located in different jurisdictions. Compliance is difficult because more than one sheriff, or other authorized person, is involved in the service of process. Therefore, in some instances, the judgment debtor may be served prior to the garnishee. This usually occurs when the sheriff serves the judgment debtor within the jurisdiction where the process originates and the garnishee to be served is in another jurisdiction.

Unfortunately, when more than one sheriff's office is involved, § 8.01-511 does not designate the party responsible for ensuring that the garnishee is served before the judgment debtor. Section 8.01-511, however, cannot be read to impose a duty on the circuit court clerk to ensure that process is served first on the garnishee. A clerk's responsibility in this context is outlined in § 17.1-214. Service of process clearly is a function of the sheriff or such other person authorized to serve process.[4] Section 8.01-511 does not order the clerk to perform any additional duty or require the clerk to alter the manner in which process is issued in order to assure compliance. Once the clerk has prepared the process and presented it to the appropriate sheriff, or other authorized person, it is that person's responsibility to execute the process.[5] If the persons serving process are located in separate jurisdictions, there is no guarantee the garnishee will be served before the judgment debtor.

Although § 8.01-511 does not allocate the responsibility between the persons serving process to ensure that the garnishee is served first, the judgment creditor has a remedy. If a judgment debtor and garnishee are located in separate jurisdictions and the creditor is concerned that the judgment debtor may be served before the garnishee, it is

incumbent upon such creditor to protect himself and adopt steps to ensure the proper order of service. In this situation, a judgment creditor should arrange for a private process server to serve the garnishee first.

Conclusion

Accordingly, it is my opinion that § 8.01-511 does not impose a duty on the clerk of a circuit court to ensure that a garnishee is served with a garnishment summons before it is served on the judgment debtor.

FOOTNOTES

[1] While a violation of § 8.01-511 could also occur with a wage garnishment, the end result is not the same. Violation of the statute does not give the judgment debtor any advantage over the judgment creditor. If a judgment debtor elects to quit his job in order to avoid the garnishment, he may do so at any time.

[2] Section 8.01-512.4 prohibits the issuance or service of a summons in garnishment "unless a notice of exemptions and claim for exemption form are attached."

[3] *See* Va. Code Ann. § 17.1-214 (Michie Repl. Vol. 1999); *see also* Va. Code Ann. § 8.01-295 (Michie Repl. Vol. 2000) (providing that sheriff may execute process throughout political subdivision in which he serves and in contiguous county or city).

[4] *See* § 8.01-293(A) (LexisNexis Supp. 2002) (designating persons authorized to serve process as (1) sheriff within territorial bounds as described in § 8.01-295; or (2) person who is eighteen or more years and is not party or otherwise interested in subject matter in controversy).

[5] Section 8.01-294 (LexisNexis Supp. 2002) ("Every sheriff who attends a court shall, every day when the clerk's office is open for business, go to such office and receive all process, and other papers to be served by him, and give receipts therefor, unless he has received notice from a regular employee of the clerk's office that there are no such papers requiring service and shall return all papers within seventy-two hours of service, except when such returns would be due on a Saturday, Sunday, or legal holiday.").

2003 Va. AG 15

AG Op. CIVIL REMEDIES AND PROCEDURE: EXECUTIONS, 1999 Va. AG 25 (99-052)

CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS OF RECOVERY — PROCESS.

COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS — FEES.

Sheriff, and not private process server, serves 72-hour notice to vacate and may charge each person served with notice $12 fee; may charge additional $12 fee for execution of writ of possession.

DATE: August 27, 1999

SDATE: 990827

REQUESTOR: The Honorable Eric Cantor, Member, House of Delegates

CITE: 1999 25

You ask several questions regarding the fees to be charged for service of notice to vacate and execution of writ of possession in unlawful detainer cases.

You first inquire whether, pursuant to § 8.01-470 of the Code of Virginia, a twelve dollar fee for serving a notice to vacate within seventy-two hours and an additional twelve dollar fee for executing the writ of possession may be charged in unlawful detainer cases.

Section 8.01-470 provides, in part:

> In cases of unlawful entry and detainer and of ejectment, the officer to whom a writ of possession has been delivered to be executed shall, at least seventy-two hours before execution, serve notice of intent to execute, including the date and time of execution, on the defendant ..., with a copy of the writ attached.

A 1997 opinion of the Attorney General concludes that pursuant to § 8.01-470, "[t]he notice of an intent to execute [a writ of possession] must be served at least seventy-two hours before execution and the notice itself must include the date and time of execution."1 Accordingly, the opinion states that "[p]ursuant to [§ 17.1-272], a sheriff may charge twelve dollars for serving a notice of intent to execute a writ of possession."2 Section 17.1-272(A)(6) authorizes a fee of twelve dollars for levying an execution. Thus, this fee may likewise be charged. It is my opinion, therefore, that a sheriff may charge a twelve-dollar fee for each person served with a notice to vacate within seventy-two hours and may charge an additional twelve-dollar fee for executing the writ of possession. [Page 26]

You next inquire whether the property owner first may pay a fee for service of the seventy-two hour notice to vacate and pay a subsequent twelve-dollar fee should it be necessary to execute the writ of possession.

"The fees set out in [§ 17.1-272] shall be allowable for services provided by such officers."3 Thus, the fees chargeable for services of a sheriff in carrying out the instances of process and service set forth in § 17.1-272 are for

services actually rendered. Therefore, a twelve-dollar fee may be imposed for service by the sheriff of a notice to vacate.4 Another twelve-dollar fee subsequently may be charged for the sheriff's execution of a writ of possession; however, if the sheriff does not execute the writ of possession, the latter fee may not be charged.5

Lastly,6 you ask whether a private process server may serve the seventy-two hour notice to vacate.

"[U]nder § 8.01-293,[7] service by a qualified private process server and service by a sheriff are equally legitimate forms of service."8 Previous opinions of the Attorney General recognize that "[t]o avoid the anticipated increase in the cost of bringing suit in general district court, some volume filers may use private process servers rather than the local sheriff to effect service of process."9 Section 8.01-293(B), however, expressly provides that "only a sheriff may execute an order or writ of possession . . . arising out of an action in unlawful entry and detainer or ejectment." Section 8.01-470 directs "the officer to whom a writ of possession has been delivered to be executed" to serve the notice of intent to execute such writ "at least seventy-two hours before execution." Reading these two statues together,10 it is my opinion that the service of the notice to vacate is restricted to the sheriff. Accordingly, it is my opinion that a private process server may not effect service of the seventy-two hour notice to vacate.

FOOTNOTES

1 1997 Op. Va. Att'y Gen. 22, 23, 1997 Va. AG 22, 23.

2 Id. (citing § 14.1-105, predecessor statute to § 17.1-272).

3 Section 17.1-272(C).

4 For purposes of clarification, it is my opinion that service of the notice to vacate (to which § 8.01-470 requires that a copy of the writ of possession be attached) is equivalent to service of the writ of possession; thus, only one $12 charge per person for such service is allowable. Compare 1987-1988 Op. Va. Att'y Gen. 128, 129, 87-88 Va. AG 128, 129 (concluding that motion for judgment and notice of motion for judgment are to be considered as single process and one fee charged for their service).

5 For example, where a tenant vacates the premises as a result of receiving the notice to vacate, making it unnecessary for the sheriff to execute the writ of possession (assuming the sheriff is so apprised).

6 Because it is my opinion that only one $12 fee may be charged for serving the notice to vacate (with the writ of possession attached to the notice), it is unnecessary to address your inquiry concerning a $24 fee for such service. See supra note 4.

7 Section 8.01-293 authorizes certain persons to serve process and includes sheriffs and private process servers. Note that only a sheriff, as opposed to a private process server, may execute a writ of possession. See § 8.01-293(B).

8 1992 Op. Va. Att'y Gen. 26, 28, 1992 Va. AG 26, 28.

9 1995 Op. Va. Att'y Gen. 54, 55, 1995 Va. AG 54, 55 (commenting on increase to $12 for sheriff's fee for service of all papers, except those returnable out of state, effective July 1, 1995).

10 See 1996 Op. Va. Att'y Gen. 134, 135, 1996 Va. AG 134, 135 (statutes relating to same subject should be considered in pari materia).

1999 Va. AG 25

AG Op. TAXATION: REVIEW OF LOCAL TAXES, 1999 Va. AG 211 (99-063)

TAXATION: REVIEW OF LOCAL TAXES — GENERAL PROVISIONS OF TITLE 58.1 — IN GENERAL (SECRECY OF INFORMATION).

ADMINISTRATION OF GOVERNMENT GENERALLY: VIRGINIA FREEDOM OF INFORMATION ACT.

Distress warrant related to taxes is public record subject to disclosure. Information appearing on warrant pertaining to transactions, property, income or business of taxpayer is confidential tax information not subject to disclosure, unless information is entered on public assessment book or published in line of duty. Line of duty exception allows disclosure of amount of tax delinquency only to other tax officers and employees. Whether distress warrant related to taxes would be deemed confidential depends on particular facts. [Page 212]

DATE: November 22, 1999

SDATE: 991122

REQUESTOR: The Honorable Ross A. Mugler, Commissioner of the Revenue for the City of Hampton

CITE: 1999 211

You ask whether the information on a distress warrant issued by a local tax collector pursuant to § 58.1-3941 of the *Code of Virginia*[1] must be disclosed in response to a request under The Virginia Freedom of Information Act[2] ("Act") or whether the information is protected from disclosure under § 58.1-3.[3] You state that the distress warrant contains the delinquent taxpayer's name and address, the type of tax, and the amount of the delinquency.

Section 2.1-342(A) of the Act provides that "[e]xcept as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth." A distress warrant is clearly a public record encompassed within the Act[4] and must be disclosed unless an exception applies. Section 2.1-342.01(A)(2) excepts from the Act "confidential tax records held pursuant to § 58.1-3." Section 58.1-3(A) provides:

> Except in accordance with a proper judicial order or as otherwise provided by law, the . . . commissioner of the revenue, treasurer, or any other state or local tax or revenue officer or employee . . . shall not divulge any information acquired by him in the performance of his duties with respect to the transactions, property, including personal property, income or business of any person, firm or corporation.

The prohibition does not apply to "[m]atters required by law to be entered on any public assessment roll or book"[5] or "[a]cts performed or words spoken or published in the line of duty under the law."[6] A violation of the confidentiality provisions of § 58.1-3 constitutes a Class 2 misdemeanor.[7]

In accordance with the language of § 58.1-3(A), the information on a distress warrant would be deemed confidential to the extent the information would reveal, either directly or indirectly, "the transactions, property, . . .

income or business of any person, firm or corporation" and to the extent the information is neither "required by law"[8] to be entered on a public assessment book nor "published in the line of duty under the law."[9]

Prior opinions of the Attorney General conclude that, while the fact of delinquency in the payment of taxes is not confidential tax information under § 58.1-3,[10] the amount of the delinquency is confidential when the tax is based on gross receipts because its disclosure would reveal the amount of business done.[11] Thus, the amount of the delinquency may not be disclosed in response to a request under the Act unless one of the exceptions in § 58.1-3 applies. The exception for matters required to be entered on a public assessment roll or book does not apply to gross receipts taxes. Moreover, while a tax collector is authorized to issue a distress warrant, I do not view the amount of a tax delinquency stated on the distress warrant as constituting "words . . . published in the line of duty under the law."[12] The line of duty exception allows tax officials to disclose information to other such officers and employees.[13] It does not authorize the disclosure of the information [Page 213] to third parties.[14] Whether a distress warrant related to taxes other than gross receipts taxes would be deemed confidential will depend on the particular facts, including the information that is on the warrant, the extent to which the information constitutes confidential taxpayer information, and whether the information fits within any of the exceptions set out in § 58.1-3.[15]

FOOTNOTES

[1] The first sentence of § 58.1-3941 provides that "[a]ny good or chattels, money and bank notes in the county, city or town belonging to the person or estate assessed with taxes, levies or other charges collected by the treasurer may be distrained therefor by the treasurer, sheriff, constable or collector." As stated in prior opinions, §§ 58.1-3941 and 58.1-3919 authorize a local treasurer to issue a distress warrant or letter without the necessity of a judicial proceeding. *See* Op. Va. Att'y Gen.: 1997 at 203, 204, 1997 Va. AG 203, 204; 1990 at 249, 250, 1990 Va. AG 249, 250; 1953-1954 at 204 (citing predecessor statutes to §§ 58.1-3919, 58.1-3941).

[2] Sections 2.1-340 to 2.1-346.1.

[3] Section 2.1-118 permits the Attorney General to issue opinions to a commissioner of the revenue only when the question is directly related to the duties of the commissioner. Although distress warrants are issued by the treasurer or other collector, I assume for purposes of this opinion that the distress warrants are in your possession and are connected with the performance of your duties as commissioner of the revenue.

[4] Section 2.1-341 defines "public records" to include "all writings . . . prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business."

[5] Section 58.1-3(A)(1).

[6] Section 58.1-3(A)(2). Section 58.1-3 includes numerous other instances in which taxpayer information may be provided. *See* § 58.1-3(A)(3)-(5), (B)-(E).

[7] Section 58.1-3(A).

[8] Section 58.1-3(A)(1).

[9] Section 58.1-3(A)(2); *see* 1993 Op. Va. Att'y Gen. 217, 219, 1993 Va. AG 217, 219 (information prohibited from disclosure under § 58.1-3 is not to be disclosed under Act).

[10] Section 58.1-3(B) states: "Nothing contained in this section shall be construed to prohibit . . . the publication of delinquent lists showing the names of taxpayers who are currently delinquent, together with any relevant information which in the opinion of the Department [of Taxation] may assist in the collection of such delinquent taxes."

[11] *See* Op. Va. Att'y Gen.: 1993, *supra,* at 220 (local tax official may reveal identity of taxpayer delinquent in payment of business license tax but may not reveal amount of delinquency); 1992 at 157, 160, 1992 Va. AG 157, 160 (local tax officials may not disclose amount of delinquent meals tax because such disclosure would reveal volume of business done for time period); *see also* 1989 Op. Va. Att'y Gen. 304, 305, 1989 Va. AG 304, 305 (commissioner of revenue may not disclose amount of tax paid by coal companies subject to gross receipts tax under § 58.1-3712 because it would reveal amount of coal produced).

[12] Section 58.1-3(A)(2).

[13] *See* 1984-1985 Op. Va. Att'y Gen. 397, 398, 84-85 Va. AG 397, 398, and opinions cited therein.

[14] Because the purpose of § 58.1-3 is to protect the taxpayer from the disclosure of confidential tax information to third parties, the fact that the distress warrant has been served on the delinquent taxpayer would not operate to authorize disclosure to third parties. *See* 1984-1985 Op. Va. Att'y Gen., *supra,* at 398 (commissioner of revenue may describe taxpayer's property on tax bill sent to taxpayer but should not describe on personal property tax book available to public except to extent necessary to satisfy statute); *see also* op. to Hon. Marsha Compton Fielder, Roanoke Comm'r Rev. (Jan. 20, 1999) [1999 Va. AG 185] (information regarding make, model and assessed value of vehicle may not be disclosed unless line of duty exception applies).

[15] A prior opinion concludes that if a local tax official receives a request pursuant to the Act for an existing record containing the names of delinquent taxpayers and the amount of the delinquency, the official should delete the amount of the delinquency before disclosing the document. *See* 1992 Op. Va. Att'y Gen., *supra* note 11, at 160 n. 1; *see also* § 2.1-342(A)(3) (public body may "delete or excise" only portion of public record to which exemption applies and shall disclose remainder of record).

1999 Va. AG 211

AG Op. MOTOR VEHICLES: TITLING AND REGISTRATION OF MOTOR VEHICLES, 2001 Va. AG 158 (00-073)

MOTOR VEHICLES: TITLING AND REGISTRATION OF MOTOR VEHICLES.

Sheriff is not required to notify Department of Motor Vehicles of levy on motor vehicle pursuant to writ of fieri facias that is not accompanied by his actual seizure of vehicle. Lien resulting from fieri facias will not appear on certificate of title to such vehicle; transfer of title to bona fide purchaser is free and clear of any lien. Vehicle levied on but not seized by sheriff and sold by debtor may not be sold at sheriff's auction.

DATE: May 15, 2001

SDATE: 010515

REQUESTOR: The Honorable Paul J. Lanteigne, Sheriff for the City of Virginia Beach

CITE: 2001 Va. AG 158

You request interpretation of § 46.2-644 of the *Code of Virginia*, a portion of Article 2, Chapter 6 of Title 46.2,[1] relating to notification to the Department of Motor Vehicles (the "Department") of the levy and seizure of a vehicle, pursuant to a writ of fieri facias.[2]

You advise that you understand § 46.2-644 to require the sheriff to notify the Department both when the sheriff physically seizes a vehicle and when the sheriff releases a seized vehicle. You advise further that your office notifies the Department when you levy on a vehicle. In this situation, possession of the vehicle remains with the debtor. You relate that the Department has advised that notification is necessary only when the sheriff has physical possession of the vehicle. Therefore, you first ask whether the sheriff is required to notify the Department when the vehicle has not been physically seized.

Section 46.2-644 provides:

> A levy made by virtue of an execution, fieri facias, or other court order, on a motor vehicle, trailer, or semitrailer for which a certificate of title has been issued by the Department, shall constitute a lien, subsequent to security interests previously recorded by the Department and subsequent to security interests in inventory held for sale and perfected as otherwise permitted by law, when the officer making the levy reports to the Department on forms provided by the Department, that the levy has been made and that the motor vehicle, trailer, or semitrailer levied on has been seized by him. If the lien is thereafter satisfied or should the motor vehicle, trailer, or semitrailer thus levied on and seized thereafter be released by the officer, he shall immediately report that fact to the Department. Any owner who, after the levy and seizure by an officer and before the officer reports the levy and seizure to the Department, shall fraudulently assign or transfer his title

> to or interest in a motor vehicle, trailer, or semitrailer or cause [Page 159] its certificate of title to be assigned or transferred or cause a security interest to be shown on its certificate of title shall be guilty of a Class 1 misdemeanor.

There are several rules of statutory construction applicable to your inquiry. The use of the word "shall" in a statute ordinarily implies that its provisions are mandatory.[3] Furthermore, neither § 46.2-644 nor any other provision in Chapter 6 of Title 46.2 contains any definition of the terms "levy" or "seize" as those terms are used in § 46.2-644. In the absence of any such definition, the terms must be given their common, ordinary meaning.[4] "Levy," as used in § 46.2-644, means "[t]he imposition of a fine or tax; the fine or tax so imposed."[5] "Seize" means "[t]o forcibly take possession (of . . . property)[;] . . . [t]o be in possession (of property)."[6]

For a levy to constitute a lien on the title of a motor vehicle by virtue of a sheriff's execution of a writ of fieri facias on such vehicle, § 46.2-644 specifically requires that the sheriff make levy on *and* take possession of the motor vehicle.[7] The sheriff must also report the levy and seizure of the vehicle to the Department on forms provided by the Department for that purpose.[8] I find no language in § 46.2-644, however, that requires the sheriff to notify the Department when he has not physically taken possession of the vehicle. Therefore, I must conclude that § 46.2-644 does not require the sheriff to notify the Department of a levy made on a vehicle pursuant to a writ of fieri facias that is not accompanied by physical seizure of the vehicle.

You next ask whether a vehicle that has been levied on but not seized by the sheriff and therefore not reported to the Department, and which is sold by the debtor after levy but prior to sheriff's auction, is a vehicle that the sheriff may sell at auction.

In the case of *Toyota Motor Credit Corp. v. C.L. Hyman Auto Wholesale, Inc.*, the Supreme Court of Virginia notes that the General Assembly enacted the motor vehicle titling statutes in Article 2, Chapter 6 of Title 42.1, which includes § 46.2-644, "to protect the public by providing for the issuance of certificates of title as evidence of ownership of motor vehicles and to provide potential buyers and creditors with a single place where information about the status of motor vehicles could be found."[9] The Court also observes:

> These statutes . . . eliminated any requirement that a lien against a motor vehicle be recorded in the county or city where the purchaser or debtor resides or in any other manner available for recording a security interest in personal property, but imposed the new condition that a security interest in a motor vehicle would not be perfected "as to third parties" unless shown on the certificate of title.[10]

The Court explains that

> § 46.2-638 specifically provides that a certificate of title showing a security interest "shall be adequate notice to the [Page 160] Commonwealth, creditors, and purchasers that a security interest in the motor vehicle exists." We have recognized that the converse is also true.

> [W]hen a certificate of title is issued which fails to show a lien or encumbrance, it is notice to the world that the property is free from any lien or encumbrance, and if transferred to a *bona fide* purchaser the latter would obtain a good title.
>
> To hold otherwise would eliminate the ability of potential buyers and lenders to rely on the information contained in certificates of title.[11]

Reading § 46.2-644 as a whole,[12] when a sheriff has levied on *and* seized a vehicle,[13] any sale of such vehicle by the debtor is "fraudulent," and such debtor "shall be guilty of a Class 1 misdemeanor." Section 46.2-644 does not, however, provide for any such criminal penalty when the sheriff levies by virtue of a fieri facias on a vehicle but does not physically take possession of the vehicle. "'While in the construction of statutes the constant endeavor of the courts is to ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity.'"[14] When the sheriff levies on but does not seize a vehicle, he is not required to report such levy to the Department. Consequently, the certificate of title on the vehicle maintained by the Department will not show a lien resulting from the fieri facias. A bona fide purchaser of such vehicle, therefore, has no notice of a lien and obtains title to the vehicle free from any such lien.

I must, therefore, conclude that a vehicle levied on but not seized and subsequently sold by the debtor may not be sold at sheriff's auction.

FOOTNOTES

[1] Article 2, Chapter 6 of Title 46.2 relates to the titling of vehicles.

[2] "Fieri facias" means "[a] writ of execution that directs a sheriff to seize and sell a defendant's property to satisfy a money judgment." BLACK'S LAW DICTIONARY 641 (7th ed. 1999). Generally, with regard to tangible personal property, the Supreme Court of Virginia has held that an execution by levy under a writ of fieri facias is not complete until the property is sold:

> The levy does not divest the defendant of the property and transfer of title to the plaintiff, or even to the sheriff. The property still remains in the defendant, notwithstanding the levy, and only a special interest is vested in the sheriff, as a mere bailee, to enable him to keep the property safely, and defend it against wrongdoers. While subject to the levy it is in the custody of the law, and the sheriff has a naked power to sell it and pass the title from the owner to the purchaser. . . . Now until this last step is taken [the sale], the thing remains *in fieri*, and may, in a certain manner and under certain circumstances, be so undone as that the plaintiff may be placed in the same situation in which he was before he sued out execution . . . .

Walker v. Commonwealth, 59 Va. (18 Gratt.) 13, 43, 44 (1867).

[3] *See Andrews v. Shepherd*, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) (noting that "shall" is word of command, used in connection with mandate); *see also Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578

(1965) (noting that "shall" generally indicates procedures are intended to be mandatory, imperative or limited); Op. Va. Att'y Gen.: 1997 at 16, 17, 1997 Va. AG 16, 17; 1996 at 20, 21, 1996 Va. AG 20, 21; 1991 at 126, 126, 1991 Va. AG 126, 126, and opinions cited therein; *id.* at 127, 129, 1991 Va. AG 127, 129, and opinions cited therein.

[4] *See Anderson v. Commonwealth*, 182 Va. 560, 565, 29 S.E.2d 838, 840 (1944) (noting well-recognized meaning of words "listed or assessed" in tax statutes); Op. Va. Att'y Gen.: 1997 at 202, 202, 1997 Va. AG 202, 202; *id.* at 72, 73; 1993 at 210, 213, 1993 Va. AG 210, 213.

[5] BLACK'S LAW DICTIONARY, *supra* note 2, at 919.

[6] *Id.* at 1363.

[7] A special or specific statute supersedes a general statute insofar as there is conflict. *Compare* VA. CODE ANN. § 46.2-644 (Michie Repl. Vol. 1998) *with* VA. CODE ANN §§ 8.01-478 to 8.01-482 (Michie Repl. Vol. 2000) (governing liens in general). *See City of Roanoke v. Land*, 137 Va. 89, 119 S.E. 59 (1923) (holding that local ordinance adopted under general charter powers that conflicts with specific statute empowering court to grant or refuse pawnbroker license to applicant is void); Op. Va. Att'y Gen.: 1987-1988 at 276, 277, 87-88 Va. AG 276, 277; 1985-1986 at 65, 68, 85-86 Va. AG 65, 68.

[8] Section 46.2-644.

[9] 256 Va. 243, 246, 506 S.E.2d 14, 15 (1998) (citing *Credit Corp. v. Credit Corp.*, 164 Va. 579, 583, 180 S.E. 408, 409-10 (1935)).

[10] *Id.* at 246, 506 S.E.2d at 15 (citing *Bain v. Commonwealth*, 215 Va. 89, 91, 205 S.E.2d 641, 643 (1974)); *see also* VA. CODE ANN. § 46.2-638 (Michie Repl. Vol. 1998).

[11] 256 Va. at 246, 506 S.E.2d at 15 (citation omitted) (quoting *Credit Corp.*, 164 Va. at 582-83, 180 S.E. at 409).

[12] *See* 1995 Op. Va. Att'y Gen. 116, 117, 1995 Va. AG 116, 117 (reading statute as whole influences proper construction).

[13] The use of the conjunctive "and" in § 46.2-644 indicates that sale by a debtor of a vehicle subject to a lien is fraudulent when a sheriff not only has levied on but also has seized such vehicle. *See* Op. Va. Att'y Gen.: 1997 at 99, 100, 1997 Va. AG 99, 100; 1990 at 209, 210, 1990 Va. AG 209, 210.

[14] *Watkins v. Hall*, 161 Va. 924, 930, 172 S.E. 445, 447 (1934) (quoting *Floyd v. Harding*, 69 Va. (28 Gratt.) 401, 405 (1877)).

2001 Va. AG 158

AG Op. CIVIL REMEDIES AND PROCEDURE: EXECUTIONS, 87-88 Va. AG 69

CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS OF RECOVERY — ENFORCEMENT GENERALLY.

ADMINISTRATION OF THE GOVERNMENT GENERALLY: COMPREHENSIVE CONFLICT OF INTERESTS ACT.

CRIMES AND OFFENSES GENERALLY: IN GENERAL — CLASSIFICATION OF CRIMINAL OFFENSES AND PUNISHMENT THEREFOR. [Page 70]

CRIMINAL PROCEDURE: GENERAL PROVISIONS.

GENERAL PROVISIONS: COMMON LAW, STATUTES AND RULES OF CONSTRUCTION.

Sheriff's sale of tangible personal property following levy. Violation of prohibitory statute. No statutory criminal remedy available; malfeasance of misfeasance may be appropriate remedy. Contract prohibition of Act not applicable.

DATE: September 30, 1987

SDATE: 870930

REQUESTOR: The Honorable Helen F. Fahey, Commonwealth's Attorney for Arlington County

CITE: 87-88 69

You ask whether certain conduct (1) is a violation of § 8.01-498 of the Code of Virginia and is punishable criminally when read in conjunction with §§ 18.2-8 and 18.2-14 and (2) violates the statutes prohibiting certain personal interests in transactions under the Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634 (the "1983 Conflicts Act").[1]

I. *Facts*

You state that, as the result of a tax lien, the treasurer for Arlington County foreclosed on a motor vehicle. The vehicle was subsequently referred to the sheriff's department to be sold at public auction. An employee of the sheriff's department asked an individual to attend the auction and purchase the vehicle for the employee. The individual complied with the request, and, two days following the sale, title to the vehicle was transferred to the employee.

II. *No Statutory Criminal Sanctions Exist for Violation of § 8.01-498*

A. *Applicable Statute*

Article 4, Ch. 18 of Tit. 8.01 details the procedures for a sheriff's sale of tangible personal property following a levy. Section 8.01-498 provides that "[n]o officer of any city, town or county or employee of any such city, town or county shall, directly or indirectly, bid on or purchase effects sold under a writ by such officer."

B. *History of Statutory Sanctions Instructive in Determining Availability of Statutory Criminal Remedy*

Prior to 1934, a commissioner's purchase of effects from a judicial sale was prohibited. *Hurt v. Jones Wife,* 75 Va. 341 (1881). *See also Merchant's Bank of Baltimore and als. v. Campbell and als.,* 75 Va. 455 (1881); *Brock v. Rice & als.,* 68 Va. (27 Gratt.) 812 (1876). Such improper action or breach of duty, however, did not carry with it statutory criminal sanctions.

In 1934, the General Assembly enacted § 2521a, making it "unlawful" for an officer to directly or indirectly purchase effects sold at such sales. Violation of this statute was punishable by a fine not to exceed $500. Chapter 257, 1934 Va. Acts 375, 376. With the enactment of the 1950 Code, the term "unlawful" was removed from the successor statute to § 2521a, but the fine provisions were retained. *See* §§ 8-427 and 8-428.

In 1977, Tit. 8 was recodified as Tit. 8.01. Chapter 617, 1977 Va. Acts 1052. Section 8.01-498, the statute replacing former § 8-427, includes none of the usual indicia of criminal statutes. Although the participation of a county employee in such sales is prohibited, there is no express provision that the activity is "unlawful," nor does this or [Page 71] any other statute provide for a fine or any other penalty. *See* 1 H. & S. Docs., *Report of the Virginia Code Commission on the Revision of Title 8 of the Code of Virginia*, H. Doc. No. 14, at 293-94 (1977 Sess.).

C. *No Statutory Criminal Remedy Available*

One treatise notes that "[i]t is not essential to the concept of statute law . . . that it must embody or express a standard for nonconformity with which specific legal consequences attach." 1A N. Singer, *Sutherland Statutory Construction* § 25.01 (4th ed. 1985). Whether a particular civil or criminal statutory remedy is available for a violation of a prohibitory statute is, instead, a question of statutory construction. 14 M.J. *Penalties and Forfeitures* § 2 (Repl. Vol. 1978).

Based on the above history of § 8.01-498, therefore, it is my opinion that there is no *statutory* criminal remedy available for a violation of § 8.01-498.[2]

D. *Malfeasance or Misfeasance, in Appropriate Case, May Be Appropriate Remedy*

Under certain circumstances, misconduct in office may make a public officer criminally responsible even in the absence of statutory criminal sanctions. At common law, malfeasance and misfeasance in office are indictable as misdemeanors. Under § 1-10, the common law continues in force in Virginia, except as altered by statute. *See Commonwealth v. Hollan,* 211 Va. 530, 532, 178 S.E.2d 506, 507 (1971). Statutory recognition of the continued

existence of these common law crimes is evidenced by § 19.2-8, which establishes a two-year statute of limitations for the prosecution of nonfelonious offenses "which constitute malfeasance in office."

The crime of *mal*feasance in office encompasses any act which is wrongful in itself, performed in the exercise of office or while acting under color of office. *See* R. Perkins, *Criminal Law* 482, 485-86 (2d ed. 1969); Black's Law Dictionary 862 (5th ed. 1979); 67 C.J.S. *Officers* § 256 (1978). Criminal intent, however, is an essential element of the offense only where the act complained of is discretionary rather than ministerial. *Warren v. Commonwealth,* 136 Va. 573, 586, 118 S.E. 125 (1923). The crime of *mis*feasance is defined as the improper performance of some act which a person may lawfully do. Black's Law Dictionary 902 (5th ed. 1979); 67 C.J.S. *Officers* § 256 (1978).

Misconduct amounting to malfeasance or misfeasance falls within the purview of statutes providing that all offenses of an indictable nature at common law and not expressly provided for by statute shall be misdemeanors. *See* §§ 18.2-8; 18.2-12. Public officials, therefore, may be subject to criminal prosecution for the violation of a public duty even though no criminal penalty is expressly provided by statute. *See* 4 E. McQuillin, *Municipal Corporations* § 12.228(a) (3d ed. 1985). Based on the above, it is my opinion that a violation of § 8.01-498 may, in an appropriate case, provide the necessary elements of proof for prosecution or indictment for the common law offenses of malfeasance or misfeasance in office.

III. *Conduct in Question Does Not Establish Necessary Elements for Violation of § 2.1-610 of the 1983 Conflicts Act*

You next ask whether the above conduct violates § 2.1-610 of the 1983 Conflicts Act.

Section 2.1-610 prohibits employees of governmental agencies from "participating" in official transactions "on behalf of" the governmental agency when the employee (1) has a personal interest in the transaction and (2) the transaction has specific application to the employee's personal interest. *See generally West v. Jones,* 228 Va. 409, 323 S.E.2d 96 (1984). The term "transaction" is defined in § 2.1-600 as "any matter [Page 72] considered by any governmental or advisory agency on which official action is taken or contemplated." The conduct about which you inquire, however, does not involve the employee of the sheriff's department "participating" in the "transaction" — the auction sale — "*on behalf of*" the sheriff's department. It is my opinion, therefore, that the conduct in question would not establish the necessary elements for a violation of § 2.1-610.

A prior Opinion of this Office concludes that employees of state governmental agencies were generally prohibited by § 2.1-605(A) from purchasing surplus property at auction sales held by their agency because such a purchase would establish a "personal interest in a contract" with the employee's own agency. *See* 1983-1984 Att'y Gen. Ann. Rep. 433, 83-84 Va. AG 433; § 2.1-600 ("personal interest in a contract"). In this instance, however, the employee of the sheriff's department was not a party to the contract of sale. It is my opinion, therefore, that the contract prohibition of § 2.1-605(A) does not apply.

IV. *Whether Specific Factual Conduct Constitutes Criminal Act Is Function Reserved to Commonwealth's Attorney, Grand Jury, and Trier of Fact*

In rendering Opinions in circumstances such as those you present, the traditional role of this Office has been to interpret applicable statutes and detail, to the extent possible, the elements of a potential criminal violation. This Office has declined to render official Opinions under certain circumstances, including when the request (1) does not involve a question of law, (2) requires the interpretation of a matter reserved to another entity, (3) involves a matter currently in litigation, and (4) involves a matter of purely local concern or procedure. *See* Att'y Gen. Ann. Rep.: 1985-1986 at 64, 65, 85-86 Va. AG 64, 65; 1982-1983 at 100, 82-83 Va. AG 100; 1977-1978 at 31, 77-78 Va. AG 31; 1976-1977 at 17, 76-77 Va. AG 17. The application of these elements of a criminal offense to a specific set of facts, therefore, has been considered a function properly reserved to the Commonwealth's attorney, the grand jury, and the trier of fact, and not an appropriate issue on which to render an Opinion. Based on the above, I must decline to render an Opinion on whether the conduct outlined in your request in fact constitutes a criminal violation.

FOOTNOTES

[1] The conduct in question occurred prior to August 1, 1987, the effective date of the State and Local Government Conflict of Interests Act, §§ 2.1-639.1 through 2.1-639.24.

[2] It is still possible that a prosecution based on common law principles may be available (discussed in Part II(D)) and that a civil proceeding to invalidate the sale may be pursued. *See, e.g., Hurt v. Jones.*

87-88 Va. AG 69

AG Op. CIVIL PROCEDURE. EXECUTION OF JUDGMENT, 82-83 Va. AG 71

CIVIL PROCEDURE. EXECUTION OF JUDGMENT. SALE PURSUANT TO LEVY.

DATE: May 19, 1983

SDATE: 830519

REQUESTOR: The Honorable Emmett L. Wingo, Sheriff of Chesterfield County

CITE: 82-83 71

This is in reply to your letter inquiring how process is handled when levy is made against a vehicle that is registered in two or more names. You also inquire what is to be done when levy is made against a vehicle which has a lien [Page 72] on it and the vehicle is not worth the amount necessary to satisfy the lien.

As to multiple ownership, I will assume that the owners have an undivided interest which is subject to severance; hence, the vehicle is subject to levy and sale under execution for each individual's interest. The certificate of title to the vehicle will indicate, more so than the registration, those persons who are owners or who have liens against the vehicle. Although he has a judgment against one co-owner, the judgment creditor does not have greater rights in the vehicle on which he levies than the non-liable co-owners. *Barnes v. American Fertilizer Co.*, 144 Va. 692 130 S.E. 902 (1925). If the sheriff is in doubt as to ownership or prior claims, he should proceed as provided in § 8.01-367 of the Code of Virginia to require an indemnifying bond and subject the interest of the judgment debtor to sale.

If two or more owners or a lienor appear on the certificate of title, the officer should not proceed until ordered to do so. The claims to such property should be tried by the circuit court pursuant to § 8.01-365, or by the general district court, pursuant to § 16.1-119 if value of the car does not exceed $5,000.[1]

Property subject to a prior lien may be levied on and sold to satisfy a writ of fieri facias.[2] If the lien is not due and payable, you should sell the property levied on subject to the lien. Although the lien amount is more than the vehicle is worth, once the judgment creditor has satisfied indemnifying requirements and you are directed to sell the property, you must do so, in spite of its value.[3] As a practical matter, when the lien is not due and payable, it is doubtful that any purchaser other than the prior lienor would buy the vehicle. If, after the sale, the amount is insufficient to satisfy the judgment creditor, § 8.01-475 gives the creditor the right to sue out additional levies on other property of the debtor until the lien is completely satisfied. *See Richardson v. Wymer*, 104 Va. 236, 51 S.E. 219 (1905). If the prior lien is due and payable, then you should apply the proceeds first to satisfy the lien and the residue, if any, to satisfy the fieri facias. If the residue be insufficient, then the judgment creditor may sue out additional executions under § 8.01-475.

FOOTNOTES

[1] Section 8.01-365 provides: "When a writ of fieri facias issued from a circuit court, or a warrant of distress, is levied on property, or when a lien is acquired on money or other personal estate by virtue of § 8.01-501, and *when some other person than the one against whom the process issued claims the property*, money, other personal estate, *or some* part of the proceeds thereof, then either (i) the claimant, if such suspending bond as is hereinafter mentioned has been given, (ii) the officer having such process, if no indemnifying bond has been given, or (iii) the party who had the process issued, may apply to try the claim, by motion to the adverse party, to the circuit court of the county or city wherein the property, money, or other personal estate is located." (Emphasis added.)

[2] Section 8.01-480 provides: "Tangible personal property subject to a prior security interest, or in which the execution debtor has only an equitable interest, may nevertheless be levied on for the satisfaction of a fieri facias. If such prior security interest be due and payable, the officer levying the fieri facias may sell the property free of such security interest, and apply the proceeds first to the payment of such security interest, and the residue, so far as necessary, to the satisfaction of the fieri facias. In the event the property is to be sold free of such prior security interest, the judgment creditor shall give written notice by certified mail to each secured party of record as hereafter specified, as his name and address shall appear on record, of the proposed sale, or to any secured party of whom the judgment creditor shall have actual knowledge. Such notice shall be given to each secured party who is of record at the State Corporation Commission or at the Division of Motor Vehicles or in the clerk's office in the city or county in Virginia, where the debtor has resided to the knowledge of the judgment creditor at any time during a one-year period prior to the sale. Certification of such notice shall be delivered to the sheriff or other officer conducting the sale pursuant to execution of the judgment, who shall announce that except as to such person so notified, the sale is subject to any prior security interest of record, other than one of record at a place where the debtor may have resided more than one year previously. If such prior security interest be not due and payable at the time of sale, such officer shall sell the property levied on subject to such security interest."

[3] Section 8.01-490 proscribes unreasonable distress or levy. There is authority from other jurisdictions which holds the levying officer liable for failing to levy on sufficient property to satisfy the demand and cost. *See* 93 A.L.R. 316; 70 Am.Jur.2d *Sheriffs, Police, and Constables* § 64 (1973). If the value of the car is less than the amount of the prior lien, it raises a question of reasonableness in levying on the property.

82-83 Va. AG 71

AG Op. BANKRUPTCY. FILING PETITION IN, 82-83 Va. AG 30

BANKRUPTCY. FILING PETITION IN BANKRUPTCY MEANS AUTOMATIC STAY OF EVICTIONS AND SHERIFF'S SALES.

You should consult your county or city attorney to see if this still complies with the 2006 bankruptcy code change.

DATE: April 8, 1983

SDATE: 830408

REQUESTOR: The Honorable M. Wayne Huggins, Sheriff of Fairfax County

CITE: 82-83 30

In your recent letter and telephone discussions, you have inquired as to your responsibilities in conducting an eviction or a sale after being informed by a debtor or his attorney that the debtor has filed a petition in bankruptcy. In order to reply to your inquiry it is first necessary to examine the pertinent provisions of the Bankruptcy Code and related cases.

Section 362 of the Bankruptcy Code, 11 U.S.C. § 362, provides that the filing of a petition in bankruptcy imposes a broad stay of litigation, lien enforcement, and other actions to collect a debt of the debtor. Section 362(b) lists certain actions which are exempted from the automatic stay provisions of § 362 and, with respect to those actions, the issuance of any stay would have to be by order of the Bankruptcy Court. Violations of the stay, whether automatic or by court order, may be punished by contempt proceedings. *In Re Tallyn*, Bank.L.Rep., ¶ 65617 (E.D.Va. 1975).

Upon the filing of the bankruptcy petition, notice of the filing is sent to the creditors by the court. No provision is made for notifying courts in which a proceeding to collect debts is pending. It is appropriate for the debtor to file a motion for a stay in the court proceeding to [Page 31] collect the debt to inform the court of the pendency of the bankruptcy. Scott, *Bankruptcy* § 2117.1 (Michie Co., 1982). Creditors seeking relief from the automatic stay must petition the Bankruptcy Court.

The automatic stay would prevent creditors from enforcing judgment liens. *Matter of Byrne, Bkrtcy.*, 5 B.R. 556 (W.D. Pa. 1980). A creditor seeking to enforce a lien in such a situation may be enjoined from seeking to enforce a state court execution. *Matter of Gibbs, Bkrtcy.*, 12 B.R. 737 (Conn. 1981). The law places no duty on you to protect the rights of either party in a bankruptcy proceeding. Generally, violation of the automatic stay does not warrant a judgment of contempt where defendants act in good faith and under state law. *In Re Joe Di Lisi Trust Co., Bkrtcy.*, 11 B.R. 694 (Minn., 1981). Actual notice of the filing is a prerequisite of a contempt citation, *Springfield Bank v. Caserta, Bkrtcy.*, 10 B.R. 57 (S.D. Ohio, 1981).

However, even though violations of the automatic stay may occur in circumstances which do not result in a contempt proceeding against you or the creditor, it is desirable that the stay be observed in circumstances where the fact of its existence is communicated to you. I am unaware, however, of any case which has addressed this issue in definitive fashion.

It is my opinion that, where the action is one for the collection of debt and you have reliable information that a petition has been filed, the stay should be observed. Pursuant to § 15.1-80 of the Code of Virginia, you can note the existence of the bankruptcy proceeding on your return and the creditor can protect his rights by seeking relief from the appropriate court. *See Narrows Grocery Co. v. Bailey*, 161 Va. 278, 170 S.E. 730 1933).

82-83 Va. AG 30

AG Op. CIVIL REMEDIES AND PROCEDURE, 2001 Va. AG 20 (01-005)

CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS OF RECOVERY. [Page 21]

Sheriff may hold public sale of personal property seized under fieri facias or distress warrant on private property of debtor. Authority and duty to establish place of sale falls within sheriff's discretion. Expenses incurred for movement or storage of property or other costs of sale are deductible from sale proceeds.

DATE: May 11, 2001

SDATE: 010511

REQUESTOR: The Honorable John R. Newhart, Sheriff for the City of Chesapeake

CITE: 2001 Va. AG 20

You ask whether a sheriff's sale of personal property held pursuant to § 8.01-492 of the Code of Virginia may be held on the debtor's property, even though it is private property. You also inquire whether the sale must be held elsewhere when the debtor objects to the sale on his property. Finally, you inquire regarding the payment of costs for any movement or storage of the sale property.

Section 8.01-492 provides:

> In any case of goods and chattels which an officer shall distrain or levy on, otherwise than under an attachment, or which he may be directed to sell by an order of a court, unless such order prescribe a different course, the officer shall fix upon a time and place for the sale thereof . . . .

With regard to whether a sheriff has the authority to hold the sale on private property, it is settled that language of a statute that is plain should be given its clear and unambiguous meaning.1 Section 8.01-492 plainly provides that the appropriate officer shall fix the "time and place for the sale." Thus, the determination of the time and place of the sale is to be made by the officer holding such sale. The Supreme Court of Virginia notes that "§ 8.01-492 requires a public sale conducted in a manner which will attract multiple bidders to achieve the best price possible for the goods sold."2 Accordingly, so long as the sale falls within these parameters, it is my opinion that the mere fact that it is held on the private property of the debtor does not invalidate such sale.3

With respect to whether the sheriff must hold the sale elsewhere upon the objection of the debtor, § 8.01-492 mandates that "the officer shall fix . . . a . . . place for the sale." The use of the word "shall" in a statute ordinarily implies that its provisions are mandatory.4 This provision plainly and unambiguously grants to the sheriff the authority, and the duty, to establish the place of the sale. Accordingly, the final decision falls within the sheriff's discretion.5

Lastly, as to expenses and costs incurred as a result of executing the sale, § 8.01-483 authorizes the officer recovering money from the execution of a writ of fieri facias to deduct "his fees and other charges." In addition, § 8.01-499 provides that the officer may deduct his "commission . . . and his necessary expenses and costs." The Attorney General previously has concluded that these statutes are sufficient authority for the sheriff to deduct from the proceeds of the sale the expenses and costs associated with such sale.6 Similarly, it is my opinion that expenses incurred for movement or storage of the property or other costs of the sale are deductible from the proceeds derived from the public sale.

FOOTNOTES

1 Barr v. Town & Country Properties, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990); 1999 Op. Va. Att'y Gen. 27, 27, 1999 Va. AG 27, 27; see also Harrison & Bates, Inc. v. Featherstone Assoc., 253 Va. 364, 368, 484 S.E.2d 883, 885 (1997) (stating that act that is not ambiguous should be applied according to plain meaning of its language; province of statutory construction lies wholly within domain of ambiguity (citing Winston v. City of Richmond, 196 Va. 403, 408, 83 S.E.2d 728, 731 (1954))).

2 Manufacturers Hanover Trust Co. v. Koubek, 240 Va. 276, 282, 396 S.E.2d 669, 672 (1990).

3 Compare Manufacturers Hanover Trust Co., 240 Va. at 276, 396 S.E.2d at 669 (voiding sale held in private room, rather than in public area of hotel, which excluded known parties in interest from attending).

4 See Andrews v. Shepherd, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) (noting that "shall" is word of command, used in connection with mandate); see also Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that "shall" generally indicates procedures are intended to be mandatory, imperative or limited); Op. Va. Att'y Gen.: 1999 at 15, 15, 1999 Va. AG 15, 15; 1997 at 16, 17, 1997 Va. AG 16, 17; 1996 at 20, 21, 1996 Va. AG 20, 21; 1991 at 126, 126, 1991 Va. AG 126, 126, and opinions cited therein; id. at 127, 129, and opinions cited therein.

5 Compare VA. CODE ANN. § 8.01-478 (Michie Repl. Vol. 2000) (providing that levy under writ of fieri facias binds item so that officer, and not defendant, has power over it).

6 Compare 1997 Op. Va. Att'y Gen. 18, 19, 1997 Va. AG 18, 19 (concluding that sheriff may deduct from proceeds of sheriff's sale conducted pursuant to § 8.01-492 sales commission of licensed stockbroker whose services sheriff used for sale).

2001 Va. AG 20

AG Op. TAXATION: REVIEW OF LOCAL TAXES — LOCAL, 1997 Va. AG 203

TAXATION: REVIEW OF LOCAL TAXES — LOCAL OFFICERS — TREASURERS.

CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS OF RECOVERY.

COUNTIES, CITIES AND TOWNS: COUNTY, CITY AND TOWN OFFICERS GENERALLY — SHERIFFS AND SERGEANTS — COUNTIES GENERALLY — POWERS OF CITIES AND TOWNS.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (COUNTY AND CITY OFFICERS).

Sheriff may use treasurer's distress letter to seize money or property located within jurisdiction and in contiguous county or city. Deputy sheriff may enforce collection of, and is required to collect, delinquent tax described in distress letter issued by treasurer. Sheriff must post notice of time and place of distress property sale at least 10 days before sale at place near residence of owner if he resides in county or city and at two or more public places in sheriff's jurisdiction. Sheriff may not be required to pay back distress property sale moneys when delinquent taxpayer later claims tax assessment was erroneous. Sheriff has no authority to file suit against delinquent taxpayer upon receipt of distress letter/warrant from local treasurer. Sheriff may not require local treasurer to provide indemnity bond for liability arising from distress. Availability of sovereign immunity defense to sheriff is determined on case-by-case basis by court assessing whether alleged act of liability involved exercise of judgment and discretion. [Page 204]

DATE: January 6, 1997

SDATE: 970106

REQUESTOR: The Honorable Carl R. Peed, Sheriff for Fairfax County

CITE: 1997 203

You ask several questions concerning the responsibility of a sheriff to collect delinquent local taxes by distress.

You relate that recent budget problems experienced by Virginia counties have caused an inordinate number of distress letters/warrants issued to sheriffs by county treasurers. You are concerned that the statutes pertaining to the collection of delinquent local taxes by distress are vague and contradictory.

You first ask whether a distress letter/warrant from a treasurer may be used by the sheriff to seize property. If so, you ask whether the sheriff may seize property in a Virginia locality other than the locality of the treasurer issuing the distress letter.

Section 58.1-3919 of the *Code of Virginia* grants local treasurers the authority to collect delinquent taxes by distress,[1] and § 58.1-3941 addresses the use of distress by the treasurer and the sheriff, among others, for collection of such taxes.[2] The notice requirements in § 58.1-3942, applicable when distress goods are subject to a security interest, refer to the sale of such goods by both the local treasurer and sheriff.[3] These statutory provisions authorize a sheriff, as well as a local treasurer, to distrain property and sell the distress property to collect delinquent taxes. These statutes detail a procedure that does not require an initial judicial proceeding. A 1973 opinion of the Attorney General notes that "[d]istress for taxes is the seizure of personal property to enforce payment of taxes due, to be followed by its public sale," and notes that "a sheriff may take possession of the debtor's property and remove it from the premises."[4]

A 1954 opinion of the Attorney General interpreting the scope of a local treasurer's authority to collect delinquent taxes concludes that the treasurer may proceed by distress to seize and sell goods to satisfy delinquent tax bills.[5] The prior opinion also concludes that the treasurer may distrain property for taxes without a warrant based on the tax bill alone, remove the property from the premises as part of the power to distrain property, and sell the property to satisfy delinquent taxes.[6]

Consequently, I am of the opinion that a distress letter from a local treasurer may be used by the sheriff to seize property.

Section 15.1-79 requires that every officer to whom any process (including any distress warrant, tax lien or administrative summons issued by a treasurer) is directed, "shall execute the same within the boundaries of the political subdivision in which he serves." The use of the word "shall" indicates that service by the sheriff of a distress warrant, tax lien or administrative summons issued by a treasurer is mandatory.[7] In addition, a 1980 opinion concludes that "a sheriff is required to serve process issued to him which has an address in a contiguous county or city."[8] Finally, under § 58.1-3946, a treasurer is authorized to distrain property of a delinquent taxpayer within or without the political jurisdiction that he serves either through his own efforts, or through the efforts of the treasurer of the jurisdiction where the delinquent taxpayer resides.[9]

"[W]here a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."[10] I am, therefore, [Page 205] of the opinion that a distress letter from a treasurer may be used by a sheriff to seize property located in a contiguous county or city.

You next ask whether a sheriff may seize money with a distress letter from the local treasurer.

Section 58.1-3941 permits "money and bank notes" to be distrained by the local treasurer and sheriff.[11] Therefore, I am of the opinion that the sheriff may seize money with a distress letter from the treasurer.

You next ask whether a deputy sheriff may enforce collection of a delinquent tax bill based on a distress letter issued by the treasurer. If so, you also ask whether a deputy sheriff is required to collect the delinquent taxes described in the distress letter.

The office of sheriff is a constitutional office created pursuant to Article VII, § 4 of the Constitution of Virginia (1971), the duties and compensation of which "shall be prescribed by general law or special act." Section 15.1-48 is such a general statute which authorizes a sheriff to appoint deputies to discharge any of the sheriff's official duties during his continuance in office. It has long been the public policy in Virginia that "'the law look[s] upon the sheriff and all his officers as one person; he is to look to his officers that they do their duty; for if they transgress, he is answerable to the party injured by such transgression, and his officers are answerable over to him.'"[12] It is clearly significant that a sheriff and his deputies are considered as "'one person.'"[13] Based on the above, I am of the opinion that §§ 15.1-79, 58.1-3941 and 58.1-3942 apply equally to a sheriff and his deputies. Therefore, a deputy sheriff may enforce collection of a delinquent tax based on a distress letter issued by the treasurer, and such deputy is required to collect the delinquent taxes described in the treasurer's distress letter.

You next ask what procedures a deputy sheriff must follow when conducting a sale of property distrained for delinquent local taxes to assure adequate protection of the rights of holders of security interests and liens.

Section 8.01-492 describes the procedure for posting notice of a distress property sale to satisfy delinquent taxes.[14] Furthermore, § 58.1-3942 provides that "[n]o security interest in goods or chattels shall prevent the same from being distrained and sold for taxes or levies assessed thereon, no matter in whose possession they may be found." When the language of a statute is clear and unambiguous, effect must be given to the plain and ordinary meaning of its provisions.[15] Therefore, I am of the opinion that, pursuant to § 8.01-492, sheriff must post notice of the time and place for the sale of distress property at least ten days before the sale at a place near the residence of the owner if he resides in the county or city and at two or more public places in the sheriff's jurisdiction.

You next ask whether a deputy sheriff is required to repay a delinquent taxpayer all moneys collected from a distress property sale when the taxpayer later claims that the tax assessment was erroneous.

Section 58.1-3980(A) provides that any person aggrieved by a local license tax assessment may apply for correction "within three years from the last day of the tax year for which such assessment is made." If the local commissioner of the revenue is satisfied that he has erroneously assessed an applicant, the commissioner shall correct such assessment pursuant to § 58.1-3981. Prior opinions of the Attorney General note [Page 206] that a letter indicating all relevant facts, or a proper or timely application or petition, from the taxpayer is necessary for correction to be made by the commissioner under § 58.1-3981.[16]

A 1985 opinion of the Attorney General concludes that "[t]he right to apply for an administrative correction is purely a statutory right."[17] The same opinion also concludes that § 58.1-3980 requires a taxpayer to make a "timely application in the form of a written request to the commissioner" of the revenue.[18] The application to the commissioner of the revenue, therefore, must be in writing.

A 1986 opinion of the Attorney General notes that a taxpayer has no right under common law to apply for correction of an assessment against him.[19]

> His remedy is purely statutory and it is incumbent upon the taxpayer seeking statutory relief to proceed strictly according to the statute. Thus, making *application* to the appropriate local official within the three-year period set forth in § 58.1-3980 is a condition precedent to the maintenance of the proceeding provided therein for correction of an erroneous assessment.[20]

Finally, tax assessments are presumed to be accurate.[21] Therefore, I am of the opinion that a sheriff may not be required to pay back moneys received from the sale of distress property when the delinquent taxpayer later claims that the tax assessment was erroneous.

You next ask whether, after receipt of a distress letter/warrant from a local treasurer, the sheriff may file suit against the delinquent taxpayer to obtain a judgment before distraining the delinquent taxpayer's property.

As I have previously noted, "[d]istress for taxes is the seizure of personal property to enforce payment of taxes due, to be followed by its public sale."[22] §§ 58.1-3941 and 58.1-3942 detail an extrajudicial procedure. I can find no statutory provision authorizing a sheriff to file suit against a delinquent taxpayer upon receipt of a distress letter/warrant from a local treasurer. Therefore, I must conclude that the sheriff has no authority to do so.

You next ask whether, before distraining property for delinquent taxes, a sheriff may require a local treasurer to provide an indemnity bond for liability arising from the distress.

Just as the office of sheriff is a constitutional office created by Article VII, § 4 of the Constitution of Virginia, so is the office of treasurer, the compensation and duties of which "shall be prescribed by general law or special act."[23] The powers and duties of a treasurer are generally set out in Article 2, Chapter 31,[24] and in Article 2, Chapter 39,[25] of Title 58.1. The treasurer is responsible for collecting taxes and other revenues payable into the treasury of the locality the treasurer serves.[26] Even when the posting of a bond is a prerequisite to the exercise of any right, nevertheless, no action shall be delayed when a locality has not posted such a bond.[27] Therefore, I am of the opinion that a sheriff may not require a local treasurer to provide an indemnity bond for liability arising from a distress. [Page 207]

Your final inquiry is whether the defense of sovereign immunity is available to a sheriff should his deputy be found civilly liable for negligence in distraining property upon a distress letter/warrant from a local treasurer.

The Supreme Court of Virginia has implicitly recognized that a constitutional officer may be entitled to sovereign immunity for wrongs committed by him in the exercise of the discretionary duties of his office.[28] It has long been the law in the Commonwealth that the relationship between a sheriff and his deputies is significantly different from the relationship between other state officers and their employees.[29] It is also well-settled that governmental officials are not entitled to sovereign immunity for acts or omissions which constitute intentional, wanton, culpable or grossly negligent conduct, or for acts beyond the scope of their employment.[30] This is true whether they act within or without the scope of their authority.[31] Therefore, whether the defense of sovereign immunity is available to a sheriff depends on the facts and circumstances of each case. Consequently, whether a sheriff actually enjoys sovereign immunity is a determination to be made on a case-by-case basis by the court in assessing whether the alleged act of liability involved the exercise of judgment and discretion.[32]

FOOTNOTES

[1] "The treasurer, after the due date of any tax or other charge collected by such treasurer, shall call upon each person chargeable with such tax who has not paid the same prior to that time, or upon the agent, if any, of such person resident within the county, city or town for payment thereof; and upon failure or refusal of such person or agent to pay the same he shall proceed to collect by distress or otherwise." Section 58.1-3919.

[2] The first sentence of § 58.1-3941 provides that "[a]ny goods or chattels, money and bank notes in the county, city or town belonging to the person or estate assessed with taxes or levies may be distrained therefor by the treasurer, sheriff, constable or collector."

[3] Section 58.1-3942 provides, in part:

> "No security interest in goods or chattels shall prevent the same from being distrained and sold for taxes or levies assessed thereon, no matter in whose possession they may be found.
>
> "Prior to such sale for distress, the treasurer, sheriff . . . or other party conducting the sale shall give notice to any secured party of record as his name and address shall appear on the records of the Department of Motor Vehicles, the Department of Game and Inland Fisheries, the State Corporation Commission, or in the office of the clerk of any circuit court where the debtor has resided to the knowledge of the party to whom the tax is owing during a one-year period prior to the sale."

[4] 1972-1973 Op. Va. Att'y Gen. 380, 380, 72-73 Va. AG 380, 380 (citing repealed § 58-1001, recodified as § 58.1-3941).

[5] 1953-1954 Op. Va. Att'y Gen. 204 (citing predecessor statutes to §§ 58.1-3919, 58.1-3941, 8.01-492).

[6] *Id.; see also Drewry v. Baugh and Sons,* 150 Va. 394, 398-99, 143 S.E. 713, 714 (1928) (localities are authorized to take personalty by distress for taxes in summary manner).

[7] The use of the word "shall" in a statute generally indicates that the procedures are intended to be mandatory, rather than permissive or directive. *See* 1989 Op. Va. Att'y Gen. 250, 252, 1989 Va. AG 250, 252, and opinions cited therein.

[8] 1980-1981 Op. Va. Att'y Gen. 322, 322, 80-81 Va. AG 322, 322.

[9] Section 58.1-3946 provides: "When the land or other property is in a county, city or town different from that of the residence of the owner or when a person assessed with any taxes or levies before paying the same removes from the county, city or town in which the assessment was made, the treasurer shall have the same remedies for the collection of all such taxes and levies in all respects as if the person owing the taxes and levies resided in the officer's own county, city or town; or the treasurer may transfer to the treasurer of the county, city or town in which such person

resides the tickets for taxation and levies against such person or property and the last-named officer shall proceed to collect the same and pay the proceeds to the former officer."

[10] *Town of South Hill v. Allen,* 177 Va. 154, 165, 12 S.E.2d 770, 774 (1941).

[11] *See* 1996 Va. Acts ch. 323, 570, 572 (adding "money and bank notes" to first sentence in § 58.1-3941).

[12] *Mosby's adm'r & als. v. Mosby's adm'r,* 50 Va. (9 Gratt.) 584, 603 (1853) (citation omitted) [hereinafter *Mosby*].

[13] *Id.* (citation omitted).

[14] "In any case of goods and chattels which an officer shall distrain or levy on, . . . the officer shall fix upon a time and place for the sale thereof and post notice of the same at least ten days before the day of sale at some place near the residence of the owner if he reside in the county or city and at two or more public places in the officer's county or city. If the goods and chattels be expensive to keep or perishable, the court from whose clerk's office . . . the distress warrant was issued under which the seizure is made . . . may order a sale of the property seized under . . . distress warrant to be made upon such notice less than ten days as to such court may seem proper. At the time and place so appointed, such officer shall sell to the highest bidder, for cash, such goods and chattels, or so much thereof as may be necessary." Section 8.01-492.

[15] *Harward v. Commonwealth,* 229 Va. 363, 330 S.E.2d 89 (1985); 1989 Op. Va. Att'y Gen. 153, 154, 1989 Va. AG 153, 154.

[16] *See* Op. Va. Att'y Gen. 1982-1983 at 509, 510, 82-83 Va. AG 509, 510; *id.* at 525, 526, 82-83 Va. AG 525, 526; 1978-1979 at 262, 263, 78-79 Va. AG 262, 263; 1973-1974 at 397, 398 73-74 Va. AG 397, 398 (all opinions construing repealed § 58-1142, recodified as § 58.1-3981).

[17] 1984-1985 Op. Va. Att'y Gen. 316, 317-18, 84-85 Va. AG 316, 317-18.

[18] *Id.* at 318.

[19] *See* 1986-1987 Op. Va. Att'y Gen. 319, 320, 86-87 Va. AG 319, 320.

[20] *Id.* at 320 (emphasis added).

[21] *Fruit Growers v. Alexandria,* 216 Va. 602, 221 S.E.2d 157 (1976); *N. and W. Ry. Co. v. Commonwealth,* 211 Va. 692, 179 S.E.2d 623 (1971).

[22] 1972-1973 Op. Va. Att'y Gen. *supra* note 4, at 380.

[23] *See also* § 15.1-40.1 (parallel statutory provisions to Art. VII, § 4).

[24] Sections 58.1-3123 to 58.1-3172.

[25] Sections 58.1-3910 to 58.1-3939.1.

[26] Sections 58.1-3127, 58.1-3910.

[27] Sections 15.1-508.1, 15.1-907.

[28] *First Va. Bank-Colonial v. Baker,* 225 Va. 72, 79-81, 301 S.E.2d 8, 12-13 (1983). The Supreme Court reversed the trial court decision granting the circuit court clerk sovereign immunity from the ministerial acts of his subordinate. This reversal, however, was based on grounds that the acts complained of were ministerial in nature and, therefore, beyond the scope of sovereign immunity, and that the clerk was liable for those acts under the doctrine of *respondeat superior. See also Heider v. Clemons,* 241 Va. 143, 400 S.E.2d 190 (1991) (holding that deputy sheriff sued by motorcyclist for damages resulting from operation of automobile while serving judicial process was not entitled to sovereign immunity defense).

[29] *See James v. M'Cubbin,* 6 Va. 314, 315, 2 Call 273, 274 (1800) ("It is a rule that the sheriff shall answer civilly for all the acts of his deputy."); *Mosby*, 50 Va. (9 Gratt.) at 603 ("The acts and defaults of the deputy, *colore officii,* are considered in law as the acts and defaults of the sheriff, who is liable therefor in the same form of action as if they had been actually committed by himself. . . . There is a difference between master and servant; but a sheriff and all his officers are considered in cases like this, as one person.").

[30] *James v. Jane,* 221 Va. 43, 53, 267 S.E.2d 108, 113, *reported at* 282 S.E.2d 864 (1980).

[31] *Fox v. Deese,* 234 Va. 412, 423-24, 362 S.E.2d 699, 706 (1987).

[32] *See Heider v. Clemons,* 241 Va. at 145, 400 S.E.2d at 191.

1997 Va. AG 203

AG Op. CIVIL REMEDIES AND PROCEDURE: PROCESS, 1997 Va. AG 29
CIVIL REMEDIES AND PROCEDURE: PROCESS — EXECUTIONS AND OTHER MEANS OF RECOVERY.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (COUNTY AND CITY OFFICERS) — FRANCHISE AND OFFICERS (QUALIFICATIONS OF VOTERS).

COUNTIES, CITIES AND TOWNS: COUNTY, CITY AND TOWN OFFICERS GENERALLY — SHERIFFS AND SERGEANTS — COUNTIES GENERALLY.

ELECTIONS: FEDERAL, COMMONWEALTH, AND LOCAL OFFICERS — CONSTITUTIONAL AND LOCAL OFFICERS — CANDIDATES FOR OFFICE.

Private process servers are not public officers who are elected by and who serve interests of qualified voters of political subdivision. Territorial limitation on authority of sheriff to execute process only throughout political subdivision he serves and in contiguous county or city does not apply to private process servers. Only limitation is that private server be at least 18 and not be party to or otherwise interested in proceeding for which process is served.

DATE: August 8, 1997

SDATE: 970808

REQUESTOR: The Honorable J.R. Zepkin, Judge, General District Court, Ninth Judicial District

CITE: 1997 29

You ask whether the territorial limitation on the authority of a sheriff to execute process in § 8.01-295 of the Code of Virginia applies to private process servers.1

You note that § 8.01-295 establishes territorial limits within which a sheriff may accomplish personal service and authorizes a sheriff to execute process throughout his political subdivision and in any contiguous county or city. Pursuant to § 8.01-293(A), service by a sheriff2 and service by "any person authorized by this section to serve process" are equally legitimate forms of service of process. The only stated restrictions on a private process server are that the person must be "age eighteen years or older" and must not be a party or be otherwise interested in the proceeding.3

You state that your inquiry is prompted by the 1996 amendment by the General Assembly to § 8.01-293(2), which added the following sentence:

> Whenever in this Code the term “officer” or “sheriff” is used to refer to persons authorized to make, return or do any other act relating to service of process, such term shall be deemed to refer to any person authorized by this section to serve process.[4]

A sheriff is a constitutional officer whose duties “shall be prescribed by general law or special act” of the General Assembly.5 The various powers and duties of a sheriff are set out in the Virginia Code.6 A prior opinion of the Attorney General concludes that a sheriff is a public officer whose position is created by law, filled by election or appointment, held for a fixed term, and who has duties assigned by law which concern the public.7 The sheriff is elected by the qualified voters of every county and city to serve a term of four years.8 The sheriff, therefore, may serve the locality and its citizens only so long as the law to which he owes the existence of his office remains in force:

> If through boundary changes, consolidation, merger, or other changes permitted by the Constitution and statutes a county or city ceases to exist, then that locality's constitutional offices also cease to exist.[9]

The verb “serve” generally is defined to mean “to perform the duties of (a position, an office, etc.).”10 In addition, courts in the Commonwealth have determined that a sheriff [Page 30] is an elected official who owes a duty of loyalty and performance to the people who elect him in the particular jurisdiction he serves.11 Section 8.01-295 authorizes the sheriff to execute process only throughout the political subdivision he serves and in any contiguous county or city. The political subdivision the sheriff serves is the county or city whose qualified voters elected him to office.

Private process servers, on the other hand, are not public officers who are elected by and who serve the interests of the qualified voters of a political subdivision. Designation of a person as a private process server is found only in § 8.01-293(A)(2). Furthermore, the only restrictions placed on private process servers are that they must be eighteen years of age or older, and must not be a party to or be otherwise interested in the proceeding for which process is being served.12 The primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature.13 Analysis of legislative intent includes appraisal of the subject matter and purpose of the statute, in addition to its express terms.14 The purpose underlying a statute's enactment is particularly significant in construing it.15 Moreover, statutes should not be interpreted in ways that produce absurd or irrational consequences.16 Instead, they should be harmonized with other existing statutes where possible to produce a consistently logical result that gives effect to the legislative intent.17

To conclude that private process servers are subject to the same territorial limits within which sheriffs have the authority to execute process — throughout the political subdivision he serves and in any contiguous county or city18 — would be absurd and would produce irrational consequences. I can find no statutory provision that requires private servers to “serve” process in any political subdivision of the Commonwealth, or that expressly restricts their activities to a particular political subdivision. I am, therefore, of the opinion that the territorial limitation on the authority of a sheriff to execute process in § 8.01-295 does not apply to private process servers.

FOOTNOTES

1 Section 8.01-295 provides: “The sheriff may execute such process throughout the political subdivision in which he serves and in any contiguous county or city. If the process appears to be duly served, and is good in other respects, it shall be deemed valid although not directed to an officer, or if directed to any officer, though executed by some other person. This section shall not be construed to require the sheriff to serve such process in any jurisdiction other than in his own.”

2 “The sheriff [is authorized to serve process] within such territorial bounds as described in § 8.01-295.” Section 8.01-293(A)(1). Section 8.01-295 provides that “[t]he sheriff may execute such process throughout the political subdivision in which he serves and in any contiguous county or city.”

3 Section 8.01-293(A)(2).

4 1996 Va. Acts ch. 501, at 849, 849.

5 VA. CONST. art. VII, § 4 (1971).

6 See, e.g., § 15.1-539 (board of supervisors may require sheriff to attend and preserve order at its meetings); §§ 15.1-79 to 15.1-80 (execution and return of process); §§ 8.01-483 to 8.01-500 (powers and duties in execution of judgments).

7 1984-1985 Op. Va. Att'y Gen. 284, 84-85 Va. AG 284; cf. 1983-1984 at 153, 155, n. 1, 83-84 Va. AG 153, 155 n. 1 (position of Secretary of State Board of Elections is public office).

8 See Art. VII, § 4; § 24.2-217; see also Art. II, § 1 (each voter must be resident of Commonwealth and of precinct where he votes); § 24.2-500 (in order to hold office of sheriff, person “must be qualified to vote for and hold that office”).

9 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 831 (1974) (citing Walker v. Massie, 202 Va. 886, 121 S.E.2d 448 (1961)).

10 WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1304 (1989 ed.).

11 See generally Franklin v. Richlands, 161 Va. 156, 170 S.E. 718 (1933) (holding that Town of Richlands is not liable for injuries suffered by plaintiff while confined in unsanitary jail, due to negligence of sheriff while engaged in performance of governmental function).

12 Section 8.01-293(A)(2).

13 Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

14 Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 222 S.E.2d 793 (1976).

15 VEPCO v. Prince William Co., 226 Va. 382, 388, 309 S.E.2d 308, 311 (1983).

16 McFadden v. McNorton, 193 Va. 455, 461, 69 S.E.2d 445, 449 (1952); see 1993 Op. Va. Att'y Gen. 192, 196, 1993 Va. AG 192, 196, and opinions cited therein.

17 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.05 (5th ed. 1992 & Supp. 1996); 1993 Op. Va. Att'y Gen., supra, at 196.

18 See § 8.01-295.

1997 Va. AG 29

AG Op. CIVIL REMEDIES AND PROCEDURE: EXECUTIONS, 1997 Va. AG 22

CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS OF RECOVERY — PROCESS.

COSTS, FEES, SALARIES AND ALLOWANCES: FEES — AMOUNTS OF FEES.

If writ of possession on judgment for recovery of real property is not executed at date and time specified in original notice of intent, sheriff must serve another notice of intent stating new date and time of execution and deliver new notice within 72 hours of date and time scheduled for execution, for which sheriff may charge additional $12 service fee.

DATE: November 10, 1997

SDATE: 971110

REQUESTOR: The Honorable Frank Drew, Sheriff for the City of Virginia Beach

CITE: 1997 22

You ask whether, when an eviction is postponed after a notice of eviction has been served, an additional notice of a new date of eviction must be served and, if so, how much additional notice must be given. You ask also the amount of the fee a sheriff may charge for serving a notice and, if additional notice must be given, whether the sheriff may charge an additional fee.

Section 8.01-470 of the *Code of Virginia* provides for the issuance of a writ of possession on a judgment for the recovery of real property. Section 8.01-470 provides that,

> [i]n cases of unlawful entry and detainer and of ejectment, the officer to whom a writ of possession has been delivered to be executed shall, at least seventy-two hours before execution, serve notice of intent to execute, including the date and time of execution, on the defendant in accordance with § 8.01-296,[1] with a copy of the writ attached.

Section 8.01-470 further provides that if, in cases of unlawful entry and detainer and of ejectment, the officer finds the premises locked, the officer may, "after declaring at the door the cause of his coming and demanding to have the door opened, employ reasonable and necessary force to break and enter the door and put the plaintiff in possession." Placing the plaintiff in [Page 23] possession involves the removal of the defendant's personal property from the premises.[2]

Section 8.01-470 authorizes the sheriff to take possession of a defendant's personal property and to do so by forcibly breaking and entering into the premises occupied by the defendant. This authority may be exercised only in accordance with the notice requirements specified in the statute.[3] The statute provides three forms of notice:

1. The defendant must first be given at least seventy-two hours notice of an intent to execute the writ.

2. Next, the defendant must be notified of the date and time that the writ will be executed.

3. Finally, when the officer executes the writ, he must notify the defendant, by "declaring at the door the cause of his coming and demanding to have the door opened," before using force to enter the premises.[4]

Section 8.01-470 is clear and unambiguous in specifying the form of required notice. The notice of an intent to execute the writ must be served at least seventy-two hours before execution and the notice itself must include the date and time of execution.[5] When the language of a statute is clear and unambiguous, effect must be given to its plain meaning.[6] It is my opinion that, consistent with the express terms of § 8.01-470, if the writ is not executed at the date and time specified in the original notice of intent, the sheriff must serve another notice of intent that states the new date and time of execution and must deliver the new notice of intent at least seventy-two hours before the date and time for execution stated in the notice.[7]

You ask also the amount of the fee a sheriff may charge, pursuant to § 14.1-105, for serving the notice of intent to execute the writ of possession, and further, whether the sheriff may charge an additional service fee if the plaintiff postpones and reschedules execution of the writ within the thirty-day period the writ remains active.[8] Section 14.1-105 directs that the sheriff's fee for service of all papers, except those returnable out of state, is set at a uniform rate of twelve dollars.[9] Pursuant to § 14.1-105, a sheriff may charge twelve dollars for serving a notice of intent to execute a writ of possession. It is my opinion, therefore, that if the plaintiff postpones and reschedules execution of the writ of possession, thus necessitating the sheriff's service of another notice of intent, the sheriff may charge an additional twelve dollar service fee.[10]

FOOTNOTES

[1] Section 8.01-296 prescribes the manner of service of process upon natural persons.

[2] *See* § 8.01-156; 1986-1987 Op. Va. Att'y Gen.: 42, 43, 86-87 Va. AG 42, 43 (citing 1979-1980 Op. Va. Att'y Gen. 312, 313, 79-80 Va. AG 312, 313) (unlike other forms of process, writ of unlawful detainer is not properly executed by merely serving copy upon defendant; it is duty of officer executing writ to physically remove defendant's property from premises).

[3] *See* Op. Va. Att'y Gen.: 1980-1981 at 48, 48, 80-81 Va. AG 48, 48 (notice requirements acknowledge dangers inherent in unannounced intrusions upon domestic peace and security); 1974-1975 at 118, 121-23, 74-75 Va. AG 118, 121-23 (recognizing constitutional requirements of notice before forcible entry into person's dwelling house and removal of person's property).

[4] Section 8.01-470.

[5] *Id.*

[6] *See Ambrogi v. Koontz,* 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982); *Temple v. City of Petersburg,* 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944); Op. Va. Att'y Gen.: 1996 at 94, 95, 1996 Va. AG 94, 95; 1994 at 93, 95, 1994 Va. AG 93, 95.

[7] You ask also whether, if additional notice is required, verbal notice would be sufficient. Section 8.01-470 provides that notice is to be served in accordance with § 8.01-296. Section 8.01-296 does not authorize verbal notice.

[8] Section 8.01-471 provides that "[w]rits of possession, in case of unlawful entry and detainer, shall be made returnable within thirty days from the date of issuing the writ."

[9] This includes the serving of any notice under § 14.1-105(1), the serving of any order of court not otherwise provided for under § 14.1-105(6), and the serving of a writ of possession under § 14.1-105(7).

[10] *See* Op. Va. Att'y Gen.: 1996 at 26, 27, 1996 Va. AG 26, 27 (separate fee may be charged for each service of process for which separate return of service is required under § 8.01-325); *id.* at 20, 21-22, 1996 Va. AG 20, 21-22 (sheriff may assess statutory fee of $12 per defendant when required to serve papers on multiple defendants at same address); 1987-1988 at 128, 129, 87-88 Va. AG 128, 129 (separate fee may be charged for separate pleadings served together if each pleading requires separate return of service).

1997 Va. AG 22

AG Op. CIVIL REMEDIES AND PROCEDURE: EXECUTIONS, 1997 Va. AG 18

CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS OF RECOVERY.

Officer must sell debtor's property publicly and receive highest price possible at fixed time of sale to recover money from execution of writ of fieri facias. Using services of licensed stockbroker to sell stock through public securities market would be consistent with requirement that personal property be sold at public sale to highest bidder at time of sale. Sheriff may deduct broker's sales commission from proceeds. If debtor fails to make conveyance and delivery of such property, commissioner must issue either capias directing sheriff to deliver debtor to commissioner or rule to show cause why debtor should not appear and make proper conveyance.

DATE: December 5, 1997

SDATE: 971205

REQUESTOR: The Honorable James L. Agnew, Sheriff for Goochland County

CITE: 1997 18

You ask several questions related to the sale of a stock certificate by the sheriff pursuant to § 8.01-510 of the Code of Virginia.

You present a hypothetical situation wherein a defendant in a case is ordered to appear before a commissioner in chancery pursuant to a summons to answer interrogatories. The commissioner orders the defendant to deliver to the sheriff a certificate for 584 shares of common stock. You ask whether, if the sheriff retains a stockbroker to [Page 19] handle the sale of the shares of common stock, and pays the broker's fee from the proceeds prior to paying the remainder to the plaintiff, the sheriff will satisfy the statutory requirements for a legal sale.

In order to ascertain the real and personal estate of a judgment debtor, § 8.01-506 authorizes the clerk of the court from which a writ of fieri facias issues to summons the execution debtor to appear before either the court or a commissioner to answer interrogatories. Section 8.01-507 provides that, based on the answers to the interrogatories, the court or commissioner may order the debtor to deliver to the officer to whom was delivered the writ of fieri facias “any money, bank notes, securities, evidences of debt, or other personal estate, tangible or intangible” in the debtor's possession or control.1 Section 8.01-510 provides that the officer to whom such property is delivered is to dispose of the property “as if levied on by him under a fieri facias.”

Section 8.01-492 provides generally that, as to any property which an officer shall levy on or be directed to sell by an order of the court, the officer is to fix the time and place for the sale and is to post notice of the sale. Section 8.01-492 provides: “At the time and place so appointed, such officer shall sell to the highest bidder, for cash, such goods and chattels, or so much thereof as may be necessary.” Section 8.01-483 authorizes the officer recovering money from

the execution of a writ of fieri facias to deduct his “fees and charges,” and § 8.01-499 provides that the officer may deduct his commission and “his necessary expenses and costs.”

The clear intent of these statutory provisions is that the officer sell the property publicly and that the officer receive the highest price possible at the fixed time of the sale.2 It is my opinion that using the services of a licensed stockbroker to sell the stock through the public securities market would be consistent with the requirement of § 8.01-492 that personal property be sold at public sale to the highest bidder at the time of the sale. It is also my opinion that §§ 8.01-483 and 8.01-499 are sufficient authority for the sheriff to deduct from the proceeds the broker's sales commission.

You state also that the defendant refuses to provide his signature on the stock certificate and that the broker advises the sheriff that the signature is necessary to effect the sale. You ask how the sheriff can satisfy the court's order directing him to sell the certificate if the defendant continues to refuse to sign the certificate. It is my opinion that this issue should be presented to and resolved by the commissioner pursuant to the provisions of § 8.01-508. Section 8.01-508 provides that if any person fails to make the conveyance and delivery of property required under § 8.01-507, the commissioner is to issue either a capias directing the sheriff to deliver the person to the commissioner or a rule to show cause why the person should not appear and make proper conveyance.

FOOTNOTES

1 See also § 8.01-501 (authorizing execution lien on all personal estate of judgment debtor).

2 See Manufacturers Hanover Trust Co. v. Koubek, 240 Va. 276, 280, 396 S.E.2d 669, 671 (1990) (policy and purpose of public sale required by § 8.01-492 is that competition be produced among bidders so that property will be sold at its market value).

1997 Va. AG 18

AG Op. CIVIL REMEDIES AND PROCEDURE: PROCESS, 1999 Va. AG 31

CIVIL REMEDIES AND PROCEDURE: PROCESS.

Strict construction of phrase "member of his family" encompasses relationships of consanguinity to intended recipient of service of process. Relationship with in-law is not relationship of consanguinity. "Member of his family" does not include in-law residing in usual place of abode of party subject to substituted service of process.

DATE: June 7, 1999

SDATE: 9900607

REQUESTOR: The Honorable W.A. Talley Jr., Judge, Goochland County General District Court

CITE: 1999 31

You ask whether § 8.01-296(2)(a) of the *Code of Virginia* permits a process server to serve civil process on the in-laws residing in the usual place of abode of the intended recipient.

Section 8.01-296 provides for the service of process in civil proceedings for which no other particular mode of service is prescribed. Section 8.01-296(1) provides that such process may be served "[b]y delivering a copy thereof in writing to the party in person." Section 8.01-296(2)(a) provides that substituted service may be effected,

> [i]f the party to be served is not found at his usual place of abode, by delivering a copy of such process and giving information of its purport to any person found there, who is a member of his family, other than a temporary sojourner or guest, and who is of the age of sixteen years or older[.]

Your inquiry concerns whether the phrase "member of his family," as used in § 8.01-296(2)(a), includes in-laws residing in the usual place of abode of the party intended to be the recipient of process.

Section 8.01-296(2)(a) provides no statutory definition for the term "family."[1] In the absence of a statutory definition, the term "family" should be given its common, ordinary and accepted meaning.[2] "Family" is defined as "[a] fundamental social group in society consisting esp. of a man and woman and their offspring."[3]

In the case of *Fowler v. Mosher,* the Supreme Court of Virginia discussed the legal definition of "family," stating that, "[i]n a limited sense [family] signifies the father, mother and children. In a more extensive sense it comprehends all the individuals who live under the authority of another."[4] In this case, the Court considered the legality of a substituted service of process whereby a deputy sheriff had left a copy of the notice with a boarder at the home of the appellant.[5] The boarder was over sixteen years of age and the deputy sheriff had explained its purport to her.[6] The Court held that such service was not sufficient, stating that the term "family" did not contemplate "a mere boarder" in

the house.[7] The Court added that the purpose of the statute "was to require service upon some person who would feel interested by the ties of consanguinity [blood], and the relation of dependence, to communicate the fact of the service to the party for whom it was designed."[8] [Page 32]

The "authority to issue and serve process, as provided for by constitution and statute, must be strictly construed."[9] "Section 8.01-296(2) sets forth the manner of serving papers upon natural persons by substituted service"[10] and is to be used where "*no particular mode of service is prescribed*."[11] "[T]his type of service *has no validity unless the terms of the statute are strictly followed*."[12] Employing strict construction to the phrase "member of his family" and consistent with *Fowler,* the phrase would thus encompass relationships of consanguinity to the party. The relationship between an in-law and a particular individual is not a relationship of consanguinity. Although it is arguable that the relationship of an in-law residing in the home of a party upon whom service of process is sought may exceed that of a "mere boarder," strict construction of the terms in the statute requires a very limited application.

Accordingly, it is my opinion that the phrase "member of his family," as used in § 8.01-296(2)(a), would not include an in-law residing in the usual place of abode of a party subject to the substituted service of process provided therein.

FOOTNOTES

[1] *Compare* § 16.1-228 (stating specific definition for phrase "family or household member").

[2] *See Commonwealth v. Orange-Madison Coop.,* 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980); Op. Va. Att'y Gen.: 1997 at 57, 59, 1997 Va. AG 57, 59; 1991 at 296, 298, 1991 Va. AG 296, 298; 1990 at 233, 234, 1990 Va. AG 233, 234.

[3] THE AMERICAN HERITAGE DICTIONARY 488 (1985).

[4] 85 Va. 421, 424, 7 S.E. 542, 543 (1888).

[5] *Id.* at 423-24, 7 S.E. at 543.

[6] *Id.* at 423, 7 S.E. at 543.

[7] *Id.* at 424, 7 S.E. at 543.

[8] *Id.*

[9] 1983-1984 Op. Va. Att'y Gen. 116, 117, 83-84 Va. AG 116, 117.

[10] 1982-1983 Op. Va. Att'y Gen. 306, 306, 82-83 Va. AG 306, 306.

[11] 1983-1984 Op. Va. Att'y Gen. 131, 131, 83-84 Va. AG 131, 131 (quoting § 8.01-296).

[12] 1982-1983 Op. Va. Att'y Gen., *supra* note 10, at 307 (citation omitted).

1999 Va. AG 31

AG Op. CIVIL REMEDIES AND PROCEDURE: ACTIONS, 1996 Va. AG 20

CIVIL REMEDIES AND PROCEDURE: ACTIONS — UNLAWFUL ENTRY AND DETAINER.

COSTS, FEES, SALARIES AND ALLOWANCES: FEES — AMOUNTS OF FEES.

COURTS NOT OF RECORD: JURISDICTION AND PROCEDURE, CIVIL MATTERS.

After judgment for damages is rendered in unlawful detainer action in general district court and possession of property is no longer at issue, time period for posting appeal bond is 10 days. Sheriff may assess $12 statutory fee per defendant when required to serve writ of possession or levy execution, distress warrant or attachment on multiple defendants at same address.

DATE: January 25, 1996

SDATE: 960125

REQUESTOR: The Honorable Thomas J. Kelley, Jr., Judge, Arlington County General District Court

CITE: 1996 20

You ask whether, after judgment for damages is rendered pursuant to § 8.01-128 of the Code of Virginia1 and possession of the property is no longer at issue in an unlawful detainer action in the general district court, the time period for the posting of an appeal bond is ten days under the provisions of § 8.01-1292 or thirty days under the provisions of § 16.1-107.3 You also ask whether the sheriff may assess the statutory fee of twelve dollars per defendant when required to serve a writ of possession, or levy an [Page 21] execution, a distress warrant or an attachment pursuant to § 14.1-105(7) and (8) on multiple defendants at the same address.

A prior opinion of the Attorney General concludes:

> Section 8.01-128 provides that if the premises have been unlawfully detained from the landlord, he shall be granted judgment for such premises. In addition, it states that any judgment rendered in such an action shall include rent and damages[.][4]

The prior opinion also notes that, "[i]n essence, this statute provides that any judgment rendered in an unlawful detainer action should only include those damages that can be established to the satisfaction of the trier of fact."5 The specific statutory provisions governing an appeal of a judgment for damages rendered in an action for unlawful detainer are contained in § 8.01-129. Specifically, § 8.01-129 provides that "[n]otwithstanding the provisions of § 16.1-106 et seq. the bond shall be posted and the writ tax paid within ten days of the date of the judgment." (Emphasis added.) Accepted principles of statutory construction dictate that the more specific statute be deemed to be

controlling.6 The provisions of § 8.01-129 specifically address appeals from judgments in unlawful detainer actions and, therefore, are controlling in this matter.

Furthermore, the General Assembly mandates that in an appeal of a judgment in an unlawful detainer action, "the bond shall be posted and the writ tax paid within ten days of the date of the judgment."7 Use of the word "shall" in a statute ordinarily implies that its provisions are mandatory.8 It is clear from the context of § 8.01-129 that the General Assembly has used "shall" in a mandatory sense to establish the time period for the posting of an appeal bond and payment of the writ taxes in an appeal from a judgment for damages rendered in an unlawful detainer action. "A statute which is plain upon its face should be taken at its face value," without the need to resort to rules of statutory construction.9 Therefore, I am of the opinion that in an unlawful detainer action in the general district court after judgment for damages is rendered pursuant to § 8.01-128 and possession of the property is no longer at issue, the time period allowed for the posting of an appeal bond is ten days under the provisions of § 8.01-129.

You next ask whether the sheriff may assess the statutory fee when required to serve a writ of possession, or levy an execution, a distress warrant or an attachment pursuant to § 14.1-105(7) and (8) on multiple defendants at the same address. Section 14.1-105(7) specifically provides that fees "[f]or serving a writ of possession [shall be] twelve dollars." Section 14.1-105(8) specifically provides that fees "[f]or levying an execution or distress warrant or an attachment [shall be] twelve dollars."

A prior opinion of the Attorney General concludes that "separate service fees may be charged . . . for each pleading requiring a separate return of service, regardless of whether these pleadings are attached to one another and served at the same time."10 The prior opinion concludes that separate service fees may be charged when several pleadings are served simultaneously on the same party.11 Consequently, consistent with the prior opinion of the Attorney General, I am of the opinion that the sheriff may assess the [Page 22] statutory fee of twelve dollars per defendant when the sheriff is required to serve papers on multiple defendants at the same address.

FOOTNOTES

1 Section 8.01-128 provides: "If it appear that the plaintiff was forcibly or unlawfully turned out of possession, or that it was unlawfully detained from him, the verdict or judgment shall be for the plaintiff for the premises . . . . The verdict or judgment shall also be for such damages as the plaintiff may prove to have been sustained by him by reason of such forcible or unlawful entry . . . . No such verdict or judgment shall bar any separate concurrent or future action for any such damages or rent as may not be so claimed."

2 Section 8.01-129 provides, in part: "An appeal shall lie from the judgment of a general district court, in any proceeding under [Article 13, Chapter 3 of Title 8.01], to the circuit court in the same manner and with like effect and upon like security as appeals taken under the provisions of § 16.1-106 et seq. except as specifically provided in this section. The appeal shall be taken within ten days and the security approved by the court from which the appeal is taken. Notwithstanding the provisions of § 16.1-106 et seq. the bond shall be posted and the writ tax paid within ten days of the date of the judgment."

3 Section 16.1-107 provides:

"No appeal shall be allowed unless and until the party applying for the same or someone for him shall give bond, in an amount and with sufficient surety approved by the judge or by his clerk if there is one, to abide by such judgment as may be rendered on appeal if such appeal is perfected, or if not so perfected, then to satisfy the judgment of the court in which it was rendered. . . .

* * *

"In addition to the foregoing, the party applying for appeal shall, within thirty days from the date of the judgment, pay to the clerk of the court from which the appeal is taken the amount of the writ tax of the court to which the appeal is taken and costs as required by subdivision (17) of § 14.1-112."

4 1981-1982 Op. Va. Att'y Gen. 444, 445, 81-82 Va. AG 444, 445.

5 Id.

6 See Dodson v. Potomac Mack Sales & Service, 241 Va. 89, 400 S.E.2d 178 (1991); Barr v. Town & Country Properties, 240 Va. 292, 396 S.E.2d 672 (1990); Va. National Bank v. Harris, 220 Va. 336, 257 S.E.2d 867 (1979).

7 Section 8.01-129.

8 See, e.g., Schmidt v. City of Richmond, 206 Va. 211, 217-18, 142 S.E.2d 573, 578 (1965) (statute using "shall" required court to summon nine disinterested freeholders in condemnation case). Compare Ladd v. Lamb, 195 Va. 1031, 1035-36, 81 S.E.2d 756, 758-59 (1954) (statute providing that clerk of court "shall forward" copy of conviction to Commissioner of Department of Motor Vehicles within 15 days is not mandatory but merely directory). See also 1991 Op. Va. Att'y Gen. 172, 173, 1991 Va. AG 172, 173, and opinion cited therein; 17 M.J. Statutes § 60, at 436-37 (1994).

9 Franklin, etc., Ry. Co. v. Shoemaker, 156 Va. 619, 623, 159 S.E. 100, 101 (1931); see also Commonwealth v. Bailey, 124 Va. 800, 803-04, 97 S.E. 774, 775 (1919); Op. Va. Att'y Gen.: 1985-1986 at 115, 116, 85-86 Va. AG 115, 116; 1984-1985 at 293, 84-85 Va. AG 293.

10 1987-1988 Op. Va. Att'y Gen. 128, 129, 87-88 Va. AG 128, 129.

11 See id.

1996 Va. AG 20

AG Op. COSTS, FEES, SALARIES AND ALLOWANCES, 1995 Va. AG 61

COSTS, FEES, SALARIES AND ALLOWANCES: SALARIES AND EXPENSES OF OFFICE — SHERIFFS AND SERGEANTS — FEES — AMOUNTS OF FEES.

Commonwealth or locality that pays sheriff's salary is exempt from paying sheriff's fees for services rendered. Conclusion does not affect sheriff's fees and mileage allowances clerk of circuit or general district court is required to collect in civil and criminal matters.

DATE: October 16, 1995

SDATE: 951016

REQUESTOR: The Honorable Douglas W. Brown, Treasurer for the City of Newport News

CITE: 1995 61

You ask whether § 14.1-69 of the Code of Virginia, as amended and enacted by the 1995 Session of the General Assembly,1 requires a locality to pay the sheriff's fees for service of process in cases filed in the general district court.2

The General Assembly amended § 14.1-105 at its 1995 Session so that the sheriff's fee for service of all papers, except those returnable out of state, is raised to a uniform rate of "twelve dollars."3 Amendments to §§ 14.1-69 and 14.1-105 remove any distinction between the circuit and general district courts, and an amendment to § 14.1-69 [Page 62] removes any distinction between civil and criminal matters, so that the allowable fees also are to be charged in actions before the general district courts.4

When the General Assembly abolished the fee system as a method of compensating sheriffs in the 1942 Session,5 it made clear that sheriffs were to continue to collect the fees authorized by law for their services. The 1942 act contained two exceptions to the collection obligation imposed on sheriffs. One exception was fees for services rendered in the prosecution of criminal matters.6 These fees continued but "would be collected by the clerk of the court in which the prosecution is had" rather than by the sheriff.7

The second exception was fees for services the sheriff would be entitled to "receive from the Commonwealth or from the county or city for which he is elected or appointed," absent the exception.8 The obvious intent of the General Assembly was to relieve any local government that paid a sheriff's salary from also paying fees for the services the sheriff provided to the local government.9

The General Assembly has not removed these two exceptions to the sheriffs' obligation to collect fees. Despite other amendments to § 14.1-69 and its predecessor statutes,10 the language providing the exception for fees payable by the Commonwealth or by the locality has remained unchanged since 1942. Section 14.1-69 continues to exclude

fees the sheriff "would have been entitled to receive from the Commonwealth or from the county or city for which he is elected or appointed." It is well-settled that "[i]f the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it."11

It is my opinion that § 14.1-69 clearly exempts the Commonwealth and the city or county the sheriff represents from the payment of sheriff's fees.12 The 1995 amendments to § 14.1-69 requiring the clerk of the court to collect sheriffs' fees in civil, as well as criminal, matters and in district, as well as circuit, courts do not affect this conclusion.

FOOTNOTES

1 See Ch. 51, 1995 Va. Acts Reg. Sess. 73, 73-74.

2 The first two sentences of § 14.1-69 provide: "Every sheriff, and every sheriff's deputy, shall, however, continue to collect all fees and mileage allowances provided by law for the services of such officer, other than such as he would have been entitled to receive from the Commonwealth or from the county or city for which he is elected or appointed and fees and mileage allowances provided for services in connection with the prosecution of any criminal matter in the circuit courts. Such fees and mileage allowances accruing in connection with any civil or criminal matter shall be collected by the clerk of the court in which the case is heard." (Emphasis added.)

Section 14.1-105 provides that "[t]he fees shall be as follows:

"(1) For service on any person, firm or corporation, a declaration in ejectment, order, notice, summons or any other civil process, except as herein otherwise provided, and for serving on any person, firm, or corporation any process when the body is not taken and making a return thereof, the sum of twelve dollars except that no fee shall be charged for service pursuant to § 9-6.14:13.

"(2) For summoning a witness or garnishee on an attachment, twelve dollars.

"(3) For serving on any person an attachment or other process under which the body is taken and making a return thereon, twelve dollars.

"(4), (5) [Repealed.]

"(6) For serving any order of court not otherwise provided for, twelve dollars. Notwithstanding the provisions of this subsection, no fees shall be charged for protective orders issued pursuant to Chapter 11 (§ 16.1-226, et seq.) of Title 16.1.

"(7) For serving a writ of possession, twelve dollars.

"(8) For levying an execution or distress warrant or an attachment, twelve dollars.

"(9) For serving any papers returnable out of state, fifty dollars.

"Such fees shall be allowable for services provided by such officers in the circuit and district courts."

3 See 1995 Va. Acts, supra note 1, at 74.

4 See id. at 73, 74.

5 See Ch. 386, 1942 Va. Acts Reg. Sess. 611.

6 See id. § 1(b), at 612.

7 Id.

8 Id.

9 Under the 1942 act, the salary of each sheriff was set by the Compensation Board and was funded two-thirds by the Commonwealth and one-third by the respective county or city represented by each sheriff. See id. §§ 2, 3, 6, at 612-15. Under present law, the Compensation Board sets and funds the salary of each sheriff. See Ch. 966, § 1-29, Item 82(A), 1995 Va. Acts Reg. Sess. 2014, 2055 (prescribing sheriffs' salaries in appropriation act for 1994-1996 biennium).

10 See § 3487(1)(b) (Michie 1942); § 14-82 (Michie 1949).

11 Temple v. City of Petersburg, 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944); see also Op. Va. Att'y Gen.: 1994 at 93, 95, 1994 Va. AG 93, 95; 1993 at 99, 100, 1993 Va. AG 99, 100.

12 See Op. Va. Att'y Gen.: 1980-1981 at 321, 80-81 Va. AG 321; 1964-1965 at 323, 324; 1959-1960 at 340, 342 (construing former § 14-82, recodified as § 14.1-69). The exclusion applies only to the Commonwealth or the locality for which the sheriff is elected or appointed. If a sheriff performs services for another political subdivision, that jurisdiction may not claim exemption from the payment of any applicable sheriff fees. See 1960-1961 at 83, 85 (construing former § 14-82).
1995 Va. AG 61

AG Op. TAXATION: REVIEW OF LOCAL TAXES — COLLECTION BY DISTRESS, SUIT, LIEN, ETC., 2003 Va. AG 172 (03-030)

TAXATION: REVIEW OF LOCAL TAXES — COLLECTION BY DISTRESS, SUIT, LIEN, ETC.

CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS OF RECOVERY.

COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, ETC.

Sheriff is not entitled to statutorily authorized 5% commission for serving distress warrant on behalf of local treasurer for collection of delinquent taxes, which subsequently are paid to treasurer's office.

DATE: June 26, 2003

SDATE: 20030626

REQUESTOR: The Honorable John R. Newhart, Sheriff for the City of Chesapeake

CITE: 2003 Va. AG 172

Issue Presented

You ask whether a sheriff is entitled to the five percent commission authorized under § 8.01-499 for serving a distress warrant on behalf of the treasurer for the collection of delinquent taxes pursuant to § 58.1-3934(B), which subsequently are paid to the treasurer's office.

Response

It is my opinion that a sheriff is not entitled to the five percent commission authorized under § 8.01-499 for serving a distress warrant on behalf of the local treasurer for the collection of delinquent taxes, which subsequently are paid to the treasurer's office. [Page 173]

Applicable Law and Discussion

Section 58.1-3919 requires a local treasurer to collect delinquent taxes “by distress or otherwise.” Section 58.1-3934(B) authorizes a county or city to place local taxes in the hands of the sheriff for collection and entitles the sheriff to the powers conferred by law upon the treasurer.

Section 8.01-499 provides:

> An officer receiving money under [Chapter 18 of Title 8.01[1]] shall make return thereof forthwith to the court or the clerk's office of the court in which the judgment is entered. For failing to do so, the officer shall be liable as if he had acted under an order of such court. After deducting from such money a commission of five per centum and his necessary expenses and costs, including reasonable fees to sheriff's counsel, he shall pay the net proceeds, and he and his sureties and their representatives shall be liable therefor, in like manner as if the same had been made under a writ of fieri facias on the judgment. [Emphasis added.]

It is well-settled that, "[i]f the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it."2 The plain language of § 8.01-499 provides for payment of a commission to the sheriff when he collects the amount due. In order to "make return thereof forthwith to the court," as required by § 8.01-499, the officer must have collected the amount due. A 1962 opinion of the Attorney General determined that no fee is payable to the sheriff when a garnishee makes payment directly to the court, because no collection is made by the officer.3 I find no authority rendering the rationale of the 1962 opinion incorrect.

Conclusion

Accordingly, it is my opinion that a sheriff is not entitled to the five percent commission authorized under § 8.01-499 for serving a distress warrant on behalf of the local treasurer for the collection of delinquent taxes, which subsequently are paid to the treasurer's office.

FOOTNOTES

1 Chapter 18 of Title 8.01 encompasses the statutes governing executions and other means of recovery.

2 Temple v. City of Petersburg, 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944), cited in 1995 Op. Va. Att'y Gen. 61, 62, 1995 Va. AG 61, 62. Based on a 1995 opinion, concluding that the Commonwealth or locality represented by the sheriff is exempt from paying the sheriff's fees, I question whether a sheriff may, in any circumstance, collect a fee from proceeds due to the Commonwealth or the locality he serves. See 1995 Op. Va. Att'y Gen., supra, at 62.

3 1962-1963 Op. Va. Att'y Gen. 101, 102 (concluding that § 8-429, predecessor to § 8.01-499, applies only to instances where sheriff makes actual collection of amounts due); see also Va. Code Ann. § 15.2-1609.3(D) (LexisNexis Supp. 2002) ("When, after distraining or levying on tangible property the officer neither sells nor receives payment and either takes no forthcoming bond or takes one which is not forfeited, he shall . . . have . . . a fee of twelve dollars." Emphasis added.).

2003 Va. AG 172

AG Op. CONSTITUTION OF VIRGINIA: LOCAL, 1995 Va. AG 42

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT.

COUNTIES, CITIES AND TOWNS: COUNTY, CITY AND TOWN OFFICERS GENERALLY.

COSTS, FEES, SALARIES AND ALLOWANCES: FEES. [Page 43]

CRIMINAL PROCEDURE: ARREST.

Offices of sheriff and high constable are not incompatible. Norfolk city sheriff may serve simultaneously as Norfolk high constable. Fees collected by sheriff as high constable must be deposited in city treasury for use in operation of city government.

DATE: February 13, 1995

SDATE: 950213

REQUESTOR: The Honorable Robert J. McCabe, Sheriff for the City of Norfolk

CITE: 1995 42

You ask whether the Norfolk city sheriff may serve simultaneously as high constable for the city. Should the Norfolk city sheriff be permitted to serve simultaneously as high constable, you also ask whether the fees collected as high constable may be deposited in the treasury of the city or must be paid to the state treasury.

Article VII, § 6 of the Constitution of Virginia (1971) and § 15.1-50.4 of the Code of Virginia prohibit the holding of dual offices by certain elected officials, including the office of sheriff. Neither Article VII nor § 15.1-50.4, however, prohibits a sheriff from serving as a high constable. The office of high constable is not listed in either provision.1

Because the office of high constable is not mentioned in either Article VII or § 15.1-50.4, the bar to dual officeholding contained therein does not apply to a sheriff serving simultaneously as high constable.2

Absent any specific statutory or constitutional prohibition, the common law doctrine of compatibility of dual officeholding may preclude such officeholding if the two offices are inherently incompatible.3 In my opinion, however, the offices of sheriff and high constable are not incompatible. The duties of both offices coincide to some extent. Both the sheriff and high constable have a mandatory duty to serve processes and warrants lawfully directed to them.4 If the office of high constable did not exist in Norfolk, it would be incumbent on the sheriff to execute all processes, warrants, summonses and notices in civil cases before the general district court. Therefore, it is my opinion

that neither Article VII nor § 15.1-50.4 prohibits a person from serving simultaneously as sheriff and as high constable.5

Under the provisions of § 14.1-105.1, any fees collected by a high constable "shall be deposited in the treasury of the city wherein such office is situated for use in the general operation of city government."6 Should the Norfolk city sheriff be appointed to the position of Norfolk high constable, fees collected by the sheriff as high constable also must be deposited with the city treasurer.7 Since all fees collected by the high constable are authorized by § 14.1-105.1, the provisions of that section will control the disposition of those fees. Therefore, I am of the opinion that fees collected as high constable must be deposited in the treasury of the city.

FOOTNOTES

1 Article VII, § 6 provides that "[u]nless two or more units exercise functions jointly as authorized in 3 and 4, no person shall at the same time hold more than one office mentioned in this Article." (Emphasis added.) Section 4 provides for the election of "a treasurer, a sheriff, an attorney for the Commonwealth, a clerk, who shall be clerk of the court in the office of which deeds are recorded, and a commissioner of revenue." Section 5 provides for the election of members of the governing bodies of counties, cities and towns.

Section 15.1-50.4 provides that "no person holding the office of treasurer, sheriff, attorney for the Commonwealth, clerk of the court in the office of which deeds are recorded, commissioner of the revenue, supervisor, councilman, mayor, board chairman, or other member of the governing body of any county, city or town shall hold more than one such office at the same time." (Emphasis added.)

2 See Op. Va. Att'y Gen.: 1992 at 58, 59, 1992 Va. AG 58, 59 (because special policemen are not mentioned in Article VII, deputy sheriffs also may serve as special policemen); 1986-1987 at 73, 74, 86-87 Va. AG 73, 74 (because Article VII does not mention membership on local board of welfare, town councilman may serve on local welfare board); 1981-1982 at 296, 297, 81-82 Va. AG 296, 297 (because post of city manager is not mentioned in Article VII, city treasurer also may serve as acting city manager).

3 1981-1982 Op. Va. Att'y Gen. 299, 299, 81-82 Va. AG 299, 299.

4 See § 19.2-80; Narrows Grocery Co. v. Bailey, 161 Va. 278, 170 S.E. 730 (1933); Norfolk, Va., Code charter § 129 (1994).

5 Whether serving as high constable and sheriff constitutes a conflict of interests is a question the Commonwealth's attorney must address. Section 2.1-639.18(B) of the State and Local Government Conflict of Interests Act requires the Commonwealth's attorney of the locality involved to respond to such inquiries from local officers or employees.

6 Section 14.1-105.1 provides that "high constables shall execute all processes, warrants, summonses and notices in civil cases before the general district court . . . to the exclusion of the sheriff. . . . Any fees, collected by the office of

the high constable for such process, shall be deposited in the treasury of the city wherein such office is situated for use in the general operation of city government."

7 See also § 15.1-83.1(A) (with certain exceptions, all money received by sheriff must be deposited with city treasurer).

1995 Va. AG 42

AG Op. COSTS, FEES, SALARIES AND ALLOWANCES, 1995 Va. AG 63

COSTS, FEES, SALARIES AND ALLOWANCES: SALARIES AND EXPENSES OF OFFICE — SHERIFFS AND SERGEANTS — FEES — AMOUNTS OF FEES.

Fees and mileage allowances accruing to sheriff in connection with civil or criminal matter are collected by clerk of circuit or general district court in which case is heard.

DATE: October 4, 1995

DATE: 951004

REQUESTOR: The Honorable Gary W. Waters, Sheriff for the City of Portsmouth

CITE: 1995 63

You ask whether the provisions of §§ 14.1-69 and 14.1-105 of the *Code of Virginia,* as amended and enacted by the 1995 Session of the General Assembly,[1] require [Page 64] the clerks of the circuit and general district courts, rather than the sheriffs, to collect the sheriff's service and process fees at the time the papers are filed in the clerk's office.[2]

You relate that it has been suggested that the sheriff's fees specified in § 14.1-105 are to be collected by the sheriff, rather than by the clerks of the courts. For the purposes of this opinion, you request that I assume that a plaintiff requests a sheriff's office to serve all papers filed with the clerk of the court.

The General Assembly amended § 14.1-105 at its 1995 Session so that the sheriff's fee for service of all papers, except those returnable out of state, is raised to a uniform rate of "twelve dollars."[3] Amendments to §§ 14.1-69 and 14.1-105 remove any distinction between the circuit and general district courts, and an amendment to § 14.1-69 removes any distinction between civil and criminal matters, so that the allowable fees also are to be charged in actions before the general district courts.[4]

A prior opinion of the Attorney General construes the provisions of former §§ 14.1-69 and 14.1-105 in relation to the office "responsible for the collection of fees for service of process and other services as set out in § 14.1-105."[5] Former § 14.1-69 provided, in part:

> Every sheriff, and every sheriff's deputy, shall, however, continue to collect all fees and mileage allowances provided by law for the services of such officer, other than such as he would have been entitled to receive from the Commonwealth or from the county or city for which he is elected or appointed and fees and mileage allowances provided for services in connection with the prosecution of any criminal matter in the circuit courts. Such fees and mileage allowances

accruing in connection with any such criminal matter shall be collected by the clerk of the circuit court in which the prosecution is had.[6]

A 1983 opinion concludes that "§ 14.1-69 requires sheriffs to collect the fees listed in §§ 14.1-105(1) through 14.1-105(9) for the services performed by them in the circuit courts."[7]

The General Assembly is presumed to have had knowledge of the Attorney General's interpretations of statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view.[8] Although the General Assembly initially may have acquiesced in the Attorney General's interpretation of former §§ 14.1-69 and 14.1-105, the 1995 amendment to § 14.1-69 now requires that "[s]uch fees and mileage allowances accruing in connection with any *civil* or criminal matter shall be collected by the clerk of the court in which the *case is heard*."[9] (Emphasis added.)

A rule of statutory construction provides that when new provisions are added to existing legislation by an amendatory act, a presumption normally arises that a change [Page 65] in the law was intended.[10] Another general rule of statutory construction is that words in a statute are to be given their usual, commonly understood meaning.[11] Finally, the use of the word "shall" in a statute generally connotes a mandatory act.[12]

Therefore, I am of the opinion that when a civil or criminal matter is brought in either a circuit or general district court, all fees and mileage allowances accruing to the sheriff in connection with the matter are to be collected by the clerk of the court in which the case is heard.

FOOTNOTES

[1] *See* Ch. 51, 1995 Va. Acts Reg. Sess. 73, 73-74.

[2] The first two sentences of § 14.1-69 provide: "Every sheriff, and every sheriff's deputy, shall, however, continue to collect all fees and mileage allowances provided by law for the services of such officer, other than such as he would have been entitled to receive from the Commonwealth or from the county or city for which he is elected or appointed and fees and mileage allowances provided for services in connection with the prosecution of any criminal matter in the circuit courts. *Such fees and mileage allowances accruing in connection with any civil or criminal matter shall be collected by the clerk of the court in which the case is heard*." (Emphasis added.)

Section 14.1-105 provides that "[t]he fees shall be as follows:

"(1) For service on any person, firm or corporation, a declaration in ejectment, order, notice, summons or any other civil process, except as herein otherwise provided, and for serving on any person, firm, or corporation any process when the body is not taken and making a return thereof, the sum of twelve dollars except that no fee shall be charged for service pursuant to § 9-6.14:13.

"(2) For summoning a witness or garnishee on an attachment, twelve dollars.

"(3) For serving on any person an attachment or other process under which the body is taken and making a return thereon, twelve dollars.

"(4), (5) [Repealed.]

"(6) For serving any order of court not otherwise provided for, twelve dollars. Notwithstanding the provisions of this subsection, no fees shall be charged for protective orders issued pursuant to Chapter 11 (§ 16.1-226, et seq.) of Title 16.1.

"(7) For serving a writ of possession, twelve dollars.

"(8) For levying an execution or distress warrant or an attachment, twelve dollars.

"(9) For serving any papers returnable out of state, fifty dollars.

"Such fees shall be allowable for services provided by such officers in the circuit and district courts."

[3] See 1995 Va. Acts, *supra* note 1, at 74.

[4] *See id.* at 73, 74.

[5] 1983-1984 Op. Va. Att'y Gen. 327, 327, 83-84 Va. AG 327. Deletion of the reference to sheriffs and criers in the fee schedule in the current sections may not be viewed as an attempt to change the present practice of sheriffs' collecting the fees for their services.

[6] 1995 Va. Acts, *supra* note 1, at 73.

[7] 1983-1984 Op. Va. Att'y Gen., *supra* note 5. Since the 1995 amendment to § 14.1-69 removes any distinction between the circuit and general district courts, the 1983 opinion arguably would apply also to fees charged for such services performed by sheriffs in matters in the general district courts had there been no other amendment to that section.

[8] *Deal v. Commonwealth,* 224 Va. 618, 622, 299 S.E.2d 346, 348 (1983); *see also* Op. Va. Att'y Gen.: 1992 at 42, 44, 1992 Va. AG 42, 44; 1991 at 1, 2, 1991 Va. AG 1, 2.

[9] *See also* 1995 Va. Acts, *supra* note 1, at 73.

[10] *Wisniewski v. Johnson,* 223 Va. 141, 144, 286 S.E.2d 223, 224-25 (1982); *see also* Op. Va. Att'y Gen.: 1992, *supra* note 8; 1990 at 156, 157, 1990 Va. AG 156, 157; 1986-1987 at 272, 273, 86-87 Va. AG 272, 273.

[11] *See* Op. Va. Att'y Gen.: 1991 at 127, 129, 1991 Va. AG 127, 129; 1986-1987 at 78, 79, 86-87 Va. AG 78, 79; 1985-1986 at 65, 66, 85-86 Va. AG 65, 66.

[12] *See* Op. Va. Att'y Gen.: 1991, *supra;* 1986-1987 at 233, 234, 86-87 Va. AG 233, 234; 1985-1986 at 133, 134, 85-86 Va. AG 133, 134.

1995 Va. AG 63

AG Op. CIVIL REMEDIES AND PROCEDURE: ACTIONS, 1999 Va. AG 24

CIVIL REMEDIES AND PROCEDURE: ACTIONS — UNLAWFUL ENTRY AND DETAINER — EXECUTIONS AND OTHER MEANS OF RECOVERY.

Officer to whom writ of possession has been delivered in unlawful detainer action must provide defendant 72-hour notice of intent to execute writ, notwithstanding court's ‘immediate possession’ direction on writ.

DATE: May 20, 1999

SDATE: 990520

REQUESTOR: The Honorable John R. Newhart, Sheriff for the City of Chesapeake

CITE: 1999 24

You ask what constitutes immediate possession under § 8.01-129 of the Code of Virginia.

You state that, in unlawful detainer actions, the office of the sheriff has been receiving writs of possession on which the courts have written “immediate possession.” Your office has been posting a seventy-two hour notice to vacate and proceeding with the eviction as soon as possible following this period. You question whether this procedure is consistent with § 8.01-129.

Section 8.01-129 provides for an appeal to the circuit court from a judgment of a general district court in a proceeding for unlawful entry and detainer.1 The appeal must be taken and the required security posted within ten days of the date of the general district court judgment.2 Section 8.01-129 further provides:

> Unless otherwise specifically provided in the court's order, no writ of execution shall issue on a judgment for possession until the expiration of this ten-day period, except in cases of judgment of default for the nonpayment of rent where the writ of execution shall issue immediately upon entry of judgment for possession, if requested by the plaintiff.[3]

Section 8.01-470 governs the issuance and execution of a writ of possession on a judgment for the recovery of specific property

> In cases of unlawful entry and detainer and of ejectment, the officer to whom a writ of possession has been delivered to be executed shall, at least seventy-two hours before execution, serve notice of intent to execute, including the date and time of execution, on the defendant in accordance with § 8.01-296, with a copy of the writ attached.

The primary goal of statutory construction is to discern and give effect to the intent of the legislature.4 In determining legislative intent, statutes dealing with the same subject matter should be construed together in order to give effect to all acts of the legislature.5 While § 8.01-129 provides that the court is to issue the writ of execution "immediately upon entry of judgment for possession," the statute contains no language suggesting a legislative intent to override the seventy-two hour notice requirement imposed on officers by § 8.01-470. Both statutes thus should be given full effect to the extent possible. Accordingly, it is my opinion that, notwithstanding the courts' "immediate possession" direction on a writ of execution issued under § 8.01-129, the officer to whom the writ of execution is delivered is to provide the seventy-two hour notice mandated by § 8.01-470.

FOOTNOTES

1 Sections 8.01-124 to 8.01-130 comprise the unlawful entry and detainer statutes. A motion for judgment for unlawful entry and detainer may be heard in general district court if the summons is issued by a magistrate. Section 8.01-126. The case may be removed to the circuit court if the amount in controversy exceeds $500. Section 8.01-127.

2 Section 8.01-129.

3 The exception clause for cases of judgment of default for the nonpayment of rent was added to the statute at the 1998 Session of the General Assembly. See 1998 Va. Acts ch. 750, at 1813.

4 See Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

5 See Prillaman v. Commonwealth, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957); see also Op. Va. Att'y Gen.: 1996 at 197, 198; 1996 Va. AG 197, 198; 1993 at 135, 137; 1993 Va. AG 135, 137; 1992 at 97, 99, 1992 Va. AG 97, 99.

1999 Va. AG 24

AG Op. PROPERTY AND CONVEYANCES: LANDLORD AND TENANT, 2002 Va. AG 264 (01-068)

PROPERTY AND CONVEYANCES: LANDLORD AND TENANT — RESIDENTIAL LANDLORD AND TENANT ACT.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (COUNTY AND CITY OFFICERS).

COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, ETC.

Actions of sheriff's office regarding disposal of personal property removed from residential premises pursuant to unlawful detainer or ejectment.

DATE: April 2, 2002

SDATE: 020402

REQUESTOR: The Honorable John R. Newhart, Sheriff for the City of Chesapeake

CITE: 2002 Va. AG 264

You request clarification regarding disposal of specific personal property belonging to a tenant who is removed by the sheriff from a residential premises pursuant to an action of unlawful detainer or ejectment.

The actions of your office, as described below, with regard to the storage of personal property removed from a residential premises pursuant to unlawful detainer or ejectment are consistent with §§ 55-237.1 and 55-248.38:2.

Facts

You advise that some sheriffs seize firearms found during the eviction process in the case of tenants whose property is to be stored. You explain that these sheriffs seize such weapons for the general welfare of the public. Your office, however, does not plan to seize any weapons that are to be stored. You advise that your office will inspect all weapons prior to transporting them to storage to ensure that such weapons are not loaded. Your office will empty any loaded weapons prior to transport.

You further advise that any open alcohol containers found during the eviction process will not be allowed to be stored, and that you will supervise the disposal of open containers. Unopened alcoholic containers, however, will be stored. You state that, following the twenty-four-hour eviction period, it becomes the right and duty of the landlord to dispose of the tenant's personal property.

In both instances, you ask whether the actions of your office are consistent with §§ 55-237.1 and 55-248.38:2 of the Code of Virginia.

Applicable Authorities and Discussion

Sections 55-237.1 and 55-248.38:2 are nearly identical statutory provisions, which provide, in part:

> At the landlord's request, the sheriff shall cause [the tenant's] personal property to be placed into a storage area designated by the landlord, which may be the dwelling unit. The tenant shall have the right to remove his personal property from the landlord's designated storage area at reasonable times during the twenty-four hours after eviction from the premises or at such other reasonable times until [Page 265] the landlord has disposed of the property as provided herein. During that twenty-four hour period and until the landlord disposes of the remaining personal property of the tenant, the landlord and the sheriff shall not have any liability for the loss of such personal property.[1]

In the case of Huffman v. Kite, the Supreme Court of Virginia considered the meaning of a state statute using the word “shall” in connection with circuit court appointments of school trustee electoral board members within thirty days after July 1.2 The Court reasoned that the time limit imposed on the circuit courts by the statute was not mandatory:

> If it appears from the nature, context, and purpose of the act that the legislature intended that “shall” be treated as advisory or directory, then it should be accorded that meaning.[3]

Therefore, “the use of ‘shall,’ in a statute requiring action by a public official, is directory and not mandatory unless the statute manifests a contrary intent.”4

Sections 55-237.1 and 55-248.38:2 do not discriminate as to the classification of personal property subject to storage and are advisory in nature. A sheriff is an independent constitutional officer whose duties “shall be prescribed by general law or special act.”5 The Supreme Court of Virginia has commented that, as a general rule, the duties of a sheriff and his deputies are regulated and defined by statute.6 A 1985 opinion of the Attorney General, however, notes that, although a sheriff's powers and duties are limited to those prescribed by statute, he is free to discharge those powers and duties in a manner he deems appropriate.7

Conclusion

Therefore, it is my opinion that the actions of your office with regard to the storage of personal property removed from a residential premises pursuant to unlawful detainer or ejectment are consistent with §§ 55-237.1 and 55-248.38:2.

FOOTNOTES

1 Va. Code Ann. § 55-237.1 (Michie Supp. 2001).

2 198 Va. 196, 93 S.E.2d 328 (1956).

3 Id. at 202, 93 S.E.2d at 332.

4 Jamborsky v. Baskins, 247 Va. 506, 511, 442 S.E.2d 636, 638 (1994), quoted in Commonwealth v. Wilks, 260 Va. 194, 199, 530 S.E.2d 665, 667 (2000).

5 Va. Const. art. VII, § 4; see Va. Code Ann. § 15.2-1600(A) (Michie Repl. Vol. 1997) (parallel statute requiring counties and cities to elect sheriffs).

6 See Hilton v. Amburgey, 198 Va. 727, 729, 96 S.E.2d 151, 152 (1957); Narrows Grocery Co. v. Bailey, 161 Va. 278, 284, 170 S.E. 730, 732 (1933).

7 1984-1985 Op. Va. Att'y Gen. 73, 73, 84-85 Va. AG 73, 73
2002 Va. AG 264

AG Op. TAXATION: REVIEW OF LOCAL TAXES, 2002 Va. AG 321 (02-055)

TAXATION: REVIEW OF LOCAL TAXES — COLLECTION BY DISTRESS, SUIT, LIEN, ETC. — COLLECTION BY TREASURERS — LOCAL OFFICERS — TREASURERS.

CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS OF RECOVERY — ENFORCEMENT GENERALLY.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (COUNTY AND CITY OFFICERS). [Page 322]

Sheriff is appropriate official to determine, based on facts, reasonableness of distress levy and holding public sale of property when proceeds will not satisfy secured interests or unpaid taxes. Meaning of 'priority' as it relates to payment of distress sale proceeds toward delinquent taxes or secured interests. Requirement that secured party with lien on distressed property receive notice of distress sale.

DATE: September 27, 2002

SDATE: 020927

REQUESTOR: The Honorable John R. Newhart, Sheriff for the City of Chesapeake

CITE: 2002 Va. AG 321

Issues Presented

You pose several questions concerning the responsibilities and duties of a sheriff regarding the enforcement of a treasurer's distress warrant. You ask whether a sheriff is required to enforce a distress warrant for delinquent taxes when such enforcement will result in the sale of property from which the proceeds will not fully satisfy a secured party with a lien on the distressed property or the delinquent taxes. You also inquire concerning the definition of "priority," as that term is used in § 58.1-3942(C), which provides that a security interest perfected prior to the distraint of the property shall have priority over the payment of certain delinquent taxes. Finally, you ask whether a secured party has any rights concerning the sale of distressed property on which he has a lien when the sale does not satisfy the secured party's lien.

Response

Under § 8.01-490, a sheriff is not required to make an unreasonable levy. It is my opinion that it is within a sheriff's discretion to determine whether the levy of a distress warrant is unreasonable; however, such discretion should not be exercised arbitrarily. In making such determination, a sheriff should

consider such factors as the divisibility of the property and the quality, quantity, nature, and value of the property in relation to the amount of the levy. The reasonableness of a levy, in any given circumstance, is a determination of fact. Attorneys General consistently have declined to render official opinions when the request involves determinations of fact rather than questions of law. Therefore, I am unable to render an opinion regarding whether the levy you describe is unreasonable.

It is also my opinion that the term "priority," as used in § 58.1-3942(C), means that a secured party whose security interest is perfected prior to any distraint for taxes shall be paid first out of any proceeds from the sale of the distrained property, unless the taxes for which the property was distrained were specifically assessed against the distrained property. If the delinquent taxes are specifically assessed against the distrained property, the proceeds of the distress sale must be paid first toward delinquent taxes and any remainder toward secured interests.

Finally, it is my opinion that a secured party with a lien on distressed property is required to receive notice of a distress sale as provided in §§ 58.1-3942(B) and 8.01-492.

Background

You relate that a local treasurer's office has requested the sheriff to levy on and sell for taxes certain tangible personal property such as automobiles, motorcycles, and [Page 323] boats. You also relate that some of the items may have a primary lien on them and that the sale of such items would not satisfy a secured party whose security interest was perfected prior to any distraint for taxes. You are concerned that such sale does not effect satisfaction of the treasurer's distress warrant and is thus an unreasonable levy on the property.

Applicable Law and Discussion

The powers and duties of a treasurer are set out generally in Article 2, Chapters 31[1] and 39[2] of Title 58.1. The treasurer is responsible for collecting taxes and other revenues payable into the treasury of the locality served by the treasurer.[3] Section 58.1-3919 grants local treasurers the authority to collect delinquent taxes by distress.[4] Article 3, Chapter 39 of Title 58.1, §§ 58.1-3940 through 58.1-3964, sets forth the requirements for collection of delinquent taxes by distress. Specifically, § 58.1-3941 addresses the use of distress by the treasurer and the sheriff, among others, for collection of such taxes.[5] Section 58.1-3941 authorizes specified tax collectors to distrain property. The distraint of property for the collection of delinquent taxes may be accomplished without an initial judicial proceeding.[6] Distress for taxes is the seizure of personal property to enforce payment of taxes due, to be followed by its public sale.[7] In acting pursuant to § 58.1-3941, a sheriff may take possession of the debtor's property and remove it from the premises.[8]

A sheriff is an independent constitutional officer whose duties "shall be prescribed by general law or special act."[9] In the absence of a statute providing otherwise, the authority of a sheriff is coextensive with

his locality.[10] As a general rule, the duties of a sheriff and his deputies are regulated and defined by statute.[11]

A sheriff may use a distress letter from a treasurer to seize property.[12] A sheriff is required to collect the delinquent taxes described in the treasurer's distress letter.[13] Additionally, a sheriff may not require the treasurer to provide an indemnity bond for liability arising from distress.[14] A January 1997 opinion of this Office determined that service by the sheriff of a distress warrant is mandatory.[15] The opinion relies on former § 15.1-79, which provided:

> Every officer to whom any order, warrant, or process (*including, but not limited to, any distress warrant, tax lien or administrative summons issued by a city or county treasurer*) may be lawfully directed, shall execute the same within the boundaries of the political subdivision in which he serves and may execute the same in any contiguous county or city in accordance with the provisions of § 19.2-76.[16]

Subsequent to the January 1997 opinion, § 15.1-79 was repealed as part of the recodification of Title 15.1.[17] The drafting note pertaining to the recodification provides that "the substance of [§ 15.1-79] is found in §§ 8.01-295[18] and 19.2-76."[19] Neither § 8.01-295 nor § 19.2-76 contains the mandatory language in § 15.1-79 requiring a sheriff to execute such distress warrants. Therefore, the statutory provision upon which the determination of the 1997 opinion was based is no longer effective. [Page 324]

A distraint letter issued by a treasurer is a command to the sheriff to seize the specified property of the delinquent taxpayer. The sheriff levies on the specified property and conducts a sale of such property to satisfy the delinquent taxes. Section 8.01-490 provides that "[o]fficers shall in no case make an unreasonable distress or levy." It is this provision that prompts your first question.

Although there is no comparable statutory language to replace the requirement in repealed § 15.1-79 that a sheriff execute a distress warrant, it appears that § 8.01-490, standing alone, allows a sheriff to refuse to perform an unreasonable levy of a distress warrant. Under § 8.01-490, it is within the sheriff's discretion to determine whether a levy is unreasonable.[20]

The sheriff's discretion in determining the unreasonableness of a levy, however, may not be exercised arbitrarily.[21] Each specific levy will have different circumstances bearing on whether the action to be taken by the sheriff is unreasonable. For instance, as noted in a prior opinion of this Office, if the value of a car is less than the amount of the prior lien, it raises a question of reasonableness in levying on the property.[22] A levy on property that does not appear to have a fair market value sufficient to fully satisfy a secured party or the delinquent taxes, however, is not per se unreasonable. The mere act of distraint may prompt a delinquent taxpayer to pay the taxes due and owing. Additionally, until the sale actually occurs, the fair market value of the distrained property is not truly known. Although there may be resources that give an indication of the fair market value of the property, it is the distress sale that determines the ultimate value of the property. If the delinquent taxes against the distrained property are specifically assessed, either per item or in bulk, the proceeds of the tax sale will be applied first to the delinquent

taxes.[23] As such, the treasurer has an interest to distrain such property even when the sale will not fully satisfy the delinquent tax amount or the secured party.

Determining whether a given levy is "unreasonable" depends on the circumstances of a particular situation.

> Several factors must be considered in the determination of whether the levy in a particular case is unreasonable or excessive. These considerations include the divisibility of the property, the quality, quantity, and nature of the property, and the value of the property in relation to the amount of the levy.[24]

For example, the distraint of substantially more property than is necessary to satisfy the delinquent taxes may be considered unreasonable if the property is divisible in such a way as to only levy against the items necessary to pay the debt owed.[25] Additionally, the person making the levy does not necessarily know the amount of the lien of the secured party against the distrained property. As such, the person may not be able to determine whether the levy is in fact "unreasonable," since he does not know whether the sale proceeds would be available to satisfy at least part of the delinquent tax obligation. Arguably, a levy is reasonable, with regard to the economic value of [Page 325] the property, as long as at least one creditor receives some payment. Conversely, an "unreasonable" levy would be one where no creditor would get anything. The determination of "unreasonable distress or levy" in these circumstances is also impacted by which creditor is paid first from the proceeds of the tax sale, as discussed below.

The reasonableness of a levy, in any given circumstance, is a determination of fact. Attorneys General consistently have declined to render official opinions when the request involves determinations of fact rather than questions of law.[26] Therefore, I am unable to render an opinion regarding whether the levy you describe is unreasonable.

You next ask the meaning of "priority," as that term is used in § 58.1-3942(C). Section 58.1-3942(C) provides that "[a] security interest perfected prior to any distraint for taxes shall have priority over all taxes, except those specifically assessed either per item or in bulk against the goods and chattels so assessed." The term "priority" is not defined in Title 58.1. Consequently, the term must be given its ordinary meaning within the statutory context.[27] The term "priority" means "precedence in rank" or "an interest having prior claim to consideration."[28]

The practical meaning of § 58.1-3942(C) is that a secured party, whose interest is secured before the distraint, will be paid first out of any proceeds from the sale of the distrained property, unless the taxes for which the property was distrained were specifically assessed against the distrained property. For example, if a taxpayer fails to pay the personal property tax assessed against a specific vehicle and the treasurer decides to distrain the taxpayer's vehicle for payment of the delinquent taxes, the proceeds from the sale of the vehicle would be paid first to the treasurer.[29] Any proceeds remaining after payment of the personal property taxes would be paid to the secured party, whose interest is secured before the distraint, up to the

amount of the lien. Because the secured party may not receive any proceeds from such a sale does not necessarily mean the levy is unreasonable.

Conversely, if taxes have not been assessed against specific property prior to its distraint,[30] the proceeds from the sale of the distrained property would be paid first to the secured party, whose interest was secured prior to distraint of the property, with the remainder paid toward the delinquent taxes. In each case, any proceeds remaining after satisfaction of the delinquent taxes and any secured interests would be paid to the taxpayer.

Section 58.1-3942(C) does not require that the secured party's lien be totally satisfied prior to levying and selling an item to satisfy any portion of a distress warrant. In certain cases, as described above, it does mean that the secured party would be paid first; however, the statute does not provide a guarantee of full payment to the secured party before property may be distrained and sold. Said another way, whether the secured party's lien is completely satisfied from the proceeds of the tax sale is of no consequence to the authority of the treasurer to distrain the property and have it sold. Section 58.1-3942(C) merely prioritizes the circumstances under which creditors are to receive payment from a distrained property sale. [Page 326]

Therefore, as a general matter, the term “priority” in § 58.1-3942(C) means that the secured party, whose interest is secured before the distraint, is paid first from the proceeds of a sale of distrained property, to the extent of his lien, before the treasurer is paid the remainder for delinquent taxes, unless the delinquent taxes for which the property is being distrained have been specifically assessed against the distrained property. If the delinquent taxes for which the property is being distrained were specifically assessed, either per item or in bulk, the proceeds of the sale of the distrained property are paid first to the treasurer, with any remaining funds paid to the secured party, to the extent of his lien and, finally, to the former owner of the property.

You also inquire whether a secured party with a security interest in distrained property has any rights concerning the sale of the property when the sale will not satisfy the amount owed to the secured party. Section 58.1-3942(B) makes applicable certain notice requirements when distress goods are subject to a security interest and sale by the treasurer and sheriff. Additionally, § 8.01-492 details the procedure for the sale of distressed property by these officials. A prior opinion of this Office concludes that the procedure set forth in § 8.01-492 should be followed in such sales.[31] Section 8.01-492 provides that the officer conducting the sale of property

> shall fix upon a time and place for the sale thereof and post notice of the same at least ten days before the day of sale at some place near the residence of the owner if he reside in the county or city and at two or more public places in the officer's county or city.

Conclusion

Under § 8.01-490, a sheriff is not required to make an unreasonable levy. Accordingly, it is my opinion that it is within a sheriff's discretion to determine whether the levy of a distress warrant is unreasonable; however, such discretion should not be exercised arbitrarily. In determining whether a levy is unreasonable, a sheriff should consider such factors as the divisibility of the property and the quality, quantity, nature, and value of the property in relation to the amount of the levy. The reasonableness of a levy, in any given circumstance, is a determination of fact. Attorneys General consistently have declined to render official opinions when the request involves determinations of fact rather than questions of law. Therefore, I am unable to render an opinion regarding whether the levy you describe is unreasonable.

It is also my opinion that the term "priority," as used in § 58.1-3942(C), means that a secured party whose security interest is perfected prior to any distraint for taxes shall be paid first out of any proceeds from the sale of the distrained property, unless the taxes for which the property was distrained were specifically assessed against the distrained property. If the delinquent taxes are specifically assessed against the distrained property, the proceeds of the distress sale must be paid first toward delinquent taxes and any remainder to secured interests.

Finally, it is my opinion that a secured party with a lien on distressed property is required to receive notice of a distress sale as provided in §§ 58.1-3942(B) and 8.01-492.

FOOTNOTES

[1] Va. Code Ann. §§ 58.1-3123 to 58.1-3172.1 (Michie Repl. Vol. 2000 & LexisNexis Supp. 2002).

[2] Sections 58.1-3910 to 58.1-3939 (Michie Repl. Vol. 2000 & LexisNexis Supp. 2002).

[3] Section 58.1-3127(A) (Michie Repl. Vol. 2000); § 58.1-3910 (LexisNexis Supp. 2002).

[4] 1997 Op. Va. Att'y Gen. 203, 204, 1997 Va. AG 203, 204.

[5] "Any goods or chattels, money and bank notes in the county, city or town belonging to the person or estate assessed with taxes, levies or other charges collected by the treasurer may be distrained therefor by the treasurer, sheriff, constable or collector." Section 58.1-3941 (Michie Repl. Vol. 2000).

[6] *See, e.g.*, 1997 Op. Va. Att'y Gen., *supra* note 4, at 204 (noting statutes detailing procedure for collection of delinquent taxes by distress that does not require initial judicial proceeding).

[7] 1972-1973 Op. Va. Att'y Gen. 380, 380, 72-73 Va. AG 380, 380.

[8] *Id.* (citing repealed § 58-1001, now codified at § 58.1-3941).

[9] Va. Const. art VII, § 4.

[10] 80 C.J.S. *Sheriffs and Constables* § 55 (2000); 1980-1981 Op. Va. Att'y Gen. 322, 322, 80-81 Va. AG 322, 322.

[11] *See Hilton v. Amburgey*, 198 Va. 727, 729, 96 S.E.2d 151, 152 (1957); *Narrows Grocery Co. v. Bailey*, 161 Va. 278, 284, 170 S.E. 730, 732 (1933); 80 C.J.S., *supra* note 10, § 52, at 153-54.

[12] 1997 Op. Va. Att'y Gen., *supra* note 4, at 203.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 204.

[16] 1995 Va. Acts ch. 17, at 38.

[17] *See* 1997 Va. Acts ch. 587, at 976 (enacting cl. 1); *id.* at 1401 (enacting cl. 13, 14).

[18] Section 8.01-295 provides:

"The sheriff may execute such process throughout the political subdivision in which he serves and in any contiguous county or city. If the process appears to be duly served, and is good in other respects, it shall be deemed valid although not directed to an officer, or if directed to any officer, though executed by some other person. This section shall not be construed to require the sheriff to serve such process in any jurisdiction other than in his own."

[19] 5 H. & S. Docs., *Report of the Virginia Code Commission on the Recodification of Title 15.1 of the Code of Virginia*, S. Doc. No. 5, at 420 (1997).

[20] Although a sheriff is responsible for determining whether a levy is unreasonable, such a decision is subject to judicial review, should the decision be challenged in court, at which point a trier of fact will determine whether the sheriff made an unreasonable levy.

[21] *See* 80 C.J.S., *supra* note 10, § 52, at 154.

[22] 1982-1983 Op. Att'y Gen. 71, 72, 73 n.3, 82-83 Va. AG 71, 72, 73 n.3 (determining that, even though vehicle was not worth amount necessary to satisfy lien, once judgment creditor has satisfied indemnifying requirements and sheriff is directed to sell property, he must do so, in spite of its value).

[23] *See* § 58.1-3942(D) (LexisNexis Supp. 2002); *see also* 1972-1973 Op. Va. Att'y Gen., *supra* note 7, at 380 (if property is subject to security interest perfected prior to any distraint for taxes, only amount of

taxes assessed against property subject to such interest may be paid over to treasurer, and balance must be paid to secured party to extent of debt due to him.)

[24] *Horbach v. Traverse Technologies, Inc.*, 19 Cir. M85602, 35 Va. Cir. 249, 249 (1994) (holding that sheriff's levy on 1,000 shares of stock valued in excess of $1 million to satisfy judgment for $210,542 was unreasonable and excessive).

[25] *See id.*

[26] *See* op. no. 01-118 to Michael M. Collins, Alleghany Co. Att'y (Apr. 12, 2002) [2002 Va. AG 302], *available at* http://www.oag.state.va.us/Opinions/2002opns/01-118.pdf;[*] 1997 Op. Va. Att'y Gen. 195, 196 & n.8, 1997 Va. AG 195, 196 & n.8.

[*] [Editor's Note: The web site address(es) which appear in this case are set out as hyperlinks for your own convenience. Due to the passage of time, however, the hyperlink may no longer work and/or the content of the web site may not accurately reflect the content which existed at the time this case was decided.]

[27] *See Grant v. Commonwealth*, 223 Va. 680, 684, 292 S.E.2d 348, 350 (1982); *Loyola Fed. Savings v. Herndon*, 218 Va. 803, 805, 241 S.E.2d 752, 753 (1978) (construing ordinary meaning of statutory terms "prescribe" and "owner," respectively).

[28] The Oxford American Dictionary and Language Guide 791 (1999).

[29] Please note that the lien derived from an assessment specifically against the property not only has priority over prior secured creditors, but also may be enforced after the property has been sold to a bona fide purchaser. *See* § 58.1-3941 ("Property on which taxes were specifically assessed, whether assessed per item or in bulk shall be subject to distress after it passes into the hands of a bona fide purchaser for value."); *see also* 1982-1983 Op. Va. Att'y Gen. 618, 82-83 Va. AG 618, (citing *Chambers v. Higgins*, 169 Va. 345, 350-51, 193 S.E. 531, 533 (1937) (noting that tangible personal property that has passed out of possession of delinquent owner is not liable for delinquent taxes, unless treasurer has assessed tax against each specific item of property)). Such specific assessments constitute liens on each specific piece of personal property for the taxes due thereon. *See Drewry v. Baugh and Sons*, 150 Va. 394, 401, 143 S.E. 713, 715 (1928).

[30] An example of this type of tax would be the business, professional and occupational license tax assessed pursuant to §§ 58.1-3700 to 58.1-3735.

[31] 1953-1954 Op. Va. Att'y Gen. 204 (citing former § 8-422.1).

2002 Va. AG 321

AG Op. TAXATION. COLLECTION. BANKRUPTCY, 85-86 Va. AG 262
TAXATION. COLLECTION. BANKRUPTCY PETITION FILING STAYS COLLECTION OF PERSONAL PROPERTY TAXES BY WARRANT IN DEBT. [Page 263]

DATE: October 4, 1985

SDATE: 851004

REQUESTOR: The Honorable William E. Jones, Treasurer for Dinwiddie County

CITE: 85-86 262

You ask whether (1) a warrant in debt for 1984 personal property taxes may be served upon an individual who has filed a petition in bankruptcy under the United States Bankruptcy Code, 11 U.S.C.A. § 101 *et seq.* (West Supp. 1985), (the "Bankruptcy Code"), and (2) a warrant in debt to collect 1984 personal property taxes may be served on an individual under the facts described above where the individual has listed the personal property tax in his "claim to creditors." For the reasons set forth below, I answer each of these questions in the negative.

With certain exceptions listed in § 362(b), § 362(a) of the Bankruptcy Code provides that the filing of a petition in bankruptcy imposes an automatic stay against litigation, lien enforcement, and other actions to collect a debt from the filing debtor. The stay applies to all entities, a term which includes governmental units. *See* 11 U.S.C.A. § 101(14).

The warrant in debt to which you refer is an action to collect delinquent 1984 personal property taxes in a court proceeding authorized by § 58.1-3953 of the Code of Virginia. Thus, the service of a warrant in debt constitutes an action to collect a tax debt of the debtor. Such actions are subject to the automatic stay provisions of § 362(a) in the absence of an exemption. None of the exemptions listed is applicable here.[1] Accordingly, I conclude that the stay provisions apply and you should not serve a warrant in debt on an individual who has filed a petition in bankruptcy.[2]

I assume that the reference in your second question to the individual listing the personal property tax in his "claim to creditors" is to the list of creditors required to be filed under the Bankruptcy Code. *See* 11 U.S.C.A. § 521. The purpose of this list is to (a) give the court information as to the persons entitled to notice of the filing of the bankruptcy petition, (b) inform the bankruptcy trustee as to the claims against the estate and the considerations on which they rest, and (c) to an extent, limit the effect of the debtor's discharge only to the parties so listed.[3]

Based on the foregoing, I find nothing with respect to the filing of the list of creditors which would change the applicability of the § 362(a) stay provision to a warrant in debt to collect taxes. It is my

opinion, therefore, for the reasons stated in my response to your first question, that the stay provision should be observed, even though the personal property tax is included in the schedule of creditors.[4]

FOOTNOTES

[1] *But cf.* 11 U.S.C.A § 362(b)(9), which exempts issuance of a notice of tax deficiency from the automatic stay provisions of § 362(a).

[2] Violations of the stay may be punished by contempt proceedings. *See 2 Collier on Bankruptcy* ¶ 362.11 (15th ed. 1979).

[3] Under § 523(a)(3) of the Bankruptcy Code, debts which have not been listed by the debtor in time to permit timely filing by the creditor of a proof of claim will not be released by discharge under the bankruptcy action unless the creditor had notice or actual knowledge of the case. *See 3 Collier on Bankruptcy* ¶ 523.13(5)(a) (15th ed. 1979).

[4] *See* 1982-1983 Report of the Attorney General at 30, 82-83 Va. AG 30 (where the action is one for the collection of debt and reliable information is available that a petition in bankruptcy has been filed, the stay provisions of § 362 should be observed).

85-86 Va. AG 262

AG Op. TAXATION: REVIEW OF LOCAL TAXES, 1997 Va. AG 202

TAXATION: REVIEW OF LOCAL TAXES — COLLECTION BY DISTRESS, SUIT, LIEN, ETC.

Highway vehicle operated, or intended to be operated, on highway is not vehicle subject to levy or distress for taxes. Mobile home does not meet definition of highway vehicle. Mobile home repossessed and subsequently sold for value to bona fide purchaser unaware of existing personal property tax lien on home may be distrained.

DATE: August 6, 1997

SDATE: 970806

REQUESTOR: The Honorable Barbara O. Carraway, Treasurer for the City of Chesapeake

CITE: 1997 202

You ask whether a mobile home may be distrained pursuant to § 58.1-3941 of the Code of Virginia when it has been repossessed and subsequently sold to a bona fide purchaser for value who had no knowledge of an existing personal property tax lien on the mobile home.1

Section 58.1-3941 provides that taxable property "shall be liable to levy or distress in the hands of any person." The word "shall" is primarily mandatory in its effect.2 The only exception to such levy or distress is "any highway vehicle as defined in § 58.1-2101 purchased by a bona fide purchaser for value." Section 58.1-2101 defines the term "highway vehicle" to mean "any vehicle operated, or intended to be operated, on a highway." The term, "operate," however, is not defined in § 58.1-2101. In the absence of any statutory definition, the term should be given its plain and ordinary meaning, given the context in which it is used.3 The term "operate" is generally defined to mean "to work, perform, or function, as a machine does; to work or use a machine, apparatus, or the like."4

A principle of statutory construction to be applied to your inquiry is that "[i]f the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it."5 It is unnecessary to resort to any rules of statutory construction when the language of a statute is unambiguous.6 In those situations, the statute's plain meaning and intent govern. Another principle of statutory construction dictates that the more specific statute shall be deemed controlling over any general statute.7 [Page 203]

In my opinion, it is clear that a mobile home is not a "highway vehicle" within the meaning of § 58.1-2101, because such vehicle is not operated, and is not intended to be operated, on a highway. Consequently, a mobile home, which has been repossessed and subsequently sold to a bona fide purchaser

for value who was unaware of an existing personal property tax lien on the mobile home, may be distrained pursuant to § 58.1-3941.8

FOOTNOTES

1 Section 58.1-3941 provides: "Any goods or chattels, money and bank notes in the county, city or town belonging to the person or estate assessed with taxes, levies or other charges collected by the treasurer may be distrained therefor by the treasurer, sheriff, constable or collector. Property subject to levy or distress for taxes shall be liable to levy or distress in the hands of any person for taxes, penalties and interest thereon, except that any highway vehicle as defined in § 58.1-2101 purchased by a bona fide purchaser for value shall not be liable to levy or distress for such taxes unless the purchaser knew at the time of purchase that the taxes had been specifically assessed against such vehicle.

"Property on which taxes were specifically assessed, whether assessed per item or in bulk shall be subject to distress after it passes into the hands of a bona fide purchaser for value."

2 See Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965); Creteau v. Phoenix Assurance Co., 202 Va. 641, 643-44, 119 S.E.2d 336, 339 (1961).

3 Commonwealth v. Orange-Madison Coop., 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980); Anderson v. Commonwealth, 182 Va. 560, 565, 29 S.E.2d 838, 840 (1944); 1995 Op. Va. Att'y Gen. 205, 207, 1995 Va. AG 205, 207.

4 WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1009 (1989).

5 Temple v. City of Petersburg, 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944); see also 1993 Op. Va. Att'y Gen. 256, 257, 1993 Va. AG 256, 257.

6 See Ambrogi v. Koontz, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982); 1993 Op. Va. Att'y Gen. 99, 100, 1993 Va. AG 99, 100.

7 See Dodson v. Potomac Mack Sales & Service, 241 Va. 89, 400 S.E.2d 178 (1991); Barr v. Town & Country Properties, 240 Va. 292, 396 S.E.2d 672 (1990); Va. National Bank v. Harris, 220 Va. 336, 257 S.E.2d 867 (1979).

8 Because I conclude that a mobile home does not meet the definition of "highway vehicle" in § 58.1-2101, it is unnecessary to consider your request for an explanation of the definitions of "motor vehicle" in §§ 46.2-100 and 58.1-2401.

1997 Va. AG 202

AG Op. CIVIL REMEDIES AND PROCEDURE: PROCESS, 2007 Va AG 27 (06-073)

CIVIL REMEDIES AND PROCEDURE: PROCESS — WHO TO BE SERVED.

No specific obligation for process server to ascertain that residence is actual abode of person to be served prior to posting service; good faith and due diligence require server to make reasonable inquiry when it appears that residence might not be actual abode. Server may not always rely solely on address supplied by party requesting such service.
DATE: January 5, 2007

SDATE: 20070105

REQUESTOR: The Honorable S. Lee Morris, Portsmouth General District Court

CITE: 2007 Va. AG 27

Issue Presented

You ask whether § 8.01-296 obligates a process server to ascertain independently that a residence is in fact the place of abode of the person to be served before posting service or whether he may rely solely upon the address supplied by the party requesting such service. [Page 28]

Response

It is my opinion that the language of § 8.01-296 imposes no specific obligation on a process server to ascertain that a residence is the place of abode of the person to be served prior to posting service; however, good faith and due diligence1 require a process server to make reasonable inquiry when it is apparent that the residence might not be the place of abode of the person to be served. It further is my opinion that based on the good faith and due diligence standard, a process server may not always rely solely on the address supplied by the party requesting such service.

Applicable Law and Discussion

The Code of Virginia and the Rules of the Supreme Court of Virginia set forth the manner by which process is served upon commencement of an action.2 Section 8.01-290 requires that:

> Upon the commencement of every action, the plaintiff shall furnish in writing to the clerk or other issuing officer the full name and last known address of each defendant and if unable to furnish such name and address, he shall furnish such salient facts as are calculated to identify with reasonable certainty such defendant. The clerk or other official whose function it is to issue any such process shall note in the record or the papers the address or other identifying facts furnished.

A prior opinion of the Attorney General states that, to the extent possible, a full name and address of the party to be served must accompany service of process issued to the sheriff.3

> For example, if only the name of a town is given, the plaintiff could be required to provide additional facts to assist in the identification of the party to be served. . . . A request for service of process at a post office box or general delivery address need not be considered a full address and additional information to identify the location of the party to be served could be required.[4]

Section 8.01-296 governs the manner of serving process upon natural persons. The preferred method of serving process is to "deliver a copy thereof in writing to the party in person."5 Additionally, § 8.01-296 provides two methods of substituted service. First, under § 8.01-296(2)(a),

> [i]f the party to be served is not found at his usual place of abode, by delivering a copy of such process and giving information of its purport to any person found there, who is a member of his family, other than a temporary sojourner or guest, and who is of the age of 16 years or older[.]

Second, § 8.01-296(2)(b) provides, in part, that "[i]f such service cannot be effected under subdivision 2 a, then by posting a copy of such process at the front door or at such other door as appears to be the main entrance of such place of abode." [Page 29]

Rule 3:6 of the Rules of the Supreme Court of Virginia provides that "[i]t shall be the duty of all persons eligible to serve process to make service within five days after receipt." The person serving process also must return the process to the clerk's office within seventy-two hours of service, except when such return would be due on a Saturday, Sunday, or legal holiday.6 The returned process must state "the date and manner of service and the name of the party served."7 If service was executed by a sheriff, the return is sufficient if it complies with "the Rules of the Supreme Court."8 The Virginia Supreme Court has ruled that a sheriff's return "may also be of the existence of such a state of facts as, without fault or negligence on his part, prevented a compliance with the mandate of the writ."9 If service was executed by a qualified person other than a sheriff, that person must include an affidavit stating: (1) his qualifications; (2) the date and manner of service; (3) the name of the party served; (4) an annotation that the service was by private server; and (5) the name, address, and telephone number of the server.10

Statutes that allow substituted service when personal service fails must be strictly construed.11 As such, in order to effect service, a process server must strictly comply with the terms of § 8.01-296, and he must reflect such strict compliance in the return providing proof of service.12

Although § 8.01-296 does not specifically impose an obligation on a process server to do so, in order to ensure effective service, it may be necessary for a process server to ascertain that a residence is, in fact, the place of abode of the person to be served before posting. Such a determination by the process server would ensure the accuracy of any subsequent proof of service or affidavit stating that service by posting was effected.

In addition, Virginia law generally requires that a sheriff execute his duty of serving civil process in good faith and with due diligence.13 The same standard applicable to a sheriff should apply to a private process server who also serves process pursuant to § 8.01-296. Such a standard would at a minimum require that a process server attempt to determine that a residence is the correct place of abode. For example, when the name displayed on a mailbox is different than the name of the person to be served, or the residence clearly is not inhabited or inhabitable, i.e., when it is apparent that the residence might not be the place of abode of the person to be served, good faith and due diligence would require a process server to make a reasonable inquiry.

Conclusion

Accordingly, it is my opinion that the language of § 8.01-296 imposes no specific obligation on a process server to ascertain that a residence is the place of abode of the person to be served prior to posting service; however, good faith and due diligence14 require a process server to make reasonable inquiry when it is apparent that the residence might not be the place of abode of the person to be served. It further is my opinion that based on the good faith and due diligence standard, a process server may not always rely solely on the address supplied by the party requesting such service. [Page 30]

FOOTNOTES

1 See infra note 13 and accompanying text.

2 See Va. Code Ann. tit. 8.01, ch. 8, §§ 8.01-287 to 8.01-327.2 (2000 & Supp. 2006); Va. Sup. Ct. R. 3:6.

3 See 1978-1979 Op. Va. Att'y Gen. 40, 40, 78-79 Va. AG 40, 40.

4 Id.

5 Section 8.01-296(1) (Supp. 2006).

6 Section 8.01-325 (2000).

7 Id.

8 Section 8.01-325(1); see also Va. Sup. Ct. R. 3:6 (providing form for “Proof of Service”).

9 Rowe v. Hardy, 97 Va. 674, 676, 34 S.E. 625, 625 (1899).

10 See § 8.01-325(2).

11 See Washburn v. Angle Hardware Co., 144 Va. 508, 514, 132 S.E. 310, 312 (1926).

12 See id.; see also § 8.01-325.

13 See Narrows Grocery Co. v. Bailey, 161 Va. 278, 170 S.E.730 (1933); 1978-1979 Op. Va. Att'y Gen., supra note 3, at 40.

14 See id. and accompanying text.

2007 Va AG 27

CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS OF RECOVERY — ENFORCEMENT GENERALLY; INTERROGATORIES. 87-88 va ag 72

COSTS, FEES, SALARIES AND ALLOWANCES: FEES — GENERAL PROVISIONS; AMOUNTS OF FEES.

Separate fees may be charged for separate returns of service; fees for process chargeable to plaintiff.

DATE: November 20, 1987

SDATE: 871120

REQUESTOR: The Honorable M. Wayne Huggins, Sheriff for Fairfax County

CITE: 87-88 72

You ask two questions concerning fees for service of process pursuant to § 14.1-105 of the Code of Virginia. [Page 73]

I. Section 14.1-105 Contemplates Separate Fees for Separate Returns of Service

You first ask whether separate fees may be charged for the service of a writ of fieri facias and an actual levy. Section 8.01-487.1 requires the officer levying under a writ of fieri facias to serve a copy of the writ when the levy is made.

Section 14.1-105 establishes a schedule of the applicable fees for the service of process.1 This schedule provides different fees for different types of service and contains no prohibition against the collection of multiple fees if more than one service is performed pursuant to the issuance of a single process. A prior Opinion of this Office concludes that separate service fees may be charged when several pleadings are served simultaneously upon the same party. See Opinion to the Honorable Robert T. Winston, Jr., Judge, Thirteenth Judicial Circuit, dated July 27, 1987. See also 1983-1984 Att'y Gen. Ann. Rep. 327, 83-84 Va. AG 327. Based on the above, it is my opinion that a judgment creditor who seeks a levy pursuant to a writ of fieri facias must pay separate fees for the levy and the service of the writ.

II. Fees for Process Issued Pursuant to § 8.01-508 Chargeable to Plaintiff

You next ask who should pay the fee imposed by § 14.1-105 for the service of a capias when the capias is issued pursuant to § 8.01-508 at the request of a plaintiff-creditor for failure to appear or answer questions at a debtor interrogatory hearing.2

Section 14.1-97 provides that fees for service of process are chargeable to the party requesting the service. Although the capias, of necessity, must be issued by the court or commissioner when the service is performed at the

plaintiff's insistence, it is my opinion that the general rule of § 14.1-97 applies and the fee for such service is chargeable to the plaintiff.3

FOOTNOTES

1 Section 14.1-105 provides, in part: "The fees shall be as follows:

(1) For service on any person, firm or corporation, a declaration in ejectment, order, notice, summons or any other civil process, except as herein otherwise provided, and for serving on any person, firm, or corporation any process when the body is not taken and making a return thereof, the sum of five dollars.

* * *

(3) For serving on any person an attachment or other process under which the body is taken and making a return thereon, five dollars.

* * *

(8) For levying an execution or distress warrant or an attachment, four dollars."

2 Section 8.01-508 provides: "[T]he commissioner or court shall issue (i) a capias directed to any sheriff requiring such sheriff to take the person in default and deliver him to the commissioner or court so that he may be compelled to make proper answers, or such conveyance or delivery, as the case may be or (ii) a rule to show cause why the person summoned should not appear and make proper answer or make conveyance and delivery."

3 If the court or commissioner awards the fee specified in § 14.1-105(3) as costs against the debtor in the contempt proceeding, this fee would be recoverable by the plaintiff.

87-88 va ag 72

AG Op. COSTS, FEES, SALARIES AND ALLOWANCES, 87-88 Va. AG 128

87-88 VA AG 128

COSTS, FEES, SALARIES AND ALLOWANCES: FEES — AMOUNTS OF FEES.

RULES OF VIRGINIA SUPREME COURT: EQUITY PRACTICE AND PROCEDURE — PROOF OF SERVICE — PRACTICE IN ACTIONS AT LAW — THE NOTICE OF MOTION FOR JUDGMENT.

Separate fees charged for separate pleadings. When combined with other papers, notice and summons considered single process; one fee charged.

DATE: July 27, 1987

SDATE: 870727

REQUESTOR: The Honorable Robert T. Winston, Jr., Judge, Thirtieth Judicial Circuit

CITE: 87-88 128

You ask whether separate service fees may be charged pursuant to § 14.1-105 of the Code of Virginia when several pleadings in the same suit are served together. You state that, in one jurisdiction you serve, there is a single fee charged "when process and a notice are attached to each other or stapled together and served at the same time as one paper." In another jurisdiction, you state that separate charges would be required for each of these papers, even though they are stapled together and served at one time.

I. Applicable Statute and Rules

Section 14.1-105(1) establishes a five dollar fee "[f]or service on any person, firm or corporation, [of] a . . . notice, summons or any other civil process, except as herein otherwise provided, and for serving on any person, firm, or corporation any process . . . and making a return thereof." (Emphasis added.)

Rule 3:3 of the Rules of Supreme Court of Virginia, which pertains to the notice of a motion for judgment, provides, in pertinent part, that "[t]he clerk shall issue the notice and attach it to a copy of the motion for judgment, and the combined papers shall constitute the notice of motion for judgment to be served as a single paper." (Emphasis added.) The same procedure applies to the service of a subpoena in chancery with a bill of complaint. See Va. Sup. Ct. R. 2:5 ("subpoena with copy of the bill attached shall constitute and be served as one paper"). [Page 129]

II. Language of Statute and Rules Contemplates Separate Fee for Individual Pleadings

The portion of § 14.1-105(1) quoted above clearly contemplates a separate service fee being charged for each pleading served for which a separate return of service is made. Although it is clear that the "process" described in Va. Sup. Ct. R. 2:5 and 3:3 includes both the pleadings initiating the legal action and the notice or subpoena, the fact that

the Court specifically defined these two documents as “a single paper” and “one paper” in its Rules supports the conclusion that a separate service fee may be charged for other separate pleadings. It is my opinion, for example, that five separate service fees may be charged when (1) a notice to take depositions, (2) interrogatories, (3) a motion for the production of documents, and (4) a request for admission are served at the same time as a bill of complaint for divorce and subpoena in chancery, regardless of whether all are stapled or otherwise attached to one another. The stapling or attachment of pleadings together is of no importance in determining whether separate service fees are to be charged.

III. Separate Fees Charged for Separate Pleadings

Based on the above, it is my opinion that separate service fees may be charged pursuant to § 14.1-105(1) for each pleading requiring a separate return of service, regardless of whether these pleadings are attached to one another and served at the same time. A motion for judgment and notice of motion for judgment, or a bill of complaint and subpoena in chancery, however, are to be considered as a single process and one fee charged for their service. 87-88 VA AG 128

AG Op. TAXATION — Sales and Use Tax — Sheriff not required, 72-73 Va. AG 444

TAXATION — Sales and Use Tax — Sheriff not required to collect tax on property sold under execution issued by a court.

DATE: July 7, 1972

SDATE: 720707

REQUESTOR: THE HONORABLE MARSHALL E. HANGER, Sheriff of the City of Staunton

CITE: 72-73 Va. AG 444

I have received your recent letter inquiring whether you should collect the Virginia retail sales tax upon sheriff's sales under executions issued by the courts.

Section 58-441.6(m), Code of Virginia (1950), as amended, provides an exclusion from the tax for "an occasional sale." This is defined as "a sale of tangible personal property not held or used by a seller in the course of an activity for which he is required to hold a certificate of registration. . . ." A sheriff is not a "retailer" engaged in the "business" of making "sales at retail" as defined in §§ 58-441.2 and 58-441.3. Therefore, he is not a "dealer" as defined in § 58-441.12 and is not required to register under § 58-441.16.

It is my opinion, therefore, that a sheriff is not required to collect sales tax upon the sale of property under an execution issued by a court.

72-73 Va. AG 444

AG Op. SHERIFFS. RESPONSIBLE FOR COLLECTING, 83-84 Va. AG 327

SHERIFFS. RESPONSIBLE FOR COLLECTING § 14.1-105 FEES IF SERVICE PERFORMED.

DATE: August 4, 1983

SDATE: 830804

REQUESTOR: The Honorable Ellis D. Meredith, Treasurer for the County of Montgomery

CITE: 83-84 327

You have asked who is responsible for the collection of fees for service of process and other services as set out in § 14.1-105 of the Code of Virginia. Your question was prompted by the deletion of the reference to sheriffs and criers in the statute by Ch. 407, Acts of Assembly of 1983.

Before the 1983 amendment, § 14.1-105 began: "The fees of sheriffs and criers shall be as follows. . . ." Section 14.1-105 now begins: "The fees shall be as follows. . . ."

The deletion of the reference to sheriffs and criers in the fee schedule cannot be viewed as an attempt to change the present practice of sheriffs collecting the fees for their services. When the fee system as a method of compensating sheriffs was abolished in 1942, the legislature included a provision making it clear that sheriffs would continue to be responsible for collecting fees even though their compensation was no longer based on collections. See § 3487(1), 1942 Code of Virginia. That provision, slightly changed, has been recodified as § 14.1-69 and still requires that "[e]very sheriff . . . shall, however, continue to collect all fees . . . provided by law for the services of such officer. . . ."

Sheriffs generally perform the services listed in §§ 14.1-105(1) through 14.1-105(9), for which the fees therein specified are allowed for services performed by such officers in the circuit courts.

Based on the foregoing, it is my opinion that § 14.1-69 requires sheriffs to collect the fees listed in §§ 14.1-105(1) through 14.1-105(9) for the services performed by them in the circuit courts.

83-84 Va. AG 327

AG Op. TAXATION: REVIEW OF LOCAL TAXES, 1999 Va. AG 207

TAXATION: REVIEW OF LOCAL TAXES.

CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS OF RECOVERY.

MOTOR VEHICLES: TITLING AND REGISTRATION OF MOTOR VEHICLES.

Broad authority to seize property for delinquent taxes does not extend to seizure of persons. Stopping automobile and detaining person at roadblock constitutes seizure of person. Within limitations imposed by Fourth Amendment, law-enforcement officers may set up roadblocks as exercise of their statutory authority to stop vehicles to inspect equipment or verify registration and licenses. No authority to detain person at roadblock to verify payment of personal property taxes or to detain person for being delinquent in payment of personal property taxes.

DATE: June 8, 1999

SDATE: 990608

REQUESTOR: The Honorable Lee Stoffregen, Sheriff for the City of Manassas

CITE: 1999 207 [Page 208]

You ask whether, in conjunction with vehicle stops conducted by the county police department to check for licensing and equipment violations, you may execute a distress warrant and seize a vehicle if the driver is delinquent in the payment of his local taxes.

You state that, pursuant to §§ 58.1-3919 and 58.1-3941 of the Code of Virginia, the Prince William County Treasury Manager issues distress warrants to your office for the collection of delinquent taxes. Your office seizes personal property, usually a vehicle, belonging to the person owing the taxes and sells the property at public auction. The proceeds are forwarded to the Treasury Manager to be applied to the delinquent tax account.

Your question involves your seizure of vehicles for delinquent taxes during periodic vehicle checks conducted by the county police department. You state that persons from your office and from the county's Treasury Management office attend the vehicle checks. The police department sets the criteria for which vehicles will be stopped. The vehicles are checked by police officers for licensing and equipment violations. If a current county decal is not displayed, Treasury Management checks the records to determine if the driver has a delinquent tax account. If the driver's taxes are delinquent, Treasury Management issues a distress seizure warrant, which the deputy sheriff is to execute on the scene. If the taxpayer cannot provide payment, the deputy sheriff seizes the vehicle and later sells it at public auction.

Section 58.1-3919 requires a local treasurer to collect delinquent taxes "by distress or otherwise." Section 58.1-3934(B) authorizes a locality to place local taxes in the hands of the sheriff for collection, with the sheriff having the powers conferred by law upon the treasurer. Additionally, § 58.1-3941 provides that "[a]ny goods or chattels . . . in the county, city or town belonging to the person . . . assessed with taxes . . . collected by the treasurer may be distrained therefor by the treasurer, sheriff, constable or collector," and § 58.1-3942 provides that a security interest in good or chattels does not prevent the property from being distrained and sold for taxes, "no matter in whose possession they may be found."

These statutes clearly authorize a sheriff, as well as a local treasurer, to distrain property and to sell the property to collect delinquent taxes.1 The procedure requires no judicial hearing. As stated in a 1954 opinion, the treasurer may distrain property for taxes without a warrant based on the tax bill alone, may remove the property from the premises as an essential part of the power to distrain the property, and may sell the property to satisfy the delinquent taxes.2

You question whether, notwithstanding this statutory authority to distrain or seize property for taxes, the procedure that you describe for seizing property in conjunction with a roadblock violates the protection against unreasonable searches and seizures secured by the Fourth Amendment to the Constitution of the United States. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, [Page 209] and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Supreme Court of the United States has held that "stopping an automobile and detaining its occupants [at a roadblock] constitute a 'seizure'" of the person and will be unreasonable under the Fourth Amendment if not based on an articulable and reasonable suspicion that the laws are being violated.3 The Court has held, however, that fixed checkpoint stops are reasonable under the Fourth Amendment if the procedure is "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers."4 The interference with individual liberty in such instances is balanced against a state's strong interest in promoting safety on its roads by checking to see that licensing, registration, and vehicle inspection requirements are being met.5 The Supreme Court of Virginia and the Court of Appeals of Virginia have applied the standards established by the United States Supreme Court in a number of cases challenging stops as violating the Fourth Amendment.6

Within the limitations imposed by the Fourth Amendment, law-enforcement officers may set up roadblocks as a means of exercising their statutory authority to stop vehicles to inspect equipment or to verify registration and licenses.7 While the practice constitutes a seizure of the person under the Fourth Amendment, the state's interest in promoting safety on the roads justifies the limited interference with individual liberty. During a roadblock conducted in conformity with Fourth Amendment standards, a law-enforcement officer may further detain a person upon a reasonable suspicion based on articulable facts that a crime has been or is being committed.8 A law-enforcement

officer would have no authority to detain a person at a roadblock to verify the payment of personal property taxes or to detain a person for being delinquent in the payment of personal property taxes.

A treasurer likewise has no such authority. While a treasurer has broad statutory power to seize property for delinquent taxes, no statute grants a treasurer the power to seize persons for the failure to pay their taxes. A roadblock constitutes a seizure of the person. It is my opinion that such a seizure of persons is beyond the statutory authority granted treasurers to seize property. It is also my opinion that the seizure would not pass Fourth Amendment scrutiny because there is no connection between the failure of a taxpayer to timely pay taxes on his vehicle and the promotion of safety on the roads.

FOOTNOTES

1 See Op. Va. Att'y Gen.: 1997 at 203, 204, 1997 Va. AG 203, 204; 1990 at 249, 250, 1990 Va. AG 249, 250. Section 8.01-492 details the procedure for the sale of distressed property.

2 See 1953-1954 Op. Va. Att'y Gen. 204 (citing predecessor statutes to §§ 58.1-3919, 58.1-3941).

3 Delaware v. Prouse, 440 U.S. 648, 653 (1979) (holding that random spot checks that place discretion in officers as to which vehicle to stop and where to conduct stop are unconstitutional).

4 Brown v. Texas, 443 U.S. 47, 51 (1979); see also United States v. Martinez-Fuerte, 428 U.S. 543, 559-62 (1976). In determining the constitutionality of any such seizure, the courts are to weigh "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." Brown v. Texas, 443 U.S. at 51.

5 See Delaware v. Prouse, 440 U.S. at 658; see also Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (holding that highway sobriety checkpoints are consistent with Fourth Amendment).

6 See Crandol v. City of Newport News, 238 Va. 697, 386 S.E.2d 113 (1989); Simmons v. Commonwealth, 238 Va. 200, 380 S.E.2d 656 (1989); Lowe v. Commonwealth, 230 Va. 346, 337 S.E.2d 273 (1985); Price v. Com., 24 Va. App. 496, 483 S.E.2d 496 (1997); Sheppard v. Com., 25 Va. App. 527, 489 S.E.2d 714 (1997); Brown v. Com., 20 Va. App. 21, 454 S.E.2d 758 (1995); Hall v. Commonwealth, 12 Va. App. 972, 406 S.E.2d 674 (1991).

7 See §§ 46.2-103, 46.2-104. If a local ordinance so provides, a law-enforcement officer may issue a citation or summons to a person who fails to display a local license required by ordinance. Section 46.2-752(G). The officer could not, of course, seize the vehicle for the nonpayment of personal property taxes.

8 See Gilpin v. Com., 26 Va. App. 105, 493 S.E.2d 393 (1997).

1999 Va. AG 207

AG Op. CIVIL REMEDIES AND PROCEDURE: PROCESS, 1999 Va. AG 32 (99-056)

CIVIL REMEDIES AND PROCEDURE: PROCESS.

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST PROPERTY — TRESPASS TO REALTY — CRIMES AGAINST PEACE AND ORDER — CRIMES AGAINST THE ADMINISTRATION OF JUSTICE.

CONSTITUTION OF THE UNITED STATES: FOURTH AMENDMENT.

Private process server is considered officer or sheriff for purpose of serving process; enters public area of business to serve process under authority of law. Entry into private offices of business area where there is justifiable expectation of privacy to serve process may constitute unreasonable search or seizure. In such case, process server would not be acting under authority of law and would be liable for trespass. Extent to which portion of business establishment constitutes private area is question of fact. Person acting jointly or in combination with other person(s) to resist or obstruct lawful service of process is guilty of misdemeanor violation. Private process server is not law-enforcement officer against whom any attempt to interfere with execution of service of process would constitute misdemeanor. [Page 33]

DATE: November 22, 1999

SDATE: 991122

REQUESTOR: The Honorable Richard H. Black, Member, House of Delegates

CITE: 1999 32

You ask several questions regarding the authority of private process servers acting pursuant to § 8.01-293(A) of the Code of Virginia.

Section 8.01-293(A)(2) provides that, in addition to the sheriff, "[a]ny person of age eighteen years or older and who is not a party or otherwise interested in the subject matter in controversy" is eligible to serve process. Section 8.01-293(A) further provides:

> Whenever in this Code the term "officer" or "sheriff" is used to refer to persons authorized to make, return or do any other act relating to service of process, such term shall be deemed to refer to any person authorized by this section to serve process.

Prior opinions of the Attorney General recognize that, under the plain language of the statute, service by a sheriff and service by a private process server are of equal force and legitimacy.1

Your first question concerns the application of § 18.2-119 to a private process server. Section 18.2-119 provides that "[i]f any person without authority of law goes upon or remains upon the lands, buildings or premises of another" after having been prohibited by the owner or other person lawfully in charge from doing so, the person is guilty of a Class 1 misdemeanor. (Emphasis added.) You ask whether, because § 18.2-119 provides that a person must be acting "without authority of law," a private process server would be subject to prosecution for trespass under the statute. You ask specifically whether a private process server has authority under the law to enter a suite of offices and look in individual offices for the person named on the process.

It is my opinion that since a private process server is considered an "officer" or "sheriff" for purposes of serving process, a private process server who enters the public area of a business does so under "authority of law" for purposes of § 18.2-119.2 Whether a process server would have the authority to enter private offices, however, will depend on whether the entry would constitute an unreasonable search or seizure in violation of the Fourth Amendment of the Constitution of the United States.3 If so, the process server would not be acting under "authority of law" and would be liable for trespass under § 18.2-119.4

The basic purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."5 A governing principle of the Fourth Amendment is that, subject to a few limited exceptions, a warrantless search of a private home is presumptively unreasonable, notwithstanding the fact that the government official may be acting pursuant to statutory authority.6 The United States Supreme Court has extended this principle to include a business as well as a home. In See v. City of Seattle, the Court recognized an expectation of privacy in an office, stating that "[t]he businessman, like the occupant of a residence, has a constitutional [Page 34] right to go about his business free from unreasonable official entries upon his private commercial property."7

These cases involve situations in which statutes authorize governmental entry into residential or business property for the purpose of conducting health and safety inspections. Neither the Supreme Court of the United States nor the Supreme Court of Virginia has expressly held that the entry into private offices merely to serve process constitutes an unreasonable search of the premises under the Fourth Amendment. It is my view that, because the intrusion of the entry is sufficient to trigger Fourth Amendment protections,8 regardless of the nature of the search, entering a business area where there is a justifiable expectation of privacy in order to serve process would be unreasonable under the Fourth Amendment. The Supreme Court of South Dakota has so held, concluding that a sheriff may serve process in the public areas of a business but may not enter the private areas for such purpose.9 The court considered the particular arrangement of the business's public and work areas and the company's policies on restricted entry to determine whether there existed a justifiable expectation of privacy in the area.10 Thus, the extent to which a portion of a business establishment constitutes a private area will be a question of fact.11 Should it be determined that there is a justifiable expectation of privacy in the area, it is my opinion that entry to serve process would not be under "authority of law" for purposes of § 18.2-119.

You next ask whether ordering a process server to leave property would constitute a violation of § 18.2-409. Section 18.2-409 provides:

> Every person acting jointly or in combination with any other person to resist or obstruct the execution of any legal process shall be guilty of a Class 1 misdemeanor.

Assuming that the attempted service of process is consistent with Fourth Amendment restrictions, it is my opinion that an attempt to resist or obstruct the service by ordering the process server to leave the property would constitute a violation of § 18.2-409. I note, however, that § 18.2-409 applies only when persons are "acting jointly or in combination."

Your final question is whether ordering a private process server to leave property would constitute a violation of § 18.2-460. Section 18.2-460 makes it a misdemeanor for a person to knowingly obstruct "any law-enforcement officer in the performance of his duties"12 or, by threats or force, attempt to impede or intimidate "any law-enforcement officer, lawfully engaged in his duties."13 Section 18.2-460 is limited to attempts to interfere with a "law-enforcement officer."14 Although § 8.01-293 equates private process servers with "officers" and "sheriffs," it does not classify private process servers as "law-enforcement officers." Numerous sections of the Virginia Code contain definitions of "law-enforcement officers" for different purposes,15 with the term generally referring to government employees "responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of this Commonwealth."16 Under none of the statutory definitions would a private process server be deemed a law-enforcement officer.17 Accordingly, it is my opinion that a private process server is not a [Page 35] law-enforcement officer for purposes of § 18.2-460 and that attempting to interfere with a private process server's execution of service would not constitute a violation of § 18.2-460.

FOOTNOTES

1 See Op. Va. Att'y Gen.: 1997 at 29, 29, 1997 Va. AG 29, 29; 1992 at 26, 27, 1992 Va. AG 26, 27.

2 See Reed v. Commonwealth, 6 Va. App. 65, 70-71, 366 S.E.2d 274, 278 (1988) (as penal statute, § 18.2-119 requires criminal intent or willful trespass; no violation of statute if person has good faith belief that he has legal right or authorization to be on premises); see also 1996 Op. Va. Att'y Gen. 86, 87, 1996 Va. AG 86, 87 (whether person has good faith belief that he has right to be on premises is factual issue).

3 The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

4 See 1987-1988 Op. Va. Att'y Gen. 446, 447, 87-88 Va. AG 446, 447 (citing Raven Red Ash Coal Co. v. Ball, 185 Va. 534, 39 S.E.2d 231 (1946) and McClannan v. Chaplain, 136 Va. 1, 116 S.E. 495 (1923), for established principle that person lawfully entering property who exceeds authority for which entry was granted is liable for trespass).

5 Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

6 See id. at 528-29. The Court in Camara held that "[t]he Fourth Amendment bars prosecution of a person who has refused to permit a warrantless code-enforcement inspection of his personal residence." Id. at 523.

7 387 U.S. 541, 543 (1967). The Supreme Court recognizes an exception to the warrant requirement for administrative searches of closely regulated businesses and industries. See United States v. Biswell, 406 U.S. 311 (1972) (gun dealers); Colonnade Corp. v. United States, 397 U.S. 72 (1970) (liquor licensees).

8 The question presented in See v. City of Seattle was whether a person could be prosecuted under a city ordinance for refusing to permit a fire inspector to inspect his locked warehouse without a warrant. The Court concluded that "administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure." 387 U.S. at 545. In Camara v. Municipal Court, the companion case to See v. City of Seattle, the Court considered the dual aspects of the Fourth Amendment protections — the right to be secure from intrusions into personal privacy and the right to be protected from searches for evidence of criminal action. The Court rejected the argument that the Fourth Amendment does not protect entry unless entry is followed by a search for criminal evidence. See 387 U.S. at 530-31.

9 See Gateway 2000, Inc. v. Limoges, 552 N.W.2d 591 (S.D. 1996).

10 See id. at 594.

11 See Johnson v. Com., 26 Va. App. 674, 496 S.E.2d 143 (1998) (court determines whether person has exhibited subjective expectation of privacy and whether expectation is objectively reasonable); see also Gateway 2000, Inc. v. Limoges, 552 N.W.2d at 593-94.

12 Section 18.2-460(A).

13 Section 18.2-460(B).

14 Section 18.2-460 applies also to judges, magistrates, justices, jurors, Commonwealth's attorneys, and witnesses.

15 See, e.g., §§ 2.1-2.2, 2.1-116.1(1), 3.1-796.66, 9-169(9), 16.1-253.4(H), 18.2-57(E), 18.2-433.1, 19.2-81.3(G), 32.1-45.1(G), 46.2-100, 65.2-102(B).

16 Section 9-169(9).

17 See Gateway 2000, Inc. v. Limoges, 552 N.W.2d at 595 (when sheriff is operating in civil matters in same capacity as private process server, sheriff has only authority of private process server; sheriff has no authority to threaten management or employees with charge of obstruction of justice).

1999 Va. AG 32

AG Op. LIENS. WRIT OF FIERI FACIAS. LIEN, 81-82 Va. AG 231

LIENS. WRIT OF FIERI FACIAS. LIEN CREATED BY PROPER LEVY REMAINS EFFECTIVE FOR REASONABLE TIME.

DATE: August 7, 1981

SDATE: 810807

REQUESTOR: The Honorable Richard L. Ashby, Sheriff of Stafford County

CITE: 81-82 231

You have asked how long a lien created by levy under a writ of fieri facias remains effective, if possession of the [Page 232] levied property remains in the hands of the debtor because the creditor has failed to give bond.

A lien of fieri facias commences from the time the writ is delivered to the officer to be executed. *See, e.g., In re Acorn Electric Supply, Inc.*, 348 F. Supp. 277 (E.D. Va. (1972)), *Crump v. Commonwealth*, 75 Va. (1 Math.) 922 (1882). The lien survives the return day of the writ if the property has been levied on, § 8.01-479 of the Code of Virginia (1950), as amended, and to properly effectuate a levy, it is not essential that the levying officer take possession of the property. *Dorrier v. Masters*, 83 Va. 459, 2 S.E. 927 (1887); *Bullitt v. Winston*, 15 Va. (1 Munf.) 269 (1810). As a prerequisite to the execution and sale of levied property, an officer may require the creditor to give an indemnifying bond. *See* § 8.01-367.

The execution statutes (generally Title 8.01, Ch. 18) specify no termination date for liens created by the fieri facias writ, but not pursued past the levy stage; the Code merely provides that property levied on "may be advertised and sold within a reasonable time thereafter. . . ." *See* § 8.01-479.

Section 8.01-251 provides, however, that no execution shall be brought on a judgment twenty years after the judgment date. Until that time the lien created by the writ of fieri facias remains effective unless there has been a judicial determination that a reasonable time for pursuing the matter to sale has elapsed. *See Wright v. Camp Mfg. Co.*, 110 Va. 678, 66 S.E. 843 (1910). The test for such a determination is whether an intention to abandon is manifest by the acts of the creditors. *See Rhea v. Preston*, 75 Va. (1 Math.) 757 (1881); *Palais v. Dejarnette*, 145 F.2d 953 (1944). Your records of fieri facias writs, therefore, must be maintained for a period of twenty years after judgment, unless it is judicially determined that the writ has been abandoned.
81-82 Va. AG 231

AG Op. CIVIL REMEDIES AND PROCEDURE: ACTIONS, 1997 Va. AG 16

CIVIL REMEDIES AND PROCEDURE: ACTIONS — DETINUE.

When final judgment is rendered in detinue proceeding arising from contract between plaintiff and defendant securing payment of monetary judgment to plaintiff or his assignor, court may not require prevailing plaintiff to elect either to recover judgment amount or to receive order for possession of specific property. Defendant has option of paying judgment amount or surrendering specific property within 30 days. When detinue proceeding does not arise from such contract, prevailing plaintiff in detinue proceeding may recover property or proceeds, but not both.

DATE: May 21, 1997

SDATE: 970521

REQUESTOR:The Honorable Gwendolyn L. Jackson and the Honorable Louis A. Sherman

CITE: 1997 16

You ask whether, when final judgment is rendered by a court in a detinue proceeding, § 8.01-121 of the Code of Virginia permits the court to require the prevailing plaintiff to elect either recovery of the amount due or receipt of an order for possession of the specific property.1 If not, you ask whether the court may award such plaintiff recovery of both the judgment amount and the specific property.

You relate that when a final judgment is rendered in detinue proceedings, the Norfolk General District Court requires the prevailing plaintiff to elect either recovery of the judgment amount or receipt of an order for possession of the specific property. Such options are subject to the election by the defendant to either pay the judgment amount or surrender the specific property within thirty days. Should the defendant fail to appear or to fulfill the election that is made within the thirty-day period, the plaintiff may seek to execute on the judgment either by a writ of fieri facias for a monetary judgment, or by a writ of possession to recover the specific property. If the plaintiff determines the defendant has no recoverable assets or no longer possesses the property sought, the prevailing plaintiff may file a timely motion to rehear following execution of either of these writs.

Finally, you have been advised that other courts interpret § 8.01-121 to allow the court, upon rendering final judgment, to award to a prevailing plaintiff both a monetary judgment for the value of the property and other damages and an order for possession of the specific property.

The action of detinue is brought to recover specific, identifiable tangible personal property wrongfully detained, or, alternatively, its value at the time of final judgment, and in both instances, damages may be imposed for the wrongful detention of the property.2 If the specific property cannot be returned, judgment is rendered for its [Page 17] value.3 Pursuant to § 8.01-121, a detinue proceeding may arise from a contract or otherwise.

When the detinue proceeding arises from a contract between the prevailing plaintiff and the defendant "to secure the payment of money to the plaintiff or his assignor," the court "shall" enter judgment "for the recovery of the amount due the plaintiff thereunder or for the specific property, and costs."4 The word "shall" is primarily mandatory in its effect.5

When judgment is rendered for the plaintiff on the contract, "[t]he defendant shall have the election of paying the amount of such judgment or surrendering the specific property."6 Thereafter, "[t]he court may grant the defendant a reasonable time not exceeding thirty days, within which to make the election."7 A prior opinion of the Attorney General interprets this provision in § 8.01-121, and concludes that this language "gives the defendant the option of paying the amount of the judgment or surrendering the specific property only when the plaintiff prevails in the final judgment on a contract made to secure the payment of money to the plaintiff or his assignor."8 The opinion also concludes that "[t]he statute gives defendant such option under no other conditions."9

The clear language of § 8.01-121 gives such an option to the defendant only when the detinue proceeding arises from a contract between the plaintiff and the defendant securing "the payment of money to the plaintiff or his assignor." An option is clearly not granted to the plaintiff in such a case. When the language of a statute is plain and unambiguous and its meaning is clear and definite, it must be given effect.10 Therefore, I am of the opinion that, in accordance with § 8.01-121, when final judgment is rendered in a detinue proceeding that arises from a contract between the plaintiff and the defendant securing the payment of monetary judgment to the plaintiff or his assignor, the court may not require the prevailing plaintiff to elect either to recover the judgment amount or to receive an order for possession of the specific property.

Section 8.01-121 also provides that, in its final judgment, "the court shall dispose of the property or proceeds according to the rights" of the parties. When the detinue proceeding does not arise from a contract between the plaintiff and the defendant securing the payment of money to the plaintiff or his assignor, and judgment is rendered in favor of the defendant, the property will be awarded to the defendant, together with any costs or damages to which he is properly entitled by law.11 When the plaintiff prevails in such a case, he may recover the property or its value, together with damages, if any, for the wrongful detention of the property, and such costs as may be taxed by law or awarded by the court.12 Section 8.01-121 uses the disjunctive "or" to describe two distinct judgments that may be entered by the court in detinue proceedings brought under a contract or otherwise: (1) recovery of the property; or (2) recovery of the proceeds. The use of the disjunctive indicates that two separate alternatives were intended,13 and reflects the General Assembly's intent that the prevailing plaintiff receive judgment for either the property or the proceeds. Consequently, I am of the opinion that § 8.01-121 does not permit the court to award a prevailing plaintiff recovery of both the amount due and the specific property.

FOOTNOTES

1 Section 8.01-121 provides, in part: "When final judgment is rendered on the trial of such detinue proceeding, the court shall dispose of the property or proceeds according to the rights of those entitled. When, in any such proceeding, the plaintiff prevails under a contract which, regardless of its form or express terms, was in fact made to secure the payment of money to the plaintiff or his assignor, judgment shall be for the recovery of the amount due the plaintiff

thereunder or for the specific property, and costs. The defendant shall have the election of paying the amount of such judgment or surrendering the specific property. The court may grant the defendant a reasonable time not exceeding thirty days, within which to make the election upon such security being given as the court may deem sufficient."

2 See, e.g., Broad St. Auto Sales v. Baxter, 230 Va. 1, 334 S.E.2d 293 (1985); Gwin v. Graves, 230 Va. 34, 334 S.E.2d 294 (1985); Vicars v. Discount Company, 205 Va. 934, 938, 140 S.E.2d 667, 670 (1965).

3 Broad St. Auto Sales v. Baxter, 230 Va. at 3, 334 S.E.2d at 294.

4 Section 8.01-121 (emphasis added).

5 The use of the word "shall" in a statute generally indicates that the procedures are intended to be mandatory, imperative or limiting. See Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965); Creteau v. Phoenix Assurance Co., 202 Va. 641, 643-44, 119 S.E.2d 336, 339 (1961); Bryant v. Tunstall, 177 Va. 1, 6, 12 S.E.2d 784, 786-87 (1941); 1989 Op. Va. Att'y Gen. 250, 251-52, 1989 Va. AG 250, 251-52, and opinions cited therein.

6 Section 8.01-121.

7 Id.

8 1967-1968 Op. Va. Att'y Gen. 48, 49, 67-68 Va. AG 48, 49 (interpreting § 8-593, former version of § 8.01-121).

9 Id.

10 Temple v. City of Petersburg, 182 Va. 418, 29 S.E.2d 357 (1944).

11 Section 8.01-119(B).

12 MacPherson v. Green, 197 Va. 27, 87 S.E.2d 785 (1955); see also LEIGH B. MIDDLEDITCH, JR. & KENT SINCLAIR, VIRGINIA CIVIL PROCEDURE, § 2.16 (2d ed. 1992 & Supp. 1996).

13 See 1990 Op. Va. Att'y Gen. 223, 224, 1990 Va. AG 223, 224; see also 1A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION, § 21.14 (5th ed. 1993 & Supp. 1996); 1991 Op. Va. Att'y Gen. 205, 207, 1991 Va. AG 205, 207 (use of "or" in statute indicates disjunctive; each statutory provision stands alone and is not modified by others); id. at 279, 280, 1991 Va. AG 279, 280 (use of disjunctive "or" indicates intent of General Assembly to provide separate instances justifying waiver of penalties and interest).
1997 Va. AG 16

CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS OF RECOVERY.

Officer must sell debtor's property publicly and receive highest price possible at fixed time of sale to recover money from execution of writ of fieri facias. Using services of licensed stockbroker to sell stock through public securities market would be consistent with requirement that personal property be sold at public sale to highest bidder at time of sale. Sheriff may deduct broker's sales commission from proceeds. If debtor fails to make conveyance and delivery of such property, commissioner must issue either capias directing sheriff to deliver debtor to commissioner or rule to show cause why debtor should not appear and make proper conveyance.

The Honorable James L. Agnew

Sheriff for Goochland County

December 5, 1997

You ask several questions related to the sale of a stock certificate by the sheriff pursuant to § 8.01510 of the Code of Virginia.

You present a hypothetical situation wherein a defendant in a case is ordered to appear before a commissioner in chancery pursuant to a summons to answer interrogatories. The commissioner orders the defendant to deliver to the sheriff a certificate for 584 shares of common stock. You ask whether, if the sheriff retains a stockbroker to handle the sale of the shares of common stock, and pays the broker's fee from the proceeds prior to paying the remainder to the plaintiff, the sheriff will satisfy the statutory requirements for a legal sale.

In order to ascertain the real and personal estate of a judgment debtor, § 8.01506 authorizes the clerk of the court from which a writ of fieri facias issues to summons the execution debtor to appear before either the court or a commissioner to answer interrogatories. Section 8.01507 provides that, based on the answers to the interrogatories, the court or commissioner may order the debtor to deliver to the officer to whom was delivered the writ of fieri facias "any money, bank notes, securities, evidences of debt, or other personal estate, tangible or intangible" in the debtor's possession or control.1 Section 8.01510 provides that the officer to whom such property is delivered is to dispose of the property "as if levied on by him under a fieri facias."

Section 8.01492 provides generally that, as to any property which an officer shall levy on or be directed to sell by an order of the court, the officer is to fix the time and place for the sale and is to post notice of the sale. Section 8.01492 provides: "At the time and place so appointed, such officer shall sell to the highest bidder, for cash, such goods and chattels, or so much thereof as may be necessary." Section 8.01483 authorizes the officer recovering money from the execution a writ of fieri facias to deduct his "fees and charges," and § 8.01499 provides that the officer may deduct his commission and "his necessary expenses and costs." The clear intent of these statutory provisions is that the officer sell the property publicly and that the officer receive the highest price possible at the fixed time of the sale.2 It is my opinion that using the services of a licensed stockbroker to sell the stock through the public securities market would be consistent with the requirement of § 8.01492 that personal property be sold at public sale to the highest bidder at the time of the sale. It is also my opinion that §§ 8.01483 and 8.01499 are sufficient authority for the sheriff to deduct from the proceeds the broker's sales commission.

You state also that the defendant refuses to provide his signature on the stock certificate and that the broker advises the sheriff that the signature is necessary to effect the sale. You ask how the sheriff can satisfy the court's order directing him to sell the certificate if the defendant continues to refuse to sign the certificate. It is my opinion that this

issue should be presented to and resolved by the commissioner pursuant to the provisions of § 8.01508. Section 8.01508 provides that if any person fails to make the conveyance and delivery of property required under § 8.01507, the commissioner is to issue either a capias directing the sheriff to deliver the person to the commissioner or a rule to show cause why the person should not appear and make proper conveyance.

[1]See also § 8.01501 (authorizing execution lien on all personal estate of judgment debtor).

[2]See Manufacturers Hanover Trust Co. v. Koubek, 240 Va. 276, 280, 396 S.E.2d 669, 671 (1990) (policy and purpose of public sale required by § 8.01492 is that competition be produced among bidders so that property will be sold at its market value).

***4891** 1982-83 Va. Rep. Atty. Gen 73
Office of the Attorney General
Commonwealth of Virginia

February 25, 1983

CIVIL PROCEDURE, EXECUTIONS, PROPERTY PREVIOUSLY LEVIED UPON BUT REMAINING UNSOLD CANNOT BE RELEASED UNTIL CREDITOR ABANDONS LEVY OR UPON COURT ORDER.

The Honorable William Heartwell, III
Commonwealth's Attorney for Botetourt County

This is in reply to your recent letter in which you inquire as to the obligations of the sheriff to both the judgment creditor and debtor after a writ of fieri facias was returned to the creditor "not sold for want of bidders." The writ of fieri facias is the customary writ directing the sheriff to levy on property in satisfaction of an execution.

Section 8.01-485 of the Code of Virginia provides that a writ of venditioni exponas may issue when the property remains unsold after the duly advertised sale under the writ of fieri facias. A writ of venditioni exponas commands the completion of the execution already begun. Beebe v. United States, 161 U.S. 104, 112 (1895). Unlike a sale under the original writ of fieri facias where a sheriff may in his discretion postpone the sale for want of a sufficient bid, the sale under the writ of venditioni exponas must be made if a single purchaser bids at the advertised sale. See Beebe, supra. Section 8.01-485 also provides that where the initial sale failed for want of bidders, the advertisement for the sale shall state that fact and the advertised sale will be made "peremptorily." However, the request for the issuance of this writ must originate from the creditor or his attorney. Burks Pleading and Practice 716 (4th ed. 1952).

If after the writ of fieri facias has been returned unsold for want of bidders, the creditor fails to seek a writ of venditioni exponas, the sheriff cannot immediately return the property to the debtor. "[AD mere suspension of proceedings on a levied execution does not authorize a restoration of the property to the possession of the defendant or a release of the levy." Walker v. Commonwealth, 59 Va. 13, 50 (1867). After an execution has been issued, levy made and the property seized, the sheriff is a mere bailee and he surrenders the property, he "does so at his peril..." Sage v. Dickinson, 74 Va. 361, 365 (1880).

Section 8.01-485 does not resolve the unusual situation presented here. However, § 8.01-479 which discusses the time for enforcement of the lien of fieri facias is instructive. Section 8.01-479 provides the property levied upon prior to the return date specified in the writ of fieri facias but unsold on such date may be sold within a reasonable time after the return date. If the creditor fails to pursue the matter after a "reasonable time" has elapsed, the sheriff may consider the levy to have been abandoned. A "reasonable

time" is, of course, a factual situation, dependent upon the circumstances of each case. The test of reasonable time to maintain the property with the view of satisfying the underlying judgment by subsequent sale hinges upon whether an intention to abandon the execution is manifest from the acts of the creditor. See Palais v. DeJarnette, 145 F.2nd 953 (4th Cir. 1944), and cases cited therein.

Consequently, the sheriff should maintain property custody of the property until one of the following circumstances occurs: (1) the creditor seeks a writ of venditioni exponas, (2) the court grants a motion to quash the execution, or (3) the actions or inactions of the creditor are such that an intention to abandon the levy is manifest. Although not required, the sheriff may avoid potential problems in determining the creditor's intent to abandon the levy if he notifies the creditor of his intent to release the levy.

Gerald L. Baliles
Attorney General
1982-83 Va. Op. Atty. Gen. 73

72-73 Va. AG 64A

AG Op. CIVIL PROCEDURE — Action of Detinue, 72-73 Va. AG 64A

CIVIL PROCEDURE — Action of Detinue; Prejudgment Repossession of Personal Property.

CIVIL PROCEDURE — Common Law Action of Replevin Has Been Abolished in Virginia.

THE HONORABLE EDWARD M. HOLLAND,
Member, Senate of Virginia

October 18, 1972

This is in reply to your recent letter in which you requested my opinion as to the constitutionality of certain provisions of Chapter 26, Title 8, §§ 8-586 through 8-595, Code of Virginia (1950), as amended, in light of the decision of the United States Supreme Court in *Fuentes v. Shevin*, 407 U.S. 67 (1972). [Page 65] The provisions in question provide procedures for the action of detinue and, especially, prejudgment repossession of personal property by agents of the state upon the application of and for the benefit of a private party.

In the *Fuentes* case, the United States Supreme Court, in a four to three decision, held the prejudgment replevin provisions of Florida and Pennsylvania law to be invalid under the Fourteenth Amendment in that they work a deprivation of property without due process of law by denying the right to a prior opportunity to be heard before chattels are taken from the possessor.

Unlike the common law action of replevin, which provided for some form of prior notice or hearing and was used to retrieve property wrongfully taken, prejudgment replevin statutes of most states are commonly used by creditors to seize goods allegedly wrongfully detained by debtors. *Id*. at 79. Both Florida and Pennsylvania permit a private party, without a hearing or prior notice to the other party, to obtain a prejudgment writ of replevin through a summary process of *ex parte* application to a court clerk upon the posting of a bond for double the value of the property to be seized. The sheriff, or other public officer, is then required to execute the writ by seizing the property; however, the property is not delivered to the plaintiff for a seventy-two hour period during which time the defendant may post a counter-bond and reclaim possession of the property until a final decision on the merits. See Florida Statutes, §§ 78.01-78.13; Pennsylvania Rules of Civil Procedure, Rules 1073-1077.

Both statutes provide for the issuance of writs ordering state agents to seize a person's possessions through the replevin process, but neither statute provides for notice to be given to the possessor of the property nor gives the possessor an opportunity to challenge the seizure at any kind of prior hearing. There is no requirement that the applicant for the writ make a convincing showing, before seizure, that the goods have been wrongfully detained. Under the Florida law, the defendant will eventually have an opportunity for a hearing, because it is required that the applicant for the writ of replevin must first initiate a court action for

repossession. No such requirement for the initiation of court action for repossession exists under the Pennsylvania law. *Id*.

The issue raised in *Fuentes* was "whether procedural due process in the context of these cases requires an opportunity for a hearing *before* the State authorizes its agents to seize property in the possession of a person upon the application of another." *Fuentes v. Shevin, supra* at 80.

To this basic question, the Court answered in the affirmative. It is fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner and, if the right to notice and a hearing is to serve its full purpose, it must be granted at a time when the deprivation can still be prevented. *Id*. at 80, 81. Furthermore, although the Florida and Pennsylvania statutes do not require a person to wait until a post-seizure hearing and final judgment to recover what has been replevied (i.e., through counter-bond procedures), a temporary, non final deprivation of property is nonetheless a deprivation in the terms of the Fourteenth Amendment. *Id*. at 85; *Sniadach v. Family Finance Corp*., 395 U.S. 337 (1969).

The common law action of replevin has been abolished in Virginia. See § 8-647, Code of Virginia (1950), as amended. In Virginia, if a creditor wishes to invoke State power to recover goods wrongfully detained, he must proceed through an action of detinue. Except for the name given to the action, the actions of detinue in Virginia and of replevin in Florida are utilized to accomplish the same ends through strikingly similar procedure.

In Virginia, as in Florida, a creditor may make an *ex parte* application by affidavit, accompanied by a bond in a value of at least double the estimated value of the property claimed In the affidavit the creditor must state that he is [Page 66] entitled to recover the property and that he has good reason to believe one of several conditions exists which may jeopardize the creditor's interest in the property as a probable consequence of the possessor's continued retention. Upon this application, the clerk of the court is required to issue an order directed to the sheriff, or other proper officer, commanding him to seize the property and deliver the same to the plaintiff forthwith. *Id*. §§ 8-586, 8-587. Section 8-588 of the Code provides, as does the Florida statute, that at any time *after* seizure the defendant in the detinue action may obtain the return of the property pending final court decision in the action upon the posting of a counter-bond in an amount of at least double the estimated value of the property. The Virginia statute further provides, *after* the goods have been seized by the sheriff and reasonable notice to the plaintiff has been given, a hearing may be requested by the defendant to contest whether the seizure provided for in § 8-586 was ordered upon false suggestions or without sufficient cause as stated in the applicant's affidavit. *Id*. 8-591. Any notice and hearing which may come after the property has been seized is not provided "at a meaningful time". *Fuentes v. Shevin, supra* at 80, 81.

The power of the State to seize goods before a final judgment in order to protect creditors' interests in not totally abridged on due process grounds. Nor is it required that plenary notice and hearing be afforded a possessor, under all circumstances, prior to State action for repossession in a private dispute. Prejudgment repossession statutes might be constitutionally drawn provided they limit the summary seizure of goods to special situations demanding prompt action in which a creditor could make a showing of immediate danger

that a debtor will destory or conceal disputed goods. Such statutes must not only be narrowly drawn to meet unusual conditions but, apparently, must also involve the participation of a judicial officer or other state official upon whom would devolve the duty to determine whether the applicant is actually able to demonstrate the existence of special circumstances and his entitlement to immediate possession of the property. *Id*. at 93, 96-97. See also *Laprease v. Raymours Furniture Co*., 315 F. Supp. 716 at 723 (N.D.N.Y. 1970); *Randone v. Appellate Dept. of S. Ct. of Sacramento Co*., 488 P.2d 13 at 31 (Cal. 1971).

In contrast with the statutes considered in *Fuentes*, the General Assembly has attempted to restrict the operation of the Virginia prejudgment repossession provisions to certain special circumstances. In this regard, the Virginia statute is more narrowly drawn than the corresponding Florida and Pennsylvania provisions. Section 8-586 reads, in part, as follows:

> "§ 8-586. When property to be taken by officer. — Whenever in any action of or warrant in detinue it is made to appear by the affidavit of the plaintiff, his agent or attorney:
>
> "(1) That there is good reason to believe that the defendant is insolvent, so that any recovery against him for the alternate value of the property and for damages and costs will probably prove unavailing;
>
> "(2) That the property, for the recovery of which such action or warrant is brought, will be sold, removed, secreted, or otherwise disposed of by the defendant, so as not to be forthcoming to answer the final judgment of the court or justice respecting the same; or
>
> "(3) That such property will be destroyed or materially damaged or injured by neglect, abuse, or otherwise, if permitted to remain longer in possession of such defendant or other person claiming under him;"

Whether the foregoing "restrictions" on the availability of state action prejudgment repossession is drawn narrow enough to cover truly special situations demanding prompt action, the Virginia provisions nonetheless appear to fall short of providing the necessary procedural due process safeguards. The person desiring prejudgment repossession under the Virginia statute is entitled to have the [Page 67] order issue to the sheriff to seize the goods merely upon his unilateral declaration in an affidavit that they exist. There is no requirement that the applicant establish his entitlement thereto by a showing to the satisfaction of a judicial officer or state official; without such a showing the State is required to act "largely in the dark."

There are a few limited and "extraordinary situations" which may justify the postponement of any notice and opportunity to be heard before an outright seizure is permitted. In those rare cases, however, seizure is usually necessary to secure an important governmental or a general public interest, and there is a special need for very prompt action. The utility of the Florida and Pennsylvania replevin provisions and the Virginia detinue provisions are primarily for benefit of private persons — "state intervention in a private dispute hardly

compares to state action furthering a war effort or protecting the public health." *Fuentes v. Shevin, supra* at 90-93.

In light of the foregoing clear application of the *Fuentes* decision to the prejudgment detinue procedures found in Chapter 26 of Title 8 of the Code, I am constrained to opine that such procedures are unconstitutional in that they tend to work a deprivation of property without due process of law through the denial of the right to a prior opportunity to be heard before chattels are taken from the possessor by State action.
72-73 Va. AG 64A

AG Op. SHERIFFS. SERVICE OF NOTICES OF, 83-84 Va. AG 329

SHERIFFS. SERVICE OF NOTICES OF OVERDRAFTS PERMITTED AND FEE MAY BE CHARGED. SERVICE OF NOTICES NOT TO TRESPASS AND NOTICES TO PAY OR QUIT PERMITTED. FEE MAY NOT BE CHARGED.

The Honorable James W. Rogers
Sheriff for Henry County

March 1, 1984

You have asked whether sheriffs are required or authorized by law to serve notices of overdrafts, notices not to trespass and notices to pay or quit.

In an Opinion to the Honorable Lynn C. Armentrout, dated September 8, 1983, 83-84 Va. AG 164, I addressed this issue. In that Opinion, I held that § 55-248.31:1 specifically authorized sheriffs to serve pay or quit notices and to charge a fee of $2.00 for each such notice served.[1] I also concluded that no statute specifically required sheriffs to serve notices of overdrafts, and further, because no statute authorizes the payment of fees to the sheriff for service of notices of overdraft and not to trespass, sheriffs could not collect a fee for such services. Section 18.2-119 is the statute dealing with notices not to trespass. This section states that a person will be guilty of trespass if he goes upon another's property without permission after having been forbidden to do so “either orally or in writing.” The statute is silent as to the manner in which the written or oral notice should be given to the trespasser. Notice, however, must be given before a prosecution for trespass may be commenced.

Similarly, § 18.2-183, the statute dealing with notices of overdraft, allows the maker of a bad check to avoid prosecution for fraud if he pays the holder of the bad check within five days of receiving notice that the check has been dishonored. This section recites that notice mailed by certified or registered mail will be deemed to be sufficient and equivalent to notice actually delivered to the maker of the bad check. The section, however, does not indicate who may or must serve notice.

This is the same situation addressed in the prior Opinion found in the 1978-1979 Report of the Attorney General at 239, 78-79 Va. AG 239, relating to service of a notice to pay or quit (prior to the enactment of § 55-248.31:1). The answer to whether the sheriff was required to serve such notices was said to turn on whether the definition of “process” in § 8.01-285 includes “notice.” The Attorney General at that time relied on prior Opinions of this Office to conclude that such notices are tantamount to process, and must be served by the sheriff when requested. *See* Reports of the Attorney General: 1959-1960 at 327; 1942-1943 at 231. It is noteworthy that courts have historically held that a sheriff is not relieved of duty to serve notice simply because no statute requires the court to issue it. *See Leas v. McVitt,* 132 F. 510 (C.C.W.D. Va., 1904).

Based on the foregoing, I am of the opinion that it is the duty of sheriffs to serve notices not to trespass and notices of overdrafts. These notices are intimately connected with court proceedings and must be served before actions may be commenced. As previously stated, however, in the absence of statutory authority, sheriffs may not receive fees for serving these notices.

FOOTNOTES

[1] Prior to the enactment of § 55-248.31:1 in 1981, there was no provision in the statutory law for serving pay or quit notices, or charging a fee for such service. *See* 1978-1979 Report of the Attorney General at 239, 78-79 Va. AG 239.

83-84 Va. AG 329

AG Op. CIVIL PROCEDURE. PROCEDURES TO EXECUTE, 80-81 Va. AG 48

CIVIL PROCEDURE. PROCEDURES TO EXECUTE LEVIES, DISTRESS WARRANTS AND PICK-UP ORDERS BY MEANS OF FORCIBLE ENTRY.

The Honorable W. Alvin Hudson, Sheriff,
City of Roanoke

July 21, 1980

You have asked related questions concerning the proper procedures for executing levies, pick-up orders and distress warrants. You ask whether the landlord has the right to let the deputies into the tenant's residence to execute such writs when no one is home. You also ask what procedures the deputies may follow in gaining entry to execute these writs when neither the tenant, owner nor landlord is present.

Pursuant to § 1-10 of the Code of Virginia (1950), as amended, Virginia is a common law State except where modified by statute. The common law, careful to prevent intrusions upon domestic peace and security and recognizing certain dangers inherent in unannounced entries in civil cases, generally disapproved of any forcible entry into a dwelling to execute civil, writs except in certain instances and with certain restrictions.1

The General Assembly has provided some guidance on when a sheriff may make entries to execute certain civil writs. Section 8.01-470 (formerly § 8-402) provides that in executing a writ of possession for specific property, an officer may in the daytime break and enter a locked or fastened building where he has reasonable cause to believe that the specific property is located therein after giving [Page 49] notice to the defendant, his agent or bailee.2 Section 8.01-491 (formerly § 8-422) provides that in order to levy, an officer "may, if need be, break open the outer doors of a dwelling house in the daytime, after having first demanded admittance of the occupant. . ."3 Section 55-235 provides that in executing a distress warrant, an officer may in the daytime, if there be need for it, break open and enter into any house in which there may be goods liable to the distress.4 These provisions require varying degrees of notice to the occupant or owner by the officer before the actual breaking in can take place. In view of the reluctance at common law to allow officers to break into dwellings to execute civil writs, what constitutes "notice" under these statutory provisions should be delineated. This Office has previously construed these sections to require that the sheriff "must signify the cause of his coming and request that the doors be opened before resorting to forcible entry. . . ."5 This would not seem to mean that the owner or occupant be actually present or that the sheriff need to receive a response to his request. This interpretation would coincide with other aspects of execution as required in Virginia. For example, in determining the type of notice of a levy that need be given to the owner, the court in Palais v. DeJarnette, 145 F.2d 953 (4th Cir. 1944) held that the owner's absence and lack of formal notice at time of levy on household goods does not invalidate the levy.

One of your inquiries dealt with whether a landlord may let a sheriff into a tenant's residence in the tenant's absence. Inasmuch as this could constitute a “breaking,” I am of the opinion that a sheriff acting under one of the above-mentioned provisions must declare the cause of his coming and demand that the doors be opened before a landlord can let him in. Where nobody, including a landlord, tenant or private homeowner, is present to let the sheriff or his deputies in, this same requirement must also be followed before any forcible entry allowed under the Code can be carried out.

This Office has previously construed these provisions to be constitutional and enforceable.6 Therefore, it is my opinion that a sheriff or his deputies in executing a civil writ under these provisions should first signify the cause of his coming and demand that the doors be opened before resorting to any type of forcible entry.

FOOTNOTES

1 17 Halsbury's Laws of England 280 (4th ed., 1976); 33 C.J.S Executions §§ 95, 96 (1942); Burks' Pleading and Practice § 363 (4th ed., 1952); 57 A.L.R. 210 (1928). An example of a permissible forcible entry would have been an execution at the instance of the King but the sheriff would still have been required to advise as to the cause of his coming and request that the doors be opened before any force could have been used. 14 Halsbury's Laws of England (47-48 2nd ed., 1934). [Page 50]

2 Section 8.01-470 provides in part: “On a judgment for the recovery of specific property, real or personal, a writ of possession may issue for the specific property, which shall conform to the judgment as to the description of the property and the estate, title and interest recovered, and there may also be issued a writ of fieri facias for the damages or profits and costs . . . And an officer having a writ of possession for specific personal property, if he find locked or fastened the building or place wherein he has reasonable cause to believe the property specified in the writ is located, may in the daytime, after notice to the defendant, his agent or bailee, break and enter such building or place for the purpose of executing such writ.”

3 Section 8.01-491 provides: “An officer into whose hands an execution is placed to be levied, may, if need be, break open the outer doors of a dwelling house in the daytime, after having first demanded admittance of the occupant, in order to make a levy, and may also levy on property in the personal possession of the debtor if the same be open to observation.”

4 Section 55-235 provides: “The officer having such distress warrant, or an attachment for rent, if there be need for it, may, in the daytime, break open and enter into any house or close in which there may be goods liable to the distress or attachment, and may, either in the day or night, break open and enter any house or close wherein there may be any goods so liable which have been fraudulently or clandestinely removed from the demised premises. He may also levy such distress warrant or attachment on property liable for the rent found in the personal possession of the party liable there for.”

5 See Report of the Attorney General (1974-1975) at 118, 74-75 Va. AG 118.

6 Id. at 123.

80-81 Va. AG 48

AG Op. COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS, 2011 Va. AG S-10 (10-075)

COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS — FEES.

Writs of fieri facias, debtor interrogatories and garnishments are distinct, though related, proceedings, so that, although the sheriff or other executing officer may be required to levy on the tangible personal property of a judgment debtor when executing a writ of fieri facias, no such requirement is imposed when serving a Summons for Interrogatories or Garnishment Summons. In addition, the fees sheriffs may charge for these services are governed by the express terms of § 17.1-272.

The Honorable L. J. Ayers, III
Sheriff for Amherst County

February 4, 2011

Issues Presented

You seek clarification regarding the executions of a Summons to Answer Interrogatories and Summons in Garnishment. You specifically ask whether the execution of the Writ of Fieri Facias requires the Sheriff to levy at the same time either summons is served. You further inquire regarding the appropriate fees to which the sheriff is entitled for his service in executing these collection methods.

Response

It is my opinion that writs of fieri facias, debtor interrogatories and garnishments are distinct, though related, proceedings, so that, although the sheriff or other executing officer may be required to levy on the tangible personal property of a judgment debtor when executing a writ of fieri facias, no such requirement is imposed when serving a Summons for Interrogatories or Garnishment Summons. It further is my opinion that the fees sheriffs may charge for these services are governed by the express terms of § 17.1-272.

Applicable Law and Discussion1

Under Virginia law, after obtaining a judgment for the payment of money, a judgment creditor may institute collection proceedings upon the issuance of a writ of fieri facias.2 Twenty-one days after judgment is entered, the creditor may request the clerk of the court in which judgment was rendered to issue the writ.3 Upon receiving the request, the clerk is required to issue the writ and deliver it to the sheriff or other proper person for execution.4 Upon receipt of the writ, the sheriff or other executing officer is “commanded to make the money therein mentioned out of the goods and chattels of the person against whom the judgment is.”5

Section 8.01-483 prescribes the protocol for the execution of a writ of fieri facias:

> Upon a writ of fieri facias, the officer shall return whether the money therein mentioned has been or cannot be made. If there is only part thereof which is or cannot be made, he shall return the amount of such part. With every execution under which money is recovered, he shall return a statement of the amount received, including his fees and other charges, and shall pay such amount, except such fees and charges, to the person entitled. In his return upon every execution, the officer shall also state in what manner a copy of the writ was served in accordance with § 8.01-487.1, whether or not he made a levy of the same, the date and time of such levy, the date when he received such payment or obtained such satisfaction upon such execution and, if there is more than one defendant, from which defendant he received the same.[6]

Other provisions govern levying,7 which is the process "by which [specific] property is set apart from the general property of the defendant and placed into the custody of the law until it can be sold and applied to the payment of the execution."8 Virginia law clearly contemplates that levying is a distinct act9 and that a levy may not always occur.10

Issuance of the writ of fieri facias authorizes a lien against the personal property of the debtor. A lien attaches to the debtor's tangible personal property "from the time it is actually levied by the officer to whom it has been delivered to be executed"11 and the levy must occur prior to the return date of the writ.12 Because intangible personal property, such as bonds and notes, is incapable of levy and sale, it is subject to the judgment lien once the writ of fieri facias is delivered to an authorized officer.13

Garnishment proceedings are available to judgment creditors to collect against third parties who are believed to hold money to which the judgment debtor is or may be entitled.14 Although creditors may take advantage of this collection method "by reason of the lien of his writ of fieri facias,"15 garnishment proceedings are separate actions,16 governed by their own statutory requirements, including specified rules regarding service of process, the form of the summons and the inclusion of the debtor's social security number.17 A garnishment proceeding "must be regarded as a civil suit, and not as a process of execution to enforce a judgment already rendered. . . . the parties have a day in court; an issue of fact may be tried by a jury; evidence adduced, judgment rendered, costs adjudged, and execution issued on the judgment."18 Therefore, no levy is necessary when pursuing garnishment proceedings, I further conclude not only that execution of the writ of fieri facias and service of the summons in garnishment need not occur simultaneously,19 but also that where the sheriff does provide both services concurrently, no levy is required with respect to the garnishment.

"Debtor interrogatories" are a means for the creditor "to ascertain the personal estate of a judgment debtor . . . to which the debtor named in a judgment and fieri facias is entitled[.]"20 "[U]pon the application of the execution creditor, the clerk of court from which such fieri facias issued, shall issue a summons against [] the execution debtor," requiring him to "appear before the court from which the fieri facias issued. . . to answer such interrogatories as may be propounded to him[.]"21 Clearly, issuance of a

summons to answer interrogatories requires as a prerequisite the issuance of the writ of fieri facias, but the Code does not require that a levy occur. Rather, a judgment creditor may want to discover what property is available before determining whether to proceed via levy or garnishment, or another collection means.22

The fee schedule provided ia § 17.1-272 supports the above conclusions. It explicitly provides that the fee for "[m]aking a return of a writ of fieri facias where no levy is made" is $12,23 whereas the fee for "[l]evying an execution" or [l]evying upon current money, bank notes, goods or chattels of a judgment debtor pursuant to § 8.01-478" is $25.24 Thus, a judgment creditor who asks the sheriff to levy upon the property of the judgment debtor upon service of debtor interrogatories or garnishment summons should be charged $25 for the levy rather than the $12 fee required for serving "any person, firm or corporation, an order notice summons or any other civil process[.]"25 Moreover, "a judgment creditor who seeks a levy pursuant to a writ of fieri facias must pay separate fees for the levy and the service of the writ."26

"A return on a writ or process is the short official statement of the officer endorsed thereon on what he has done in obedience of the writ or, or why he has done nothing"27 and "it is the duty of a sheriff or other ministerial officer to return all writs on the return day with a short account in writing endorsed by him thereon of the manner in which he has executed the same, or why he has done nothing."28 The return forms currently authorized by the Supreme Court of Virginia for the institution of debtor interrogatories and garnishment both provide for the executing officer to document the levy.29 In the situations where the judgment creditor requests a levy, if the officer locates property while executing the writ, the forms instruct the officer to utilize the back of Form DC-46730 to inventory the property, If no effects can be located by the officer, he can simply note that fact on the back of the summons form. In instances where no levy is required, the officer simply may insert his own notation stating that fact.

Conclusion

Accordingly, it is my opinion that writs of fieri facias, debtor interrogatories and garnishments are distinct, though related, proceedings, so that, although the sheriff or other executing officer may be required to levy on the tangible personal property of a judgment debtor when executing a writ of fieri facias, no such requirement is imposed when serving a Summons for Interrogatories or Garnishment Summons. It further is my opinion that the fees sheriffs may charge for their services is governed by the express terms of § 17.1-272.

FOOTNOTES

1 Because you have requested a clarification of the law regarding the writ of fieri facias as it pertains only to garnishment and interrogatory proceedings, this opinion is not intended to constitute a comprehensive analysis of all aspects of the law governing post-judgment execution proceedings.

2 VA. CODE ANN. 8.01-466 (2007). See also DOUG RENDLEMAN, ENFORCEMENT OF JUDGMENTS AND LIENS IN VIRGINIA (2d ed. 1996).

3 Id.

4 Id. Although the twenty-one day period generally applies to collection proceedings, the court may enter an order permitting an earlier execution on thejudgment if the judgment creditor demonstrates good cause. Id.

5 Section 8.01-474 (2007).

6 Section 8.01-483 (2007) (emphasis added).

7 See, e.g., § 8.01-487.1 (2007) (copy of writ and any attachments to be served on debtor or other responsible person or posted at premises where levy made); § 8.01-491 (2007) (officer may break outer doors of dwelling house during daytime to execute a levy after first demanding admittance and may levy on visible property in the debtor's personal possession); § 8.01-490 (2007) (officer may not make unreasonable levy and may not remove property from his jurisdiction unless specifically authorized).

8 Walker v. Commonwealth, 59 Va. (18 Gratt.) 13, 43 (1867).

9 “Several successive steps are to be taken between the issuing of the execution and the satisfaction of the judgment. The first step is, to place the execution into the hands of the sheriff. . . . The second step is, to levy the execution on specific property, . . . [t]he third step and last step is, the sale of the property.” Id. See also Humphrey v. Hitt, 47 Va. (6 Gratt.) 509, 526-28 (1850)

10 See, e.g., Humphrey, 47 Va. (6 Gratt.) at 526-28; Rowe v. Hardy, 97 Va. 674, 676-77, 34 S.E. 625, 625-26 (1899) (“In executing the writ, the sheriff was the agent of the plaintiff, who was entitled to its proceeds, and he and his attorneys had the right to control the execution and to say whether the officer should levy it or return it without doing so.”). See also RENDLEMAN, supra note 2, at 56-58 (noting that the creditor must decide whether or not to levy) and VA. CODE ANN. § 17.1-272 (2010) (establishing different fees for service by sheriff depending on whether levy occurs).

11 Section 8.01-478 (2007).

12 Section 8.01-479 (2007).

13 Section 8.01-501 (Supp. 2010). The statute provides that:

> Every writ of fieri facias shall, in addition to the lien it has under §§ 8.01-478 and 8.01-479 on what is capable of being levied on under those sections, be a lien from the time it is delivered to a

> sheriff or other officer, or any person authorized to serve process pursuant to § 8.01-293, to be executed, on all the personal estate of or to which the judgment debtor is, or may afterwards and on or before tie return day of such writ or before the return day of any wage garnishment to enforce the same, become, possessed or entitled, in which, from its nature is not capable of being levied on under such sections, except such as is exempt under the provisions of Title 34, and except that, as against an assignee of any such estate for valuable consideration, the lien by virtue of this section shall not affect him unless he had notice thereof at the time of the assignment.

See also Knight v. Peoples Nat'l Bank of Lynchburg 182 Va. 380, 391, 29 S.E.2d 364, 370 (1944) ("A summons in garnishment creates no lien. It is a means of enforcing the lien of an execution placed in the hands of an officer to be levied.").

14 Section 8.01-511 (2007).

15 Id. See also In re Lamm, 47 B.R. 3.64, 368 (Bankr. E.D. Va. 1984) ("The garnishment summons itself does not create a lien, but the lien is created by the fieri facias, and dates from the date of delivery of the fieri facias to the officer. The garnishment is notice of the lien." (emphasis added)).

16 A "'proceeding in garnishment is substantially an action at law by the judgment debtor in the name of the judgment creditor against the garnishee.'" Network Solutions, Inc. v. Umbro Int'l, Inc., 259 Va. 759, 768, 529 S.E.2d 80, 85 (2000) (quoting Lynch v. Johnson, 196 Va. 516, 521, 84 S.E.2d 419, 422 (1954)).

17 Section 8.01-513 (2007).

18 Levine's Loan Office, Inc. v. Starke, 140 Va. 712, 714 125 S.E. 683, 684 (1924) (citations and internal quotation marks omitted).

19 Cf. § 8.01-512.3 ("Date of delivery of writ of fied facias to sheriff if different from the date of this [garnishment] summons.").

20 Section 8.01-506 (Supp. 2010) (emphasis added).

21 Id. (emphasis added).

22 "The law authorizes the plaintiff, though execution has come to the hands of the sheriff, to sue out other and different process of execution." Humphrey, 47 Va. (6 Gratt.) at 528.

23 VA. CODE ANN. § 17.1-272(A)(5) (2010).

24 Sections 17.1-272(B)(6); 17.1-272(B)(3) (2010).

25 Section 17.1-272(A)(1) (2010).

26 1987-88 Op. Va. Att'y Gen. 72, 73, 87-88 Va. AG 72, 73.

27 Rowe, 97 Va. at 676, 34 S.E. at 625.

28 Id. at 679, 34 S.E. at 626.

29 SUMMONS TO ANSWER INTERROGTORIES, Form DC-440 (07/09) & GARNISHMENT SUMMONS, Form DC-451 (1/07), respectively. See also § 8.01-512.3 (2007).

30 WRIT OF FERI FACIAS, FORM DC-467 (10/07).

2011 Va. AG S-10

AG Op. COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS, 2010 Va. AG S-76 (10-109)

COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS — FEES.

Virginia Code § 17.1-272 authorizes the sheriff to charge an initial fee of $25 for service of a writ of possession and to add $12 to that fee for each additional defendant who is served.

The Honorable Bill Watson
Sheriff, City of Portsmouth

November 24, 2010

Issues Presented

You inquire under § 17.1-272 what amount you may charge for serving and executing writs of possession, writs of fieri facias in detinue and fieri facias.

Response

It is my opinion that § 17.1-272 authorizes you to charge an initial fee of $25 for service of a writ of possession and to add $12 to that fee for each additional defendant who is served.

Applicable Law and Discussion

Section 17.1-272(A)(1) authorizes a fee of $12 for "service on any person, firm or corporation, an order, notice, summons or any other civil process." Therefore, the default fee established in the Code for service of papers is $12.1 Section 17.1-272(B) allows a $25 fee for "process and service" with respect to "service of a writ of possession, except that there shall be an additional fee of $12 for each additional defendant." Therefore, with respect to a writ of fieri facias, the fee is $12 for each person or entity served. The fee for service of a writ of possession is $25, but where an additional defendant must be served, an additional $12 fee may be charged. Therefore, when a single defendant is served with a writ of possession, the total fee is $25.

Conclusion

Accordingly, it is my opinion that the fee for process and service of a writ of fieri facias and fieri facias in detinue is $12 for each person served and the fee for service and process for a writ of possession is $25, with an additional fee of $12 for each additional defendant who is served.

FOOTNOTES

1 Virginia Form CC-1478 (“Writs of Possession and Fieri Facias in Detinue”), issued by the Supreme Court of Virginia, contains both the writ of possession and writ of fieri facias within one document, contemplates simultaneous service and alternative execution of the writs, and thus the service fee for the writ of fieri facias in detinue is subsumed within the fee for the writ of possession unless the writ offieri facias in detinue is served alone in a particular case.

2010 Va. AG S-76

AG Op. SHERIFFS. SERVICE OF PROCESS. MAY NOT, 83-84 Va. AG 330

SHERIFFS. SERVICE OF PROCESS. MAY NOT ENTER FACTORY WITHOUT CONSENT TO SERVE CIVIL PROCESS.

The Honorable George W. Bailey
Sheriff, County of Albemarle

May 23, 1984

This is in response to your request for an opinion whether a Virginia sheriff may enter a factory to serve a civil warrant on an employee over objection of the management.

In my opinion, specific statutory authority would be required to authorize an officer to enter the premises of a third party without permission to serve civil process. Neither § 8.01-296 of the Code of Virginia, governing service of process on natural persons, nor any other Virginia statute, grants such authority.

This view is in accord with a prior Opinion of this Office found in the 1955-1956 Report of the Attorney General at 26.

It is noteworthy that the General Assembly has expressly authorized the service of a summons for a witness or juror at his or her usual place of business during business hours. Section 8.01-298 reads in part:

> "In addition to the manner of service on natural persons prescribed in § 8.01-296, a summons for a witness or for a juror may be served:
>
> 1. At his or her usual place of business or employment during business hours, by delivering a copy thereof and giving information of its purport to the person found there in charge of such business or place of employment. . . ."

Until such time as the General Assembly grants such authority, I am of the opinion that a sheriff may not enter a factory over the objection of the management for the purpose of serving an employee with a civil warrant.
83-84 Va. AG 330

AG Op. SHERIFFS. WHERE PROPERTY IS REMOVED FROM, 81-82 Va. AG 335

SHERIFFS. WHERE PROPERTY IS REMOVED FROM PREMISES IN UNLAWFUL DETAINER, SHERIFF NOT REQUIRED TO PROVIDE STORAGE WHERE NO STORAGE AREA IS DESIGNATED.

The Honorable Clay Hester
Sheriff of the City of Newport News

May 11, 1982

This is in reply to your inquiries regarding property removed from premises under a court order in an action for unlawful detainer.

You have inquired whether, in the absence of a designated storage area by the governing body of the county or city under § 8.01-156[1] of the Code of Virginia (1950), as amended, the sheriff is required to provide storage for property referenced above. In my opinion, if no storage area has been designated by the governing body, the officer's duty under § 8.01-156 ends when he places the property on a public way. *See* Reports of the Attorney General (1979-1980) at 312, 79-80 Va. AG 312 and (1965-1966) at 318.

Assuming a negative response to the first inquiry, you have further inquired whether the officer may legally leave the property on a public way. In my opinion he may, as long as he does not do so in such a manner as to constitute a nuisance under § 15.1-316 or 15.1-867, or in violation of any applicable local ordinances.

FOOTNOTES

[1] "In any county or city, when personal property is removed from premises pursuant to an action of unlawful detainer or ejectment, or pursuant to any other action in which personal property is removed from premises in order to restore such premises to the person entitled thereto, the sheriff shall cause such personal property to be placed in a storage area, if such a storage area has been designated by the governing body of such county or city, unless the owner of such personal property then and there removes the same from the public way."

81-82 Va. AG 335

AG Op. CIVIL REMEDIES AND PROCEDURE: ACTIONS, 1999 Va. AG 24

CIVIL REMEDIES AND PROCEDURE: ACTIONS — UNLAWFUL ENTRY AND DETAINER — EXECUTIONS AND OTHER MEANS OF RECOVERY.

Officer to whom writ of possession has been delivered in unlawful detainer action must provide defendant 72-hour notice of intent to execute writ, notwithstanding court's 'immediate possession' direction on writ.

The Honorable John R. Newhart,
Sheriff for the City of Chesapeake

May 20, 1999

You ask what constitutes immediate possession under § 8.01-129 of the *Code of Virginia.*

You state that, in unlawful detainer actions, the office of the sheriff has been receiving writs of possession on which the courts have written "immediate possession." Your office has been posting a seventy-two hour notice to vacate and proceeding with the eviction as soon as possible following this period. You question whether this procedure is consistent with § 8.01-129.

Section 8.01-129 provides for an appeal to the circuit court from a judgment of a general district court in a proceeding for unlawful entry and detainer.[1] The appeal must be taken and the required security posted within ten days of the date of the general district court judgment.[2] Section 8.01-129 further provides:

> Unless otherwise specifically provided in the court's order, no writ of execution shall issue on a judgment for possession until the expiration of this ten-day period, except in cases of judgment of default for the nonpayment of rent where the writ of execution shall issue immediately upon entry of judgment for possession, if requested by the plaintiff.[3]

Section 8.01-470 governs the issuance and execution of a writ of possession on a judgment for the recovery of specific property:

> In cases of unlawful entry and detainer and of ejectment, the officer to whom a writ of possession has been delivered to be executed shall, at least seventy-two hours before execution, serve notice of intent to execute, including the date and time of execution, on the defendant in accordance with § 8.01-296, with a copy of the writ attached.

The primary goal of statutory construction is to discern and give effect to the intent of the legislature.[4] In determining legislative intent, statutes dealing with the same subject matter should be construed together in order to give effect to all acts of the legislature.[5] While § 8.01-129 provides that the court is to

issue the writ of execution “immediately upon entry of judgment for possession,” the statute contains no language suggesting a legislative intent to override the seventy-two hour notice requirement imposed on officers by § 8.01-470. Both statutes thus should be given full effect to the extent possible. Accordingly, it is my opinion that, notwithstanding the courts' “immediate possession” direction on a writ of execution issued under § 8.01-129, the officer to whom the writ of execution is delivered is to provide the seventy-two hour notice mandated by § 8.01-470. [Page 25]

FOOTNOTES

[1] Sections 8.01-124 to 8.01-130 comprise the unlawful entry and detainer statutes. A motion for judgment for unlawful entry and detainer may be heard in general district court if the summons is issued by a magistrate. Section 8.01-126. The case may be removed to the circuit court if the amount in controversy exceeds $500. Section 8.01-127.

[2] Section 8.01-129.

[3] The exception clause for cases of judgment of default for the nonpayment of rent was added to the statute at the 1998 Session of the General Assembly. *See* 1998 Va. Acts ch. 750, at 1813.

[4] *See Turner v. Commonwealth,* 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

[5] *See Prillaman v. Commonwealth,* 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957); *see also* Op. Va. Att'y Gen.: 1996 at 197, 198; 1996 Va. AG 197, 198; 1993 at 135, 137; 1993 Va. AG 135, 137; 1992 at 97, 99, 1992 Va. AG 97, 99.

1999 Va. AG 24

AG Op. CIVIL PROCEDURE — Service of Process, 71-72 Va. AG 59

CIVIL PROCEDURE — Service of Process — On inmates of State mental institutions.

MENTALLY ILL — Service of Process — Inmates of State mental institutions.

THE HONORABLE E. P. LANDERS
Sheriff of Nottoway County

December 14, 1971

This is in reply to your recent letter in which you make the following inquiry:

> In cases where legal documents requiring personal service must be served on inmates of severe mental condition at Piedmont State Hospital, would it be proper to make service upon the superintendent of the hospital or some other person in authority, with the notation that the inmate cannot be served in person?

A careful review of Virginia law reveals that there is no specific provision which authorizes service of process upon the superintendent of a mental hospital. Section 8-51, Code of Virginia (1950), as amended, prescribes personal service on the individual where no particular mode of service is otherwise prescribed. If the inmate has been adjudicated insane, a committee must be appointed pursuant to § 37.1-127. In such a case, notice may be served on the committee. In cases where there is no committee appointed and the inmate has not been adjudicated insane or feebleminded, in the absence of an express statutory requirement to the contrary, notice must be personally served on the individual. I am therefore of the opinion that you may not substitute service of process upon the superintendent of Piedmont State Hospital for personal service upon the individual.
71-72 Va. AG 59

AG Op. ARREST. WARRANTLESS ARREST AT SCENE OF, 78-79 Va. AG 15A

ARREST. WARRANTLESS ARREST AT SCENE OF MOTOR VEHICLE ACCIDENT FOR ARREST RESULTING FROM ACCIDENT. § 19.2-81.

The Honorable James A. Cales, Jr.,
Commonwealth's Attorney for the City of Portsmouth

March 13, 1979

You have asked whether, under § 19.2-81 of the Code of Virginia (1950), as amended, a police officer can make an arrest without a warrant at a place other than at the scene of a motor vehicle accident when the arrest results from the accident. In my opinion he cannot. [Page 16]

The general provision of § 19.2-81 essentially codifies the common law in providing for warrantless arrest by peace officers[1] of "any person who commits any crime in the presence of such officer and any person whom he has reasonable grounds or probable cause to suspect of having committed a felony not in his presence.[2]

The portion of § 19.2-81 about which you inquire follows the general provision and provides that "any such officer may, *at the scene* of any motor vehicle accident, . . . upon reasonable grounds to believe, based upon personal investigation, including information obtained from eyewitnesses, that a *crime* has been committed by any person *then and there present*, apprehend such person without a warrant of arrest." (Emphasis supplied.)

To the extent that the crime involved is a misdemeanor, this provision creates an exception to the common law rule, incorporated into the preceding general provision of § 19.2-81, that a peace officer cannot arrest without a warrant for a misdemeanor not committed in his presence.

The exception is stated in plain and unambiguous terms, and I find no authority suggesting that it be interpreted so as to allow such warrantless arrest for a misdemeanor other than "at the scene" of a person "then and there present." Moreover, the Virginia Supreme Court has stated that a statute "will not be construed as changing the common law rule beyond what is expressly stated or necessarily implied, and in doubtful cases the presumption is that no change was intended." *Strother v. Lynchburg Bank*, 155 Va. 826, 833 (1931).[3]

FOOTNOTES

[1] Section 19.2-81 specifies members of the State Police, sheriffs and their deputies, members of county, city and town police forces, and special policemen of counties as provided by § 15.1-144.

[2] The common law, unlike § 19.2-81, limited warrantless misdemeanor arrests by peace officers to breaches of the peace occurring in their presence. I C. Torcia, *Wharton's Criminal Procedure* § 63 (12th ed. 1974); 2A M.J. *Arrest* § 9, at 127 (1969).

[3] Of course, if the crime involved is a felony, a warrantless arrest other than at the scene may be justified.

78-79 Va. AG 15A

AG Op. CIVIL PROCEDURE. SERVICE OF PROCESS, 78-79 Va. AG 40

CIVIL PROCEDURE. SERVICE OF PROCESS ISSUED TO SHERIFF MUST ACCOMPANY FULL NAME AND ADDRESS OF PARTY TO BE SERVED.

The Honorable Robert W. Legard,
Sheriff for the County of Loudoun

February 23, 1979

You have asked three questions about service of process which I shall answer in order.

First, you have asked if a plaintiff can be made to comply with § 8.01-290 of the Code of Virginia (1950), as amended, when supplying information to the clerk of court for purposes of service of process. That section requires a plaintiff to provide a full name and last known address of each defendant to be served, if available, and if not, "such salient facts as are calculated to identify with reasonable certainty such defendant."

For example, if only the name of a town is given, the plaintiff could be required to provide additional facts to assist in the identification of the party to be served. The use of initials or nicknames may not be sufficient for identification, and if the full name is available to the plaintiff it should be used. A request for service of process at a post office box or general delivery address need not be considered a full address and additional information to identify the location of the party to be served could be required.

In a prior Opinion found in Report of the Attorney General (1974-1975) at 64, 74-75 Va. AG 64, it was ruled that, pursuant to § 15.1-79, it is the mandatory duty of the sheriff to execute civil process issued by the courts. Nevertheless, the law requires only that the sheriff do his duty in good faith and with due diligence.[1]

If your office is asked to make service of process in a case where an incomplete name or address is given, your return should indicate your inability to execute service owing to the inadequacy of the information supplied. The Supreme Court of Virginia held in *Rowe v. Hardy*, 97 Va. 674, 676, 34 S.E. 625 (1899), that a sheriff's return "may also be of the existence of such a state of facts as, without fault or negligence on his part, prevented a compliance with the mandate of the writ."

Second, you have asked whether a plaintiff may withhold the address of a defendant's usual place of abode, and provide only the address where the defendant is employed. Section 8.01-290 provides that the plaintiff is to furnish the last known address of the defendant and only if he is unable to [Page 41] furnish such address should he furnish other information (such as his place of employment) calculated to reasonably identify or locate the defendant.

Section 8.01.296,[2] providing for the manner of serving process upon natural persons, does permit service of process to be obtained by delivering the process to the defendant in person. Nevertheless, *Burk's Common Law and Statutory Pleading and Practice* states, on page 73, that "personal service may be on the defendant anywhere he may be found in the officer's bailiwick, but the officer is not required to search for him at but one place and that is place of abode, . . ."

Thus, it is my opinion that, if personal service is not otherwise required by law, the plaintiff may not insist upon personal service at the defendant's place of employment unless he is unable, under § 8.01-290, to provide the full address of the defendant's usual place of abode.

78-79 Va. AG 40

AG Op. SHERIFFS. COMMISSIONS. § 14.1-69 PROHIBITS, 80-81 Va. AG 321

SHERIFFS. COMMISSIONS. § 14.1-69 PROHIBITS COLLECTION OF COMMISSIONS USUALLY ASSESSABLE UNDER § 14.1-109 WHEN PROCESS IS ISSUED FOR RECOVERY OF DELINQUENT TAXES FOR THE COMMONWEALTH OR FOR THE LOCALITY.

The Honorable C. A. Rollins, Jr., Sheriff
County of Prince William

January 8, 1981

You have asked whether commissions payable out of proceeds received upon execution, levy or other process, as authorized by § 14.1-109 of the Code of Virginia (1950), as amended, may be collected when such process is instituted to enforce a judgment for delinquent local taxes. A writ of fieri facias, writ of possession or other process for execution of a judgment is issued for purposes of levy and collection to a sheriff or other authorized official. *See* §§ 16.1-99 and 17-50.

The commissions payable on account of such levies and collections by a sheriff or other official are in the nature of fees, assessable under Title 14.1. Section 14.1-69 states, in part, that: [Page 322]

> "Every sheriff, and every sheriff's deputy, shall however, continue to collect all fees and mileage allowances provided by law for the services of such officer, *other than such as he would have been entitled to receive from the Commonwealth or from the county or city for which he is elected or appointed*. . . ."

I am of the opinion that § 14.1-69 prohibits collection of commissions usually assessable under § 14.1-109 when process is issued for recovery of delinquent taxes for the Commonwealth or for the locality in which the sheriff or other collecting officer is elected or appointed. A prior Opinion of this Office reached the same conclusion with respect to other fees assessable under Title 14.1. *See* Opinion to the Honorable Wescott B. Northam, Commonwealth Attorney for Accomack County, dated October 15, 1964, found in Report of the Attorney General (1964-1965) at 323.
80-81 Va. AG 321

AG Op. TAXATION: REVIEW OF LOCAL TAXES, 1990 Va. AG 249

TAXATION: REVIEW OF LOCAL TAXES — COLLECTION BY DISTRESS, SUIT, LIEN, ETC. — COLLECTION BY TREASURERS, ETC.

CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS OF RECOVERY.

Treasurer statutorily authorized to sell goods or chattels seized by distress to satisfy delinquent tax bills; sheriff may sell such goods without writ of fieri facias or other court order. Statutory procedure for sale of distressed property by treasurer, sheriff.

The Honorable Stephen L. Moloney
Treasurer for the City of Fairfax

August 3, 1990

You raise several questions concerning the collection of taxes through the sale of goods or chattels seized by distress. Specifically, you ask (1) whether a local treasurer is authorized to sell goods or chattels seized by distress, (2) whether a sheriff may sell such goods other than pursuant to a writ of fieri facias or other writ issued by a court, and (3) what procedures must be followed by a treasurer or sheriff in the sale of distressed goods or chattels.

I. *Applicable Statutes*

Section 58.1-3919 of the Code of Virginia grants local treasurers the authority to collect unpaid taxes by distress:

> The treasurer, after the due date of any tax, shall call upon each person chargeable with such tax who has not paid the same prior to that time, or upon the agent, if any, of such person resident within the county, city or town for payment thereof; and upon failure or refusal of such person or agent to pay the same he shall proceed to collect by distress or otherwise. Should it come to the knowledge of the treasurer that any person owing taxes is moving or contemplates moving from the county, city or town prior to the due date of such taxes, he shall have power to collect the same by distress or otherwise at any time after such bill shall have come into his hands.

Section 58.1-3941 also addresses the use of distress for collection of local taxes:

> Any goods or chattels in the county, city or town belonging to the person or estate assessed with taxes or levies may be distrained therefor by the treasurer, sheriff, constable or collector. [Page 250]

Notice requirements in § 58.1-3942, applicable when distressed goods are subject to a security interest, refer to the sale of these goods by the local treasurer or sheriff:

> No security interest in goods or chattels shall prevent the same from being distrained and sold for taxes or levies assessed thereon, no matter in whose possession they may be found.
>
> Prior to such sale for distress, *the treasurer, sheriff* . . . or other party *conducting the sale* shall give notice to any secured party of record as his name and address shall appear on the records of the Department of Motor Vehicles, the Department of Game and Inland Fisheries, the State Corporation Commission, or in the office of the clerk of any circuit court where the debtor has resided to the knowledge of the party to whom the tax is owing during a one-year period prior to the sale. Notice shall also be given to any secured party of whom the party to whom the tax is owing shall have knowledge. [Emphasis added.]

Section 8.01-492 details the procedure for the sale of distrained goods:

> In any case of goods and chattels which an officer shall distrain or levy on, otherwise than under an attachment . . . the officer shall fix upon a time and place for the sale thereof and post notice of the same at least ten days before the day of sale at some place near the residence of the owner if he reside in the county or city and at two or more public places in the officer's county or city. If the goods and chattels be expensive to keep or perishable, the court from whose clerk's office the writ of fieri facias or the distress warrant was issued under which the seizure is made, or if the distress warrant was issued by a clerk, the court of which he is a clerk, may order a sale of the property seized under fieri facias or distress warrant to be made upon such notice less than ten days as to such court may seem proper. At the time and place so appointed, such officer shall sell to the highest bidder, for cash, such goods and chattels, or so much thereof as may be necessary.

II. *Treasurer May Distrain and Sell Property to Collect Delinquent Taxes*

A prior Opinion of this Office interpreting the scope of a local treasurer's authority to collect delinquent taxes pursuant to the predecessor statutes to §§ 58.1-3919, 58.1-3941 and 8.01-492 concludes that the treasurer may proceed by distress to seize and sell goods to satisfy delinquent tax bills. 1953-1954 Att'y Gen. Ann. Rep. 204. This prior Opinion also concludes that the treasurer may distrain property without a warrant, based upon the tax bill itself, may remove the property from the premises as part of the power to distrain property pursuant to former § 58-1001 (present § 58.1-3941), and may sell the property to satisfy delinquent taxes following the procedure detailed in former § 8-422.1 (present § 8.01-492).[1] *Id. See also* § 58.1-3942 (referring to sales for distress by treasurers to collect taxes); Att'y Gen. Ann. Rep.: 1968-1969 at 228, 68-69 Va. AG 228; 1963-1964 at 285 (Opinions describing general authority of local treasurers to collect taxes by distress).

Based on the above, it is my opinion that a treasurer has the authority pursuant to §§ 58.1-3919, 58.1-3941 and 8.01-492 to collect delinquent taxes by the seizure and sale of goods or chattels.

III. *Sheriff May Sell Distrained Property Without Writ or Order Issued by Court*

As discussed above, §§ 58.1-3941 and 58.1-3942 authorize a sheriff, as well as a local treasurer, to distrain property and sell that distressed property to collect delinquent taxes. These statutes detail an extrajudicial procedure; no court order or writ of [Page 251] fieri facias is required to exercise the power to distrain and sell property to collect delinquent taxes. *See* 1953-1954 Att'y Gen. Ann. Rep. 204. It is my opinion, therefore, that a sheriff may sell distrained property without a writ of fieri facias or other court order to collect delinquent taxes.

IV. *Treasurer, Sheriff Must Follow Procedure in § 8.01-492 in Selling Distrained Goods*

Your final inquiry concerns the procedure a sheriff or treasurer must follow in effecting a sale of distrained goods to pay delinquent taxes. As discussed in Parts I and II of this Opinion, § 8.01-492 details a procedure for the sale of distressed property by these officials, and a prior Opinion of this Office concludes that this procedure should be followed in such sales. 1953-1954 Att'y Gen. Ann. Rep. 204. It is my opinion, therefore, that the procedure described in § 8.01-492 must be followed in the sale of distressed property.

FOOTNOTES

[1] *See Drewry v. Baugh and Sons,* 150 Va. 394, 398-99, 143 S.E. 713, 714 (1928) (localities authorized to take personalty by distress for taxes in summary manner). *Cf. G. M. Leasing Corp. v. United States,* 429 U.S. 338, 354 (1977) (warrantless seizures by taxing authorities permissible, provided taxpayer's privacy is not invaded).

1990 Va. AG 249

AG Op. SHERIFFS AND SERGEANTS — Warrants for, 70-71 Va. AG 352

SHERIFFS AND SERGEANTS — Warrants for violation of Sec. 18.1-108 of the Code — By whom may be obtained.

THE HONORABLE KERMIT E. ALLMAN
City Sergeant for City of Roanoke

October 8, 1970

I am in receipt of your letter of recent date wherein you advise that as a result of a civil judgment your office executed a *fieri facias* and levied upon a 1961 Ford station wagon. You further advised that when you went to seize and sell the said station wagon, it was not available, and you understand that the defendant removed the vehicle from the State. Your letter refers to § 18.1-108, Code of Virginia, 1950, as amended, which makes it a criminal offense to remove goods which have been levied upon with intent to defeat the levy. The question you pose is upon whom is the burden for obtaining a criminal warrant under § 18.1-108, your office or the civil plaintiff.

I am not aware of any statute which places a burden on any particular person to obtain a criminal warrant. As you have pointed out in your letter, § 18.1-108 does not place the burden upon any particular person to obtain the warrant under that section. I am of the opinion that it would be proper for either your office or the civil plaintiff to obtain a criminal warrant under § 18.1-108 under the circumstances you have described.
70-71 Va. AG 352

AG Op. COUNTIES, CITIES AND TOWNS: POLICE AND PUBLIC ORDER, 2010 Va. AG 84 (10-040)

COUNTIES, CITIES AND TOWNS: POLICE AND PUBLIC ORDER

TAXATION: ENFORCEMENT, COLLECTION, REFUNDS, REMEDIES AND REVIEW OF LOCAL TAXES — COLLECTION BY DISTRESS, SUIT, LIEN, ETC.

Local police officers have no authority in civil matters, absent four statutory exceptions.

Local police may not distrain property for payments owed to the locality.

Ms. Barbara O. Carraway
City Treasurer for the City of Chesapeake

July 8, 2010

Issues Presented

You inquire whether the local police force can participate in the distraint[1] of property for the collection of delinquent City accounts.

Response

It is my opinion that police officers do not have the civil authority to distrain property for payments owed to the City.

Background

You note that a vehicle equipped with a license plate reader could be used to "distrain property and collect on delinquent accounts." You describe a license plate reader as an apparatus consisting of a high-speed camera mounted on the vehicle, which is then connected to an onboard computer. The computer can run information on the captured plates against various databases. You state that because of the expense of the readers, you hoped to partner with the police department and share the costs of installing and maintaining the equipment. Because the license plate readers would be installed on police vehicles, you have asked whether the police department can be involved in the civil collection process.

Applicable Law and Discussion

Code § 58.1-3941 provides in relevant part that

> Any goods or chattels, money and bank notes in the county, city or town belonging to the person or estate assessed with taxes, levies or other charges collected by the treasurer may be distrained therefor by the treasurer, sheriff, constable or collector.

Property subject to levy or distress for taxes shall be liable to levy or distress in the hands of any person for taxes, penalties and interest thereon . . . .[2]

By statute, local police officers are vested with "all the power and authority which formerly belonged to the office of constable at common law."[3] Their chief responsibility is "the prevention and detection of crime, the apprehension of criminals, the safeguard of [Page 85] life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances."[4]

The General Assembly has provided that, "a police officer shall have no authority in civil matters,"[5] subject to four specified exceptions: (1) "execut[ing] and serving temporary detention and emergency custody orders;" (2) "serv[ing] an order of protection;" (3) executing certain warrants or summons; and (4) "deliver[ing], serv[ing], execut[ing] and enforc[ing] orders of isolation and quarantine."[6] Distraining civil property is a civil matter which does not fall within the plain language of the limited civil authority provided to police officers.[7]

Section 58.1-3941 does not alter this conclusion. It does not authorize police officers to distrain property. Instead, it states that "the treasurer, sheriff, constable or collector" may distrain certain property. Police officers are not "constables." Instead, they are "invested with the power and authority which formerly belonged to the office of constable at common law" but with that broad grant of authority then being expressly limited in civil matters. Code § 1-200 provides in pertinent part that, "[t]he common law of England . . . shall continue in full force within the same, and shall be the rule of decision, except as altered by the General Assembly."[8] Furthermore, in interpreting statutes, "[t]he common law will not be considered altered or changed by statute *unless* the legislative intent is plainly manifested."[9] The General Assembly plainly manifested that intent by providing that police officers have "no authority in civil matters" except in the specified situations.[10] Distraining property is not one of the specified exceptions.

Further support can be found in previous opinions by this office, which all conclude in a variety of contexts that police departments do not have specific civil authority beyond what is set forth in Code § 15.2-1704.[11]

Conclusion

Accordingly, it is my opinion that police officers do not have the civil authority to distrain property for payments owed to the City.

FOOTNOTES

[1] To "distrain" means "to take as a pledge property of another, and keep it until he performs his obligation . . . ." BLACK'S LAW DICTIONARY 474 (6th Ed. 1990).

[2] VA. CODE ANN. § 58.1-3941 (2005).

[3] Section 15.2-1704(A) (2008).

[4] *Id.*

[5] Section 15.2-1704(B) (2008).

[6] *Id.*

[7] The words and phrases in a statute should be given their ordinary meaning unless a different intention is obvious. *See Smith v. Commonwealth*, 26 Va. App. 620, 625, 496 S.E.2d 117, 119 (1998). "Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed." *Id.* at 625, 496 S.E.2d at 119 (quoting *Weinberg v. Given*, 252 Va. 221, 225-26, 476 S.E.2d 502, 504 (1996)) (other citations omitted). *See also Commonwealth v. Zamani*, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998) ("The plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction.").

[8] VA. CODE ANN. § 1-200 (2008). [Page 86]

[9] *Boyd v. Commonwealth*, 236 Va. 346, 349, 374 S.E.2d 301, 302 (1988) (citations omitted).

[10] Section 15.2-1704(B).

[11] *See, e.g.*, 2007 Op. Va. Att'y Gen. 108, 113, 2007 Va. AG 108, 113 (noting that Code § 15.2-1504 does not appear to give police officers arrest authority for civil violations of federal immigration law); 1976-1977 Op. Va. Att'y Gen. 81, 82, 76-77 Va. AG 81, 82 (concluding that city police are expressly prohibited from serving civil process for collection of unpaid fines); 1976-77 Op. Va. Att'y Gen. 204, 205, 76-77 Va. AG 204, 205 (concluding that transfer and movement of private funds between various locations are matters of civil nature and not within duties of police officer) (these opinions were issued before the 1982 amendment to § 15.1-138, which was repealed and recodified as § 15.2-1704).

2010 Va. AG 84

Glossary

ABSTRACT OF JUDGMENT—is a document which contains a review, or a synopsis of a judgment. A copy of the abstract is filed in the Circuit Court in any city where the defendant may have property to give the public notice that a judgment has been obtained against the defendant. **An abstract of judgment is NOT SUFFICIENT to inventory property as you would under a Writ of Fieri Facias.** Many people mistake this for a Writ. It would be wise for the serving deputy to keep an eye out for these.

ACTION/SUIT—a lawsuit; a preceding taken in a court of law.

AFFIANT—the person who makes and subscribes an affidavit.

AFFIDAVIT—a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it; taken before an officer having the authority to administer such oaths.

ADMISSIONS—there are several types of admissions. Simply, an admission is a voluntary acknowledgment of certain facts or truths in a case. You may also Requests for Admissions where an attorney is requesting someone to file admissions.

ANSWER—this is drafted by an attorney in response to service of either a Motion for Judgment or a Bill of Complaint in which the defendant attempts to resist the plaintiff's demand by an allegation of facts. It is a formal written statement by the defendant setting forth his defense.

ATTACHMENT—the seizure and taking into custody of the law of the person or property of a party to the suit, either in an action already begun or at the beginning of an action to acquire jurisdiction, to secure possession of property which is in controversy or to create security for a debt which is in controversy. The plaintiff must have grounds to request this process and a bond must be posted prior to issuance to protect the defendant against unlawful process.

BAILIFF—an officer of a court who executes arrest process; a courtroom attendant; a sheriff's officer.

BAILIWICK—a geographical area in which an officer, e.g., a bailiff, exercises his jurisdiction.

BANKRUPTCY—jurisdiction exercised by United States courts and created by federal statutes. It concerns the affairs of insolvent debtors and includes voluntary petitions of natural persons, wage earner plans and corporate reorganization.

BILL OF COMPLAINT—is a pleading drafted by an attorney and filed in the Circuit Court, Chancery Division. This document is make someone do something, i.e., enforcement of contracts, adoptions, or divorce actions. The Bill of Complaint has a "Subpoena in Chancery" attached by the Clerk of the Court which states the defendant has 21 days from the date of service in which to file an Answer if he disagrees with any portion of the pleading.

BILL OF PARTICULARS—is a document that a defendant or his attorney can request form a plaintiff in a pending action. This document is an orderly sequence of events (or criminal acts charged) or accounts that brought the case to court. This enables the defendant to prepare for his defense.

BY-BIDDING— In the law relating to sales by auction, this term is equivalent to "puffing." The practice consists in making fictitious bids for the property, under a secret arrangement with the owner or

auctioneer, for the purpose of misleading and stimulating other persons who are bidding in good faith.

CAPIAS/WARRANT OF ARREST—is an order to take a person into custody and detain them. This usually happens as a result of the defendant failing to do as the court directed or has committed some offense.

CHATTELS—tangible, moveable personal property of the judgment debtor, and also on his current money and bank notes, except as may be exempt under the Homestead Act.

CHOSE—a thing, personal property.

CHOSE IN ACTION—a right to sue for a debt or sum of money.

CHOSE IN POSSESSION—personal property of which one has the actual possession and enjoyment.

CLOSE—a piece of land.

COMMON CARRIER—are those that hold themselves out or undertake to carry persons or goods of all persons indifferently, or of all who chose to employ it.

CONFESSION OF JUDGMENT—is a document by the defendant giving written authority to the plaintiff to confer their judgment before the court, should the defendant default on payment of the debt.

DECREE/JUDGMENT—a determination made by the court in a suit in equity, usually in divorce cases.

DETINUE—a personal action for the recovery of goods or their value.

Warrant in Detinue: is a civil action filed to recover specific personal property being withheld by its lawful owner. The plaintiff can choose o either have the document served, or if there is an urgency to expedite the matter, the plaintiff can have property seized prior to court date, but must post a bond before doing so.

DISTRAIN—to take as a pledge property of another, and keep it until he performs his obligation or until the property is redelivered to the owner by the sheriff. It was used to secure an appearance in court, payment of rent, performance of services, etc. The term not generally used is “distress.”

DISTRESS—a taking of a personal chattel from the possession of a wrongdoer, without legal process to enforce payment, e.g., of rent. It is limited to a taking of personal property for purpose of security.

DISTRESS WARRANT—when rent is past due a landlord may obtain a warrant of distress and is a means by which the landlord can have the sheriff levy on the goods (personal property) of the tenant (and later sell them to make the money due the landlord). This is a prejudgment seizure or levy and grounds must be met in order for the judge or magistrate to issue.

DEMURRER—is a document filed by an attorney for the defendant stating the plaintiff has no case and that the evidence given is insufficient to go on with litigation.

EXECUTION—the writ, order or process issued to a sheriff, directing him to carry out the judgment of the court, e.g., to make the money due on the judgment out of the property of the defendant.

FIERI FACIAS—an execution in acivil action, which is directed to the sheriff, via which a person who has recovered judgment for any debt or damages may obtain satisfaction from the personal property of the

judgment debtor. In Latin- Fieri Facias means "cause it to be done."

FORTHCOMING BOND—a written obligation, taken by a sheriff, to secure the production of goods levied upon, when required.

GARNISHEE—a person in whose hands a debt is attached.

GARNISHMENT—when a creditor has obtained a judgment against a debtor, and knows of money in the possession of some third party to which the debtor is entitled, the creditor may seek to obtain such money through an action of garnishment. The third party could be an employer or perhaps a bank where the debtor has an account.

HOMESTEAD ACT—created to protect debtors from being left destitute by creditors seeking satisfaction of judgments against the debtor.

HOUSEHOLDER—may be any person who maintains a separate residence of living quarters. A householder may be married or unmarried, and could even be a juvenile. It is not necessary that a householder have anyone dependent upon him.

INDEMNIFICATION OR INDEMNIFY—to make good another's loss caused by some particular act or omission.

INDEMNITY—a payment or promise to pay, which is given or granted, to a person to prevent his suffering damage.

INDEMNITY BONDS—whenever an officer may be required to seize property in the course of a legal action, he may required that the parting initiating the action provide a bond sufficient to indemnify (protect) the officer (and the interests of all other parties to the action) against all costs and claims which might result from the seizure.

INTERPLEADER—a procedure by which persons having claims against another person may be joined as parties to a lawsuit and required to set up their claims, if their claims are such that the person initiating such procedure is, or may be, exposed to double or multiple liability. If a interpleader is filed as a result of a levy, the interpleader itself does not quash (kill) the levy. The court would have to send a Notice to Quash informing the Sheriff to release levy upon all or selected property.

INTERROGATORY PROCEEDINGS—written questions propounded on behalf of one party in action to another party, or to someone who is not a party, before the trial. Verbal questions put to a witness before an examiner, and answered under oath.

INTERROGATORY SUMMONS—
Out of General District Court: It is issued after a person has obtained judgment for money owed. This process is used as a means of discovery for both plaintiffs in GDC and attorneys in Circuit Court. When an Interrogatory is issued, the law requires that a Writ of Fieri Facias (levy) be issued. The reason for this is, if the defendant appears in court under this process, the judge or commissioner can take the money out of their pockets and the rings off their fingers (this would not apply to wedding rings) while they are in court. If this happens, the Judge will request the property be turned over to the Sheriff for public auction at a later date. If a Writ of Fieri Facias were not issued simultaneously with the interrogatories, the Sheriff would have no authority to take possession of the items seized.
Out of Circuit Court: It is a written list of questions drawn for the purpose of discovery. This is done prior to judgment being rendered by the court.

LEVY—the act of a sheriff in subjecting property to the satisfaction of a court judgment. The act of a sheriff in subjecting property to the lien of a court attachment.

LIEN—when a court renders a judgment for a plaintiff in a civil action, that judgment becomes a legal claim for the plaintiff against the defendant.

MECHANIC'S LIEN—
Out of General District Court: is used primarily when a person takes their car in for repairs and disagrees about the bill the mechanic is charging, or is dissatisfied with the work performed. The person who owns the vehicle and wishes to seize the vehicle before payment of the bill must post a bond with the court before coming to the Sheriff. The bond amount is equal to the amount of the bill and placed in escrow with the courts. Should the owner of the vehicle lose his case, then the money paid in escrow would be paid to the mechanic.
Out of Circuit Court: these are filed to protect a mechanic's interest in real estate where he has performed work but has not yet been paid. The lien is attached to the real estate and cannot be sold until the lien is paid.

MOTION FOR JUDGMENT—
Out of General District Court: As opposed to the Warrant in Debt issued by the Clerk of General District Court, the Notice of Motion for Judgment is drafted by the attorney representing the plaintiff for non-payment of a debt owed under $15,000, and then forwarded to the Clerk, along with the filing fee. Both Warrants in Debt and Notice of Motions for Judgment serve the same purpose but are generated from different places. And, like the Warrant in Debt, this document also has a court date for the defendant to appear.
Out of Circuit Court: Notice of Motions for Judgment issued from this court has no court date. The attorney representing the plaintiff drafts a pleading called "Motion for Judgment" and files it with the Circuit Court clerk. The clerk then types a proof of service along with a "Notice of Motion for Judgment" which tells the defendant that he has 21 days from the date of service (the date the deputy served the process) to file an Answer with the court if he disagrees with anything in the body of the Motion for Judgment. This is issued out of the Law Division for any debts over $15,000.

MOTION TO REHEAR—is usually issued out of General District Court. If a person misses a court date and wants to have the case reheard, he must do so within 30 days of the hearing date.

NATURAL PERSON—a human being, as distinguished from an artificial person, i.e., a corporation which has a legal, though not actual, existence.

NOTICE OF LIEN—is a document drafted by attorney and is preliminary to issuance of a garnishment summons. It serves the same purpose as a garnishment but is only good for the date it is served, whereas, a garnishment summons is good for 90 days.

OBLIGOR—a person who is bound to perform an obligation.

PENDENTE LITE, NOTICE OF—is a document notifying a person there is pending litigation in a case. Sometimes this is used when there is a dispute over real estate.

PERSONAL SERVICE—is actually handing a copy of the process to the person named therein. (If a person should refuse to accept service, the process may be dropped at his feet and the officer's return will indicate that personal service was effected.)

PERSON—a human being or a corporation.

PERSONAL PROPERTY—the right or interest which a person has in things movable, or in any estate in real property which is less than a freehold.

PRAECIPE—is a document drawn up to command the defendant to do the thing required, i.e., get ready for trial, or show the reason why he had not done it.

PRIMA FACIE—at first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary.

PROCESS—a means whereby a court enforces obedience to its orders. Process is termed (a) original, when it is intended to compel the appearance of the defendant; (b) mesne, when issued pending suit to secure the attendance of jurors and witnesses, (c) final, when issued to enforce execution of a judgment.

PUBLICATION—to make public; to make known to people in general; to bring before public; to exhibit, display, disclose, or reveal. Offering to public notice, or rendering it accessible to public scrutiny.

PUFFING— secret bidding at auction by or on behalf of the seller.

PURPOSE OF THE SERVICE OF CIVIL PROCESS— is to provide timely notice to a person or legal entity of pending legal action in which they are somehow involved.

REAL PROPERTY/REAL ESTATE, or REALTY— all land and buildings, including estates and interest in land and buildings which are held for life, but not for years, or some greater estate therein.

RENDITION OF JUDGMENT—the time at which the judgment is signed and dated.

RETURN—an endorsement or report by an officer, recording the manner in which he executed the process or order of a court.

SHOW CAUSE SUMMONS—is issued become someone failed to do something. It could be failure to obey a court order, failure to appear in court as requested, failure to pay child support, or even failure to pay court fines. This order usually specifies what they failed to do. If someone tells you they have already taken care of the failure, i.e., they have already paid the fine, you must tell them that unless the court of issuance releases them from the Show Cause, then they must appear. Failure to appear when served with a Show Cause Order can result in their arrest.

SUBPOENA—a process to cause a witness to appear and give testimony, commanding him to lay aside all pretenses and excuses, and appear before the court or magistrate named, at a time mentioned to testify for the party named under penalty of law.

SUBPOENA DUCES TECUM—a process by which the court, at the instances of a suitor, commands a witness who has in his possession or control some document or paper that is pertinent to the issues of a pending controversy, to produce it at the trial.

SUMMONS TO PARTY OF JOINT ACCOUNT—is a summons notifying a joint account holder, such as a bank or savings account, that a garnishment summons had been served against the account.

VENDITIONI EXPONAS—an order directing the sheriff to sell goods which he has taken under a fieri facias.

WARRANT IN DEBT—is issued out of General District Court for non-payment of a debt owed to another. The amount in controversy must be $15,000

or less. These have a court date for which the defendant may want to appear.

WRIT—a written court order, or judicial process. It is issued by authority of a court, and directed to the sheriff, or other officer authorized by law to execute the same. He must return it with a brief statement of what he has done in pursuance of it, to the court or officer who issued it.

WRIT OF POSSESSION IN UNLAWFUL DETAINER— is an order directing the Sheriff to physically removed a person from the premises and restore possession to the landlord.

WRIT OF POSSESSION AND FIERI FACIAS IN DETINUE—is an order from the court directing the Sheriff to repossess personal property on behalf of the plaintiff/creditor. Notice is usually given to the defendant and is coordinated ahead of time with the plaintiff for a mutually agreeable time.

VA STATE CODES

Case Law

November 13, 1944

145 F2d 953 (4th Cir)

PALAIS ET AL.

v.

DEJARNETTE ET AL.; IN RE SCHARTON'S ESTATE.

Appeals from the District Court of the United States for the Eastern District of Virginia, at Richmond; Robert N. Pollard, Judge.

A. Barclay Taliaferro, of Orange, Va., and M. J. Fulton, of Richmond, Va., for appellants.

A. Stuart Robertson, of Orange, Va., for appellees.

Author: Dobie

Before SOPER, DOBIE, and NORTHCOTT, Circuit Judges.

DOBIE, Circuit Judge.

This appeal is brought by Maurice Palais, Trustee in bankruptcy of William R. Scharton, Bankrupt, and William R. Scharton, Bankrupt (hereinafter called appellants when referred to collectively).

The questions before us involve the validity of levies of execution under two judgments acquired against William R. Scharton in the Circuit Court of Orange County, Virginia, and the effectiveness of Scharton's claim for homestead exemption under the Virginia statute, Va. Code (Michie) ? 6543.

For our purposes we herein summarize the facts found by the Referee in Bankruptcy and approved by the District Court.

Margaret A. DeJarnette, executrix of E. H. DeJarnette, Jr., deceased, recovered judgment against Scharton on January 16, 1942. On January 29, 1942, execution, returnable to Second April Rules, 1942, was issued. On April 10, 1942, during Scharton's absence from his home, Gaston Hall, a deputy sheriff, accompanied by one Colvin with whom Scharton had left the keys to his home, entered Gaston Hall. A detailed list of the personal property was made and the deputy sheriff advised Colvin that he had levied thereon. None of the personalty was removed from the premises.

A. P. Beirne recovered judgment against Scharton on April 17, 1942, and execution was issued on May 25, 1942, returnable to Second August Rules, 1942.

On May 28, 1942, the sheriff of Orange County was admitted by Scharton to Gaston Hall and the Beirne levy was made. The sheriff warned Scharton against removal of the property and Scharton assured the sheriff that it would not be removed.

Before the Referee, Scharton denied giving any such assurance; but we accept the finding of the Referee. Federal Rules of Civil Procedure, Rule 52(a), Rule 53(c)(2), 28 U.S.C.A. following section 723c.

A sale under both levies was advertised for August 13, 1942. Subsequently, in compliance with a request made by Scharton through his broker, the judgment creditors agreed to postpone the sale for thirty days. No release of the lien was asked or granted.

Two subsequently advertised sales, one for October 30, 1942, and one for April 17, 1943, were also postponed, but the Referee found that the responsibility for these postponements rested with the debtor, and not with the judgment creditors. In the light of the record, we agree with this finding.

On October 21, 1942, on his voluntary petition, Scharton was adjudged a bankrupt in the United States District Court for the District of Massachusetts.

On April 9, 1943, after the personal property had been advertised for sale on April 17, Scharton recorded a homestead deed in Orange County, Virginia, alleging that he was a householder and a resident of the State of Virginia, and claiming the property levied on as his homestead exemption.

The validity of the DeJarnette and Berine levies must be determined under the rules laid down by the Virginia Courts. Erie R. Co. v. Tompkins, 1938,304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487. We are here concerned solely with the manner in which the levies were made. It is clear from the record that the disputed levies were made within the proper time. Va Code (Michie) ? 6485.

Under the law of Virginia, actual seizure of the goods levied upon is not necessary. Dorrier v. Masters, 1887, 83 Va. 459, 2 S.E. 927; Bullitt's Executors v. Winston, 1810, 1 Munf. 269, 15 Va. 269. The rule is stated succinctly in Burks Pleading and Practice, 3d Ed., ? 336, p. 619: "What, then, constitutes a levy? A manucaption of the property in pursuance of the writ and an endorsement of that fact on the writ is generally sufficient, but is that necessary? By no means. 'It is not essential that the officer make an actual seizure. If he have the goods in his view and power and note on the writ the fact of his levy thereon, this will in general suffice'."

The rule stated in Burks Pleading and Practice, op. cit. p. 619, that the view of "cattle on distant hills or goods behind bars securely locked" is insufficient, is without application here. The levying officer in each instance entered Gaston Hall and, after viewing and listing the property, levied thereon. It can hardly be doubted that the property was within the dominion of the levying officer.

It is contended that the officers were without the "power" to levy since they were physically incapable of carrying the household goods away. This contention, we think, is lacking in merit. It is quite apparent from the words of the statute that the levy "shall bind what is capable of being levied on." Va. Code (Michie) ? 6485. Capacity of the officer to levy refers to intangible property, and not to inaccessible property. Burks, op. cit. supra, ? 336. The physical prowess of the levying officer is of no consequence.

It is further contended that because of Scharton's absence, and his lack of formal notice, at the time of the DeJarnette levy, no valid levy was made. The mere statement of the contention discloses its weakness. Should any such contention prevail, all levies might be prevented by the debtor if he merely stays away from his property. This the law never intended. As to notice to the debtor, the rule in Virginia is that while notice is advisable, it is not essential. Burks, op. cit. supra, ? 336; see also 23 C.J.P. 430; 33 C.J.S. Executions, ? 95.

Failure to remove the property from the debtor's premises does not, of itself, invalidate the levy. The practice in Virginia has been to permit it to remain on the premises of the debtor until the day of sale, in order to save expenses. Burks, op.cit. supra, ? 339.

Appellants further contend that even if the levies were valid when made, they have been abandoned by the judgment creditors.

If the officer levies before the return day of the writ, he continues to have the power to sell, even after the return day has passed, Grandstaff v. Ridgely, 1878, 30 Grat. 1, 71 Va. 1, and this power continues for a reasonable time. Va. Code (Michie) ? 6485. "Reasonable Time" is a question of fact, dependent on the circumstances of each case. Wright v. Camp Mfg. Co., 1910, 110 Va. 678, 66 S.E. 843. The test, of course, is whether an intention to abandon was manifest from the acts of the creditors. Rhea v. Preston, 1881, 75 Va. 757. The Referee found no such intention here and we think his finding is supported by substantial evidence. While it is true that the creditors postponed the sale at the request of the debtor, no relinquishment of the lien was found. As the Court said in Walker v. Commonwealth, 1867, 18 Grat. 13, 59 Va. 13, 98 Am.Dec. 631: "A mere suspension of proceedings on a levied execution does not authorize a restoration of the property to the possession of the defendant, nor release the levy," citing Fisher v. Vanmeter, 1837, 9 Leigh 18, 36 Va. 18, 33 Am.Dec. 221.

We agree with the Referee and the District Court, that the levies were valid and have so remained.

In regard to Scharton's claim to homestead exemption, Section 6 of the Bankruptcy Act, 11 U.S.C.A. ? 24, reads in part as follows: "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition * * * ."

Counsel has strenuously argued the point that Scharton has established a bona fide domicile in Virginia, and by reason of this fact he has established a right to the Virginia homestead exemption. Whatever the worth of such argument in other situations, we find it completely irrelevant here.

The controlling rule was stated with crystal clearness in White v. Stump, 1924, 266 U.S. 310, 312, 45 S. Ct. 103, 69 L. Ed. 301: "The Bankruptcy Law does not directly grant or define any exemptions, but directs, in section 6 * * * , that the bankrupt be allowed the exemptions 'prescribed by the state laws in force at the time of the filing of the petition'; in other words, it makes the state laws existing when the petition is filed the measure of the right to exemptions."

Counsel argues that Myers v. Matley, 1943, 318 U.S. 622, 63 S. Ct. 780, 87 L. Ed. 1043, 145 A.L.R. 498, has changed the rule laid down in the Stump case. With this we cannot agree. There the Supreme Court distinguished the Stump case on the facts alone. In the plainest of language it approved the doctrine of the Stump case. The rights of the bankrupt are fixed as of the date of adjudication. Georgouses v. Gillen, 9 Cir., 1928,24 F.2d 292.

Were this not the rule, the bankrupt, after being so adjudicated, might "shop around" and establish a domicile in a state more generous in its exemptions. Such a procedure is altogether inconsistent with the whole spirit of the bankruptcy laws. Scharton cannot ride both sides of the sapling. On the date he was adjudged a bankrupt, Scharton was a citizen of the State of Massachusetts. No question of his rights under Massachusetts law is before us.

The judgment of the District Court is affirmed.

Affirmed.

19441113
Palais v. DeJarnette

VIRGINIA: IN THE CIRCUIT COURT OF FAIRFAX COUNTY

HORBACH

v.

TRAVERSE TECHNOLOGIES, INC. ET AL.

Miscellaneous No. 85602
Decided: November 30, 1994

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LETTER OPINION BY JUDGE ROSEMARIE ANNUNZIATA:

The matter before the Court is plaintiff's motion to compel defendants to surrender all of the stock of Integrated System Technology to the sheriff of Fairfax County pursuant to a judgment entered against defendants in the King County Superior Court in Seattle, Washington. For the reasons that follow, plaintiff's motion is denied.

The following facts are relevant: Defendant Traverse owns all of the stock of Integrated Systems, 1000 shares of which have been issued to this date. On August 26, 1994, Traverse purchased 700 of the shares from plaintiff for a per share purchase price of $1,428.57. Traverse paid plaintiff $950,000 in cash and executed a confessed judgment promissory note in the amount of $200,000. When Traverse failed to meet its obligations under the note, plaintiff obtained a judgment in the amount of $210,542 against Traverse. Plaintiff has now executed on the judgment here in Virginia and seeks to levy on all 1000 shares of stock.

Virginia Code § 8.01-490 states that no levy or distress shall be unreasonable. Several factors must be considered in the determination of whether the levy in a particular case is unreasonable or excessive. These considerations include the divisibility of the property, the quality, quantity and nature of the property, and the value of the property in relation to the amount of the levy. *See, e.g.*, 30 Am. Jur. 2d *Executions* §§ 9699 (1967) and 33 C.J.S. *Executions* § 107 (1942)

I find that the proposed levy in this case is unreasonable and excessive. Using the purchase price at which the stock was sold three months ago, the approximate fair market value of 1000 shares of stock exceeds one million dollars; the

amount of the judgment is $210,542. The property sought to be subjected to the levy is readily divisible and while its value is open to fluctuation, execution on shares valued only a few months ago at five times the amount of the judgment is unreasonable.

Accordingly, plaintiff's motion to compel defendants to surrender all 1000 shares of stock is hereby denied. The Court will enter the order submitted by defendant Traverse, limiting the amount of the levy to 150 shares.
HORBACH v. TRAVERSE TECHNOLOGIES

Pollard v. City of Richmond, 181 Va. 181, 24 S.E.2d 564 (1943)

IN THE SUPREME COURT OF VIRGINIA
RICHMOND

POLLARD BAGBY, INC., TRUSTEE, ET AL.
v.
CITY OF RICHMOND, ET AL.

Record No. 2615.
Decided: March 8, 1943.

Present, All the Justices.

1. TAXATION — Collection — Option of Following Several Statutory Methods. — The prompt collection of taxes by a governmental unit is vitally necessary to the discharge of its functions. Legislative recognition of this is evidenced by the several statutory methods, some of which are quite drastic (e.g., right of distress), which are provided for the collection of taxes. There is no statutory requirement that a governmental unit should adopt one method rather than another.

2. TAXATION — Collection — Option of Following Several Statutory Methods — Case at Bar. — The instant case was a suit by the city of Richmond for the sale of land for taxes. The city named as parties trustees under a deed of trust on the land and the executors of the estate of a grantee subsequent to the deed of trust. The trustees contended that the taxes assessed on the real estate in the name of the subsequent grantee were a personal debt due by his estate which should be paid out of the personalty before the real estate was sold.

Held: That under the various statutes such as Tax Code, sections 251 and 403, and section 2454 of the Code of 1942, the city was given alternative methods of collecting its taxes, and it had the right to pursue whichever course it deemed most expeditious. The fact that the taxpayer may have died leaving sufficient personal estate to discharge his taxes did not alter the city's rights, and to hold that the city must resort to the personalty before enforcing its lien on the land would deprive it of its right of election.

3. TAXATION — Collection — Sale of Land for Nonpayment — Scope of Proceedings — Case at Bar. — The instant case was a suit by the city of Richmond for the sale of land for taxes. The city named as parties trustees under a deed of trust on the land and the executors of the estate of a grantee subsequent to the deed of trust. The trustees sought to inject into the suit by their petition and answer and cross-bill the contention that the taxes were a personal debt of the subsequent grantee's estate and should be paid out of the personalty before the real estate was sold. The trial court rejected the contention as so made.

Held: No error, since the question sought to be injected was collateral to and quite beyond the purpose of the city's original suit. [Page 182]

4. TAXATION — Collection — Sale of Delinquent Land — No Delay to Settle Collateral Controversy — Case at Bar. — The instant case was a suit by the city of Richmond for the sale of land for taxes. The city named as parties trustees under a deed of trust on the land and the executors of the estate of a grantee subsequent to the deed of trust. The trial court held that the settlement of the city's claim for taxes ought not to be delayed pending adjudication of a collateral controversy between the trustees and the grantee's estate.

Held: No error, since the city had no interest in the rights of the parties inter sese.

5. MARSHALING ASSETS — Litigants Must Be Creditors of Same Debtor. — In the absence of independent and separate equities, the doctrine of marshaling assets does not apply unless the litigants are creditors of the same debtor.

6. TAXATION — Collection of Taxes — Collection by Suit — Marshaling Assets — Case at Bar. — The instant case was a suit by the city of Richmond for the sale of land for taxes. The city named as parties trustees under a deed of trust on the land and the executors of the estate of a grantee subsequent to the deed of trust. The trustees insisted that, under the doctrine of marshaling assets, the city should be required to exhaust its remedy against the grantee's estate before it should have the specific real estate sold to pay taxes.

Held: That there was no merit in the contention of the trustees, since, while both they and the city had claims on a single piece of real estate, they were not creditors of the same debtor. The city claimed to be a creditor of the grantee's estate and the trustees were creditors of the grantor's estate.

7. TAXATION — Collection — Collection by Suit — Settlement of Collateral Controversy — Case at Bar. — The instant case was a suit by the city of Richmond for the sale of land for taxes. The city named as parties trustees under a deed of trust on the land and the executors of the estate of a grantee subsequent to the deed of trust. The trustees assigned as error the rejection of their pleadings, which raised the collateral question as to the liability for taxes between themselves and the grantee's estate.

Held: That while the court below, in the exercise of its sound judicial discretion, might have settled this question, refusal to do so was not reversible error.

Appeal from a decree of the Law and Equity Court of the city of Richmond. Hon. Willis D. Miller, judge presiding.

Affirmed.

The opinion states the case. [Page 183]

Montague & Montague, for the appellants.

Horace H. Edwards, John P. McGuire, Jr., Williams, Mullen & Hazelgrove, Guy B. Hazelgrove and Ralph T. Catterall, for the appellees.

EGGLESTON, J., delivered the opinion of the court.

By deed dated June 1, 1925, John R. Blair and wife conveyed to Pollard & Bagby, Inc., trustee, certain property located at the southwestern corner of Grace and Adams Streets, in the city of Richmond, to secure a first lien debt of $60,000, evidenced by several notes made by Blair and payable to bearer, and a second lien debt of $5,750.

On November 10, 1931, Blair and wife conveyed the property to Harry Craver. This conveyance was subject to the deed of trust mentioned above, but expressly provided that the grantee did not assume any liability for the debts thereby secured. On August 24, 1939, Harry Craver, who was then a resident of Gloucester county, Virginia, died testate, leaving a large estate. Apparently he left sufficient personal estate to pay all taxes and other debts due by him.

In May, 1940, the city of Richmond filed in the court below a bill in equity alleging that city taxes assessed against the above-mentioned real estate were delinquent for the years 1933 to 1939, both inclusive, that they amounted, with interest and penalties, to approximately $7,000, and that the city had a lien on the land to secure the same. The prayer of the bill was that the property be sold to discharge this lien and to satisfy these taxes. Among those made parties defendant to the bill were the executors of the will of Harry Craver, deceased, the devisees in the will, Pollard & Bagby, Inc., trustee, and "unknown parties," the latter being the holders of the notes secured as the first lien under the deed of trust.

The executors and devisees under Craver's will filed answers which denied any personal liability on the estate [Page 184] for the taxes, but offered no objection to the sale of the property for their collection.

Pollard & Bagby, Inc., trustee, filed an answer alleging that the first lien debt secured in the deed to it had been reduced to the principal amount of $50,000, and that several of the noteholders were represented by Pollard & Bagby Investment Corporation "as agent." This answer further alleged: "* * * this respondent does not know, but is advised, and alleges, that strict proof should be required in this cause" as to whether Craver's estate was liable for the taxes claimed to be due the city.

After the suit had been properly matured there was a decree of reference to ascertain the fee simple value, annual value, the name of the owner of the property mentioned in the bill, a statement of the taxes and other liens due thereon and their relative priorities, the holders thereof, and whether the necessary parties were properly before the court. In due time the special commissioner reported that the property had a fee simple value of $18,000, an annual value of $150, and was subject to taxes due to the city of Richmond for the years 1933 through 1940, both inclusive, amounting, with interest and penalties, to $7,509.04 as of December 1, 1940, which were a first lien thereon. The report also

showed that the principal of the first mortgage had been reduced to $50,000, evidenced by various notes held by numerous parties, the majority of whose names were ascertained and listed.

The report further stated that while the answer of Pollard & Bagby, Inc., trustee, "raises the question as to the liability of the estate of Harry Craver to pay the taxes, the said answer was not by way of cross-bill and in the pleadings the question is not, therefore, properly raised, nor was your Special Commissioner requested to make a report thereon."

Pollard & Bagby, Inc., trustee, and others, excepted to the report, in substance, on the ground that the special commissioner should have reported that the taxes were a debt due by the estate which should be paid by it out of [Page 185] the personalty before the city's lien was enforced against the real estate.

Before the court had passed on these exceptions, Pollard & Bagby Investment Corporation and certain of the other noteholders secured in the deed of trust, tendered a petition setting out the above facts and praying that the cause be recommitted to the special commissioner to ascertain and report whether or not the personal estate of Harry Craver, deceased, was sufficient to pay the taxes in question, and if so, whether the executors of the estate should be required to pay them out of the personal estate in their hands before the city of Richmond should be permitted to enforce its lien for taxes against the real estate in question.

Some months later the matter came on to be heard on the exceptions filed to the special commissioner's report and on the petition tendered. After the lower court had announced its decision that the exceptions should be overruled and the petition rejected, Pollard & Bagby Investment Corporation and the same noteholders who had tendered the petition, as above stated, tendered an answer and cross-bill to the original bill filed by the city of Richmond. In substance, the purpose and prayer of the cross-bill were the same as that of the petition which had been tendered and rejected. This answer and cross-bill was likewise rejected by the lower court.

From a decree overruling the exceptions to the special commissioner's report, rejecting the petition and the answer and cross-bill, and directing that the property be sold to satisfy the city's lien for taxes thereon, Pollard & Bagby, Inc., trustee, and certain of the noteholders have appealed.

Their contention is that the taxes assessed on the real estate in the name of Harry Craver are a personal debt due by his estate which should be paid out of the personalty before the real estate is sold, and that under the doctrine of marshaling assets the appellants had the right to compel that this be done. Hence, they say, the lower court erred in rejecting the petition and the answer and cross-bill which prayed for this relief. [Page 186]

The city contends that under various statutes it had the election of collecting its taxes either by enforcing its lien on the land or by asserting its claim against Craver's estate, and that having elected to pursue the former remedy in the present suit, it should not, in effect, be compelled by the appellants to pursue the other course.

Moreover, the city says, the satisfaction of its claim for taxes should not be delayed until the collateral matters between the appellants and the Craver estate are litigated and settled.

The Craver estate takes the position that while it is not liable for the taxes, that question is beyond the scope of the pleadings, was not decided by the lower court, and hence is not before us.

[1, 2] We agree with the contention of the city that under various statutes it is given alternative methods of collecting its taxes. For instance, under Tax Code, section 403, as amended by Acts 1938, ch. 92, p. 157, such taxes may be enforced "by warrant, motion, action of debt or assumpsit, bill in chancery or by attachment * * *, to the same extent, and with the same rights of appeal as now exist or may hereafter be provided by law for the enforcement of demands between individuals."

Under Code, section 2454, as amended by Acts 1936, ch. 431, p. 1024, the city is given a lien upon real estate for the taxes assessed thereon, and accrued penalties and interest, "prior to any other lien or encumbrance thereon." See also, Tax Code, section 251 (as amended by Acts 1930, ch. 411, p. 869; Acts 1938, ch. 293, p. 426; Acts 1940, ch. 379, p. 665); Charter of the City of Richmond, section 67 (Acts 1926, ch. 318, pp. 533, 574).

Under section 251 of the Tax Code, as amended, the city's lien for taxes "shall, in addition to existing remedies for the collection of taxes and levies, be enforceable by suit in equity, * * *." See also, Charter of the City of Richmond, section 75 (Acts 1926, ch. 318, pp. 533, 576).

The prompt collection of taxes by a governmental unit is, of course, vitally necessary to the discharge of its functions. [Page 187] Legislative recognition of this is evidenced by the several statutory methods, some of which are quite drastic (e.g., right of distress), which are provided for the collection of taxes. There is no statutory requirement that a governmental unit should adopt one method rather than the other. Consequently, we think, the city of Richmond, in the present instance, had the right to pursue whichever course it deemed most expeditious or advisable in the collection of the taxes due to it.

The fact that the taxpayer may have died leaving sufficient personal estate to discharge his taxes and other debts, as here, does not alter the city's rights. While it is true, as contended by the appellants, that in the settlement of a decedent's estate the personalty is the primary fund for the payment of his debts, including taxes, to hold that the city must resort to the personalty before enforcing its lien on the land would deprive it of its right of election to pursue either course.

The holding in Pugh v. Russell, 27 Gratt. (38 Va.) 789, 800, that real estate taxes must be paid out of the personalty of a decedent before the tax lien on the land is enforced, was in 1876, and before either the Commonwealth or any of its political subdivisions had been given the right to enforce a tax lien by an independent suit in equity. Marye v. Diggs, 98 Va. 749, 37 S.E. 315, 51 L.R.A. 902. Until such right was given by the Acts of 1901, Ex. Sess., ch. 140, p. 148, amending Code of 1887, section 456 (with later amendments carried into Tax Code, section 251), the city, of course, had no election to pursue that remedy.

The present suit is a statutory proceeding in equity to enforce the city's tax lien on a particular piece of property. Alexander v. Commonwealth, 137 Va. 477, 487, 488, 120 S.E. 296. The bill filed by the city alleges that it has a lien on the particular property to secure the taxes which have been assessed against it and have accrued thereon. This is not a general creditors' suit to settle Craver's estate or to subject his lands to the payment of his debts, as the appellants seem to think it is. No convening of the general [Page 188] creditors of the Craver estate is necessary for the establishment of the city's claim. While those holding subordinate liens on this particular property are made parties defendant to the bill, this is for the purpose of properly disposing of the balance of the proceeds of the sale after the city's claim has been discharged.

The prayer of the bill is that this particular piece of property, and none other, be sold in satisfaction of the tax liens thereon. Whether this should be done is the only matter presented. Consequently, the execution of the decree of reference, the confirmation of the report, the sale of the property, and the proper distribution of the proceeds among the holders of the liens thereon, are within the scope of the pleadings and the purpose of the suit. After these things have been done the purpose of the suit will have been accomplished.

[3] On the other hand, the matters which the appellants sought to inject into the suit by their petition and answer and cross-bill, which the court rejected, are collateral to and quite beyond the purpose of the city's original suit. By the petition and the answer and cross-bill, the appellants, as the holders of a lien, admittedly subordinate to the city's tax lien, in effect, sought to have the lower court adjudicate their rights against the deceased taxpayer. In substance, they ask the court to compel the Craver estate to discharge the city's lien on the real estate for their (appellants') benefit.

[4] Since the city has no interest in the rights of these parties inter sese, the trial court quite correctly held that the settlement of the city's claim for taxes against the real estate ought not to be delayed pending the adjudication of this collateral controversy between the appellants and the Craver estate.

The appellants insist that, under the doctrine of marshaling assets, the city should be required to exhaust its remedy against the Craver estate before it should have the specific real estate sold to pay the taxes. Here the argument is, that while the appellants have a claim only against the specific [Page 189] real estate for the satisfaction of their lien, the city has a claim both against the specific property and the Craver estate, and in this situation it should be required to pursue the latter remedy, which would leave the real estate free as security for the appellants' claim.

[5] Aside from the fact that the determination of such a question is not within the scope of the city's bill, the contention is not sound. It is well settled that, in the absence of independent and separate equities, the doctrine of marshaling assets does not apply unless the litigants are creditors of the same debtor. Blakemore v. Wise, 95 Va. 269, 272, 28 S.E. 332, 64 Am. St. Rep. 781; Savings & Loan Corp. v. Bear, 155 Va. 312, 334, 154 S.E. 587, 75 A.L.R. 980; Pomeroy's Equity Jurisprudence, 5th Ed., Vol. 4, section 1414, p. 1063; 35 Am. Jur., section 4, pp. 387-8.

[6] In the case before us, while both the appellants and the city have claims on a single piece of real estate, they are not creditors of the same debtor. The city claims to be a creditor of Craver's estate (which the executors deny), but the appellants are creditors of Blair (Craver's grantor). They have no claim against Craver personally or against his estate.

Nor do the appellants claim that there is any existing independent equity in their favor which would require either the Craver estate or the city to exonerate the real estate for their (appellants') benefit.

If it be true, as the appellants claim, that the Craver estate is primarily liable to the city for the payment of the taxes on this particular real estate, and that they (the appellants) will be entitled to reimbursement by the Craver estate to the extent that the proceeds derived from the sale of the real estate are depleted in the payment of the taxes, such claim may be asserted by the appellants against the Craver estate in a separate and appropriate proceeding without delaying the city's collection of the taxes admittedly due to it. The payment of the city's claim out of the proceeds of the sale of the real estate will in no wise impair the rights, if any, of the appellants against the Craver estate. [Page 190]

The final contention of the appellants is that the lower court should have permitted the filing of either the petition or the answer and cross-bill, to the end that after the city's claim for taxes had been satisfied, the court, having jurisdiction of the necessary parties, could then have proceeded to do complete justice by settling the collateral controversy between the appellants and the Craver estate, thereby avoiding a second suit for that purpose.

[7] While the court below, in the exercise of its sound judicial discretion, might have followed this course, in our opinion its refusal to do so was not reversible error.

The decree appealed from will be affirmed without prejudice to the right of the appellants to pursue in an appropriate proceeding such rights as they may have against the Craver estate.

Affirmed.

Pollard v. City of Richmond

Drewry v. Baugh and Sons, 150 Va. 394, 143 S.E. 713 (1928)

IN THE SUPREME COURT OF VIRGINIA
WYTHEVILLE

H. M. DREWRY, TREASURER
v.
BAUGH AND SONS, INC., ET ALS.

Decided: June 14, 1928

Argued and submitted before Judge Holt took his seat.

1. TAXATION — Tax Liens Statutory. — Constitution 1902, section 168, provides that all taxes shall be levied and collected under general laws. It follows that there are no liens for taxes except as provided by statute.

2. TAXATION — Assessments, Levies and Collections Must Conform to Statute — Distress — Summary Remedies. — In Virginia taxes can only be assessed, levied and collected in the mode pointed out by the statute. When the State or a county has assessed and levied a tax, they are severally clothed with power to take the personalty by distress, and the realty by sale, for taxes in the most summary manner.

3. TAXATION — Failure of Taxpayer to Pay His Taxes — Duty of County Treasurer. — Under Code of 1924, section 2410, the treasurer is required upon failure of the taxpayer to pay his taxes after being called upon to make settlement, to "proceed to collect them by distress or otherwise."

4. TAXATION — Lien of Taxes — County Treasurer Settling with Auditor of Public Accounts and Later Levying on Property of the Taxpayer — Case at Bar. — The purpose of the instant suit was to determine and settle the priorities of the claims of the lien creditors of one G. against his personal property. In the year 1925 G. was unable to pay his taxes and the county treasurer settled with the Auditor of Public Accounts for these taxes on June 15, 1926, and later levied on certain property of G. for the payment of the same. The treasurer assigned as error that the trial court erred in holding that the other lien-holders took priority over the treasurer, who had levied for his taxes within the period of time prescribed by section 2440 of the Code of 1919. When sections 2440 and 2443 are read and construed in the light of and along with sections 2454, 2271 and 2493, it is clear that the treasurer had the right, at any time within one year from June 15, 1926, to distrain the goods and chattels in the county which then belonged to the taxpayer, for the taxes and levies assessed against [Page 395] him, for which the treasurer had accounted

to the Auditor of Public Accounts and the county authorities. But there is no provision in the statute which gives a lien on all of the taxpayer's personal property for the amount of taxes due by him. Such a lien can be acquired only by distraining or levying upon the property; except there is a lien on each specific piece of personal property for the taxes and levies due thereon.

5. TAXATION — Lien of Taxes — Mortgages and Deeds of Trust. — No deed or mortgage upon goods and chattels will prevent the same from being sold for taxes against the grantor in such deed or mortgage, while such goods and chattels remain in the grantor's possession; nor will any such deed or mortgage prevent the goods and chattels from being distrained and sold for the taxes and levies assessed thereon, no matter in whose possession they may be found.

6. TAXATION — Lien of Taxes — Subrogation — County Treasurer who has Settled with Auditor of Public Accounts — Case at Bar. — In the instant case a county treasurer made settlement with the Auditor of Public Accounts on June 15, 1926, for the taxes of a taxpayer for the year 1925, which the taxpayer was unable to pay, and later levied on certain property of the taxpayer for the payment of the same. In a suit to determine the priorities of lien creditors of the taxpayer against his personal property, it was contended by the treasurer that the court erred in holding that the treasurer was not subrogated to the rights of the Commonwealth, even though he had made the levy on the property of the taxpayer within the period of time prescribed by section 2440 of the Code of 1919. Upon the treasurer's accounting to the Auditor of Public Accounts for the taxes and levies, the taxpayer became his debtor, and section 2440 of the Code of 1919 authorized him to distrain the property of the taxpayer for the amount accounted for. The statute defines his rights in the premises. The treasurer was not compelled to pay the taxes for the taxpayer and therefore was not subrogated to the rights of the Commonwealth.

7. TAXATION — Lien of Taxes — Treasurer Accounting to the Auditor of Public Accounts for Taxes which the Taxpayer was Unable to Pay — Priority of Execution Creditor — Case at Bar. — In the instant case a county treasurer made settlement with the Auditor of Public Accounts on June 15, 1926, for taxes for 1925, which the taxpayer was unable to pay, and later on the 10th and 12th of January, 1927, levied on certain property of the taxpayer for the payment of the same. A creditor of the taxpayer obtained judgment against him on January 3, 1927, and on the same day execution was issued and placed in the hands of the sheriff for collection. The property levied on by the treasurer was also levied on by the creditor under the execution mentioned. No part of the taxes for which the treasurer settled with the Auditor of Public Accounts was due upon the property levied upon. [Page 396]

Held: That the execution was a lien on the taxpayer's goods and chattels from the moment it went into the officer's hands to be levied, and had priority over the lien which the treasurer acquired by his levy for taxes.

8. SALES — When Title Passes — Sale of Peanuts — Weighing and Measuring — Case at Bar. — The purpose of the instant suit was to determine and settle the priorities of the claims of the lien creditors of one G. against his personal property. G. being unable to pay his taxes for 1925, the county treasurer made settlement with the Auditor of Public Accounts for the taxes on June 15, 1926, and later on January 10 and 12, 1927, levied on 140 bags of peanuts on a farm of G.'s for the payment of the same. On the 26th day of December, 1926, G. agreed to sell appellees his entire crop of peanuts for 1925. The treasurer contended that the title to the peanuts had not passed to the purchaser because they were in the possession of G. and had not been weighed, set aside and delivered to the purchaser at the time the treasurer's levy was made. The purchaser contended that the peanuts had been set aside and the price ascertained, and that the weighing was not essential to the passing of the title, and that the contract of sale showed that the parties intended that the title should pass before the peanuts were weighed or delivered. Both seller and buyer testified as to the sale of the peanuts and G. testified that the peanuts "were specific and had been identified and all ready for loading," and that he considered the title had passed.

Held: That it clearly appeared from the evidence that the title to the peanuts had passed to the purchaser before the treasurer made his levy.

9. TAXATION — Tax Lien — Treasurer Settling with Auditor for Taxes which Taxpayer was Unable to Pay — Subrogation — Case at Bar. — The purpose of the instant suit was to determine and settle the priorities of the claims of the lien creditors of one G. against his personal property. G. was unable to pay his taxes for 1925 and the county treasurer made settlement with the Auditor of Public Accounts for these taxes on June 15, 1926, and levied on certain property of G. for the payment of the same. It was the contention of the treasurer that he was subrogated to the rights of the Commonwealth, as he had levied upon the property of the taxpayer within the period of time prescribed by section 2440 of the Code of 1919.

Held: That if the treasurer were subrogated to the rights of the Commonwealth, it would avail him nothing in the instant case, as it appeared that the liens of G.'s other creditors took priority over the lien created by the levy of the treasurer for taxes. [Page 397]

Appeal from a decree of the Circuit Court of Southampton county. Judgment for complainants. Defendant assigns error.

Affirmed.

The opinion states the case.

John M. Britt and R.E.L. Watkins, for the appellant.

Wm. M. Birdsong, Junius W. Pulley and Chas. W. Davis, for the appellees.

WEST, J., delivered the opinion of the court.

In the year 1925, James T. Gillette was operating ten farms in Southampton county, Virginia. He entered into many financial obligations, and being unable to meet them was embarrassed by the efforts of his creditors to secure settlements of their claims.

He was unable to pay his taxes for 1925. H. M. Drewry, treasurer of Southampton county, made settlement with the Auditor of Public Accounts for these taxes on June 15, 1926, and later levied on certain property of Gillette for the payment of the same.

The purpose of this suit is to determine and settle the priorities of the claims of the lien creditors of James T. Gillette against his personal property, and to subject the property to the payment of such debts.

The evidence was taken in open court. Upon a final hearing upon the pleadings and the evidence, the judge of the trial court entered a decree on April 6, 1927, determining the priorities of the various liens, and adjudicating the rights of the parties accordingly. From that decree H. M. Drewry, treasurer of Southampton county, was allowed an appeal to this court. [Page 398]

The petitioner, H. M. Drewry, treasurer, makes four assignments of error:

"1. The court erred in holding that the other lienholders took priority over the treasurer of Southampton county, Virginia, who had levied for his taxes within the period of time prescribed by section 2440 of the Code of Virginia, 1919.

"2. The court erred in holding that the treasurer of Southampton county, Virginia, was not subrogated to the rights of the Commonwealth of Virginia, even though he had made the levy on the property of the taxpayer within the period of time prescribed by section 2440 of the Code of Virginia.

"3. The court erred in holding that the lien created by the fieri facias on the Sebrell-Wade Company judgment was a lien prior to the lien created by the levy of the treasurer of Southampton county for taxes.

"4. That the court erred in holding that the sale of peanuts to T. H. Birdsong and Company and a delivery of the same after the levy of the treasurer of Southampton county, Virginia, constituted a complete sale and defeated the levy of the said treasurer for taxes, even though said peanuts had not been weighed or delivered to the said T. H. Birdsong and Company and the value thereof ascertained."

[1] The Virginia Constitution, section 168, provides that all taxes shall be levied and collected under general laws. It follows that there are no liens for taxes except as provided by statute.

[2] In Marye v. Diggs, 98 Va. 749, 37 S.E. 315, 51 L.R.A. 902, the court says: “In Virginia taxes can only be assessed, levied and collected in the mode pointed out by the statute. When the State or a county has assessed and levied a tax, they are severally clothed with power to take the personalty by distress, [Page 399] and the realty by sale, for taxes in the most summary manner.”

[3] Under Code of 1924, section 2410, the treasurer is required upon failure of the taxpayer to pay his taxes after being called upon to make settlement, to “proceed to collect them by distress or otherwise.”

[4, 5] First Assignment. It is contended by the treasurer of Southampton county that having made his levy within the period of time prescribed by section 2440, his claim has priority over all other liens upon the property.

Sections 2440 and 2443 provide as follows:

Section 2440. “A treasurer may distrain for taxes and levies for which he has accounted to the Auditor of Public Accounts and the county authorities, respectively, at any time within one year after the period fixed by section twenty-four hundred and twelve of this Code for the final settlement with the Auditor of Public Accounts for State taxes.”

Section 2443. “No deed of trust or mortgage upon goods or chattels shall prevent the same from being distrained and sold for taxes and levies against the grantor in such deed while such goods and chattels remain in the grantor's possession; nor shall any such deed prevent the goods and chattels conveyed from being distrained and sold for taxes and levies assessed hereon, no matter in whose possession they may be found.” (Italics ours.)

Code, section 2454, reads in part as follows: “There shall be a lien upon all real estate for the taxes assessed, and county, city and town levies assessed thereon, and interest upon such taxes and levies, at the rate of six per centum per annum, from the fifteenth day of June, in the year after which the same may have been assessed, for the period of five years, unless sooner paid. * *” [Page 400]

Section 2271 provides: “All real estate, except such as is exempted by the following section, shall be subject to such annual taxation as may be prescribed by law, and there shall be a lien on such real estate for the payment of the taxes and levies imposed thereon, hereafter assessed, prior to any other lien or encumbrance thereon; which lien, in addition to existing remedies for the collection of taxes and levies, shall be enforceable by suit in equity; and there shall be a further lien upon the rent of said real estate, whether the same be in money or in kind, for taxes of the current year. * * *.”

Section 2439 provides, in part, as follows: “Any goods or chattels in the corporation or county belonging to the person or estate assessed with taxes or levies, may be distrained therefor by the treasurer, sheriff, sergeant, constable, or collector. In all cases property subject to levy or distress for taxes shall be liable to levy or distress in the hands of any person for taxes thereon. * *.” (Italics ours.)

When sections 2640 and 2443 are read and construed in the light of and along with the other sections, supra, it is clear that the law gave the treasurer the right, at any time within one year from June 15, 1926, to distrain the goods and chattels in the county of Southampton which then belonged to the taxpayer, for the taxes and levies assessed against him, for which the treasurer had accounted to the Auditor of Public Accounts and the county authorities.

No deed of trust or mortgage upon goods and chattels will prevent the same from being sold for taxes against the grantor in such deed or mortgage, while such goods and chattels remain in the grantor's possession; nor will any such deed or mortgage prevent the goods and chattels from being distrained and sold for the taxes [Page 401] and levies assessed thereon, no matter in whose possession they may be found.

It is true that taxes due upon real estate constitute a lien thereon and that they may be collected by distress or by suit in equity. But we find no provision in the statute which gives a lien on all of the taxpayer's personal property for the amount of taxes due by him. Such a lien can be acquired only by distraining or levying upon the property; except there is a lien on each specific piece of personal property for the taxes and levies due thereon. As will be hereafter seen, the lien of the execution creditor has priority over the lien of the treasurer.

[6] Second Assignment. The appellant contends that he was subrogated to the rights of the Commonwealth of Virginia even though he had made the levy on the property of the taxpayer within the period of time prescribed by section 2440 of the Code.

With this contention we cannot concur. If the treasurer chooses to settle with the Auditor of Public Accounts and the county authorities, respectively, for taxes which he has not collected, and the taxpayer fails to reimburse him, he may, at any time within a year of the time for the settlement with the Auditor for State taxes, look to section 2440 for redress. Upon the treasurer's accounting to the Auditor of Public Accounts for the taxes and levies, the taxpayer becomes his debtor, and section 2440 authorizes him to distrain the property of the taxpayer for the amount accounted for. The statute defines his rights in the premises.

He was not compelled to pay the taxes for Gillette and therefore was not subrogated to the rights of the Commonwealth. [Page 402]

In the case of Repass v. Moore, 98 Va. 377, 36 S.E. 474, this court said:

“Every consideration of public policy which requires a sheriff to collect money due upon an execution in his hands, or to levy and sell, and pay the proceeds into court or to the plaintiff, or make prompt return upon it, applies with equal force to the officer whose duty it is to collect the taxes due to the Commonwealth. The course which he should pursue is clearly marked out by the statute law. He is clothed with ample power to discharge it, and he and his sureties can incur no liability unless he is guilty of a voluntary deviation from the prescribed course of duty.

“In the case before us, the treasurer, without any previous request or subsequent promise of indemnity, with no assignment of the tax lien (if it be capable of assignment), voluntarily paid the tax which he now seeks to recover into

the treasuries of Wythe county and the State of Virginia. There was certainly no such duty imposed upon him by law. He was under no obligation whatever, and was bound in no way to pay or advance the taxes. It was his voluntary act in derogation of the duty imposed upon him by law, and he is, therefore, not within the broadest and most comprehensive definition of the right of subrogation as stated by any text writer or decided case that has been brought to our attention.

[7] Third Assignment. On January 3, 1927, Sebrell, Wade & Company obtained a judgment against James T. Gillette in the Circuit Court of Southampton county for $1,576.20, with interest thereon from October 1, 1926, till paid, and $7.85 costs. On the day the judgment was granted execution was issued thereon and placed in the hands of the sheriff of the county to be levied. [Page 403]

On June 15, 1926, H. M. Drewry, treasurer, settled with the Auditor of Public Accounts for a tax account due by James T. Gillette for 1925, amounting to $1,750.13. On January 10 and 12, 1927, he levied on 140 bags of peanuts, on the Everette farm (sometimes referred to as 139 bags), upon peanuts on other farms and upon certain chattel property; and on the 18th day of January, 1927, he levied upon other goods and chattels, all being the property of James T. Gillette, and being levied on to secure the payment of the tax account aforesaid, which is itemized as follows:

Close one bond, etc.	$ 41.59
Real estate	1,656.88
Chattel property	50.46
Total	$1,748.93
Levy fee	1.20
	$1,750.13

No part of these taxes was due upon the peanuts in controversy.

The property levied on by the treasurer was also levied on by Sebrell, Wade & Company under the execution above mentioned.

This execution was a lien on Gillette's goods and chattels from the moment it went into the officer's hands to be levied, and has priority over the lien which the treasurer acquired by his levy for taxes.

[8] Fourth Assignment. It appears from the evidence that James T. Gillette was indebted to T. H. Birdsong & Company in a sum in excess of $6,000.00, and on the 26th day of December, 1926, Gillette agreed to sell to T. H. Birdsong & Company and they agreed to buy the entire peanut crop of James T. Gillette, for 1925, at the price of four and one-quarter cents per pound, [Page 404] except one car which he had sold to E. H. Brooks to be delivered at Angelico Water Tank. Gillette delivered all the peanuts to T. H. Birdsong & Company in December, 1926, except those sold to Brooks and three other lots of 139 (sometimes called 140), fifty and fifty bags, respectively.

H. M. Drewry, treasurer, only levied on the 139 bags, of all the peanuts which were ever received by T. H. Birdsong & Company. All parties agreed that T. H. Birdsong & Company should take these peanuts at four and one-quarter cents per pound and hold the proceeds subject to the order of the court. At the price named, the 139 bags brought $476.26.

The appellant, H. M. Drewry, treasurer, contends that the title to the 139 bags of peanuts did not pass to T. H. Birdsong & Company, because they were in the possession of Gillette and had not been weighed, set aside and delivered to them at the time his levy was made. Appellees contend that the 139 bags of peanuts had been set aside and the price ascertained; that the weighing was not essential to the passing of the title, and that the contract between Gillette and Birdsong & Company shows their intention to pass title before the peanuts were weighed or delivered.

T. H. Birdsong, Jr., of T. H. Birdsong & Company, testified that he purchased the 139 bags of peanuts. James T. Gillette testified that he sold T. H. Birdsong & Company all the peanuts on the Everett farm (upon which the 139 bags were grown), and arranged to have them delivered but they were levied on before they were delivered.

James T. Gillette, referring to the 139 bats, testified further as follows:

“Q. You sold them?

“A. Yes. [Page 405]

“Q. They were specific and had been identified and all ready for loading?

“A. Yes; and the car had been put in.

“Q. And you considered the title had passed?

“A. Yes; I had sold the peanuts * * *.”

It clearly appears from the evidence that the title to these peanuts had passed to T. H. Birdsong & Company before the treasurer made his levy.

[9] If the treasurer were subrogated to the rights of the Commonwealth of Virginia, it would avail him nothing in this case, since, as appears herein, the liens of Gillette's other creditors took priority over the lien created by the levy of the treasurer for taxes. For the foregoing reasons, the decree will be affirmed.

Affirmed.

Drewry v. Baugh and Sons

U.S. v. Waddill, Holland & Flinn, 182 Va. 351, 28 S.E.2d 741 (1944)

IN THE SUPREME COURT OF VIRGINIA
RICHMOND

UNITED STATES OF AMERICA, ET AL.
v.
WADDILL, HOLLAND & FLINN, INCORPORATED, ET AL.

Record No. 2733.
Decided: January 24, 1944.

Present, Campbell, C. J., and Hudgins, Gregory, Browning, Eggleston and Spratley, JJ.

1. UNITED STATES — Claims Due United States — Effect of Statute Giving Right of Priority. — 31 U.S.C.A., section 191, giving the United States a right of priority of payment out of the assets of an insolvent debtor or one who makes a voluntary assignment, creates no lien upon the debtor's property in favor of the United States but merely confers upon the government a right of priority of payment out of such property in the hands of the debtor's assignees, or their representatives, under the conditions specified in the statute.

2. UNITED STATES — Claims Due United States — Date Right to Priority Became Fixed — Case at Bar. — In the instant case, a suit by a trustee in a deed of assignment for the benefit of creditors to determine the priority of payment of claims, the lower court held that the claims should be paid in the following order: (1) City of Danville, for personal property taxes; (2) landlord of the assignor, for six months' rent due and to become due; (3) the United States, for debts due by assignor; (4) Virginia Unemployment Compensation Commission, for unemployment compensation taxes due by the assignor. The United States contended that it was entitled to priority of payment of its claim before those of the other creditors, under 31 U.S.C.A., section 191, giving the United States a right of priority of payment out of the assets of an insolvent debtor or one who makes a voluntary assignment.

Held: That the right of the United States, if any, to priority became fixed at the date of the delivery of the deed of assignment, and, if not preferred at that time, the claims of the other creditors were subordinate to those of the government.

3. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS — Order of Payment of Claims — Not Affected by Subsequent Attachment and Distraint — Case at Bar. — In the instant case, a suit by a trustee in a deed of assignment for the benefit of creditors to determine the priority of

payment of claims, the lower court held that the claims should be paid in the following order: (1) City of Danville, for personal [Page 352] property taxes due; (2) landlord of the assignor, for six months' rent due and to become due; (3) the United States, for debts due by assignor; (4) Virginia Unemployment Compensation Commission, for unemployment compensation taxes due by the assignor. Shortly after the delivery of the deed of assignment the landlord levied a distress warrant for accrued rent and an attachment for the installments of rent. On the following day the collector of taxes for the city distrained the personal property of the assignor on the premises leased by the assignor for personal property taxes due. The United States contended that it was entitled to priority of payment of its claim before those of the other creditors, under 31 U.S.C.A., section 191, giving the United States a right of priority of payment out of the assets of an insolvent debtor or one who makes a voluntary assignment.

Held: That, since the right of the United States became fixed at the date of the delivery of the deed of assignment, the rights of the landlord and the city must be determined irrespective of the attachment and distraint levied on the debtor's property after the delivery of the deed of assignment.

4. UNITED STATES — Claims Due United States — Acquisition by Another Creditor of Specific and Perfected Lien. — If before the Federal government's right of priority under 31 U.S.C.A., section 191 attaches, a creditor acquires a specific and perfected lien on the property of the insolvent debtor, the estate of the latter is, for all practical purposes, diminished to the extent of the claim secured by such lien, and the government's right attaches only to the residue.

5. LANDLORD AND TENANT — Lien for Rent — At Common Law. — At common law the landlord had no lien upon any property of his tenant as security for rent prior to the levy of a distress warrant.

6. LANDLORD AND TENANT — Lien for Rent — Statutes Give Fixed and Specific Lien. — Sections 5519, 5523 and 5524 of the Code of 1942, by clear implication, give the landlord a lien which is fixed and specific, and not one which is merely inchoate, and such a lien exists independent of the right of distress or attachment, which are merely remedies for enforcing it.

7. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS — Order of Payment of Claims — Priority of Landlord's Claim Over That of United States — Case at Bar. — In the instant case, a suit by a trustee in a deed of assignment for the benefit of creditors to determine the priority of payment of claims, the lower court held that the claims should be paid in the following order: (1)

City of Danville, for personal property taxes due; (2) landlord of the assignor, for six months' rent due and to become due; (3) the United States, for debts due by assignor; (4) Virginia Unemployment Compensation Commission, for unemployment Compensation taxes due by the assignor. The United States contended that it was entitled to priority of payment of its claim before those of the other creditors, under 31 U.S.C.A., section [Page 353] 191, giving the United States a right of priority of payment out of the assets of an insolvent debtor or one who makes a voluntary assignment.

Held: That under sections 5519, 5523 and 5524 of the Code of 1942, the claim of the landlord was entitled to priority of payment over that of the United States.

8. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS — Order of Payment of Claims — Subordination of Landlord's Lien to City's Lien for Taxes — Case at Bar. — In the instant case, a suit by a trustee in a deed of assignment for the benefit of creditors to determine the priority of payment of claims, the lower court held that the claims should be paid in the following order: (1)) City of Danville, for personal property taxes due; (2) landlord of the assignor, for six months' rent due and to become due; (3) the United States, for debts due by assignor; (4) Virginia Unemployment Compensation Commission, for unemployment compensation taxes due by the assignor.

Held: That, under section 5524 of the Code of 1942, the lower court correctly subordinated the landlord's lien to the lien of the city for personal property taxes assessed against the specific chattels on the leased premises.

9. MUNICIPAL CORPORATION — Municipal Taxation — Lien. — A city has a lien on specific chattels against which personal property taxes were assessed.

10. UNEMPLOYMENT COMPENSATION — Lien for Payroll Taxes — Priority of Lien of Landlord — Case at Bar. — In the instant case, a suit by a trustee in a deed of assignment for the benefit of creditors to determine the priority of payment of claims, the lower court held that the claims should be paid in the following order: (1) City of Danville, for personal property taxes due; (2) landlord of the assignor, for six months' rent due and to become due; (3) the United States, for debts due by assignor; (4) Virginia Unemployment Compensation Commission, for unemployment compensation taxes due by the assignor. The Unemployment Compensation Commission contended that it was entitled to priority of payment over the claim of the landlord by virtue of section 1887(106), (c) of the Code of 1942, which makes payroll taxes a lien against an employer's assets but preserves the priority of “any mortgage, deed of trust or other lien duly perfected prior to the date the contributions” accrued.

Held: That the lien of the landlord was a "lien duly perfected" within the meaning of the statute, since the landlord's lien related back to the beginning of the tenancy and therefore was perfected prior to the accrual of the commission's claim for contributions.

Appeal from a decree of the Corporation Court of the city of Danville. Hon. Henry C. Leigh, judge presiding.

Affirmed. [Page 354]

The opinion states the case.

F. S. Tavenner, Jr., and Henry T. Clement, for the appellants.

Abram P. Staples, Attorney General, Kenneth C. Patty, Assistant Attorney General, Crews & Clement and E. Walton Brown, for the appellees.

EGGLESTON, J., delivered the opinion of the court.

On June 19, 1941, Oeland R. Roman, who operated a restaurant in the city of Danville, executed and delivered to Earle Garrett, as trustee, a deed of assignment for the benefit of the assignor's creditors. The deed conveyed to the trustee all of the personal property and fixtures which had been used by the assignor in the conduct of the business and which were then located on the premises. It authorized the trustee to sell such personal property and out of the proceeds thereof to "pay as preferred claims such creditors as are given a lien or preference by law, or those having a valid lien upon the property conveyed or some part thereof".

On July 1, 1941, Waddill, Holland & Flinn, Incorporated, the owner of the premises which had been occupied by the assignor, under a written lease for a five-year term, commencing January 1, 1937, and reserving a rental of $250 per month, levied a distress warrant on the assignor's personal property on the premises for accrued rent of $850 for three and two-fifths months. On the same day it levied an attachment on the same personal property for future instalments of rent for two and three-fifths months in the sum of $650.

On July 2, 1941, the Collector of Taxes for the city of Danville distrained the personal property on the premises for personal property taxes assessed thereon for the years 1939, 1940, and 1941, amounting in all to the sum of $222.31.

No sale was held under the distress warrant, attachment, or distraint for taxes, but pursuant to the terms of the deed [Page 355] of trust, the trustee sold the property of the assignor for the sum of $1,680.80, which is conceded to have been the fair value thereof. He then filed in the court below a bill in chancery asking the guidance of the court in determining the priority of payment of the following claims filed with him:

(1) The city of Danville, for the stated taxes due, in the sum of $222.31;

(2) Waddill, Holland & Flinn, Incorporated, for six months' rent due and to become due, amounting to $1,500;

(3) The United States, for debts due it by the assignor, amounting to $1,559.63, with interest;

(4) The Virginia Unemployment Compensation Commission, for unemployment compensation taxes due it by the assignor, in the sum of $66.38.

The lower court held that the creditors mentioned were entitled to priority in the order listed, and from a decree distributing the fund in that manner, the United States has appealed. It claims that it is entitled to priority of payment of its claim before those of any of the creditors mentioned.

The Virginia Unemployment Compensation Commission assigns cross-error. While it admits that its claim is subordinate to that of the United States, it contends that it should be paid ahead of the city of Danville and Waddill, Holland & Flinn, Incorporated.

Waddill, Holland & Flinn, Incorporated, has filed no cross-assignment of error to the action in subordinating its claim to that of the city of Danville. Hence, the main question before us is whether the lower court was correct in holding that the rent claim of $1,500 was entitled to priority over that of the United States. If that holding is correct, then, admittedly, after the allowance of reasonable costs of administration, the fund will be exhausted. In that case neither the United States nor the Virginia Unemployment Compensation Commission will be interested in the relative priority of the claims of the city of Danville and those of the landlord. [Page 356]

The basis for the contention of the United States is section 3466 of the Revised Statutes (31 U.S.C.A., § 191), which is copied in the margin.1

[1] It is settled that this statute creates no lien upon the debtor's property in favor of the United States. It merely confers upon the Government a right of priority of payment out of such property in the hands of the debtor's assignees, or their representatives, under the conditions specified in the statute. United States v. Oklahoma, 261 U.S. 253, 259, 43 S. Ct. 295, 67 L. Ed. 638.

[2, 3] The right of the United States, if any, to priority, became fixed at the date of the delivery of the deed of assignment. United States v. Oklahoma, supra. Thereafter none of the other creditors could obtain preference over the United States. If not preferred at that time, their claims are subordinate to those of the Government. New York v. Maclay, 288 U.S. 290, 292, 53 S. Ct. 323, 324, 77 L. Ed. 754. Hence, the rights of the landlord and the City of Danville must be determined irrespective of the attachment and distraint levied on the debtor's property after the delivery of the deed of assignment.

The landlord does not dispute this principle, but contends that before the right of priority of the United States accrued under U.S. Rev. Stat., § 3466, by the delivery of the deed of assignment, it (the landlord), by virtue of Virginia Code, Section 5524, had acquired a fixed and specific lien upon the property located on the premises for six months' rent, and that, therefore, its claim is superior to that of the Government. [Page 357]

There are expressions in recent opinions of the Supreme Court, the final arbiter in the interpretation of an Act of Congress, which support the view that the rights of a creditor who holds a "specified perfected lien" on the property of an insolvent, at the time the rights of the Government attach, under Rev. Stat., § 3466, are superior to those of the Government.

In United States v. Knott, 298 U.S. 544, 549, 550, 56 S. Ct. 902, 905, 80 L. Ed. 1321, 104 A. L. R. 741, speaking through Mr. Justice Brandeis, the court said: "* * * But it is settled that an inchoate lien is not enough to defeat the priority. United States v. Oklahoma, 261 U.S. 253, 43 S. Ct. 295, 67 L. Ed. 638; Spokane County v. United States, 279 U.S. 80, 49 S. Ct. 321, 73 L. Ed. 621; New York v. Maclay, 288 U.S. 290, 53 S. Ct. 323, 77 L. Ed. 754. Unless the law of Florida effected, at least as early as the date of insolvency, either a transfer of title from the company, or a specific perfected lien in favor of the Florida creditors, the United States is entitled to priority." (Italics supplied.)

In that case it was held (298 U.S., at pages 550, 551, 56 S. Ct., at page 905) that the deposit by a foreign surety company of securities with the State Treasurer, as a condition precedent to its right to do business in the State of Florida, while creating a "trust fund" for the benefit of Florida creditors, constituted "an inchoate general lien" for such purpose, and lacked "the characteristics of a specific perfected lien which alone bars the priority of the United States." See also, United States v. Texas, 314 U.S. 480, 62 S. Ct. 350, 86 L. Ed. 356.

It is true, as argued by the Government, that the Supreme Court has reserved the question as to whether the holder of a specific and perfected lien, without a "change of title or possession," is entitled to priority over the United States Government in the distribution of the estate of an insolvent. See New York v. Maclay, supra (288 U.S., at pages 293, 294, 53 S. Ct., at page 324); United States v. Texas, supra (314 U.S., at page 488, 62 S. Ct., at page 354). [Page 358]

[4] However, it seems to us that if before the Government's right of priority attaches, a creditor acquires a specific and perfected lien on the property of the insolvent debtor, the estate of the latter is, for all practical purposes, diminished to the extent of the claim secured by such lien, and the Government's right attaches only to the residue. See Brent v. Bank of Washington, 10 Pet. (35 U.S.) 596, 611, 9 L. Ed. 547.

In Ernst v. Guarantee Millwork, 200 Wash. 195, 93 P. (2d) 404, it was held that where the statute gave the county a "specific lien" on personal property for taxes assessed thereon, such claim was prior to the claim of the United States when the taxpayer thereafter became insolvent.

In Spokane County v. United States, supra (279 U.S., at page 94, 49 S. Ct., at page 325), Mr. Chief Justice Taft said that whether the lien of State taxes on property of the taxpayer was "specific", is properly "a State question." See also, United States v. Knott, supra (298 U.S., at page 548, 56 S. Ct., at page 904).

The main question for decision, then, is whether, under the law of Virginia, the landlord is given a specific and perfected lien for six months' rent accrued and to accrue, or whether he is given an inchoate lien which becomes specific and perfected only after the levy of a distress warrant or attachment.

[5] At common law the landlord had no lien upon any property of his tenant as security for rent prior to the levy of a distress warrant. 32 Am. Jur., Landlord and Tenant, § 564, p. 461, and authorities there cited. Now the statutes of many States give the landlord a lien for rent upon the property of his tenant and, in case of agricultural lands, upon the crops raised on the demised premises. 32 Am. Jur., Landlord and Tenant, Sec. 575, p. 468.

While there are dicta on the subject, the precise question as to whether such a lien is given by the Virginia statutes, [Page 359] Code, Sections 5519, 5523 and 5524, which are copied in the margin,2 has not been heretofore presented by this court.

In Richmond v. Duesberry, 27 Gratt. (68 Va.) 210, 213, 214, this court in speaking of sections 11 and 12 of the Code of 1860, ch. 138 (now Code, Sections 5523 and 5524), said:

> "From these sections, it is plain that the intention of the legislature was to secure one year's rent to a landlord against all liens created by the tenant after the lease has commenced. [Page 360]
>
> "The landlord is protected by the statute against all deeds of trust, mortgages, and other liens, where the lien has been created after the commencement of the tenancy, upon goods on the leased premises which belong to a person liable for rent, and where there is an existing liability for rent in arrear, or to become due at the time the lien is created."

In Wades v. Figgatt, 75 Va. 575, 581, 582, it was said that goods of the tenant carried on the leased premises and encumbered after the commencement of the tenancy, "are bound for one year's rent."

In Allen v. Parkey, 154 Va. 739, 748, 149 S. E. 615, 154 S. E. 919, it was held that a trustee in a deed of assignment from the tenant took subject to the provisions of Code, Section 5524, and was bound to pay the landlord six months' rent as a preferred charge, although no distress warrant had issued therefor.

These expressions, and the holding in Allen v. Parkey, supra, would indicate that the landlord has a fixed specific lien on the tenant's goods on the leased premises irrespective of the levy of a distress warrant.

On the other hand, in American Exch. Bank v. Goodlee Realty Corp., 135 Va. 204, 216, 116 S. E. 505, it was said that, “accurately speaking, neither section 5524 nor section 5523 of the present Code gives the landlord any lien for rent”, and that until his right has been perfected by the levy of a distress warrant, the landlord's lien is merely “inchoate.”3

But that statement was not necessary to the decision of the case. There the American Exchange Bank, subsequent to the commencement of the tenancy, acquired a lien on [Page 361] certain goods belonging to the tenant and removed them from the leased premises without paying six months' rent. The court held (135 Va., at page 218) that such removal, in violation of Code, section 5524, was a wrong to the estate of the landlord, for which the latter might maintain an action in tort against the person removing the goods, and recover a personal judgment against him for the value of the goods removed, if not in excess of the amount of one year's rent in arrear, and, if the goods removed were in excess of that amount, then for the amount of the rent in arrear, for one year, and costs. No question as to whether the landlord had a lien on the goods on the leased premises, irrespective of distress, was there involved.

In In re Wynne, 30 Fed. Cas. 752, 762, Case No. 18, 117, Mr. Chief Justice Chase, sitting on appeal in the United States Circuit Court, reviewed the Virginia statute fully and held that a lien existed thereunder for not exceeding one year's rent, “independently of any proceeding by distress or attachment”, which, he said, are merely remedies for enforcing the lien. He said:

> “* * * Liens are [of] various descriptions, and may be enforced in different ways; but we think it sufficient to say here, what seems to us well warranted in principle and authority, that whenever the law gives the creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt. And we think that a lien of this sort is given by the 12th section of title 41, chapter 138, of the Revised Code of Virginia, adopted in 1860 (now Code, section 5524). * * *
>
> “We can not doubt that this statute creates a lien in favor of the landlord, and a lien of a high and peculiar character, * * *
>
> “* * * Would it not be trifling with the plain sense of words to say that there is a lien under the trust deed and a lien under the execution, but the claim which by law is [Page 362] made superior to either as a charge upon the goods is no lien?”

In Bradford v. Graham, 287 F. 686, 689, 690, the Circuit Court of Appeals, speaking through Judge Waddill, adopted the reasoning of In re Wynne, supra, and held that Code, sections 5523 and 5524, give the landlord a lien for rent in arrears and to become due for not exceeding one year (now six months) on the property of the tenant on the leased premises, or that which has been removed therefrom within thirty days, without distraint or attachment being made therefor.

Statutes paralleling Virginia Code, sections 5523 and 5524, are found in Michie's Code of West Virginia (1937), sections 3663 and 3668. The highest court of that State, in construing these statutes, has repeatedly held that the landlord has a fixed and specific lien upon the property of the tenant while upon the leased premises, and not merely an inchoate lien.

In Anderson v. Henry, 45 W. Va. 319, 31 S. E. 998, 999, it is said that the statute "gives the landlord right of payment and preference out of the goods themselves, and this operates as a lien. It gives right to the landlord to detain the goods on his premises against a removal of trust until paid and secured as prescribed, just like an innkeeper or tailor may retain goods until payment. If removed under legal process, it says that the officer, though he may remove them, shall, out of the goods, pay rent in arrear, and sell enough on credit to pay the balance when due. Why all this is not a lien, I fail to see. It makes no difference whether a distress warrant has been sued out or not, or can be sued out, for want of maturity of the rent." The court concludes (31 S. E., at page 1000) that section 12, ch. 93, of the Code of 1891 (now Michie's Code of West Virginia (1937), section 3668, which corresponds to Virginia Code, section 5524), "of its own force gives a lien without a distress warrant."

It is significant to note that the West Virginia court supports its reasoning by citing Wades v. Figgatt, supra, [Page 363] and Richmond v. Duesberry, supra, and points out that the Virginia and West Virginia statutes are substantially the same.

The holding that the landlord has a fixed and specific lien, and not merely an inchoate lien, irrespective of the levy of a distress warrant, has been reaffirmed by the West Virginia court in Huffard v. Akers, 52 W. Va. 21, 43 S. E. 124, 127; Thomas Co. v. Lewis, etc., Co., 79 W. Va. 138, 141, 90 S. E. 816, 818.

We may observe in passing that in 18 Am. & Eng. Enc. of Law, Landlord and Tenant, p. 332, note 5, and in 36 Corpus Juris, Landlord and Tenant, section 1447, p. 487, note 53, and in 9 A. L. R. 300, Virginia and West Virginia are classed among those States whose statutes give the landlord a lien on the property of the tenant.

[6] We agree with the reasoning of Mr. Chief Justice Chase in In re Wynne, supra, and that of the West Virginia court, that the Virginia statutes, by clear implication, give the landlord a lien which is fixed and specific, and not one which is merely inchoate, and that such a lien exists independent of the right of distress or attachment, which are merely remedies for enforcing it.

[7] It follows from what we have said that the lower court was right in holding that the claim of the landlord, Waddill, Holland & Flinn, Incorporated, was entitled to priority of payment over that of the United States.

[8, 9] We are further of opinion that the lower court correctly held that Code, section 5524, subordinated the landlord's lien to the lien of the city of Danville for its personal property taxes assessed against the specific chattels on the leased premises. That the city has a lien therefor is settled in this State. Chambers v. Higgins, 169 Va. 345, 351, 193 S. E. 531, 533; Drewry v. Baugh & Sons, 150 Va. 394, 401, 143 S. E. 713.

Whether the city's lien for taxes is such a specific lien as would entitle it to priority of payment over the claim of the United States, if no rent claim were here involved, we need not decide. Cf. Spokane County v. United States, [Page 364] supra; Ernst v. Guarantee Millwork, supra. Since the rent claim takes priority over that of the United States, and completely exhausts the fund, the United States has no concern in the relative priority of the claim of the city and that of the landlord.

The Virginia Unemployment Compensation Commission contends that it is entitled to priority of payment over the claim of the landlord by virtue of section 14(c) of the Virginia Unemployment Compensation Act (Acts 1936-7, Ex. Sess., ch. 1, p. 3, as amended by Acts 1940, ch. 334, p. 550; Acts 1942, ch. 317, p. 446; Michie's Code of 1942, sec. 1887(106),(c)), which makes payroll taxes a lien against an employer's assets. However, that section expressly preserves the priority of "any mortgage, deed of trust or other lien duly perfected prior to the date the contributions or any part thereof first accrued".

[10] We are of opinion that the lien of the landlord is a "lien duly perfected" within the meaning of this section. It is settled that the landlord's lien relates back to the beginning of the tenancy. Wades v. Figgatt, supra; Pepsi-Cola Bottling Co. v. Indian Rock Bottling Co., 98 W. Va. 269, 126 S. E. 715; Dingess-Rum Coal Co. v. Draper Eagle Coal Co., 108 W. Va. 37, 150 S. E. 228; 32 Am. Jur., Landlord and Tenant, sec. 579, p. 470. Therefore it was perfected prior to the accrual of the Commission's claim for contributions.

What we have said in disposing of the claim of the United States applies here in consideration of the claim of the Unemployment Compensation Commission. Since the rent claim takes priority over that of the Unemployment Compensation Commission, and completely exhausts the fund, the Unemployment Compensation Commission is not concerned with the relative priority of the claims of the landlord and the city of Danville.

In our opinion the decree complained of is plainly right, and accordingly it is

Affirmed.

FOOTNOTES

1 U.S. Rev. Stat., section 3466. "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient properly to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

2 Section 5519. “Remedy for rent and for use and occupation. — Rent of every kind may be recovered by distress or action. A landlord may also, by action, recover (where the agreement is not by deed) a reasonable satisfaction for the use and occupation of lands; * * * .”

Section 5523. “On what goods levied. — The distress may be levied on any goods of the lessee, or his assignee, or undertenant, found on the premises, or which may have been removed therefrom not more than thirty days. A levy within such thirty days shall have like effect as if the goods levied on had not been removed from the leased premises. If the goods of such lessee, assignee, or undertenant, when carried on the premises, are subject to a lien, which is valid against his creditors, his interest only in such goods shall be liable to such distress. If any lien be created thereon while they are upon the leased premises, or within thirty days thereafter, they shall be liable to distress, but for not more than six months' rent if the premises are in a city or town, * * * whether it shall have accrued before or after the creation of the lien. * * * .” (As amended by Acts 1922, ch. 495, p. 863; Acts 1932, ch. 357, p. 696.)

Section 5524. “When goods not to be removed without paying six months' rent; lien for taxes, levies, and militia fines not affected. — If, after the commencement of any tenancy, a lien be obtained or created by deed of trust, mortgage, or otherwise, upon the interest or property in goods on premises leased or rented, of any person liable for the rent, or the said goods be sold, the party having such lien, or the purchaser of such goods, may remove them from the premises on the following terms, and not otherwise, that is to say: On the terms of paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due, what is so paid or secured not being more altogether than six months' rent if the premises are in a city or town, * * * . If the goods be taken under legal process, the officer executing it shall, out of the proceeds of the goods make such payment of what is in arrear; and as to what is to become due, he shall sell a sufficient portion of the goods on a credit till then, taking from the purchasers bonds, with good security, payable to the person so entitled, and delivering such bonds to him. If the goods be not taken under legal process, such payment and security shall be made and given before their removal. Neither this nor the preceding section shall affect any lien for taxes, levies, or militia fines. * * *” (As amended by Acts 1922, ch. 495, p. 863; Acts 1932, ch. 357, p. 696.)

3 This statement is supported by the cited text in Burks' Pleading and Practice, 1st Ed., section 13, p. 14. The text in the 2d Ed., section 379, pp. 736, 737, and that in the 3d Ed., section 381, pp. 712-714, omits this statement. In a footnote, the 3d Ed., at page 713, says: “It is believed that the ruling in the American Exchange Bank case is correct”, but Bradford v. Graham, 287 F. 686, and Thomas Co. v. Lewis, etc., Co., 79 W. Va. 138, 141, 90 S. E. 816, 818, are cited as being to the contrary.

U.S. v. Waddill, Holland & Flinn

Griscom v. Childress, 183 Va. 42, 31 S.E.2d 309 (1944)

IN THE SUPREME COURT OF VIRGINIA
STAUNTON

ACTON GRISCOM
v.
J. S. CHILDRESS, SHERIFF OF MONTGOMERY COUNTY,
MAURICE H. NEUMULLER AND LAURA NEUMULLER.

Record No. 2765.
Decided: September 6, 1944.

Present, Campbell, C.J., and Hudgins, Gregory, Eggleston and
Spratley, JJ.

1. CONTRACTS — Definitions — Executory and Executed Contracts Distinguished. — An executory contract is one in which a party binds himself to do, or not to do, a particular thing, whereas an executed contract is one in which the object of the agreement is performed and everything that was to be done is done.

2. SHERIFF'S SALES — Legal Effect of Highest Bid. — The legal effect of the highest bid at a sheriff's sale is a promise on the part of the bidder to pay the sum bid and a promise on the part of the sheriff, after he accepted the bid and knocked the property down at the auction sale, to deliver the property advertised to the bidder upon receipt of payment. The contract remains executory as to each party until his promise is fulfilled.

3. SPECIFIC PERFORMANCE — Personal Property Contracts — Not Decreed Where Damages Furnish Adequate Remedy. — A court of equity will not entertain jurisdiction for the specific performance of an agreement respecting personal property where compensation and damages furnish a complete and adequate remedy.

4. SPECIFIC PERFORMANCE — Personal Property Contracts — Enhancement in Value Insufficient to Give Jurisdiction. — The simple fact that personal property has enhanced in value does not give equity jurisdiction to specifically enforce the contract of sale of such property.

5. SPECIFIC PERFORMANCE — Personal Property Contracts — Necessity for Proof of Irreparable Injury. — A complainant must not only allege, but must prove, irreparable injury before he is entitled to specific performance of a contract of sale of personal property.

6. SPECIFIC PERFORMANCE — Personal Property Contracts — Purchase of Property at Sheriff's Sale — Increase in Value Not Proof of Irreparable Damage — Case at Bar. — In the instant case, the highest bidder at a sheriff's sale of personal property distrained for rent failed to make payment and the property was advertised for resale. Appellant then [Page 43] notified the sheriff that the bidder at the first sale had assigned his bid and interest in the property to appellant, who tendered the sheriff the amount bid for the property, plus interest and the costs incurred. The sheriff refused to accept payment and the property was resold, appellant declining to bid at the resale. Appellant then filed a bill praying that the sheriff be required to accept the bid made at the first sale, and that he be required to deliver to appellant the property. It was alleged that because of the national emergency the property had increased greatly in value.

Held: That the fact that the property had increased in value did not prove that appellant had suffered or would suffer irreparable damage so as to entitle him to specific performance of the contract.

7. SPECIFIC PERFORMANCE — Discretion of Court. — The specific performance of a contract is not a matter of absolute right but rests in a sound judicial discretion.

8. SPECIFIC PERFORMANCE — Good Faith — Necessary Showing by Complainant. — In order for a litigant to avail himself of the extraordinary remedy of specific performance, he must show that he has been able, ready, prompt, eager and willing to perform the contract on his part. He must not have remained quiet or held himself aloof so as to enforce or abandon the contract as events might prove advantageous.

9. SPECIFIC PERFORMANCE — Purchase of Personal Property at Sheriff's Sale — Want of Diligence and Good Faith — Case at Bar. — In the instant case, the highest bidder at a sheriff's sale of personal property distrained for rent failed to make payment and the property was advertised for resale. Appellant then notified the sheriff that the bidder at the first sale had assigned his bid and interest in the property to appellant, who tendered the sheriff the amount bid for the property, plus interest and the costs incurred. The sheriff refused to accept payment and the property was resold, appellant declining to bid at the resale. Appellant then filed a bill praying that the sheriff be required to accept the bid made at the first sale, and that he be required to deliver to appellant the property. The bidder at the first sale did not inform the sheriff that he had sold his bid until thirty-three days after default, and on three or four occasions when payment was demanded, he promised to settle promptly and did not keep his promise. The trial court dismissed the bill.

Held: No error.

Appeal from a decree of the Circuit Court of Pulaski county. Hon. J. S. Draper, judge presiding.

Affirmed.

The opinion states the case. [Page 44]

C. C. Daniels and J. P. Saul, Jr., for the appellant.

W. H. Calhoun and V. M. Sowder, for the appellees.

HUDGINS, J., delivered the opinion of the court.

Maurice H. Neumuller and Laura Neumuller, landlords, caused certain culm coal and machinery owned by the Hard Coal Mines, Inc., tenants, to be distrained for rents due and in arrears. J. L. Childress, sheriff of Montgomery county, pursuant to the levy, offered the property for sale at auction on September 27, 1941, in Christiansburg. The property was cried out to W. L. McClung of Salem for $5,100. On the request of the bidder and with the consent of the attorney for the landlords, the sheriff gave McClung a few days in which to pay the amount bid. The sheriff's repeated demands upon McClung for payment were unavailing. Finally, on October 10, he notified McClung that unless payment was made by October 13 he would resell the property. Hearing nothing from the purchaser, the sheriff advertised the property for resale on October 31, 1941. On October 30, 1941, J. P. Saul, acting as attorney for Acton Griscom, to whom McClung claimed he had assigned his bid and interest in the property, tendered the sheriff $5,100, plus interest from September 27, 1941, and all costs incurred by delay in payment and in readvertising the property for sale. The sheriff, with the consent of the attorney for the landlords, refused to accept payment and sold the property as advertised.

On the day of sale and just before bidding began, Keith K. Hunt, another attorney for Acton Griscom, notified the crowd assembled that Acton Griscom, as an assignee of L. McClung, claimed the property by virtue of the sale to McClung on September 27, and that Griscom would pursue his claim for the property against any purchaser whose bid was accepted on that day. After this statement was read, the property was offered and Maurice Neumuller bid $5,000 for it. Mr. Hunt, when requested by the sheriff to make a [Page 45] bid on the property, declined to do so, stated that the property belonged to his client and again offered the check to pay for it. Thereupon Mr. Maurice Neumuller jumped his own bid to $5,200 and the property was cried out to him.

Acton Griscom, as assignee of McClung, filed his bill in chancery praying that the sheriff be required to accept McClung's bid of $5,100 made at auction on September 27, 1941, and that he be required to deliver to him the property levied upon and advertised for sale. The trial court denied appellant the relief prayed for and dismissed the bill. From that decree Acton Griscom, as assignee, obtained this appeal.

[1] Appellant contends that this is not a suit for the specific performance of an executory contract because, when the property was cried out to the highest bidder, nothing remained to be done except for the bidder to pay the cash and the sheriff to deliver the property. The mere statement of appellant's claim clearly demonstrates that the contract between the parties was executory and not executed. It is true that at the fall of the hammer the contract was complete. An executory contract is “one in which a party binds himself to do, or not to do, a particular thing, whereas an executed contract is one in which the object of the agreement is performed and everything that was to be done is done.” 12 Am. Jur. 507.

[2] The legal effect of the highest bid at the sheriff's sale was a promise on the part of the bidder to pay the sum bid and a promise on the part of the sheriff, after he accepted the bid and knocked the property down at the auction sale, to deliver the property advertised to the bidder upon receipt of payment. The contract remained executory as to each party until his promise was fulfilled.

Appellant states in his brief that "on a sale under execution * * * the purchaser is on all-fours with a purchaser at a judicial sale after the court has confirmed the sale." This is quite true. Judge Burks the elder, in Hurt v. Jones, 75 Va. 341, 347, states that, on default of a bidder after the sale has been confirmed, "the proceeding to enforce payment, whether by bill, or in the more summary way, by rule, is [Page 46] substantially a proceeding for the specific performance of a contract."

The allegations and prayer of complainant's bill clearly reveal that he was proceeding on the theory that he was entitled to specific performance of a contract of sale of personal property. This fact is emphasized in that part of his bill in which it is alleged that the property levied on "has peculiar and unusual value at this time by reason of the National Emergency, and your Orator has a ready market for the sale thereof not ordinarily available, but existing now by reason of the National Defense Program in which the said Culm Coal can be used by the Government and its agencies in its National Defense Program."

[3] It is apparent that this allegation was made to bring the case within the exception to the general rule that a court of equity will not entertain jurisdiction for the specific performance of an agreement respecting personal property where compensation and damages furnish a complete and adequate remedy.

[4] While the sheriff admitted in his answer that the culm coal, by reason of the national emergency, did have unusual value and alleged that a greater part of this value accrued between the time of the first sale and the date of tender, neither side introduced evidence tending to show any peculiar or unusual value of the property in question. The only effect of the allegation and the admission is to establish the fact that the national emergency had created a demand for this particular class of property and its market value had been greatly enhanced. But the simple fact that personal property has enhanced in value does not give equity jurisdiction to specifically enforce the contract of sale of such property.

Judge Crump, speaking for the special court in Walker v. Henderson, 151 Va. 913, 931, 145 S.E. 311, said: "The remedy of specific performance, however, when the transfer of personal property is sought, is rarely allowed by a court of equity." [Page 47]

Appellant further contends that title to the property passed to him when the sheriff accepted his bid, that the sheriff retained possession of the property as security for the payment of the purchase money, and that, while the sheriff did not specifically notify him that the resale was at his risk, Code, sec. 6492*, imposes this liability upon him.

Conceding that the statutory provisions require the resale to be made at the risk of the highest bidder at the first sale, still appellant's remedy at law is adequate. He could have seized. the property in an action of detinue and, thus, in a common law action had his right to possession determined.

[5, 6] In Langford v. Taylor, 99 Va. 577, 580, 39 S.E. 223, it is held that a complainant must not only allege, but must prove, irreparable injury before he is entitled to specific performance of a contract of sale of personal property. The only allegation tending to prove irreparable damage was that the property had increased in value. This fact, if true, does not prove that appellant has suffered or will suffer irreparable damage.

Even if it be conceded that the allegations of complainant's bill and the admission in respondents' answer are sufficient to show that the property in question has a peculiar value and that complainant's remedy at law is not adequate, Still he is not entitled to specific performance of his contract on the evidence introduced.

[7, 8] No principle of equity is more generally approved than that the specific performance of a contract is not a matter of absolute right but rests in a sound judicial discretion. In order for a litigant to avail himself of this extraordinary remedy, he must show that he has been able, ready, prompt, eager and willing to perform the contract on his [Page 48] part. He must not have remained quiet or held himself aloof so as to enforce or abandon the contract as events might prove advantageous. Chilhowie Iron Co. v. Gardiner, 79 Va. 305; Powell v. Berry, 91 Va. 568, 22 S.E. 365; Showalter v. Hambrick, 2 Va. Dec. 402, 25 S.E. 102; Gish v. Jamison, 96 Va. 312, 31 S.E. 521; Adams v. Hazen, 123 Va. 304, 96 S.E. 741; Scott v. Albemarle Horse Show Ass'n, 128 Va. 517, 104 S.E. 842; Dyer v. Duffy, 39 W. Va. 148, 19 S.E. 540, 24 L.R.A. 339; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 44 S.E. 433, 97 Am. St. Rep. 1027.

The uncontradicted evidence in this case shows that W. L. McClung, assignor of appellant, was insolvent, and that he did not inform the sheriff that he had sold his bid to a responsible party until 33 days after default. On each of the three or four times that the sheriff demanded payment, McClung promised to settle promptly. Each of these promises was broken. He was not able, prompt or eager to perform the contract on his part. He trifled with the sheriff in the matter of paying the purchase price and delayed tender of payment for an unreasonable length of time. Such conduct, if approved, gives an irresponsible party, at a cash sale under execution, time to speculate on his bid at the expense of other interested parties. A court of equity responds only to conscience, good faith and reasonable diligence.

[9] We find no error in the decree of the trial court, and it is affirmed.

Affirmed.

FOOTNOTES

* “If, at any sale by an officer, the purchaser does not comply with the terms of sale, the officer may sell the property, either forthwith or under a new advertisement, or return that the property was not sold for want of bidders. If, on a resale, the property be sold for less than it sold for before, the first purchaser shall be liable for the difference to the

creditor, so far as is required to satisfy him, and to the debtor for the balance. This section shall not prevent the creditor from proceeding as he might have done if it had not been enacted."

183 Va. 42

Flynn v. Great Atlantic Management Co., 246 Va. 93, 431 S.E.2d 327 (1993)

IN THE SUPREME COURT OF VIRGINIA

ROBB FLYNN
v.
GREAT ATLANTIC MANAGEMENT CO., INC.

Record No. 921539
Decided: June 11, 1993

Present: All the Justices

The trial court correctly held that a serviceman was not entitled to have a default judgment set aside pursuant to the Soldiers' and Sailors' Relief Act of 1940 under the circumstances of this case, and that judgment is affirmed.

Practice and Procedure — Default Judgments — Soldiers' and Sailors' Relief Act — Statutory Construction — Landlord and Tenant

The plaintiff was on active duty in the United States Navy when he and two other members of the armed forces rented an apartment from the defendant. He went on leave in mid-December and left money for his share of the rent for January with his roommates, but the rent for January was not paid and a delinquency notice was posted on the apartment door. The lessor filed an unlawful detainer action, returnable on February 1. The plaintiff returned to the area about January 20 and was still there on the return date, but he did not appear when the general district court entered judgment by default against the renters. He went to sea about two weeks later and did not return to the area until more than a month had passed. A writ of possession was executed and the plaintiff's possessions were placed outside the apartment and were taken by unknown parties. The plaintiff sought relief from the default judgment and the writ of possession based on the application of the Soldiers' and Sailors' Relief Act. The trial court denied the motion for relief and dismissed the case with prejudice. The plaintiff appeals.

1. Before a default judgment may be taken against a member of the armed services, 50 U.S.C. APP. § 520(1) (1988) requires that the plaintiff file an affidavit indicating whether the defendant is in the military service and, if so, the court appoints an attorney to represent the defendant and represent his interest.

2. A judgment entered against a person in the military services without the filing of such an affidavit can be set aside and the case reopened if it appears that such person was prejudiced by reason of his military service in making his defense and it appears that the defendant had a meritorious defense.

3. The trial court found that the plaintiff failed to show that he was prejudiced by his military service in making his defense to the unlawful detainer action and correctly refused to vacate the default judgment entered in that action based on application of the Act. [Page 94]

4. The plaintiff was in the area at the time of the return date for the unlawful detainer action and he had found the notice of delinquency posted on the apartment door on his return and negotiated payment of some rent to the lessor.

5. It would be inconsistent to vacate a judgment based on the Act when military service did not prejudice the entry of the judgment in the first place and to apply the provisions of § 520(4) not only to the date on which the default judgment was entered, but to all periods thereafter during which a defendant could file and pursue an appeal or a motion to rehear.

6. The statutory provision in former 50 U.S.C. APP. § 530(1) (1981) is plainly inapplicable to the plaintiff.

Appeal from a judgment of the Circuit Court of the City of Virginia Beach. Hon. A. Bonwill Shockley, judge presiding.

Affirmed.

Charlotte H. Purkey (Sykes, Carnes, Bourdon, Ahern & Shapiro, on brief), for appellant.

Todd M. Fiorella (Paul D. Fraim; Heilig, McKenry, Fraim & Lollar, on brief), for appellee.

JUSTICE WHITING delivered the opinion of the Court.

In this case we determine whether the trial court correctly held that a serviceman was not entitled to have a default judgment set aside pursuant to the Soldiers' and Sailors' Relief Act of 1940, 50 U.S.C. APP. §§ 501-591 (1988) (the Act).

On October 1, 1989, Robb Lee Flynn was on active duty in the United States Navy. He and two other persons, also in the military, rented an apartment from Great Atlantic Agency (lessor) for $535 per month, payable in advance on the first day of each month. In mid-December 1989, Flynn went on leave and left his roommates money for his share of the January 1990 rent. However, the January rent was not paid and, on January 6, the resident manager of the apartment complex posted a delinquency notice on the front door of the apartment.

The rent remained unpaid and the lessor filed an unlawful detainer action, returnable on February 1. Flynn contends that he was unaware this action had been filed. He also maintains that he never saw a copy of the process.

Although Flynn returned from leave about January 20 and was in the Virginia Beach area on February 1, neither he nor the other [Page 95] defendants appeared on the return date when the general district court entered judgment by

default against them for: (1) possession of the premises, (2) the January rent, including 10% late charges, and (3) the lessor's attorney's fees.* Flynn went to sea on February 12 and did not return to the Virginia Beach area until March 16. During this period, the lessor sought and obtained a writ of possession on the judgment. Notice thereof was posted by the sheriff on Flynn's front door on February 14, and the writ was executed on February 26. Because Flynn was not present when the writ was executed, and the other lessees had vacated the premises prior to execution of the writ, Flynn's possessions were placed outside the apartment and were taken by unknown parties.

Flynn subsequently sought relief from the default judgment and writ of possession based on the application of the Act. The trial court denied Flynn's motion for relief and dismissed the case with prejudice. We awarded Flynn an appeal.

[1-2] The Act suspends enforcement of certain civil liabilities of members of the armed services "in order to enable such persons to devote their entire energy to the defense of the needs of the nation." 50 U.S.C. APP. § 510 (1988). Accordingly, before a default judgment may be taken against a member of the armed services, 50 U.S.C. APP. § 520(1) (1988) requires the plaintiff to file an affidavit indicating whether the defendant is in the military service. If the affidavit indicates that the defendant is in the military service, the court appoints "an attorney to represent [the] defendant and defend his interest," and the court is authorized to take further action to protect the defendant's interest. Id. A judgment entered against one in the military without the filing of such an affidavit can be set aside and the case reopened if: (1) "it appears that such person was prejudiced by reason of his military service in making his defense" to the suit; and (2) "it is made to appear that the defendant has a meritorious defense." 50 U.S.C. APP. § 520(4) (1988).

[3] Finding that Flynn failed to show that he was prejudiced by his military service in making his defense to the unlawful detainer action, the trial court refused to vacate the default judgment entered in the unlawful detainer action based on application of this section of the Act. We agree. [Page 96]

[4] Flynn asserts that his military service prejudiced his ability to defend against the unlawful detainer action because he did not receive notice of the action "as he was on leave out of the area at the time it was allegedly served." But Flynn had returned from his leave and was in the Virginia Beach area on February 1, 1990, the return date for the unlawful detainer action. Furthermore, he found the lessor's notice of delinquency posted on the apartment door on his return and negotiated with the lessor regarding resolution of the unpaid rent from the time he returned from leave in mid-January. Any assurances made by the lessor to Flynn that no legal action would be taken were immaterial to the effect Flynn's military service had on his ability to defend against the unlawful detainer action.

[5] Flynn also argues that the provisions of § 520(4) should be construed to apply "not only to the date on which the default judgment was entered, but to all periods thereafter during which a defendant could file and pursue an appeal or a motion to rehear." Under this construction, Flynn maintains that his deployment overseas on February 12, 1990, prejudiced his ability to appeal the default judgment and to avoid issuance of the writ of possession. Flynn cites no cases in support of his construction, and we find none. And, indeed, it would be inconsistent to vacate a judgment based on the Act when military service did not prejudice the entry of the judgment in the first place.

[6] Flynn also contends that the writ of possession should be set aside and his eviction declared improper because another provision of the Act prohibited such evictions when "the agreed rent does not exceed $150 per month [and the premises are] occupied chiefly for dwelling purposes by the wife, children, or other dependents of a person in military service, except upon leave of court." Former 50 U.S.C. APP. § 530(1) (1981). However, this statutory provision is plainly inapplicable to Flynn, because he and the other servicemen were the only occupants of the apartment and, further, they paid a monthly rental in excess of $150.

Accordingly, we conclude that the trial court correctly sustained the lessor's motion to strike Flynn's evidence on the issue of whether the default judgment against him should be set aside. Therefore, the judgment of the trial court will be

Affirmed.

FOOTNOTES

* The lease provided for Flynn's payment to the lessor of a 10% late charge if the rent was not paid on the first of each month, and it also provided for payment of the lessor's attorney's fees in any action to recover delinquent rent.

Flynn v. Great Atlantic Management Co., 246 Va. 93

Narrows Grocery Co. v. Bailey, 161 Va. 278, 170 S.E. 730 (1933)

IN THE SUPREME COURT OF VIRGINIA
STAUNTON

NARROWS GROCERY COMPANY, INC.
v.
R. H. BAILEY AND THE AETNA CASUALTY AND SURETY COMPANY

Decided: September 21, 1933

Present, Campbell, C.J., and Holt, Epes, Gregory and Browning, JJ.

1. EXCEPTIONS, BILL OF — Making of a Bill of Exception a Judicial Act — Identification of the Evidence. — The making of a bill of exception is a judicial act and cannot be delegated. It is essential to the validity of the bill of exception that the trial court must, by proper authentication, identify the evidence adduced at the trial.

2. EXCEPTIONS, BILL OF — Identification of the Evidence — Reference to the Paging of the Transcript — Case at Bar. — In the instant case it clearly appeared that the trial court, at the time of the signing of the bill of exception, had before it the evidence introduced both by the plaintiff and the defendants. The court's reference to the paging of the transcript sufficiently earmarked the evidence “so transcribed and filed” as to make it a part of the record.

3. SERVICE OF PROCESS — Returns of Officer — Duty of Executing Process — Stating Reason for Failure to Execute Process — Case at Bar. — The instant case was an action by plaintiff against a sheriff and his surety. There was a trial by jury which resulted in a verdict for defendants, which verdict was approved by the trial court. There were four assignments of error, but they were so interrelated as to present in fact but one question for decision, viz., the right of action of plaintiff against the sheriff, based upon the invalid returns made by him upon several warrants which the law imposed upon him the duty of executing in a legal and proper manner, or, in lieu thereof, stating the reason for his failure to execute them in the manner required by the statute.

Held: That the judgment of the trial court must be reversed.

4. SHERIFFS AND CONSTABLES — Office of Sheriff — Mandatory Duty of Service of Process. — The office of sheriff is a most important one. Under the provision of section 110 of the Constitution of 1902, a sheriff becomes a constitutional officer. His duties are defined by statute, and, with certain exceptions, the law imposes upon him the mandatory duty of service of process. For a failure to execute a process issuing from a court [Page 279] of competent jurisdiction without legal excuse, the law imposes penalties.

5. SERVICE OF PROCESS — Liability of Sheriff for Failure to Serve Process — Excuse of Illness of Party upon Whom Process Was To Be Served — Case at Bar. — The instant case was an action against a sheriff and his surety for

failure to serve warrants. The defense interposed by the defendants was that the person on whom the warrants were to be served was too ill to warrant service of process upon him. The sheriff testified that he derived his information as to the physical condition of the party upon whom the warrants were to be served from his son. The physician of the party upon whom the warrants were to be served testified, but he was not asked what effect the service of a civil warrant would have had upon his patient. That the party upon whom the warrants were to be served was not, at the time the warrants were delivered to the sheriff, in such a serious physical or mental condition as to warrant apprehension that the service of process would prove fatal, is clearly disclosed by the record.

Held: That the sheriff's excuse for failure to serve the warrants was not a valid one.

6. SERVICE OF PROCESS — Code of 1930, Section 6041 — Modes of Service — Illness. — As set forth, Code of 1930, section 6041, provides for only three modes of service of process upon a defendant, viz., personal service, service by delivering a copy to a member of defendant's family, etc., and by posting a copy of the process. While from a humanitarian viewpoint it seems that the legislature should have provided for a substitute service of process in case of the extreme illness of a defendant, that has not been done, and the court has no power to add to the statute.

7. SERVICE OF PROCESS — Presumption that Sheriff Would Do His Duty. — A party has a right to rely upon the presumption of law that an officer to whom warrants were delivered for service would perform his duty.

8. PUBLIC OFFICERS — Duty of Litigant to Compel Performance of Duty Imposed upon an Officer. — It is not incumbent upon a litigant to compel the performance of a duty imposed by the State upon an officer, but it is incumbent upon the officer to perform such duty in the mode prescribed by law, or else properly account for his non-performance of duty, if he would avoid liability for his misfeasance.

9. SERVICE OF PROCESS — Action against Sheriff for Failure to Perform His Duty — Case at Bar. — The instant case was an action against a sheriff for failure to perform his duty in the service of warrants. That the sheriff did not perform his duty in the service of the warrants was apparent from his return showing an acceptance of service upon a father by his son for the father. That he should have made a true return showing his inability to perform his duty is likewise apparent. Whether [Page 280] or not this latter action would have relieved him of liability it is not necessary to decide.

Error to a judgment of the Circuit Court of Giles county, in a proceeding by motion for a judgment for money. Judgment for defendants. Plaintiff assigns error.

Reversed.

The opinion states the case.

James D. Johnston and Williams & Farrier, for the plaintiff in error.

J. L. Dillow and W. B. Snidow, for the defendants in error.

CAMPBELL, C.J., delivered the opinion of the court.

The defendants in error have moved this court to dismiss this writ of error, granted by one of its justices, and in the petition they allege six grounds to sustain the motion. The first five grounds are so palpably without any merit that we deem it unnecessary to enter upon a discussion of them. The sixth ground relied upon is that the purported evidence is not properly certified by the trial judge.

Bill of Exception No. 1, which was signed by the trial judge within the time prescribed by the statute, reads as follows:

"Be it remembered that, after the jury was sworn to try the issue joined in this cause, the plaintiff to prove and maintain the said issue on its part, introduced the evidence as transcribed by the court reporter, L. D. Wilmore, and shown on pages 1 to 13 inclusive in the said evidence so transcribed, and filed as part of this Bill of Exception.

"And the defendant to prove and maintain the said issue on his part, offered to introduce and did introduce the following evidence, as transcribed by said court reporter, [Page 281] and embodied therein, beginning at the bottom of page 13, and extending to the top of page 33, and the plaintiff, to further maintain the issue on its behalf, introduced in rebuttal the evidence as shown in the report aforesaid, on pages 33 to 38 inclusive, as transcribed by said L. D. Wilmore, and made part of this Bill of Exception."

Counsel for defendants rely upon Blackwood Coal Co. v. James, 107 Va. 656, 60 S.E. 90, 92; Turner v. Smith, 143 Va. 206, 129 S.E. 367; and Pereira v. Moon, 146 Va. 225, 135 S.E. 672, to sustain their contention.

In the Blackwood Coal Company Case, it appears that the trial court had merely signed a skeleton bill of exception, without in any way identifying the evidence, and had directed the clerk to insert "all the evidence introduced by both plaintiff and defendant as appears from stenographic report of the evidence." This court held there was an entire lack of identification of the evidence, and in affirming the judgment, said: "It is settled practice that the evidence is not a part of the record unless made so by a proper bill of exception. If the evidence is only vouched for by the clerk, it cannot be considered by this court."

In Turner v. Smith, supra, the record disclosed that the purported bill of exception was never signed by the trial judge, but that the evidence was certified by the stenographer who transcribed the same.

In the Pereira Case, the evidence was not in any way authenticated.

[1] This court has repeatedly held that the making of a bill of exception is a judicial act and cannot be delegated. It is essential to the validity of the bill of exception that the trial court must, by proper authentication, identify the evidence

adduced at the trial. West v. Richmond Ry., etc., Co., 102 Va. 339, 46 S.E. 330; Jeremy Improvement Co. v. Commonwealth, 106 Va. 482, 56 S.E. 224, and cases cited.

[2] In the case at bar it clearly appears that the trial [Page 282] court, at the time of the signing of the bill of exception, had before it the evidence introduced both by the plaintiff and the defendants. The court's reference to the paging of the transcript sufficiently earmarked the evidence "so transcribed and filed" as to make it a part of the record.

The motion to dismiss will be overruled.

The facts are as follows: Plaintiff was engaged in the wholesale grocery business at Narrows, Virginia. Floyd W. Gearheart and his son, N. D. Gearheart, during the year 1928, conducted a retail store in Narrows, under the firm name and style of F. W. Gearheart & Son. The firm, on sundry occasions, purchased from plaintiff goods and merchandise amounting to the sum of $907.08, and in payment gave to plaintiff a series of notes maturing weekly. Gearheart and Son defaulted in the payment of the notes and they were placed in the hands of two justices of the peace for collection. Warrants were issued by the justices against the Gearhearts, beginning on April 20, 1928, and at times up to and including July 11, 1928. Eleven warrants were delivered to R. H. Bailey, sheriff of Giles county, to be served. Bailey executed the first warrant issued and made return thereon as follows: "Executed on the 20th day of April, 1928, within Giles county, by delivering a copy of the within to N. D. Gearheart in person and N. D. Gearheart accepting service for F. W. Gearheart, F. W. Gearheart being sick in bed and too bad to be served." However, on May 30th, Bailey, sheriff, served a warrant on each of the Gearhearts as shown by this return: "Executed on the 30th day of May, 1928, by delivering a copy of the within to N. D. Gearheart and F. W. Gearheart in person." The other warrants show this return: "Executed within the county of Giles by delivering a copy of the within to N. D. Gearheart in person and N. D. Gearheart accepting service for F. W. Gearheart."

Judgments were obtained on the respective warrants. [Page 283] At the time the judgments were rendered, F. W. Gearheart was the fee simple owner of valuable real estate situated in Giles county. Subsequent to the rendition of the judgments, F. W. Gearheart & Son made an assignment of all the firm's assets to one Hale, trustee, for the benefit of their creditors. Some time thereafter, F. W. Gearheart departed this life and a chancery suit in the nature of a general creditor's suit was instituted by the Roanoke City Mills and other lien creditors, to subject the lands of F. W. Gearheart to the payment of their debts, the sum realized from the sale of the firm's assets under the assignment being insufficient to discharge the firm's debts. In that suit an account of liens was ordered. The commissioner reported the judgments in favor of Narrows Grocery Company as prior liens upon the real estate of F. W. Gearheart.

Exceptions were filed to the report by the subsequent judgment creditors, on the ground that the judgments of the Narrows Grocery Company were invalid, by reason of the invalid and illegal service of process on F. W. Gearheart. The chancellor sustained the exceptions, and as a result thereof, Narrows Grocery Company lost their claim against F. W. Gearheart & Son, as N. D. Gearheart was insolvent and the estate of F. W. Gearheart was insufficient to discharge the indebtedness of the firm. Thereupon, the plaintiff in error filed its notice of motion for judgment against Bailey and his surety, The Aetna Casualty and Surety Company — surety upon the official bond of Bailey.

There was a trial by a jury, which resulted in a verdict for the defendants.

This writ of error challenges the action of the court in entering judgment upon the verdict of the jury.

[3] There are four assignments of error, but they are so interrelated as to present in fact but one question for decision, viz., the right of action of plaintiff against Bailey, sheriff, based upon the invalid returns made by him upon the several warrants which the law imposed upon him [Page 284] the duty of executing in a legal and proper manner, or, in lieu thereof, stating the reason for his failure to execute them in the manner required by the statute.

[4] The office of sheriff is a most important one. In 2 Virginia Law Reg.(N.S.) 669, there is an illuminating treatise dealing with the advent of that functionary known as the sheriff, which occurred when William the Conqueror found himself military master of Britain. In the hands of the sheriff was placed the royal writ, and service by him was essential to jurisdiction by the King's court.

Under the provision of section 110 of the Virginia Constitution, the sheriff becomes a constitutional officer. His duties are defined by statute, and, with certain exceptions, the law imposes upon him the mandatory duty of service of process. For a failure to execute a process issuing from a court of competent jurisdiction without legal excuse, the law imposes penalties.

Section 6020 of the Code, as amended by Acts 1928, ch. 394, places a warrant and notice in the same category, so far as service is concerned, and by section 6041 of the Code, it is provided that a notice may be served by delivering a copy thereof in writing to the party in person; or, if he or she be not found at his or her usual place of abode, by delivering such copy and giving information of its purport to a member of his or her family above the age of sixteen years; or, if neither he, she nor such member of the family be found at the defendant's usual place of abode, then by leaving such copy posted at the front door of said place of abode.

By a further provision of section 2825, it is made the mandatory duty of the sheriff to make a true return upon the process, showing the day and manner of executing the same.

[5] The defense interposed by the defendants was that F. W. Gearheart was too ill to warrant service of process upon him in person. The court permitted Bailey to testify that he derived his information as to the physical [Page 285] condition of F. W. Gearheart from his son, N. D. Gearheart; and that he was warned by the son not to serve the warrant upon his father.

Over the objection of plaintiff, Dr. Newton, a witness for the defendants, was permitted to testify that he began treating F. W. Gearheart in January, 1928, and continued to visit him periodically until his death on January 4, 1929. During the process of his examination, Dr. Newton stated:

“Q. Did you have occasion to attend Mr. F. W. Gearheart during his illness in the year 1928?

"A. Yes, sir.

"Q. Over what period of time would you say that was?

"A. I went in on January 16th with Dr. Caudill, seeing the patients he was going to turn over to me, Mr. Gearheart was one of them.

"Q. What was his physical condition, Dr. Newton?

"A. At that time he was partly bedfast, he spent part of the day in his chair, but to my knowledge, he did not leave the room from the time I started treating him until his death on January 4, 1929.

"Q. Doctor, just what was the trouble with him?

"A. First, his age; he was suffering from senility, hypertension, and chronic nephritis, and a chronic prostate disease. All these were in rather the advanced stage, and as in the case with most people in that condition, he showed symptoms of mental deterioration."

It is a pregnant fact that the physician was not asked what effect the service of a civil warrant would have had upon the patient. That F. W. Gearheart was not, at the time the warrants were delivered to Bailey, in such a serious physical or mental condition as to warrant apprehension that the service of process would prove fatal, is clearly disclosed by the record.

On August 2, 1928, F. W. Gearheart executed the deed of assignment heretofore mentioned. On August 10, 1928, F. W. Gearheart accepted service of a warrant upon which judgment was obtained. Again, on August 13th, [Page 286] he accepted service of three other warrants. The fact that F. W. Gearheart did not depart this life until January, 1929, is conclusive that the acts performed by him in August did not hasten his death.

So far as the record shows, Bailey, though a resident of Narrows, did not interview the attending physician relative to the physical condition of F. W. Gearheart. He merely accepted the statement of the son that the father was too ill to be served with process.

[6] As set forth, Code, section 6041, provides for only three modes of service of process upon a defendant, viz., personal service, service by delivering a copy to a member of defendant's family, etc., and by posting a copy of the process. From a humanitarian viewpoint, it seems that the legislature should have provided for a substituted service of process in case of the extreme illness of a defendant. However, that has not been done. It being the province of the legislature to define the method of service of process, and it having done so, this court has no power to add to the statute.

[7] It may be true that if the sheriff had made inquiry of the attending physician, and if advised that the defendant's condition was such as to endanger his life if unduly harassed, and had then made a return based upon such a state of facts after due notice to the plaintiff, he would have been absolved of liability. Until such a state of facts was brought home to the plaintiff, it had the right to rely upon the presumption of law that the officer would perform his duty. Rowe v. Hardy, 97 Va. 674, 34 S.E. 625, 75 Am. St. Rep. 811.

[8] It is not incumbent upon a litigant to compel the performance of a duty imposed by the State upon an officer, but it is incumbent upon the officer to perform such duty in the mode prescribed by law, or else properly account for his non-performance of duty, if he would avoid liability for his misfeasance.

[9] That Bailey, sheriff, did not perform his duty in the service of the warrants is apparent from his return [Page 287] showing an acceptance of service by N. D. Gearheart for F. W. Gearheart. That he should have made a true return showing his inability to perform his duty is likewise apparent. Whether or not this latter action would have relieved him of liability it is not necessary to decide.

Our conclusion is that Bailey was derelict in the performance of his duty, whether we view the case from a legal or a humanitarian standpoint.

The judgment will be reversed and annulled, and this court will enter a judgment in favor of the Narrows Grocery Company, Inc., against R. H. Bailey and his surety, The Aetna Casualty and Surety Company, in the sum of $907.38, with interest thereon from the 10th day of December, 1930.

Reversed.

EPES, J., dissenting.

Narrows Grocery Co. v. Bailey

Commonwealth v. Malbon, 195 Va. 368, 78 S.E.2d 683 (1953)

IN THE SUPREME COURT OF VIRGINIA
RICHMOND

COMMONWEALTH OF VIRGINIA, AT RELATION
OF J.E.C. DAVIS, AND OTHERS
v.
C. ROGER MALBON, SHERIFF OF PRINCESS ANNE COUNTY.

Record No. 4104.
Decided: November 30, 1953.

Present, Hudgins, C.J., and Spratley, Buchanan, Miller, Smith and Whittle, JJ.

(1) Public Officers — Proceeding to Remove — Character Evidence Admissible.

(2) Public Officers — Statutory Grounds for Removal Exclusive.

(3) Public Officers — Proceeding to Remove — Degree of Proof Required.

1. Defendant sheriff was cited, and correctly exonerated by the jury, on an order to show cause why be should not be removed from office on complaint filed by citizens of his county under Code § 1950, section 15-501 alleging that he had knowingly and wilfully neglected to perform his official duties in that he had allowed open and notorious gambling and sale of intoxicating liquor. In such proceeding evidence offered by defendant of his reputation for truth and veracity and for honesty in enforcement of the law was highly relevant and properly admitted.

2. Since a proceeding to remove a public officer is highly penal, the controlling statute must be strictly construed; and it would be improper to instruct the jury as to any ground of removal not specified in the statute, Code § 1950, section 15-500.

3. The proceeding being highly penal in nature, the burden was upon the Commonwealth to prove by clear and convincing evidence that defendant sheriff was guilty of the statutory ground of removal alleged; and no presumption could be indulged, as urged by the Commonwealth, that he had knowledge of violations of law if the jury believed such violations were a matter of general public knowledge. [Page 369]

Error to a judgment of the Circuit Court of Princess Anne county. Hon. R. Watson Sadler, judge designate presiding.

Affirmed.

The opinion states the case.

James G. Martin & Sons, M. Earl Woodhouse and Robert Lee Simpson, for the plaintiff in error.

William L. Parker and Richard B. Kellam, for the defendant in error.

HUDGINS, C.J., delivered the opinion of the court.

J. E. C. Davis, and thirteen other citizens of Princess Anne county, filed a complaint, under Code sec. 15-501, in which it was alleged that, "C. Roger Malbon is Sheriff of Princess Anne county, Virginia, and during his present term of office as such Sheriff he has been and is guilty of malfeasance, misfeasance, incompetency and gross neglect of official duty in his office as said Sheriff, and has knowingly and wilfully neglected to perform duties enjoined upon such Sheriff by law of this State, and should be removed from said office on the following grounds and for the following reasons, occurring during his present term of office as said Sheriff, to wit:

> "1. He has permitted and allowed open and notorious gambling and sale of intoxicating liquor contrary to law and gambling and sale of intoxicating liquor which could have been easily prevented by him had he performed his duties during the months of July, and August, 1952, at the following places in said county.

The complaint then enumerated twelve designated places in Virginia Beach and in Princess Anne county. The prayer of the complaint was "that said C. Roger Malbon be removed from said office pursuant to law." [Page 370]

On this complaint a rule was issued requiring the sheriff to show cause, if any he could, why he should not be removed from office. The case was docketed under the style of the Commonwealth of Virginia at relation of J. E. C. Davis and others, vs. C. Roger Malbon, Sheriff, defendant. A judgment was entered on the verdict finding defendant not guilty. From that judgment this writ of error was allowed.

The resident judge, Honorable Floyd E. Kellam, disqualified himself from presiding and thereupon Honorable R. Watson Sadler, judge of the Corporation Court of the city of Charlottesville, was designated to preside at the trial. Paul W. Ackiss, Attorney for the Commonwealth of Princess Anne county disqualified himself from prosecuting and thereupon M. Earl Woodhouse was appointed to represent the Commonwealth.

There is no substantial conflict in the testimony though there is sharp difference of opinion as to the inferences that may be drawn therefrom. The Commonwealth introduced twenty-seven witnesses, each of whom testified that on several occasions in July and August, 1952, he or she visited one or more of the twelve establishments named in the complaint and observed flagrant violations of the gambling laws and the illegal sale of intoxicants. Some of the witnesses participated in the gambling games and some bought and drank intoxicants by the glass. None of the witnesses had any trouble getting into the different establishments or in drinking and gambling therein. Indeed, several

of the witnesses said they saw a number of people, variously estimated at ten to fifty persons, in various rooms participating in, or observing others playing roulette, dice, bingo, skillo or fortune.

Many of the establishments named in the complaint are within the corporate limits of Virginia Beach, a city of the second class. Others are outside the city in the county of Princess Anne. However, under the statute, Code sec. 15-94, Virginia Beach must be considered, for the purpose [Page 371] of this case, as a part of the county and within the jurisdiction of the sheriff of the county.

Virginia Beach has a normal population of approximately 5,500, but during the summer months this population is increased by fifty to one hundred thousand visitors. It has a city manager under whose supervision there is a police department with a chief of police and nineteen police officers who work on eight hour shifts, twenty-four hours a day.

The population of Princess Anne county is between fifty and sixty thousand. The board of supervisors employs an executive secretary and has created a police department with a chief of police and twelve full time employees, all of whom are appointed upon request and recommendation of the board. Each is subject to removal for cause. “All police officers appointed under this act, including the chief of the department, shall be conservators of the peace in the county, and shall be charged with the enforcement throughout the confines of the county of all criminal laws of the State and all local ordinances.” Chapter 21, Acts of 1944, Code sec. 15-574.

The sheriff is an officer of the court subject to its orders and directions. He is also a conservator of the peace and charged with the enforcement of all criminal laws within his jurisdiction. It is his duty, as well as the duty of the other police officers of the county and city, to investigate all violations of law and to serve criminal warrants.

C. Roger Malbon, as sheriff, employs eight deputies, four of whom are jailers and radio dispatchers; another is investigator for the Attorney for the Commonwealth. He and his deputies are charged with serving all civil processes for the circuit and trial justice courts. Ninety-five percent of his time and his deputies' time is consumed in attending court, executing orders of the court and serving civil process. While he and his deputies cooperate with the police officers of the county and city, he has no supervision or control over their activities.

The creation of two separate and distinct police departments [Page 372] in his county, one in Virginia Beach and the other in the county, does not relieve the sheriff of his duty to enforce the criminal laws of the State within his county. However, in the absence of evidence to the contrary, he has a right to assume that the regular police officers of the police departments are performing their duties in enforcing the criminal laws. 80 C. J. S., Sheriffs and Constables, § 42(c) p. 213. On the other hand, if he knows that any such officer is deliberately ignoring or permitting violations of law, it is his duty to take proper steps to prevent and suppress such violations and prosecute the violators.

There are five military establishments in Princess Anne county with a military population exceeding twenty thousand. Each of these establishments has its own military police.

The sheriff testified, and his testimony is not contradicted, that he actively cooperated not only with the local police officers but with the military police, with inspectors of the Alcoholic Beverage Control Board, and with the State police in efforts to enforce the criminal laws within his jurisdiction. Numerous arrests had been made both in the city and in the county, but it was difficult to get convictions of illegal sales of intoxicants unless definite proof of a consummated sale was obtained. Neither he nor the other officers received any cooperation or help from the parties who frequented gambling places and nip joints. These establishments usually maintained "spotters" on the outside who warned the operators of the approach of policemen, so that frequently when the police entered, the whiskey had been destroyed and gambling paraphernalia had been removed or hidden.

The sheriff further testified that in his efforts to obtain evidence against the violators of the criminal laws, numerous search warrants had been issued but even then some delay had been encountered in gaining entrance to the different establishments; and that in order to reduce such delays to a minimum, the board of supervisors, at his request, [Page 373] had adopted an ordinance prohibiting the various clubs and establishments from the use of locked doors. Notwithstanding this fact, many of the establishments maintained "spotters" who gave warning of an officer's approach so that it was still difficult to obtain sufficient evidence to secure convictions.

J. E. Moore, chief of police of Princess Anne county, testified he had sometime employed undercover men to investigate violations of law in the various nip joints in the county, but it was difficult even then to get sufficient evidence to make arrests or obtain convictions, since the "spotters" soon learned the identity of the undercover men and gave warning of an officer's approach or presence in the vicinity. He said, "It is quite a problem to police those places. If you concentrate on one place it will close for a while and maybe open under different management or maybe move, and then you have trouble to locate them again." This officer said that from June 19th to August 20th, his force investigated in the county 1,424 complaints, made 424 arrests and issued 158 summons for violations of law.

Reeves E. Johnson, chief of police of Virginia Beach, testified that in July and August, 1952, his department in Virginia Beach investigated 1,556 complaints and made 926 arrests. Most of the arrests were for violation of the traffic laws and other laws of the Commonwealth. Between forty and fifty arrests were made for violation of the gambling laws and twenty-two were for illegal sale of intoxicants.

J. Wilcox Dunn was the only one of the twenty-seven witnesses who testified that he gave the sheriff any information about violations of the law known to have occurred at any of the establishments named. This witness said he informed defendant that a friend of his had lost a considerable sum of money gambling at Piney Point. He stated that his language to the sheriff was: "Frankly, it had to do with two $500.00 checks and three $200.00 chips which [Page 374] had not been collected. The checks were paid out, but whether they were cashed or not, I could not tell you. The party came from Richmond down to Piney Point on Saturday night of Memorial Day weekend, and the call came to me Monday following, and I am reporting this to you to let you know it appears to be a job of work for the Sheriff." Later he asked the sheriff what he had done about it and the sheriff replied, "I don't know anything about it." The witness replied, "It appears to me it's your job to know something about it."

The sheriff testified that Dunn did tell him about a friend losing money at Piney Point but that Mr. Dunn declined to give him the name of the party who signed the checks or to give him the cancelled checks or to give any other information about the alleged loss. The sheriff said that on the morning following the conversation with Dunn, he reported the matter to the police of the county and ask them to investigate Piney Point. So far as he knew the officers were unable to obtain any evidence of gambling there.

[1] The defendant over the objection of the Commonwealth introduced 43 witnesses who testified that his reputation for truth, veracity, and honesty in enforcement of the law was good.

The Commonwealth's first contention is that this is a civil proceeding and therefore evidence tending to show the character of defendant was not admissible.

Courts have no inherent power to remove a public officer from office. Their authority is derived entirely from the provisions of the pertinent statutes, Code sec. 15-500 and 15-501. In some jurisdictions such proceedings are held to be civil, while in others they are regarded as criminal, or quasi criminal in nature. “Such statutes will be construed to conform to the legislative intent to provide a speedy remedy for the removal of corrupt and unfaithful officials, but where they may be considered penal in nature they are to be strictly construed.” 67 C. J. S. Officers, § 67 (a) 288. [Page 375]

In 43 Am. Jur., Public Officers, § 226, p. 59, it is said: “The proceeding has been characterized as a special proceeding — a proceeding sui generis. The proceeding prescribed is in some states regarded as being criminal or as quasi criminal in nature, and in others as partaking of the nature of a civil action or proceeding, and an action at law. The courts differ in this respect even in regard to actions under similar statutes.”

The proceeding in Warren v. Commonwealth, 136 Va. 573, 118 S.E. 125, under the same statute as is involved in this case, was to remove the commissioner of revenue of the city of Hopewell from office. There it was held that since the proceeding was quasi criminal in nature the court had no authority under Code sec. 8-352 to set aside a verdict and enter final judgment as in civil cases. At page 594 it was said: “From the language of the revisors' note, and the use of the technical terms ‘civil action’ in the statute, we think that the statute means to embrace only private personal actions, and not such a quasi criminal statutory proceeding as that before us, which is not a private or personal action — is not purely private or civil — but one which is primarily public in its nature, which although not a criminal case is one highly penal in its nature, and one in which the Commonwealth is the party plaintiff.”

The Commonwealth in Wray v. Commonwealth, 191 Va. 738, 62 S.E.(2d) 889, instituted an action for the forfeiture of an automobile seized while illegally transporting intoxicants. The Commonwealth introduced evidence over the objection of Wray, the owner of the car, tending to prove that Wray was an habitual bootlegger and similar evidence with respect to some of his associates. On the question of admissibility of this evidence the court speaking through the late Mr. Justice Gregory said: “We think the Attorney General, in his brief, effectively disposes of the question of the reputation of Wray and others for being bootleggers. It is true that over the objection of the defendant Wray evidence was introduced to the effect that his reputation was [Page 376] that of one trafficking in whiskey, and likewise the same

evidence was given as to some of his associates in this matter. It must be noted that this is not a criminal procedure, but is one of a civil nature. In civil matters the reputation of the litigant may be shown where it is pertinent to the issue. Certainly, in a case involving illegal transportation of alcoholic beverages and the knowledge, consent and connivance of the owner of a car in its use for such purposes, the question of whether or not he bore the reputation of being a bootlegger, and those with whom he associated also bore that reputation, is relevant to the issue and may be shown. In support of this premise, see Chrysler Roadster v. Commonwealth, 152 Va. 508, 147 S.E. 243, a case in which the confiscation of an automobile was involved, and the reputation of the owner of the car and members of his family as being engaged in the illegal handling of whiskey was presented to the Court."

The vital issue before the jury in this case was whether the sheriff had knowingly and wilfully refused or neglected to perform his duties. This necessarily involved an attack on his official integrity which made character evidence admissible. It would be highly inconsistent to hold that character evidence is admissible to prove that the owner of an automobile had knowledge of its illegal use in transportation of ardent spirits and that such evidence is inadmissible to show the reputation of a public official charged with knowingly and wilfully neglecting to perform his official duties. Evidence as to these traits of character is relevant and has probative value. We, therefore, find no reversible error in the admission of evidence tending to prove the character of defendant.

Usually the number of witnesses permitted to testify as to reputation is within the sound discretion of the trial court. However, the court in exercising its discretion should permit only a reasonable number of witnesses to testify on this one issue. Too many witnesses (43 in this case) unnecessarily prolong the trial and tend to turn the case into a popularity [Page 377] contest, which is contrary to the impartial administration of justice.

[2] The Commonwealth's second contention is that the trial court erred in refusing to give the following instruction:

> "The Court instructs the jury that if they believe from the evidence that the defendant did not use reasonable diligence to prevent gambling and unlawful sale of intoxicating liquor in Princess Anne county, including Virginia Beach, it is the duty of the jury to find for the plaintiff."

As heretofore stated, this court has held a proceeding to remove a public officer to be "highly penal in nature" and hence the statute must be strictly construed. Code sec. 15-500 states eight specific grounds of misconduct for which a public officer may be removed from office, only five of which are pertinent to this case, namely: malfeasance, misfeasance, incompetency, gross neglect of official duty, or knowing or wilful neglect to perform any duties enjoined upon such officer by law of this State. Failure to "use reasonable diligence to prevent gambling and unlawful sale of intoxicating liquor" is not one of the grounds included in the statute and it would have been improper for the court to add another ground to those enumerated by giving the instruction requested.

[3] The Commonwealth's third contention is that the trial court erred in refusing to give the following instruction:

> "The Court instructs the jury that if they believe from the evidence that gambling and illegal liquor sales in Princess Anne county, including Virginia Beach, was a matter of general public knowledge, then the defendant is presumed to have had such knowledge."

There is no error in the refusal of the court to give this instruction. The burden was upon the Commonwealth to prove by clear and convincing evidence that defendant had knowledge of the flagrant violations of law and that he wilfully neglected to perform his duties in regard thereto. "Knowledge" was an essential element of proof on this [Page 378] part of the Commonwealth's case. Proof that a number of people knew of such violations is not sufficient, standing alone, to bring home to the defendant knowledge of such violations. It was within the province of the jury to find that defendant did have such knowledge, but there was no presumption of the fact that he did.

The presumption sought to be established by the instruction is a presumption of fact and not one of law. "As a general rule a court will always instruct a jury with reference to presumptions of law, but it will ordinarily not instruct a jury with reference to presumptions of fact, for this would be obviously an encroachment on their province, they being the judges of fact." 7 M. J., Evidence, sec. 18, p. 349.

The Commonwealth's next contention is that the court erred in giving the following instruction for defendant.

> "The Court instructs the jury that the defendant is presumed as a matter of law, to be innocent of the charges contained in the complaint and this presumption of innocence must be overcome by a preponderance of affirmative evidence, and must be such as to satisfy the minds of the jury that he is guilty of one or more of the charges mentioned in the complaint."

The Commonwealth's objection to this instruction is thus stated: "This instruction puts the case almost, if not entirely, on the footing of a criminal case, required more than a preponderance of the evidence."

A very similar instruction was approved in Rudlin v. Parker, 186 Va. 647, 43 S.E.(2d) 918. In that case Parker instituted an action for damages against his employer for discharging him without cause. The employer defended the action on the ground that Parker was discharged because he made an assault upon a female patient. In approving the instructions, the court at page 653 said. "Certainly to sustain such a charge the duty was upon the defendant to do so by clear and satisfactory evidence. Courts always indulge a presumption that one is innocent of a crime charged against [Page 379] him whether it be upon a criminal prosecution or in a civil action in which the defense is based upon a crime."

This proceeding being "highly penal in nature," the burden was upon the Commonwealth to prove by clear and convincing evidence that defendant was guilty of one or more of the charges enumerated in the statute, and set forth in the complaint.

In 67 C. J. S. Officers, sec. 67 (a) p. 292, it is said, “The evidence in support of the complaint must be clear and convincing. In a proceeding to remove an officer for intoxication, the evidence should be scrutinized carefully lest the act in question be utilized as a mere means of petty persecution.”

The essence of the charges is that defendant was guilty of gross neglect of duty and knowingly and wilfully neglected to perform his official duties in preventing certain violations of law within his jurisdiction. Twenty-seven respectable citizens of the county testified that at various times in July and August 1952, they observed flagrant violations of gambling laws and numerous illegal sales of intoxicants at the places named in the complaint. Only one of these witnesses notified defendant of these violations and none offered him any assistance in obtaining evidence of such violations.

Defendant denied the charges and stated that he had used his honest efforts to prevent all violations of law and to obtain evidence to convict all such violators known by or reported to him. The evidence shows how active he and other police officers in the area had been in arresting and prosecuting violators of the criminal law. He put his character in issue by introducing a large number of respectable citizens of the county who said that his reputation for truth and veracity was good, as was his reputation for honesty in enforcement of the law. This good reputation was not challenged. A jury, likewise composed of the citizens of the county, after duly weighing the evidence for the Commonwealth and defendant under proper instructions of the court, [Page 380] found as they had a right to find from the evidence, that defendant was not guilty of any of the charges made against him. This verdict was approved by the trial judge who heard the witnesses testify and observed their demeanor while on the stand and therefore was in a better position to pass on the merits of the case than are the members of this court. We find no reason to disturb the finding of the jury or the action of the court.

Judgment is affirmed.

Affirmed.

Commonwealth v. Malbon

Palmer v. Owens, 19 Cir. L154619 (1998)

VIRGINIA: IN THE CIRCUIT COURT OF FAIRFAX COUNTY

WALTER PALMER
v.
EDWIN OWENS

At Law No. 154619
Decided: March 30, 1998

COUNSEL

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LETTER OPINION BY JUDGE DENNIS J. SMITH:

The Defendant, Edwin A. Owens, filed a Motion to Quash Service of Process and to Dismiss by way of Special Appearance of Counsel. The Defendant presented affidavits for the Court to consider, without objection, and the matter was argued. The Court held the matter open for submission by the Plaintiff of an affidavit regarding his attempts at locating the defendant, and the Court considered such affidavit, again without objection. The Court then took the matter under advisement.

In his Motion, the Defendant contends that the Service of Process effected through the Commissioner of the Department of Motor Vehicles, (DMV), is invalid as since August, 1996, the Defendant has been a resident of Virginia, and no basis existed for service through DMV in July, 1997. Specifically, the defendant asserts that § 8.01-316c is inapplicable as the basis for service through DMV under the holding in Dennis v. Jones, 240 Va. 12 (1990), which he

characterizes as "(process held by sheriff for eight days and returned unfound deemed insufficient to comply with subsection 8.01-316c)."

In Dennis, the Richmond Sheriff was given the process 8 days before the return was filed, and the return recites as follows:

> Front door kept locked — unable to enter for service. Name not listed on outside directory. One source states, the mail box for #1 is completely full of mail, appears no one has picked up for 10 days plus."

In this case, the request for service by the Sheriff was filed April 18, 1997, issued April 22, 1997, received by the Sheriff on April 23, 1997, so it was certainly held by the Sheriff for less than 21 days. The Sheriff's return indicated a service attempt on April 23, 1997, when the Defendant was not found, and the Sheriff included on the return a notation "moved per current resident." This is distinguishable from the service in Dennis. After an unsuccessful attempt to serve papers, and receipt of information that the party does not live at the address provided for service, the Sheriff is not required to continue making futile attempts to serve for the entire 21 day period. Accordingly, § 8.01-316c applies, the issuance of an Order of Publication would be proper, and therefore service through the Commissioner of the Department of Motor Vehicles was proper.

The defendant has also asserted that § 8.01-316b may not be relied upon by the Plaintiff to support service through DMV as the Plaintiff has not established that a factual basis exists for his assertion in his affidavit for service on the Commissioner of DMV that he exercised diligence to ascertain the location of the party to be served. The Court finds factually that Mr. Hassan exercised diligence in attempting to locate the Defendant after the Sheriff was unable to serve him at the last known address. As stated in Dennis, supra, "(t)he noun "diligence" means `devoted and painstaking application to accomplish an undertaking.' Webster's Third New International Dictionary 633 (1981)." Id., at 19. Unlike Dennis, counsel in this case made a formal request of the Post Office for a change of address notification and was informed that there was no forwarding address, and from May to August, 1997, counsel utilized Internet services to check for new address or telephone listings for the Defendant without success. This is due diligence as required by § 8.01-316b, and would allow issuance of an Order of publication, therefore service through the Commissioner of the Department of Motor Vehicles was proper.

For the foregoing reasons, the Motion to Quash Service of Process and to Dismiss is denied. Mr. Hassan is directed to prepare an appropriate Order and submit it to Mr. Fudala for review and endorsement. Either counsel may set forth on the Order any exceptions they may have to the Court's rulings. The Order should be submitted to my chambers after endorsement by both

counsel. The case is placed on my docket for 10:00 a.m. on April 10, 1998, for entry of the Order in the event that a fully endorsed Order is not submitted prior to that time.

Palmer v. Owens, 19 Cir. L154619

Wheeler v. City Corp., 156 Va. 402, 157 S.E. 726 (1931)

IN THE SUPREME COURT OF VIRGINIA
RICHMOND

A. S. J. WHEELER AND AETNA CASUALTY
AND SURETY COMPANY OF HARTFORD, CONN.
v.
CITY SAVINGS AND LOAN CORPORATION

Decided: March 19, 1931

Present, Prentis, C.J., and Campbell, Holt, Epes and Hudgins, JJ.

1. EXECUTIONS — Chattel Mortgage — Sale of Property Under Execution Upon which there is a prior Mortgage — Common Law. — At common law, personal property subject to a mortgage lien could not be sold on an execution against the mortgagor because it was said the legal title was not in him.

2. EXECUTIONS — Chattel Mortgage — Sale of Property Under Execution Upon which there is a Prior Mortgage — Under Section 6486 of the Code of 1919 — Case at Bar. — By the express terms of section 6486 of the Code of 1919 it is the duty of the officer to levy on personal property notwithstanding it may be subject to a mortgage or other lien, and if the lien is due, sell the property under the execution and pay the prior lien before applying any of the proceeds of sale to the execution debt, or, if the lien is not due, sell the property levied on subject to such lien. In the instant case the officer seems to have sold the property in question free of any liens.

3. EXECUTIONS — Indemnifying Bond — Conditional Sales Contract — Claim of Execution Creditor and Claim of Prior Lienor — Action by Claimant Under Prior Lien Against Officer and His Surety — Case at Bar. — In the instant case the question at issue was whether or not a party who claimed a prior lien on personal property sold under an execution had a right to maintain an action against the officer on his official bond, where the officer had taken a proper indemnifying bond with good surety. By the sale under the execution, the security for the payment of the debt of appellee, who held a mortgage upon the property, had been changed from an interest in specific personal property to a money demand. By the failure of the execution creditor to disclose his contention that the lien claimed by appellee was invalid and the action of the officer in disposing of the proceeds of sale before appellee had time to institute interpleader proceedings, appellee had no opportunity to test the validity of its lien, to which it was certainly entitled. [Page 403]

Held: That appellee was barred by section 6155 of the Code of 1919 from pursuing the property in the possession of the purchaser at the execution sale, and his remedy was not against the officer and his surety but against the obligors on the indemnifying bond.

4. SHERIFFS' SALES — Indemnifying Bond Under Section 6155 of the Code of 1919. — By his act in giving an indemnifying bond under section 6155 of the Code of 1919, the creditor agrees to save the officer harmless from the claims of any third party, and when the officer takes from an execution creditor the proper indemnifying bond with ample security and then proceeds to sell and pay the money received to the execution creditor, he has discharged his duties to all parties.

Error to a judgment of the Corporation Court of the city of Hopewell, in a proceeding by motion for a judgment for money. Judgment for plaintiff. Defendants assign error.

Reversed and action dismissed.

The opinion states the case.

Nathaniel Stuart Nelson, for the plaintiffs in error.

Harry L. Snead, for the defendant in error.

HUDGINS, J., delivered the opinion of the court.

The City Savings and Loan Corporation of Petersburg, Virginia, claims a lien by virtue of a recorded conditional sale contract wherein title to a Chrysler coupe, owned by W. A. Pendleton, was retained until the sum of $306.00 was paid. Subsequent to the recordation of the contract in the clerk's office of the Corporation Court of Hopewell, W. B. Nelson caused to be delivered to A. S. J. Wheeler, sergeant of the city of Hopewell, an execution issued on a judgment obtained by him against W. A. Pendleton. The sergeant levied the execution on the coupe in possession of W. A. Pendleton. The City Savings and Loan Corporation notified the sergeant of its prior [Page 404] claim on the coupe and stated that it had no objection to sale under the execution provided its debt was paid out of the proceeds. A few days thereafter the execution creditor delivered to the sergeant an indemnifying bond, which bond seems to have been duly returned to the proper clerk's office. Within two weeks the coupe was sold by the sergeant under the execution. The City Savings and Loan Corporation, on the day of sale, demanded that its lien be paid by the sergeant out of the proceeds of sale, and for the first time it was informed that the execution creditor contended that the lien claimed by the City Savings and Loan Corporation was invalid. Over the protest of the City Savings and Loan Corporation the sergeant applied the entire proceeds of sale of the execution debt without giving it an opportunity to institute interpleader proceedings. The City Savings and Loan Corporation thereupon began this action against the sergeant and

the surety on his official bond to recover the amount due it under the above mentioned conditional sales contract, and obtained a judgment therefor.

There are numerous assignments of error, the arguments in the briefs are somewhat confusing, but in our view of the case, it is only necessary to consider the one question, whether or not a party who claims a prior lien on personal property sold under an execution has a right to maintain an action against an officer on his official bond, if the officer has taken a proper indemnifying bond with good surety.

[1] At common law, personal property subject to a mortgage lien could not be sold on an execution against the mortgagor because it was said the legal title was not in him. See 1 Minor's Institutes, 1018; 11 Am. & Eng. Encl. Law, 642; Burks' Pleading and Practice (2nd ed.), 641; 10 R.C.L. 1377; 23 C.J. 349; Claytor v. Anthony, 6 Rand. (27 Va.) 316; Coutts v. Walker, 2 Leigh (29 Va.) 268.

[2] By the express terms of section 6486 (Code) it is the duty of the officer to levy on personal property notwithstanding it may be subject to a mortgage or other lien, and if the [Page 405] lien is due, sell the property under the execution and pay the prior lien before applying any of the proceeds of sale to the execution debt, or, if the lien is not due, sell the property levied on subject to such lien. The officer in the instant case seems to have sold the coupe free of any liens.

[3, 4] After the sale the officer was between two fires. The holder of the conditional sales contract and the execution creditor each demanded that he pay them the money realized by the sale. It was not his duty to decide the merits of the claims between the contending parties. The City Savings and Loan Corporation finally modified its request by urging that the officer pay no one until the contentions could, by appropriate proceedings, be decided by the court. The execution creditor not only demanded the money, but it had indemnified the officer by giving him a bond in the penal sum of double the value of the property levied on and sold, conditioned not only to protect the officer from any damage he might sustain, but to pay any claimant of such property all damages he might sustain by reason of the seizure and sale, and to warrant and defend the title in the purchaser at the execution sale. By the sale under the execution, the security for the payment of the debt due the City Savings and Loan Corporation had been changed from an interest in specific personal property to a money demand. Under the circumstances the City Savings and Loan Corporation is barred by section 6155 from pursuing the property in the possession of the purchaser at the execution sale. By the same act, namely, the giving of a proper indemnifying bond, the execution creditor has agreed to save the officer harmless from the claims of any third party. By the failure of the execution creditor to disclose his contention, namely, that the lien claimed by the City Savings and Loan Corporation is invalid, and the action of the officer in disposing of the proceeds of sale before the claimant had the time to institute interpleader proceedings, it has had no opportunity to test the validity of its lien. It is [Page 406] certainly entitled to its day in court. The question is, against whom must it proceed?

The purpose of an indemnifying bond is to relieve the officer of liability not only from the seizure and sale of property claimed by a third party, but in paying proceeds from the sale of such property to the execution creditor. The execution creditor is the interested party. He demands that the officer proceed; the sale is for his benefit. If the officer

takes from him the proper indemnifying bond with ample security and then proceeds to seize, sell and pay the money received to the execution creditor, he has discharged his duties to all parties.

It is obvious that the interest of the City Savings and Loan Corporation in the coupe or its proceeds is included in the provision of that part of section 6156, which reads:

"Upon any such bond as is mentioned in this or the preceding section, an action may be prosecuted in the name of the officer for the benefit of the claimant, creditor, purchaser, or other person injured."

In the instant case no objection is raised to the form of indemnifying bond or to the sufficiency of the surety. It follows that by the express terms of section 6155 the right of the defendant in error to maintain this action against the officer is barred, and its right of action, if any, is against the obligors in the indemnifying bond.

In deciding the issue between the parties to this action, we have not passed upon the validity of the lien claimed by the City Savings and Loan Corporation. That question may arise between parties who are not now before the court. It being the duty of this court to enter such judgment as the trial court should have entered, an order will be entered here reversing the judgment complained of and dismissing the action.

Reversed and action dismissed.

Wheeler v. City Corp., 156 Va. 402

Manufacturers Hanover Trust Co. v. Koubek, 240 Va. 276, 396 S.E.2d 669 (1990)

IN THE SUPREME COURT OF VIRGINIA

MANUFACTURERS HANOVER TRUST COMPANY
v.
VLASTIMIL KOUBEK, ET AL.

Record No. 891549
Decided: September 21, 1990

Present: Carrico, C.J., Compton, Stephenson. Russell, Whiting, and Lacy, JJ., and Cochran, Retired Justice

The trial court's ruling that the execution sale of items of personal property from a hotel in Richmond was conducted in accordance with Virginia law is reversed because the parties imposed conditions on the sale which resulted in the elimination of potential bidders and the predetermination of the sale price, thereby changing the nature of the sale from a public auction to a private sale. The sale is set aside and the case remanded for further proceedings.

Creditors' Rights — Sales — Public Auctions — Statutory Construction (Code § 8.01-492) — Notice Requirements

Defendant obtained a default judgment against the owner of a hotel for architectural services rendered in the renovation of the building. To enforce the judgment, the defendant delivered a writ of fieri facias to the sheriff directing him to levy against furnishings in the hotel, which included several thousand pieces of furniture, a marble statute of Thomas Jefferson, grand pianos and an oil painting. The furnishings were already encumbered by another security interest, junior to the defendant's (held by plaintiff here), and by a possessory interest held by the lessee of the hotel. The defendant and the hotel tenant reached an agreement on the method by which they would conduct the execution sale: the hotel tenant agreed to bid approximately the amount of the judgment for the furnishings and, if a third party appeared at the sale, the hotel tenant would purchase the defendant's judgment for that amount. The sheriff posted notice of the sale and it was held in a private room at the hotel. No members of the general public were present at the sale. Pursuant to the agreement, counsel for the hotel tenant purchased the furnishings as a lot, for the amount of the judgment, which was considerably less than their fair market value. Plaintiff learned of the sale less than a month later and filed a suit to prohibit its consummation or to invalidate it on the grounds of inadequate notice and inadequate price. The trial court denied a permanent injunction, ruling that Code § 8.01-492 did not require notice to

be given to the plaintiff, that the posting of notice undertaken by the sheriff complied with the notice provisions of the statute, and, therefore, that the sale could not be set aside. Plaintiff appeals.

1. The notice requirements of Code § 8.01-492 are straightforward and were satisfied when the sheriff posted notice in front of the two courthouses. However, [Page 277] statutory compliance with that requirement does not legitimate an execution sale conducted by a public officer which did not afford the public any opportunity to participate and which distorted the purpose and policy of the statute as reflected in its terms.

2. Anything which tends to prevent competition is likely to produce a sacrifice in the interests of the debtor, and perhaps of both debtor and creditor. Any agreement made between two or more persons to avoid or reduce competition at an execution or judicial sale is treated as fraudulent and void.

3. Here, preclusion of competition was the result specifically sought and achieved by the hotel tenant and the judgment holder. The sale was located in a private room of the hotel and the result was a private sale rather than the "public auction" advertised in the sheriff's notice.

4. Code § 8.01-492 requires a public sale conducted in a manner which will attract multiple bidders in order to achieve the best price possible for the goods sold. Here the nature of the process changed from a public auction to a private sale which failed to comply with the express terms of the notice and violated both the language and policy of the statute.

Appeal from a judgment of the Circuit Court of the City of Richmond. Hon. Randall G. Johnson, judge presiding.

Reversed and remanded.

Benjamin C. Acklerly (Deborah L. Fletcher; Hunton & Williams, on briefs), for appellant.

Allen S. Rugg (Melrod, Redman & Gartlen, on brief), for appellee Vlastimil Koubek.

Daniel A. Gecker (John S. Barr; Kevin R. Huennekens; Cynthia B. Tripp; Maloney, Yeatts & Barr, on brief), for appellees Jefferson Equities Corporation and Maloney, Yeatts Barr.

No brief or argument for appellees Jefferson Hotel Associates Limited Partnership and Andrew J. Winston.

JUSTICE LACY delivered the opinion of the Court.

In this appeal, we decide whether an execution sale of certain items possessed by a judgment debtor was conducted in accordance with Virginia law.

In June of 1988, Vlastimil Koubek obtained a default judgment against the owner of the Jefferson Sheraton Hotel in Richmond, Jefferson Hotel Associates Limited Partnership (the hotel owner), in the amount of $113,923.02 plus interest for architectural services rendered in the renovation of the hotel. To enforce the judgment, [Page 278] Koubek delivered a writ of fieri facias to the Richmond City sheriff directing him to levy against certain furnishings in the hotel, including a marble statue of Thomas Jefferson, a Henri Bernard painting, two Yamaha grand pianos, and various room furnishings (collectively, the furnishings). At the time of the levy, the furnishings were also encumbered by a security interest, junior to Koubek's lien, held by Manufacturers Hanover Trust Company (Manufacturers Hanover) and by a possessory interest held by the lessee of the hotel, Jefferson Equities Corporation (the hotel tenant).

The hotel tenant filed a motion to quash Koubek's levy on the ground that the levy interfered with its possessory rights under its lease. Although aware of this proceeding, Manufacturers Hanover did not participate. The trial court denied the motion to quash and authorized the sale of the furnishings, subject to the hotel tenant's possessory interests under the hotel lease. The trial court recognized that publicity surrounding a public sale could have an adverse impact on the hotel tenant's business and stated in its May 19, 1989 opinion and order that the circumstances did

> warrant some special accommodation with respect to the manner and contents of any advertisements, the time and conduct of prospective purchasers' inspections, and the manner of the actual sale itself. Accordingly, counsel for the parties are requested to confer with each other in an attempt to work out the details of the items just mentioned, and to arrange a hearing with the court during the week of June 1, to present a plan for the advertisement, inspection, and sale contemplated herein or, in the absence of agreement between the parties, to present their respective positions with regard to those matters.

Koubek and the hotel tenant did reach an agreement on the method by which they would conduct the execution sale: the hotel tenant agreed to bid $115,000 for the furnishings and, if a third party appeared at the sale, the hotel tenant would purchase Koubek's judgment for $115,000. There is no indication that this agreement was presented to the court for review at a hearing during the week of June 1, as had been directed in the opinion.1 [Page 279]

The sheriff posted notice of the sale at two courthouses in Richmond. The sale was held in a private room at the hotel at 10:00 a.m. on June 29, 1989. The only parties present at the sale were: the representative of the sheriff's office who conducted the sale; George T. Ross, a general partner of RWS Associates, the entity which had assumed the hotel owner's indebtedness to Manufacturers Hanover; Gecker, counsel for the hotel tenant, RWS Associates, and Ross; and Allen S. Rugg, counsel for Koubek. Pursuant to the agreement, Gecker purchased the furnishings as a lot for $115,000 on behalf of an entity he called Jefferson Properties Corporation.2

Manufacturers Hanover learned of the sale on July 5, 1989, and filed this suit to prohibit consummation of the sale or to invalidate it on the grounds of inadequate notice and inadequate price. The trial court held an expedited hearing on July 11, 1989, and granted Manufacturers Hanover's request for a temporary injunction.

On September 6, 1989, the court held an evidentiary hearing at which time Manufacturers Hanover requested issuance of a permanent injunction or decree invalidating the sale, arguing, inter alia, that "if the sale is had in such a way that a Sheriff's sale becomes a private sale, then the sale is subject to attack as an improper sale." It urged that "what we had here was a private sale where the parties intentionally, without representing fully what they were doing to this Court, conducted a private sale with intent to exclude known parties in interest from attending the sale . . . ."

The trial court, however, denied the injunction, ruling from the bench that Code § 8.01-492 did not require notice to be given to Manufacturers Hanover, that the posting of notice undertaken by the sheriff complied with the notice provisions of that statute, and, therefore, the sale could not be set aside. We awarded Manufacturers Hanover an appeal.

On appeal, Manufacturers Hanover again argues that the execution sale violated Code § 8.01-492 because it was conducted as a "secret sale" and such a sale runs afoul of the policy behind the [Page 280] statute, which requires an open and public sale.3 Conversely, the hotel tenant and Koubek argue that the sheriff complied with the plain meaning of the statute in conducting the sale and, therefore, the trial court properly held that the sale was valid.

Code § 8.01-492 provides, in pertinent part:

> In any case of goods and chattels which an officer shall distrain or levy on, otherwise than under an attachment, or which he may be directed to sell by an order of a court, unless such order prescribe a different course, the officer shall fix upon a time and place for the sale thereof and post notice of the same at least ten days before the day of sale at some place near the residence of the owner if he reside in the county or city and at two or more public places in the officer's county or city. . . . At the time and place so appointed, such officer shall sell to the highest bidder, for cash, such goods and chattels, or so much thereof as may be necessary.

[1] The notice requirements of this statute are straightforward and were satisfied when the sheriff posted notice at the two courthouses, two public places in the City of Richmond. Koubek and the hotel tenant argue that this statutory compliance legitimates an execution sale conducted by a public officer which, by private agreement did not afford the public any opportunity, much less a meaningful opportunity, to participate. This argument frustrates the purpose and policy of the statute as reflected in its terms.

[2] It is axiomatic that execution sales conducted by public officers under judicial process to effectuate a legal right are public sales. The policy underlying this presumption was articulated long ago and remains valid today:

> Execution sales are required to be made at public auction, and after due notice, in order that competition may be produced, and the property of the debtor be sold at its market value. Anything which tends to prevent this competition is likely to produce a sacrifice of the interests of the debtor, and perhaps of both debtor and creditor. It is also against public policy, and highly immoral, and whenever discovered will be [Page 281]

> stamped with marks of disapproval, both at law and in equity. Any Agreement made between two or more persons to avoid or reduce competition at an execution or judicial sale is treated as fraudulent and void.

Freeman, 2 Law of Executions, § 297, at 1714 (3d ed. 1900).

[3] Code § 8.01-492 affirms this policy by directing the officer to sell the items "to the highest bidder."4 That language contemplates a competitive environment with more than one bidder. Competitive bidders may or may not materialize for any given set of sale items, but they clearly will not materialize when all buyers but one are precluded from participation in the sale. However, preclusion of competition was the result specifically sought and achieved by the hotel tenant and Koubek in this instance.

Initially, at the urging of the hotel tenant, the sheriff agreed to forego the customary, although not required, practice of advertising execution sales.5 The sheriff's notice, posted at the two courthouses, advertised a "public auction."6 Yet, the sale in this case was not conducted in a public area of the hotel; it was held in a private room in the hotel. These circumstances effectively limited the number of bidders and resulted in a private sale rather than the "public auction" advertised in the sheriff's notice.

Furthermore, the parties agreed that the sale price would be "the minimum bid" of $115,000 and that, if anyone else appeared to bid, the hotel tenant would purchase Koubek's judgment rights against the hotel owner for $115,000, an amount less than the value of the judgment. While the extent to which the sheriff's office was apprised of the complete agreement is unclear, the sheriff was aware of the $115,000 minimum bid agreement and that the procedure of sale would be altered if anyone other than the parties to the agreement were present at the sale. [Page 282]

[*4] **Code § 8.01-492 requires a public sale conducted in a manner which will attract multiple bidders to achieve the beat price possible for the goods sold. Here, the parties imposed conditions on the sale in which the sheriff acquiesced, resulting in the elimination of additional bidders and the predetermination of the sale price. Consequently, the nature of the process changed from a public auction to a private sale which failed to comply with the express terms of the stated notice, and violated both the language and policy of the statute.** Accordingly, we will reverse the judgment of the trial court, set the sale aside, and remand the case for further proceedings.

Reversed and remanded.

FOOTNOTES

1 A conference call regarding the notice of the sale was instituted at the request of the sheriff's office. The court, the sheriff's office, and counsel for the hotel tenant and Koubek participated. Daniel A. Geeker, counsel for the hotel tenant, testified that the chilling effect of a "minimum bid" was discussed during the call.

2 The parties' stipulation of facts states that, at the time of trial, Jefferson Properties Corporation was not yet formed, but would be a Virginia corporation owned by the same persons who own the hotel tenant.

3 Manufacturers Hanover assigns other errors to the trial court's ruling which we need not address in light of our holding.

4 Manufacturers Hanover argues that the sheriff violated the statute by selling the furnishings at a price far below their obvious value. However, in addition to noting that the value of the furnishings was affected by the tenant's lease, we agree with the observations of the trial court that the sheriff is not in the appraisal business and should not be expected to make value judgments as to whether items are bringing a sufficient price. Under the competitive bidding process contemplated by the statute, that price would be set by the market.

5 This concession was secured after a conference call with the trial court in which the court agreed that the sheriff need only comply with the statute.

6 The notice stated that the sale would be held at 10:00 a.m. on June 19, 1989, at the Jefferson Sheraton Hotel, Franklin and Adams Street.

Manufacturers Hanover Trust Co. v. Koubek, 240 Va. 276

Edmunds v. Gwynn, 157 Va. 528, 159 S.E. 205 (1932)

IN THE SUPREME COURT OF VIRGINIA
WYTHEVILLE

T. W. EDMUNDS, MRS. SALLIE D. EDMUNDS, HIS WIFE,
AND EDMUNDS HOSPITAL, INC.
v.
RICE GWYNN

Decided: June 18, 1931

Present, Prentis, C.J., and Holt, Epes, Hudgins and Gregory, JJ.

On rehearing, Richmond, January 14, 1932

Present, Campbell, C.J., and Holt, Epes and Hudgins, JJ.

1. FRAUD AND DECEIT — Proof of Fraud — Fraud Must be Clearly Proven — Circumstantial Evidence — Case at Bar. — Fraud must be clearly proven, but proof of necessity is frequently circumstantial. In this cause it has been established and the final judgment of the chancellor, setting aside a sale for fraud, was supported by the evidence.

2. AUCTIONS AND AUCTIONEERS — Employment of Puffers or By-Bidders as Fraud — Proof of Fraud — Case at Bar. — The instant case was a suit for specific performance against the vendee at an auction sale. The vendee filed a cross bill praying that the contract be cancelled because puffers or by-bidders were used. The prayer of the cross bill was granted.

Held: That in the instant case the sale was tainted by puffing or by-bidding, and that the decree of the chancellor was supported by the evidence.

3. VENDOR AND PURCHASER — Representations by Vendor — Reliance by Vendee on Representations. — The buyer of property has the right to rely upon representations made by the seller, with reference to the property, which from their nature might induce the buyer to enter into the contract on the faith of them, and evidence of the seller that the purchaser did not rely upon such representations must be of the clearest and most satisfactory character, in order to rebut the inference that the buyer did rely upon such representations.

4. AUCTIONS AND AUCTIONEERS — Employment of Puffers or By-Bidders — Rescission of Sale. — The employment of a puffer is illegal and constitutes sufficient ground for the avoidance or rescission of a sale, irrespective of whether such employment was merely for the purpose of preventing a sacrifice of the property or for the purpose of enhancing the price above the true value thereof. It makes no difference that such puffer or by-bidder was employed to

prevent a sacrifice of the [Page 529] property and was directed to bid it to a fixed price only; nor does it make any difference that the property only sold at a reasonable price.

5. AUCTIONS AND AUCTIONEERS — Puffers or By-Bidders — Rescission of Sale — Case at Bar. — A vendee at an auction sale who has shown that puffers or by-bidders are employed has made out a case, and he who seeks to uphold a contract so tainted has upon him the burden of showing that by-bidding did not actually affect the sale. In the instant case the property in question was first offered separately and then as a whole. Appellee's, the vendee's, bid for the whole was based upon the sum of fictitious bids for the separate lots. Of course the bids of the puffers or by-bidders affected the sale, as appellee had to go above them to get the property. Vendee's rights were not changed by the fact that the property may have been worth all he gave for it.

6. AUCTIONS AND AUCTIONEERS — Puffers or By-Bidders — Rescission of Sale — Statement by Purchaser that He was Satisfied — Case at Bar. — In the instant case vendee at an auction sale sought to have the sale rescinded on account of the employment of puffers or by-bidders. The auctioneer testified to a statement of the purchaser after the sale. The statement amounted to no more than a statement by the purchaser to the effect that he then thought he had made a satisfactory bargain and intended to stand by it. At the time he made the statement he knew nothing of the fraud which had been perpetrated upon him. When this knowledge came to him repudiation promptly followed. Whether the price was fair was immaterial, as contracts superinduced by puffing or by-bidding are voidable on account of public policy.

7. AUCTIONS AND AUCTIONEERS — Puffers or By-Bidders — Invalidity of Sale — Failure of Vendee to Testify — Case at Bar. — The instant case was a suit for specific performance against the vendee at an auction sale. The vendee filed a cross bill praying that the contract be cancelled because puffers or by-bidders were used. There was a decree in favor of the vendee. At the trial the vendee did not testify. Had he testified he could have been expected to say no more than that he had bought the property at public auction and thought that he had made a good bargain and was willing to stand by his bargain until he had ascertained that the apparent value had been augmented by puffing.

Held: That the vendee's failure to testify could not alter the conclusion that the sale was void for puffing or by-bidding.

Appeal from a decree of the Corporation Court of the city of Danville. Decree for defendant. Complainants appeal.

Affirmed.

The opinion states the case.

Harris, Harvey & Brown, for the appellants. [Page 530]

Aiken, Benton & Bustard and John W. Carter, Jr., for the appellee.

HUDGINS, J., delivered the opinion of the court.

Complainants filed their bill to compel the vendee to specifically perform an auction sale contract of certain lots and buildings. The respondent answered and filed a cross bill praying that the contract be cancelled and the cash payment of ten per cent on the purchase price be refunded him. From a decree granting the prayer of the cross bill complainants appealed.

The appellants owned five lots, with buildings thereon, fronting on West Main street in the city of Danville. Three of the lots, known as the Edmunds Hospital, the Moorefield House and the Nurses' Home, were located on the north side of the street, and the other lots, called the Herman Home and the Hodges House, were located on the south side of the street, facing the other property. The three lots on the north side of Main street were formerly used in connection with the Edmunds Hospital, but on the day of the sale were vacant, and had been for some time prior thereto.

The owners, desiring to sell the five lots, employed for that purpose the Ben Temple Land Company, a well-known real estate concern that specialized in selling real estate at public auction. The property after being extensively advertised was exposed for sale at public auction in April, 1929. The terms of sale were ten per cent cash, balance to be paid in instalments extending over a period of twelve years, and to be secured by a deed of trust. The parties acting for the selling company on the day of sale were Ben Temple, the auctioneer, who stood on a truck on the street in front of the property, a clerk, L. B. Handy, and three others called “ground men.” The duty of the ground men was to obtain bids on the property from those in attendance [Page 531] and notify the auctioneer when they were successful in so doing. Sometimes the bidders communicated their bids directly to the auctioneer and sometimes through the ground men.

The appellee informed the auctioneer before the sale that he was interested in the three pieces of property on the north side of the street. The auctioneer stated to him that in that event he would first offer these three parcels separately and then together, with the right to accept the highest bid. This method of offering the property was publicly announced. After the three pieces had been offered separately, announcement was made that the combined bids totalled $40,750.00 and that bidding on them as a whole would start at those figures. The appellee bid $41,000.00, the property was cried out to him at that price, he signed the memorandum of sale and paid $4,100.00, the required ten per cent, in cash.

The appellee relies upon the following circumstances to show fraud: The Herman House was cried out to a Mr. Lewis for $12,000.00. He signed the memorandum of sale and gave his check for $1,200.00, but either during the sale or immediately thereafter, with the consent of Dr. Edmunds, the check and memorandum were returned to him. Dr. Edmunds testified that the price of the property was less than he desired and Mr. Lewis was willing to withdraw his offer. There was no sale of this property. Apparently this transaction was bona fide.

When the Hodges lot was offered for sale Julius F. Baum made several bids, his highest and last bid was $8,000.00. The auctioneer continued to cry the property and as Baum was leaving the place of sale it was being cried at $11,000.00, and later he heard that it was knocked out to him at that price. As soon as the hammer fell on this lot a

ground man reported to the auctioneer that it was no sale and the auctioneer "immediately forgot it." Dr. Edmunds [Page 532] and the auctioneer said that there was some mistake about this bidding, but exactly how it occurred they could not say.

Some time after the sale, one of the attorneys employed by the appellee asked the auctioneer, Ben Temple, to give him the names of the parties who had bid upon the three pieces of property separately, stating that he desired to interest them, if possible, in purchasing the property from Mr. Gwynn; to which it is claimed the auctioneer replied that it was useless for him to try to find them, that "whoever bid was simply bidding to protect Dr. Edmunds." The auctioneer denied making this statement, but said he could not remember the names of any of the bidders on the three pieces of property except R. A. James, Jr., and could not recall the amount of his bid nor for which piece of property he was bidding. No memorandum of agreement was signed by any of the parties who made separate bids, and neither the clerk nor the ground men were introduced as witnesses for either side. These facts suggest the effect fictitious bidding has upon an auction sale.

It seems that no cases involving puffing or by-bidding at auction sales have in recent years been decided by this court, although the question has been the subject of much litigation in the other States and in England. Two of the early Virginia decisions deal with the subject. The facts in the case of Hinde v. Pendleton (1799), Wythe 354, were that a by-bidder employed by the auctioneer, without specific authority from the seller, bid on the property offered for sale and thereby caused it to bring more than its true value. The court held that the fictitious bids constituted a fraud upon the real bidder and reduced the price of the property to its actual value as ascertained by the commissioner.

Judge Staples rendered the opinion in the other case of Brock v. Rice (1876), 27 Gratt. (68 Va.) 812, where a judicial [Page 533] sale was set aside because the auctioneer bought the property, claiming to be the agent of a person who was not present. It was said that no person employed or concerned in selling property at a judicial sale should be permitted to become the purchaser, or the agent for one desiring to purchase; that it was the duty of the seller and his employees to obtain honestly the best price possible for the property and if he was interested in purchasing it for himself, or another, his interest and duty alike would prompt him to obtain the property upon more advantageous terms, and there was an irreconcilable conflict between the two positions.

The owner of property has a right to offer it for sale upon such terms, conditions and restrictions as he may elect. When, however, he elects to advertise it for sale at public auction to the highest bidder it is an invitation to all persons to attend and bid therefor on equal terms and is equivalent to a public statement on the seller's part that the sale will be conducted openly, fairly and in good faith toward all parties.

The general rule in the United States Court, and in the majority of the State courts, is that unless the right is reserved in the seller to bid, fictitious bidding by the auctioneer or by any other person acting on behalf of the seller is a fraud on bona fide bidders. Veazie v. Williams, 8 How. 134, 12 L. Ed. 1018; McMillan v. Harris, 110 Ga. 72, 35 S.E. 334, 48 L.R.A. 345, 78 Am. St. Rep. 93; Osborn v. Apperson Lodge, 213 Ky. 533, 281 S.W. 500, 46 A.L.R. 117; note in 131 Am. St. Rep. 479, at page 488; Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332; Peck v. List, 23 W.Va. 338, 48 Am. Rep. 398; 2 R.C.L. 1128; 6 C.J. 833.

As opposed to this rule, it has been said that the property may be sacrificed for want of bidders. The answer to this objection is that the owner may set a specific sum, less than which he will not take, or he may reserve the right and [Page 534] publicly announce that he will bid on the property himself. Strictly speaking, a seller offering to buy his own property occupies an anomalous position. In such a case, however, there is no concealment and the bidders know exactly what to expect. “The whole and the real truth should be stated when the property is offered for sale.” Towle v. Leavitt, 23 N.H. 360, 55 Am. Dec. 195; Bowman v. McClenahan, 20 App. Div. 346, 46 N.Y.S. 945; Latham's Exrs. v. Morrow, 6 B. Mon.(Ky.) 630; Jenkins v. Hogg, 2 Tread. Const.(S.C.) 821; Reynolds v. Dechaums, 24 Tex. 174, 76 Am. Dec. 101; 2 R.C.L. 1131.

One of the difficulties this case presents is raised by the following testimony: The auctioneer, within a day or two after the sale, went to see the appellee, Rice Gwynn, for the purpose of ascertaining just how he desired the deed transferring the property and the deed of trust securing the unpaid purchase price to be prepared. During this interview, Mr. Gwynn told him that he had examined the property before the sale and had bought it cheaper than he had expected. About that time Mrs. Gwynn came into the room and requested Mr. Temple to get Dr. Edmunds to let her husband out of the sale and that Mr. Gwynn said: “When I buy anything I buy it, and I don't want anybody to take it back.”

This evidence is not denied, Mr. Gwynn was not called as a witness, and no attempt was made to meet the situation presented by it. The only inference that can be drawn is that Mr. Gwynn was thoroughly familiar with the property in question; that he had made up his mind before the sale what price he was willing to pay, and that he bought it at the sale cheaper than he had anticipated.

If we assume that there was no mistake, but there was fictitious bidding, on the Hodges lot, the above evidence clearly establishes the fact that it did not influence the appellee in bidding on the three pieces of property.

One of the cases cited and relied upon by the appellee is [Page 535] Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332, where it is said that the ground upon which by-bidding at auction invalidates the sale is that a fraud is practiced upon the purchaser, and that in such a case the burden of proof is upon the party alleging it not only to prove the fraud, but that he was influenced or damaged by it; that there is a presumption that real bidders upon the property are influenced and misled by secret by-bidding. “But this presumption may be rebutted. If the by-bidding had no effect or influence upon the purchaser's bid, the latter cannot avoid his contract. As in other cases where deceit or fraud is used in a sale, the purchaser cannot avoid it if he was not induced or influenced by the fraud to enter into the contract.”

The appellee relies upon a number of Virginia cases holding that this court will not reverse the trial court upon issues of fact unless the finding is against the preponderance of evidence, or without substantial evidence to support it. The trial court in the instant case rendered two opinions. In the first he granted the relief prayed for by the appellants, and in the second he reversed himself and denied relief to the appellants and granted it to the appellee. This shows not only the conscientiousness of the chancellor in the court below, but also that he had decided doubts as to the correctness of his conclusion. We appreciate his difficulty. The case does not present one of determining the credibility of witnesses or a close question of disputed fact. The question is, were fraud and misrepresentation to be presumed against Dr. Edmunds because of the inability of his agent, Temple, to remember the names of the persons who made

the separate bids on the three pieces of property? Dr. Edmunds states positively that he had no by-bidders and knew nothing about any such bids. Mr. Temple is likewise emphatic in stating that he knew of no by-bidding. In its final analysis, the court is asked to cancel a contract on the ground of [Page 536] Temple's failure to remember the names of the bidders and the contradicted statement that he said "whoever was bidding was simply protecting Dr. Edmunds."

We are cited by the appellee to the case of Strickland v. Cantonwine, 140 Va. 193, 124 S.E. 292, and other Virginia cases which hold that a buyer of property has a right to rely upon representations made by the seller which are calculated to induce the buyer to enter into a contract on the faith of them. When such is the case and the seller claims that the purchaser did not rely upon the representations, the burden is upon him to prove by clear and satisfactory evidence that the buyer was not misled thereby.

This rule has no application to the case at bar because the record shows by uncontradicted testimony that the buyer stated in positive terms that he made up his mind prior to the day of the sale the amount he was willing to pay for the property and bought it at a smaller figure. If we assume that there was by-bidding on the property and that by reason of that fact the buyer paid more for the property than he otherwise would have done, the inference is undoubted that he has been misled. In this case, however, the appellee is asking the aid of a court of equity to cancel a contract of sale on the ground of fraud, and the rule is that the proof of fraud must be clear and convincing, and such as to satisfy the conscience of the chancellor, who should be cautious not to lend too ready an ear to the charge. Redwood v. Rogers, 105 Va. 155, 53 S.E. 6; Hutcheson v. Savings Bank, 129 Va. 281, 105 S.E. 677.

The proof of fraud in the present case fails to measure up to this rule. There is no proof, but only an inference, that the appellee relied upon the alleged fraud. There is no proof, but only an inference, that he has been injured, as no evidence was introduced showing the value of the property. There is no proof, but only an inference, that the appellee was influenced or misled by anything that happened at [Page 537] the sale. There is positive and uncontradicted evidence showing that he was present during the entire sale and was an active participant therein, that he examined the property before the sale, exercised his own judgment as to its value and bought it under the sum he thought it was worth. He did not avail himself of the opportunity to take the witness stand and inform the court how and under what circumstances he was misled or injured. There was error in granting the relief prayed for in the cross bill.

The appellee further contends that the complainants did not tender a marketable title to the property, and as a basis for this claim states that there was a wrongful dissolution of the corporation known as the Edmunds Hospital, Incorporated, because the State Corporation Commission entered an order of dissolution upon an order purporting to be by unanimous consent of all the stockholders, and as a matter of fact those signing did not own all of the stock. The chancellor correctly held that the appellee had failed to prove this fact. Even if this finding on the question of fact were not sufficient, the minutes of the stockholders and directors show that on February 12, 1927, all of the stock of the corporation was represented and a sale of the property in the manner prescribed was authorized. The correctness of the minutes was not attacked. It follows that even though all of the stockholders did not consent to the dissolution, the sale of the property was duly authorized by the corporation.

For the reasons stated, the decree complained of is reversed, and the cause remanded to the lower court with direction to enter a decree directing specific performance of the contract of sale set out in appellants' bill.

Note — Accordingly, on the first hearing the case was ordered to be reversed and remanded; Prentis, C.J., and Epes, J., dissenting. [Page 538]

ON REHEARING.

Richmond

January 14, 1932.

Present, Campbell, C.J., and Holt, Epes and Hudgins, JJ.

HOLT, J., delivered the opinion of the court.

This cause, which is reported in ante, page 528, 159 S.E. 206, is not free from difficulty. The chancellor who presided at its trial was first of opinion that the plaintiffs should prevail, but upon more mature reflection reached the conclusion that he was in error, held with the defendant, and granted the prayer of his cross bill. That decree was reversed by this court, two justices dissenting. In the majority opinion the justice now drafting this on rehearing concurred.

The major issue is, was there fraud in the auction sale brought about through puffing or by-bidding? Mr. Temple, the auctioneer, is a man of wide experience, as were his clerk and three "ground men." Their duty was to excite interest among possible bidders, and, in the language of Mr. Temple: "They know their job is not let the man bidding get away from them." The three lots bought by Gwynn lie on the north side of Main street in the city of Danville. In accordance with plans announced they were first offered separately and then as a whole. If the gross bid should exceed the aggregate amount of the separate bids it was to be accepted. Otherwise the separate bids were to hold. When separate bidding was at an end the auctioneer announced that they aggregated $40,750.00, thereupon Mr. Gwynn bid for them as a whole $41,000.00. There was no other bid and they were sold to him.

Temple's evidence is:

"Q. When Mr. Gwynn bid $41,000.00 on the whole, he did it upon the representation that the three pieces had been knocked out at $40,750.00 as a total?

"A. That is right.

"Q. Can you tell us of any bid that was received from [Page 539] anyone up there besides Mr. Gywnn who wanted the property?

"A. As far as I known all that were received were from people who wanted the property.

"Q. Can you give us the name of a single Danville man who bid on any of that property and what his bid was besides Mr. Gwynn?

"A. I cannot on these three pieces."

He does elsewhere say that a Mr. James bid on one or more of these lots but he does not undertake to say what were his bids or that any sales were actually made to him.

Judge Aiken, acting for Mr. Gwynn, went to see Temple. His testimony is:

"According to the best of my recollection, later on that same day, I met Mr. Temple just at the entrance of my office, his office being just a few doors from mine, and he spoke to me and asked me what was the information we wanted about the auction sale. I told him that we wanted the names of the persons who bid on the property, in the hope that we could interest them in relieving Mr. Gwynn of it, and asked him to give me the names. He said it was no use for me to try to find them or see them. I asked him why not. He said: 'Well whoever bid was simply bidding to protect Dr. Edmunds.' I asked him if he meant by this they were bidding without any serious intention of becoming purchasers. He said words to this effect: 'Oh, well, you know how these things are, they were just trying to protect Dr. Edmunds.' He never did give me the names."

Miss Mitchell, an employee of Judge Aiken's law firm, in reply to a question by that gentleman, said:

"Well, I was sitting there typing, and Mr. Temple asked you something about the Edmunds transaction. He had been in several times asking about it. I think he asked you about a letter you had written Mr. Harris the day before. I believe he wanted to know what you wanted to know from [Page 540] Mr. Harris, and you told him you wanted to know the names of some of the bidders of the Edmunds property, so that you could get them to take it off of Mr. Gwynn's hands. I don't recall exactly what the words were he said, but he said they were bidding to protect Dr. Edmunds."

These statements are denied by Mr. Temple. He is deeply interested in this litigation. He is charged with fraud. Judge Aiken has no interest beyond that as counsel for Mr. Gwynn, and Miss Mitchell has no interest at all. Mr. Temple admits that he knows almost everybody in Danville. He says that his experienced ground men are charged with the duty of not letting any bidder get away, and it was the duty of Mr. Handy, the clerk, to make memoranda of what was done. He did not testify, but on the day on which final judgment was entered filed an affidavit. He could recall the name of no bidder, and in it said:

"I, therefore, did not make any inquiry at that immediate moment as to who the purchasers of the separate parcels were but waited until the property as whole was purchased by Mr. Gwynn when I presented to him the contract and closed up that sale. Had I done otherwise, I would have had to go to each one of the separate purchasers and have him sign a contract, receive his deposit and then when the property was sold as a whole I would have had to undo the

contract, and deliver the deposit back. In other words, I did not think it was required or expected that a memorandum of sale would be signed until the sale was a final one." This is not evidence and was offered in extremis.

Here are five men, experienced specialists, two of whom knew the people of Danville, and yet not one of them is able or willing to give us the name of a single purchaser of property which sold for over $40,000.00.

We think Judge Aiken's recollection of this statement made by Mr. Temple is accurate, namely: "Oh, well, you know how those things are. They were just trying to protect Dr. Edmunds." [Page 541]

The sales at the same time of the Herman Home and the Hodges House on the south side of Main street have no direct bearing on the case but do serve in a general way to show what manner of auction it was.

The Herman House was sold to a Mr. Lewis for $12,000.00 but that sale with the consent of Dr. Edmunds was immediately cancelled. For the Hodges House Julius Baum bid $7,500.00 or $8,000.00 and then withdrew. The auctioneer continued to cry this property and as Baum was leaving the place of sale it was being carried at $11,800.00. Later he was surprised to hear that he had purchased it at that price. As a matter of fact one of the ground men told the auctioneer that there was no sale and he "immediately forgot it."

[1, 2] Of course fraud must be clearly proven, but proof, of necessity, is frequently circumstantial. In this cause we think that it has been established and that the final judgment of the chancellor is supported by the evidence.

Having reached the conclusion that the sale was tainted by puffing or by-bidding, we must determine its effect.

[3] "Moreover, in such case it is settled that the buyer of property has the right to rely upon the representations made by the seller with reference to the property which from their nature might induce the buyer to enter into the contract on the faith of them, and evidence of the seller that the purchaser did not rely upon such representations must be of the clearest and most satisfactory character in order to rebut the inference that the buyer did rely upon such representations. Wilson v. Carpenter, 91 Va. 183, 21 S.E. 243, 50 Am. St. Rep. 824; Fitzgerald v. Frankel, supra (109 Va. 603, 64 S.E. 941)." Strickland v. Cantonwine, 140 Va. 193, 124 S.E. 292, 298.

[4] "The great weight of modern authority is to the effect that the employment of a puffer is illegal and constitutes sufficient ground for the avoidance or rescission of a sale, irrespective of whether such employment was merely for [Page 542] the purpose of preventing a sacrifice of the property or for the purpose of enhancing the price above the true value thereof. It is generally recognized that the employment of a puffer to enhance the price of property is not only opposed to the soundest principles of public policy, but that a sale made under such circumstances is a fraud upon the purchaser, and consequently is invalid at law." 2 R.C.L. page 1129; Williston on Sales, volume 1, section 298; 6. C.J. page 833.

"It makes no difference that such puffer or by-bidder was employed to prevent a sacrifice of the property and was directed to bid it to a fixed price only; nor does it make any difference that the property only sold at a reasonable price.

The purchaser in any such case has a right to repudiate the sale, if he does so promptly, as soon as he ascertains that there was such puffer or by-bidder who bid at the sale." Peck v. List, 23 W.Va. 338, 48 Am. Rep. 398.

In Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. page 332, the court said:

"There is some diversity in the decisions as to the circumstances under which by-bidding will invalidate a sale at auction. But it is clear, both upon principle and the weight of the authorities, that when the sale is advertised or stated to be without reserve, the secret employment by the seller of puffers or by-bidders renders the sale voidable by the buyers."

It was there held that this presumption of fraud might be rebutted. But as was said in Strickland v. Cantonwine, supra, the evidence to rebut it must be of the clearest and most satisfactory character.

[5] In other words, one who has shown that puffers or by-bidders are employed has made out a case, and he who seeks to uphold a contract so tainted has upon him the burden of showing that by-bidding did not actually affect the sale. Of course it affected it here. Gwynn's bid was [Page 543] based upon the sum of these fictitious bids. Apparently he had to go above them to get the properties, and his rights are not changed by the fact that they may have been worth all he gave for them. He had the right to start his bid where the sum of separate bona fide bids left off.

Temple gives this evidence as to an interview he had with Gwynn:

"I went up to see Mr. Gwynn myself and he was lying down on the sofa in his living room and began talking to me about the purchase of this property and said he was satisfied and he had gotten it a little cheaper than he expected. He said he had been going over the situation about two weeks and been studying this property that was advertised and being an apartment man he thought he would be interested in turning this property into an apartment and said for the last two weeks he had been going there and looking it over without letting his wife or anybody know; that he did not want anybody to know he was interested in it. About that time Mrs. Gwynn came in and she said: 'Ben, cannot you get Dr. Edmunds to let Rice out of this buy. I believe it is going to worry him?' I said: 'I don't reckon Dr. Edmunds would have sold it if he had wanted to take it back.' Mr. Gwynn said: 'When I buy anything I buy it and I don't want anybody to take it back.' Then he told me how he wanted his deed made out."

[6] This amounts to no more than a statement by this purchaser to the effect that he then thought he had made a satisfactory bargain and intended to stand by it. At that time he knew nothing of the fraud which had been perpetrated upon him. When this knowledge came to him repudiation promptly followed. And, as we have seen, the question of whether or not the price paid was fair is immaterial. Contracts superinduced by puffing or by-bidding are voidable on account of public policy.

[7] It is true that Gwynn did not testify and by way of [Page 544] explanation it is said that he was nervous, emotional and sick. For complainants it is said that he was amply able to attend to business.

Had he gone upon the stand he could have been expected to say no more than this, that he had bought the property at public auction and thought that he had made a good bargain and was willing to stand by his purchase until he had ascertained that apparent value had been augmented by puffing. He could not reasonably be expected to say that he had used knowingly as a basis for his bid, bids which were fictitious and irresponsible and made for the express purpose of running up prices.

The decree of February 3, 1930, from which this appeal is taken must be affirmed and it is so ordered.

Affirmed.

HUDGINS, J., dissenting:

I do not concur in the views expressed in the majority opinion. My views are set forth in the opinion reported in ante, page 528, 159 S.E. 206.

Edmunds v. Gwynn, 157 Va. 528

Smith v. Swoope

United States District Court, W. D. Virginia,
Roanoke Division.
James Lee SMITH, Plaintiff,
v.
M. W. SWOOPE, individually and as Sheriff of Alleghany County, Virginia, Defendant.
Civ. A. No. 71-C-123-R.
Nov. 13, 1972.

Complaint alleging deprivation, under color of law, of plaintiff's rights, privileges and immunities security by the United Stated Constitution. The District Court, Dalton, Chief Judge held that where plaintiff acted in an improper manner at judicial sale of his automobile and was warned several times by both sheriff and auctioneer and his actions chilld the bidding and contempt charge on which plaintiff ultimately was found guilty flowed from same set of actions for which he initially was arrested, there was probable cause for sheriff to make arrest for breaching the peace and interfering with a law enforcement officer in the discharge of his lawful duties and plaintiff was not entitled to recover damages.

Summary judgment granted in favor of defendant and plaintiff's action dismissed.

OPINION AND JUDGMENT

DALTON, Chief Judge.

Plaintiff file this complaint on November 2, 1971 and assets jurisdiction under 42 U.S.C. §§1983 and 1988, alleging the deprivation, under color of law, of his rights, privileges and immunities secured by the United States Constitution. The rights allegedly violated are those guaranteed by the First, Fourth, Fifth and fourteenth Amendments to the Constitution, namely, the right to freedom of speech; the right to freedom of assembly; the right to security of person and freedom from arrest except upon probable cause and with due process of law; and the right not to be deprived of liberty without due process of law. Plaintiff seeks compensatory damages in the amount of $5,000 and punitive damages in the amount of $5,000.

Defendant filed an answer on November 19, 1971, and a demurrer and amended complaint were subsequently filed. Both parties filed motions for summary judgment on October 24, 1972 *161 acknowledging that there is no genuine issue as to any material fact.

FACTS

The case arises because of an alleged false arrest made by Sheriff Swoope on November 2, 1970, at the conclusion of the sale of plaintiff's car at a public auction. The vents leading up to arrest are as follows: On March 31, 1970, the

plaintiff, an engineering student at West Virginia institute of Technology, was returning from spring vacation at his home in Winchester, Virginia to Montgomery, West Virginia. He was operating his 1968 Buick Sport Coup automobile, serial number 446378B111329, after his Virginia operator's license had been revoked in January 1970, because receipt of two speeding tickets within one year.

He was stopped again for speeding near Clifton Forge, Virginia by State Trooper Lee Roy Vess, Jr. And was taken into custody when it was dtermined that he driving on a revoked permit. His care was confiscated in compliance with Sections 46.1-351, 351.1 and 351.2 of the Code of Virginia. On October 7, 1970, the Judge of the Circuit Court of Alleghany County, Virginia ordered that the plaintiff's vehicle be old by the Sheriff of Alleghany County as a public auction and that the net proceeds of the sale, afer all valid liens had been satisfied, be distributed according to law.

The auction took place on November 2, 1970 at 10:00 a.m. at the Alleghany County Courthouse in Covington, Virginia. The plaintiff appeared at the public auction prior to the sale and saw approximately six to ten other people standing there. When the plaintiff arrived at the location and noticed that other prospective bidders were also present, he began communicating with these persons, advising them that he was the former owner of the vehicle to be sold and that it was his intent to reacquire the vehicle. The plaintiff also advised the prospective bidders that he wished that they would not bid on the vehicle in competition with him.

At approximately 10:00 a.m. or shortly thereafter, the auctioneer, Mr. Claude W. Baine, assumed his position and red the Order of the Circuit Court of Alleghany County, dated October 7, 1970, requiring the defendant, as Sheriff of Alleghany County, to offer for sale as public auction the vehicle in question. When he began reading the order, he made a brief pause, and the plaintiff spoke up, identifying himself and requesting that there be no competition when he bid on the vehicle. Also, during the bidding period, the plaintiff approached competing bidders and requested that they not attempt to bid an amount higher than he was bidding. The defendant testified that "he (plaintiff) interrupted the sale on more occasions, and on one occasion, the first time I remember I called him over to the side and I asked him not to do it, that I was holding the sale under a court order." (Page 13). Sheriff Swoope further testified that he again admonished plaintiff "on two or three occasions because he kept interrupting and harassing the folks that were there." (Pages 13 and 14). According to Sheriff Swoope's testimony, Mr. Baine, the auctioneer, was also compelled to admonish the plaintiff several times not to interfere with the auction sale.

Plaintiff bid the highest bid of the day, $850, but Sheriff Swoope and the auctioneer conferred and determined that since the bid was lower than normal, and auction may have been affected by the plaintiff's behavior, the bid would have to be confirmed by the Circuit Court of Alleghany County before the vehicle can be delivered. The auctioneer announced this position and plaintiff, thinking the sale had been completed, began to address the crowd, thanking them and explaining to them the consequences of driving with a revoked license. At this point, Sheriff Swoope placed the plaintiff under arrest and charged him with breaching the peace and also interfering with a law enforcement officer in the performance of his duties.

After the plaintiff's arrest, the Commonwealth's Attorney for Alleghany County served notice upon the plaintiff that on November 3, 1970, the plaintiff should appear and show cause whey he should not be held in contempt of court for

interfering with the judicial sale. The factual circumstances prompting the contempt charge were precisely the same factual circumstances which prompted the defendant to charge the plaintiff with breaching he peace and interfering with law enforcement officer in the performance of his duties. The judge of the Alleghany County Circuit Court heard the charge and found plaintiff guilty of contempt of court. He was fined twenty-five dollars plus costs. Since the plaintiff had been convicted of contempt of court, the Commonwealth's Attorney for Alleghany County elected not to prosecute the charges brought against the plaintiff by the defendant.

By Order of the Circuit Court of Alleghany County dated November 3, 1970, the court ordered that the judicial sale of November 2, 1970 be readvertised and reheld by the Sheriff of Alleghany County, since it appeared that the sale was not proper as a result of the plaintiff's behavior. Pursuant to the order, another sale was held on November 18, 1970, in which the vehicle in question sold for $1,450. Although the plaintiff attended the second sale, there were no further incidents.

JUDGMENT AND OPINION

Plaintiff argues that he was arrested after the sale was concluded, however, the Sheriff states that plaintiff was arrested as the auctioneer was announcing the conclusion of the sale. The court feels that this is a minor matter and would have no bearing on the outcome. The principal question is whether there was probable cause for an arrest. To determine this, the court must consider the entire record.

Plaintiff contend that he spoke to the people gathered at the sale but threatened no one. While he created public sympathy and cause poor bidding, he contends that this no breach the peace or interfere with the Sheriff's duties. The plaintiff contends that he threatened, coerced or abused no one-that he used no violent or vulgar language. He states that the Sheriff arrested and jailed the plaintiff for activities which were constitutionally protected. The activities of plaintiff, as presented by him, did not breach the peace or interfere with the Sheriff's duty, and therefore, probable case or an arrest did not exist.

In *Beauegard v. Wingard, 362 F.2d 901 (9th Cir. 1966), at 903*, the court said "...it should in any event be clear that where probable cause does exist civil rights are not violated by an arrest even tough innocence may subsequently be established." The court further said that even if the arrest was made with actual malice, if probable cause existed, then no civil rights protected by § 1983 could be considered violated.

In *Hebert v. Morley, 273 F.Supp 800 (C.D.Cal.1967)*, the plaintiff was arrested and charged with a criminal offense, tried and convicted, which decision was reversed on appeal. The case was dismissed when it came up for retrial. The court held that despite the dismissal, the plaintiff was deprived of no constitutional or civil rights protected by § 1983 in that probable cause existed at the time of arrest. The court said in *Hebert v. Morley, supra, at 806* "Reasonable or probable cause is shown if a man of ordinary care and prudence would be led to believe and conscientiously entertain an honest and strong suspicion that the accused is guilty."

In *Mueller v. Powell, 203 F.2d 797 (8th Cir. 1953)*, the court generally adhered to the principle that in § 1983 actions, the issue of the lawfulness of the arrest in question is determined under the law of the state in which the arrest is made. The court in Mueller concluded that if the procedure prescribed by the state of Missouri actually affords the character of due process contemplated by the federal constitution, and is followed, there is no denial of the rights under the federal constitution. Referring to decisions of the Virginia Court, this court finds that probable cause is considered to be "knowledge of such a sate of acts and circumstances as excite the belief in a reasonable mind, acting on sc facts and circumstances, that the plaintiff is guilty of the crime of which he suspected." *Virginia Railway & Power Company v. Klaff, 123 Va. 260, 96 S.E. 244, 246 (1918); Clinchfield Coal Corp. V. Redd, 123 Va. 420, 96 S.E. 836, 842 (1918).* The test adopted by the Virginia Supreme Court is almost identical that announced by the federal court in *Hebert v. Morley, supra.*

With regard to the question of burden of proof, it has been held that in actions maintained under § 1983, the burden is upon the plaintiff, who is alleging the deprivation of constitutional rights, to establish the lack of probable cause at the time of his arrest. *Martin Duffie, v. 327 F.Supp. 960 (D.C.N.M. 1971)*. In *Martin*, the plaintiff had been charged with a criminal offense and subsequently the charges were dismissed on motion of the prosecuting attorney The court in *Martin* stated,

The existence or non-existence of probable cause cannot be shown through the eyes of the arrestee nor through the fact that the charges against him were later dismissed. Only through a showing of the facts under which the arresting officer acted can it be determined whether or not probable cause existed at the time of arrest.

Martin v. Duffie, supra at 962

In determining whether probable cause existed, the applicable legal est is an objective one. Similar to that used in negligence cases. If a law enforcement officer is reasonable in concluding that an arrestee is guilty of a particular offense based on facts and circumstances which are available and obvious to such an officer, then any arrest made is with probable cause and therefore lawful. The authorities are clear that a dismissal of charges or an acquittal after arrest are not dispositive of the lawfulness of the arrest itself. Indeed, such a disposition in favor of the arrestee is actually irrelevant on the issue of whether an arrest was either with or without probable cause.

Although plaintiff submits that he was arrested without probable cause, he never contended that his conviction for contempt of court was improper or unjustified. The plaintiff acted in an improper manner at the judicial sale, and was warned several times by both the Sheriff and the auctioneer. His actions "chilled" the bidding as reflected by the auction two weeks later, where the sale price for same car was $600 higher. His conviction for his behavior indicates that the Alleghany County Circuit Court found probable cause for his arrest. It has never been contended that the criminal behavior for which the plaintiff was convicted was any different from that behavior which resulted in his arrest and his being charged with breaching the peace and interfering with a law enforcement officer in the discharge of his lawful duties.

This court feels that plaintiff's behavior certainly was disruptive of Sheriff Swoope's official duties, which he was ordered to perform by the judge of the Circuit Court of Alleghany County. The judicial sale was set aside by the Circuit Court of Alleghany County because of the disruption and the plaintiff was convicted for his disruptive behavior. Accordingly, it has been judicially determined that not only was there probable cause that the plaintiff was guilty of an offense, but that beyond a reasonable doubt he was guilty. The court holds that the contempt charge on which he ultimately was found guilty flowed from the same set of actions for which he initially was arrested. We believe that there was probable cause for Sheriff Swoope to make the arrest "in light of the circumstances of the moment as viewed through his eyes. *Martin v Duffee, supra. at 962.*

Accordingly, summary judgment should be and hereby is granted in favor of the defendant, and plaintiff's action is ordered dismissed, and each party shall bear their own costs.

D.C.Va., 1972, Smith v. Swoope, 351 F.Supp. 159

In re John Douglas FENESSY, Debtor.
Bankruptcy No. 92-30482-S
United States Bankruptcy Court,
E.E. Virginia,
Richmond Division

June 14, 1993

Chapter7 debtor objected to trustee's application to compensate auctioneer for its services in selling vehicle. The Bankruptcy Court, Blackwell N. Shelley, J., held that debtor was entitled to claim $2,000 exemption in proceeds from sale of vehicle.

So ordered.

1. Exemptions

Under Virginia law, Chapter 7 debtor was entitled to claim exemption in vehicle, where lien on vehicle was neither perfected nor given to secure loan for purchase of vehicle. Va.Code 1950 §§34-26(8), 34-28 (1991).

2. Exemptions

Under Virginia law, monetary limits in exemption scheme apply to value of exception rather than value of property. Va. Code 1950 §§34-26(8), 34-28 (1991).

3. Exemptions

Exemption statutes are to be liberally construed in favor of purpose behind exemption claim.

4. Exemptions

Chapter 7 debtor could claim exemption in vehicle's sale proceeds, even if vehicle itself was subject of exemption, where claim of exemption was properly noticed long before sale of vehicle. Va. Code 1950 §§34-26(8), 34-28 (1991).

Robert B. Hill, Hill & Rainey, Petersburg, VA, for debtor.
Robert A. Lefkowitz, Maloney, Yeatts & Barr, Richmond, VA, for trustee.

MEMORANDUM OPINION

BLACKWELL N. SHELLEY, Bankruptcy Judge

This matter comes before the Court on an objection by John Douglas Fenessy, the debtor, to an application by Kevin R. Huennekens, the trustee, to compensate an auctioneer for its services in selling a vehicle that was part of the bankruptcy estate. Briefs filed by counsel for the trustee and the debtor clarified that the real issue is whether the debtor is entitled to a $2,000 exemption of the proceeds from the sale of the vehicle. There being no objection to the reasonableness of the auctioneer's compensation, and there being sufficient proceeds remaining to pay the debtor's claimed exemption, the Court approved the compensation on the auctioneer by order entered March 5, 1993. This opinion constitutes the findings of fact an conclusions of law which this Court has reached, and set out the Court's reasoning in granting debtor's request to exemption $2,000 from the proceeds of the sale of the vehicle.

FINDINGS OF FACT

On February 3, 1992, John Douglas Fenessy ("Fenessy") filed a voluntary Chapter 7 petition. On May 7, 1992, Fenessy filed an amended Schedule C– Property Claimed as Exempt. Fenessy listed on the amended schedule a 1988 Jeep Cherokee with a current market value of $7,500, $2,000 of which he claimed as exempt under Va. Code §34-26(8) ("Poor Debtor's Exemption"). The trustee made no objection to the scheduled exemption within the 30 days thereafter. See Fed.R.,Bankr.Pro. 4003(b). On Schedule D– Creditors Holding Secured claim, Fenessy listed Harry F. Webb, Jr., as a secured creditor holding a $12,000 "June 6, 1991 Notice and Lien" on the same vehicle. Fenessy listed Gladys M. Webb on Schedule F– Creditors Holding Unsecured Nonpriority Claims, as the holder of a $12,000 unsecured note. It was elsewhere clarified in the petition that Harry F. Webb, Jr., and Gladys M. Webb were Fenessy's father-in-law and mother-in-law and that the Webbs were creditors on the $12,000 note.

On July 17, 1992, the trustee field a complaint to determine the validity, priority and extent of a lien, to avoid a preference, and to compel turn over of property to the estate against Fenessy, Gladys M. Webb, and Harry F. Webb, Jr. (Adversary Proceeding No. 92-3121-S). That proceeding, *Huennekens, Trustee v. Fenessy & Webb*, was concluded by a consent order entered November 13, 1992. The Court ordered that the security interest of Harry F. Webb, Jr., and Gladys M. Webb be avoided, and that any interest of the trustee in the vehicle be preserved for the benefit of the bankruptcy estate. 11 U.S.C. §§ 544,551. A separate consent order entered November 13, 1992, in the bankruptcy case authorized the trustee to sell the vehicle free and clear of all liens.

Those orders were based in part on finding that "Harry F. Webb, Jr. does not have a properly perfected security interest in the vehicle." Consent Order entered November 13, 1993, in adversary Proceeding No. 92-3121-S, Document #9, Item 6.

On November 21, 1992, the trustee sold the vehicle for a price of $9,000. The auctioneer was later paid the court approved fee and expenses totaling $1,633.31. In the trustee's report of sale, the trustee acknowledged that the debtor had filed an exemption under the Virginia Code relating to the vehicle, but took the position that "the exemption comes behind the trustee's avoidance of a lien on the vehicle." Trustee's Report of Sale filed January 25, 1993.

In his brief, the trustee argues in support of his asserted priority that 11 U.S.C. §544 places the trustee in the same position as the lien creditor whose lien the trustee has avoided, and 11 U.S.C § 551 preserved a creditor's avoided lien for the trustee argues that the exemption allowed under Va. Code 34-26 does not apply to a vehicle worth in excess of $2,000, nor to the proceeds of the sale of such a vehicle.

On the other hand, the debtor argues that since, according to the order dismissing the adversary proceeding, Webb never had a perfected security interest in the vehicle, Va. Code §34-26(8) allows him a $2,000 exemption. The debtor concedes that § 544 places the trustee in the shoes of the creditor, but in this case the trustee avoided Webb's unperfected security interest, over which the debtor's state law exemption takes priority. Since the debtor had an exemption in the vehicle all along by operation of Va. Code §34-26(8), the trustee could only "recover" by his avoiding powers that part of the value of the vehicle in excess of the debtor's state law exemption. Debtor further argues that the $2,000 figure in Va. Code $34-26(8) does not refer to the value of the vehicle but rather the value of the exemption in the vehicle.

CONCLUSIONS OF LAW

[1] The Virginia Code exemption section applicable to this case under 11 U.S.C. § 522(b) provides:

> every household shall be entitled to hold exempt from creditor process...
> (8) [a] motor vehicle ..., not to exceed $2,000 in value, except that a perfected security interest on the motor vehicle shall have priority over the claim of exemption..."

Va. Code Ann. §34-26(8),[1] In addition, Virginia Code § 34-28 avoids liens on property exempt under § 34-26 except for "property covered by a ... writing or pledge given by a householder to secure a loan for the purchase thereof." Va. Code. Ann. §34-28 (1990 Repl. Vol.),[2] In combination §§34-26 and 34-28 allow a debtor to exempt , and avoid the lien on, up to $2,000

in value of a motor vehicle where that lien is neither a "perfected security interest," nor was it given "to secure a loan for the purchase" of the vehicle.

1. Reference is to the Virginia Code in effect on the date of the debtor's bankruptcy filing. The 1992 amendments to § 34-26 were enacted after the debtor's filing date 1992 Acts of Assembly, C. 644.

2. Reference is to the Virginia Code in effect on the date of the debtor's bankruptcy filing. The 1992 amendments to §34-28 were enacted after the debtor's filing date. 1992 Acts of Assembly, c. 644

In the adversary proceeding, the consent order provided that Webb's lien was not a perfected security interest. No evidence exists that Webb's lien was given "to secure the purchase" of the vehicle. It appears to this Court that since no perfected security interest nor purchase money security interest impaired Fenessy's exemption, § 34-26(8) allows Fenessay a $2,000 exemption in the value of the vehicle, and § 34-28 avoids Webb's lien to the extent that it impairs the exemption. Fenessy claimed his $2,000 exemption in the vehicle on an amended Schedule C filed on May 27, 1992. As there were no objections by a party in interest, including the trustee, within 30 days of the list being filed, the property claimed as exempt on such list is exempt. *See Taylor v. Freeland & Kronz* — U.S. — 112 Sct. 1644, 118 L.Ed.2d 280 (1992) Fed.R.Bankr.Pro 4003(b); 11 U.S.C. § 552(1).

[2,3] The trustee argues that the Virginia Code §34-26(8) exemption applies only to a motor vehicle was a value not exceeding $2,000, and does not exempt $2,000 of the proceeds from sale of a motor vehicle worth in excess of $2,000. A reading of the complete exemption scheme in § 34-26 makes it clear that the monetary limits found in several of its subsections apply to the value of the exemption rather than the value of the property. Virginia Code §34-26 provides that "the value of an item claimed as exempt under this section shall be the fair market value of the item less any prior security interest." Va. Code Ann. §34-26 (1990 Repl. Vol.). This clause indicates that the General Assembly intended the dollar value to limit the net exemption rather than to limit the value of the property to be exempted. Further, exemption statutes are to be liberally construed in favor of the purpose behind the exemption claim. *In re Hayes*, 119 B.R. 86 (Bankr. E.D.Va. 1990).

[4] The trustee further argues that the debtor's exemption should not apply to proceeds, from sale of a vehicle, even if the vehicle itself was subject to an exemption. This argument must also be rejected as the debtor's claim of exemption was properly noticed long before the sale of the vehicle and, if a debtor can except $2,000 of the value of a vehicle, that $2,000 can only be separated from the non-exempt portion through a sale.

For the foregoing reasons, this Court orders that $2,000 of the proceeds from the sale of the vehicle be paid to the debtor as his exempt property.

An order confirming to this decision will be entered contemporaneously herewith.

In re John Fenessy, Debtor. Bankruptcy No. 92-30482-S

Newport News Shpbldg Emp C.U. v. B&L;Body, 241 Va. 31, 400 S.E.2d 512 (1991)

IN THE SUPREME COURT OF VIRGINIA

NEWPORT NEWS SHIPBUILDING EMPLOYEES' CREDIT UNION, INC.
v.
B & L AUTO BODY, INC., ET AL.

Record No. 900569
Decided: January 11, 1991

Present: All the Justices

Since a bailee did not comply with the explicit notification requirements of Code § 43-34 before conducting the sale of an automobile subject to a mechanic's lien, the trial court erred in sustaining the bailee's motion to strike the evidence in a suit to recover amounts owed to a credit union which had financed the purchase of the vehicle, and that decision is reversed. The case is remanded.

Creditors' Rights — Code § 43-34- Statutory Construction — Auction Sales — Lienholders' Rights — Advertisement of Sale — Notice — Practice and Procedure

Plaintiff credit union loaned a member the full purchase price of an automobile and its security interest was recorded on the face of the title to the vehicle. A year later, the car was vandalized and defendant towed it to its garage to be stored until the owner could arrange for repairs and storage. However, defendant sold the vehicle at public auction. The credit union filed a bill of complaint and applied to the court for a temporary injunction, contending the defendant has failed to give it timely notice of the sale. It asked that the defendant be ordered to reacquire the vehicle or to pay the sum due on account of the note for which it had a lien. The case was heard by the trial court and plaintiff presented evidence on the notice issue and evidence of the value of the car, both at the time of purchase and at the time the damage occurred. The trial court sustained the defendant's motion to strike the evidence. The court ruled that the burden to establish the value of the vehicle at the time of sale was upon the credit union and, because there was no evidence of such value, the petition and bill of complaint should be dismissed. The credit union appeals.

1. Code § 43-34 outlines the procedure for the auction sale of personal property by holders of mechanics' liens for repairs to articles of personal property. It empowers the lienor to sell the personal property in his possession by public auction, for cash, if the debt for which the lien exists is not paid in ten days and if the value of the property affected by the lien does not exceed $3,000.

2. There is no requirement for court intervention prior to sale if the value of the personalty does not exceed $3,000. If, however, the value is more than [Page 32] $3,000 but does not exceed $7,000, the lienor, after giving notice, must apply to the appropriate general district court for an order of sale. If the value exceeds $7,000, the lienor, after notice, must apply to the appropriate circuit court prior to sale.

3. The $600 mentioned in the statute relates to a requirement of notice to any secured party who has filed a financing statement against the subject property, but according to Code § 8.9-302(3)(b), the filing of a financing statement to perfect the security interest in a motor vehicle such as this is not required.

4. Code § 43-34 requires the lienor to ascertain whether the certificate of title shows a lien and, if it does, the bailee proposing the sale must give notice to the lienholder of record.

5. Code § 43-34 has explicit notification requirements for a sale without court intervention. It requires the lienor, prior to the sale, to advertise the "time, place and terms" of the sale "in a public place," and also to give the owner of the property "written notice" as provided.

6. A public place is "a premises owned by the Commonwealth," one of its political subdivisions "or an agency of either which is open to the general public." An ad in a newspaper does not qualify as an advertisement "in a public place" within the meaning of the statute.

7. The "written notice" to be furnished for a sale to be made without resort to the courts must be by personal delivery or by certified or registered mail to the property owner and by certified mail to the lienholder of record in the case of a motor vehicle. Those notices must be delivered at least ten days prior to the sale.

8. Here the purported advertisements and notices of sale were utterly deficient. The notices to the owner and to the credit union gave either conflicting or incomplete information about the sale. The written notice, at the very least, should state the specific time and place of the sale.

9. The statement in the letter that the sale would be held ten days from the receipt of the letter is too indefinite because the date of sale then depends upon receipt of the letter, a time uncertain.

10. Because the credit union established that the sale was invalid due to defective notice, the trial court erred in striking the credit union's evidence at the conclusion of its case in chief, holding that the credit union had failed to prove the value of the vehicle at the time of sale. The vehicle's value was irrelevant to the question whether the sale was void for lack of notice.

11. Since the forum or method employed is controlled by the vehicle's value at the time of sale, the burden of establishing value is upon the possessor of the property, who has ready access to it for appraisal purposes and has undertaken to conduct the sale.

12. Once the sale's invalidity has been determined, the ultimate burden of proof is upon the credit union to establish any damages claimed as a result of the void sale. [Page 33]

Appeal from a judgment of the Circuit Court of Virginia Beach. Hon. Thomas S. Shadrick, judge presiding.

Reversed and remanded.

Kimber L. White (James A. Howard, on brief), for appellant.

Donald Bennis (Carlton F. Bennett, on brief), for appellee B & L Auto Body, Inc.

No brief or argument for appellee Lawrence Cooper.

JUSTICE COMPTON delivered the opinion of the Court.

Code § 43-34 authorizes certain lienors to enforce their liens by sale of personal property at public auction for cash. In this appeal, we consider the validity of such a sale held to satisfy the lien of a bailee of a motor vehicle.

In October 1987, appellant Newport News Shipbuilding Employees' Credit Union, Inc., approved a loan to appellee Lawrence Cooper in the sum of $11,995 to finance the full purchase price of a 1985 Buick automobile. The credit union's security interest was duly recorded on the face of the title to the vehicle issued to Cooper by the Department of Motor Vehicles.

On October 13, 1988, Cooper discovered that the vehicle had been damaged by vandals while parked on a street in Norfolk near his residence. According to Cooper, the damage included “four flat tires, the windshield was busted out, [and it] had three scratches” on the exterior. Upon Cooper's request, appellee B & L Auto Body, Inc., also known as B & L Towing Service of Virginia, transported the vehicle on that date to its premises in Virginia Beach to be stored until Cooper could arrange to pay for repairs and the storage. Subsequently, Cooper applied to the credit union for funds to cover these charges. Before the transaction could be completed, however, B & L sold the vehicle at public auction in November 1988.

In December 1988, the credit union filed a “petition and Bill of Complaint — Application for Temporary Injunction” naming as defendants B & L, Cooper, and the “Commissioner of the

Division of Motor Vehicles." The credit union contended that B & L failed to give it proper and timely notice of the sale. It sought a temporary injunction against B & L and its "alleged vendee," as well as against the motor vehicle commissioner, to prevent issuance [Page 34] of a new certificate of title to the vendee. Additionally, the credit union asked that B & L be ordered to reacquire the vehicle or, in the alternative, be ordered to pay the sum of $12,496.69. The credit union asserted that the sum represented the amount due on account of the note executed by Cooper to purchase the vehicle, for which it has a lien, and on account of unlawful conversion of the vehicle by B & L. The temporary injunction was entered by agreement of the parties in January 1989.

In December 1989, the case was heard by the trial court sitting without a jury. The credit union presented evidence on the notice issue. It also presented evidence of the value of the car both at the time of purchase and at the time the damage occurred. The credit union presented no evidence of the vehicle's value at the time of the sale.

At the conclusion of the credit union's case in chief, the trial court sustained B & L's motion to strike the evidence. The court ruled that the burden to establish the value at the time of sale was upon the credit union and, because there was no evidence of such value, the petition and bill of complaint should be dismissed.

We awarded the credit union an appeal from the trial court's February 1990 dismissal order, which also dissolved the temporary injunction. The only parties appearing on appeal are the credit union and B & L.

This dispute centers around the interpretation of Code § 43-34. The statute establishes the procedure for enforcement of liens acquired under Code § 43-31 (lien of innkeepers and others), § 43-32 (lien of keepers of livery stables, garages, and vehicles, among others), and § 43-33 (lien of mechanic for repairs to articles of personal property).

As pertinent to this controversy, Code § 43-34 provides that:

> "Any person having a lien under §§ 43-31 through 43-33 and any bailee, . . . having a lien as such at common law on personal property in his possession which he has no power to sell for the satisfaction of the lien, if the debt for which the lien exists is not paid within ten days after it is due and the value of the property affected by the lien does not exceed $3,000, may sell such property or so much thereof as may be necessary, by public auction, for cash. The proceeds shall be applied to the satisfaction of the debt and expenses of sale, and the surplus, if any, shall be paid to the owner of the [Page 35] property. Before making such sale, such person shall advertise the time, place, and terms thereof in a public place, and in case of property having a value in excess of $600 after giving ten days' prior notice to any secured party who

has filed a financing statement against such property, and also give to the owner written notice as hereinafter provided. If such property is a motor vehicle required by the motor vehicle laws of Virginia to be registered, the person having such lien shall ascertain from the Commissioner of the Department of Motor Vehicles whether the certificate of title of the motor vehicle shows a lien thereon. If the certificate of title shows a lien thereon, the bailee proposing the sale of such motor vehicle shall notify the lienholder of record, by certified mail, at the address on the certificate of title of the time and place of the proposed sale ten days prior thereto. . . . If the value of the property is more than $3,000 but does not exceed $7,000, the party having such lien, after giving notice as herein provided, may apply by petition to any general district court of the county or city wherein the property is, or, if the value of the property exceeds $7,000, to the circuit court of such county or city, for the sale of the property; and if, on the hearing of the case on the petition, the defense, if any made thereto, and such evidence as may be adduced by the parties respectively, the court shall be satisfied that the debt and lien are established and the property should be sold to pay the debt, such court shall order the sale to be made by the sheriff of the county or city. . . . If the owner of the property is a resident of this Commonwealth, any notice required by this section may be served in the mode prescribed by § 8.01-296 or, if the sale is to be made without resort to the courts, by personal delivery or by certified or registered mail delivered to the present owner of the property to be sold at his last known address at least ten days prior to the date of the sale. . . . For purposes of this section, a public place shall mean a premises owned by the Commonwealth, a political subdivision thereof or an agency of either which is open to the general public.

"Whenever a motor vehicle is sold hereunder, the Department of Motor Vehicles shall issue a certificate of title and registration to the purchaser thereof upon his application containing the serial or motor number of the vehicle purchased [Page 36] together with an affidavit of the lienholder that he has complied with the provisions hereof, or by the sheriff conducting a sale that he has complied with said order."

On appeal, the credit union argues, as it did below, that the purported notice of sale was wholly insufficient. The evidence showed that the following letter dated "11/09/88" addressed to Cooper was received by him by certified mail on November 14, 1988. A copy of the letter was received in like manner by the credit union on November 14. The letter was addressed "Dear Lawrence" from "Karry Scott Collection Manager." It stated:

"THE FOLLOWING VEHICLE IS LOCATED AT B & L AUTO BODY, INC., T/A B & L TOWING SERVICE OF VIRGINIA, 5004 VIRGINIA BEACH BOULEVARD, VIRGINIA BEACH, VIRGINIA. THERE ARE PENDING STORAGE AND TOWING CHARGES ON THE VEHICLE. THE VEHICLE WILL BE SOLD AT PUBLIC AUCTION TEN DAYS FROM RECEIPT OF THIS LETTER, IF NOT CLAIMED. ANY DEFICIENCY FROM

AUCTION WILL BE YOUR RESPONSIBILITY TO PAY AS REGISTERED OWNER OF THIS VEHICLE."

The model, serial number, and license number of the Buick vehicle were included in the letter.

The evidence also showed that an advertisement appeared in a newspaper from November 24 through November 26, 1988 announcing an "Auto Auction" to be held on November 26 at 10 a.m. by "B & L Towing Service" with a Virginia Beach address of "120 Dorset Ave." Listed among the many "[a]bandoned & wrecked vehicles" to be sold was the Buick automobile in question. The credit union contends that the advertisement is insufficient because it was not published in "a public place" as required by the statute.

The credit union also argues, as it did below, that it was not required to prove the value of the vehicle at the time of sale. It contends that if the sale was invalid due to lack of proper notice, "the value of the vehicle at the time of sale is of no consequence and is irrelevant." In addition, the credit union contends that the statute places the burden on the storage lienor to prove the value [Page 37] at the time of sale because such value, under the statute, determines the proper forum or method of enforcement of the lien.

On appeal, B & L, asserting that Cooper and the credit union had actual notice of the impending sale, contends that the "central issue" in the case is whether "sufficient evidence" was presented by the credit union upon the value of the vehicle when it came into B & L's possession and at the time of the subsequent sale. B & L argues that the credit union "never submitted to the court any evidence that the Cooper vehicle had a value in excess of $600.00." Thus, it says, the trial court correctly struck the credit union's evidence.

We disagree. Both B & L and the trial court have misconstrued the statute.

[1] As we analyze the statutory provisions that are pertinent to this controversy, we observe that the language is set forth in plain terms. At the outset, the statute empowers the lienor to sell the personal property in his possession by public auction, for cash, if the debt for which the lien exists is not paid in ten days and if the value of the property affected by the lien does not exceed $3,000.

[2] There is no requirement for court intervention prior to sale if the value of the personalty does not exceed $3,000. If, however, the value is more than $3,000 but does not exceed $7,000, the lienor, after giving notice, must apply to the appropriate general district court for an order of sale. And, if the value exceeds $7,000, the lienor, after notice, must apply to the appropriate circuit court prior to sale.

[3-4] Contrary to B & L's contention, the $600 amount mentioned in the third sentence of the statute has no application to the sale of motor vehicles. That amount relates to a requirement of notice to "any secured party who has filed a financing statement" against the subject property. According to Code § 8.9-302(3)(b), the filing of a financing statement to perfect the security interest in a motor vehicle such as Cooper's is not required. Instead, the sale of such motor vehicles is governed by the specific provisions of the fourth and fifth sentences of § 43-34. Those sentences require the lienor to ascertain whether the certificate of title shows a lien. If it does, the bailee proposing the sale must give notice to the lienholder of record.

[5] The statute has explicit notification requirements. Where, as here, a sale is attempted without court intervention, the third sentence of the statute requires the lienor, prior to sale, to advertise [Page 38] the "time, place, and terms" of the sale "in a public place," and also to give the owner of the property "written notice" as provided in the enactment.

[6] The term "a public place" means "a premises owned by the Commonwealth," one of its political subdivisions "or an agency of either which is open to the general public." An ad in a newspaper does not qualify as advertisement "in a public place" within the meaning of the statute.

[7] The "written notice" to be furnished for a sale to be made without resort to the courts must be by personal delivery or by certified or registered mail to the property owner and, in the case of a motor vehicle, by certified mail to the lienholder of record. Those notices must be delivered at least ten days prior to the sale, according to the statute.

[8] When measured by the statutory requirements, B & L's purported advertisement and notices of sale were utterly deficient. As noted, the newspaper ad was not an advertisement "in a public place." The written notices to Cooper and to the credit union gave either conflicting or incomplete information about the impending sale. We conclude that, in order to achieve the statutory purpose, the written notice, at the very least, should state the specific time and place of the sale.

[9] The November 9 letter gave neither the specific time nor place of the sale. A statement that the sale will be held ten days "from receipt of this letter" is too indefinite because the date of sale depends upon receipt of the letter, a time uncertain. Even if it be assumed that the Virginia Beach Boulevard address contained in the letter was notice of the place of sale, this information conflicted with the reference to the Dorset Avenue address in the ad. And, we do not reach for discussion the effect of any actual notice Cooper and the credit union may have had of the specific time and place of the impending sale, as contended by B & L. The record fails to support any such conclusion of fact.

[10] Because the credit union established, at least prima facie and probably conclusively, that the sale was invalid due to defective notice, the trial court erred in striking the credit union's evidence

at the conclusion of its case in chief, holding that the credit union had failed to prove the value of the vehicle at the time of sale. At that stage of the proceeding, the vehicle's value was irrelevant to the question whether the sale was void for lack of notice. Once the credit union made out a prima facie case of a void sale [Page 39] due to defective notice, the burden shifted to B & L to go forward and present evidence of a valid sale.

If the credit union's evidence had not been stricken, proof of value would have become relevant when B & L endeavored to show that a valid sale had been conducted. In submitting evidence of validity, B & L would have been required not only to rebut the proof of defective notice, but also to show that it had selected the proper forum or method of enforcement.

[11] The forum or method employed is controlled by the vehicle's value at the time of sale. Therefore, the burden of establishing value is upon the possessor of the property, who has ready access to it for appraisal purposes and who has undertaken to conduct the sale.

[12] Of course, once the sale's invalidity has been determined, the ultimate burden of proof is upon the credit union to establish any damages claimed as a result of the void sale.

Therefore, the judgment of the trial court will be reversed. The cause will be remanded for a new trial consistent with the views expressed in this opinion.

Reversed and remanded.

Newport News Shpbldg Emp C.U. v. B&L;Body, 241 Va. 31, 400 S.E.2d 512 (1991)

Williams v. Matthews, 248 Va. 277, 448 S.E.2d 625 (1994)

IN THE SUPREME COURT OF VIRGINIA

CLARENCE G. WILLIAMS, SHERIFF OF CHESTERFIELD COUNTY
v.
D. BROCK MATTHEWS

Record No. 931690
Decided: September 16, 1994

Present: All the Justices

Virginia's detinue statutes do not authorize and require a sheriff to break and enter a dwelling house, without the occupant's permission, for the purpose of seizing personal property before trial, in execution of a court order entered *ex parte* in accord with such statutes. Since the trial court erred in issuing a writ of mandamus on this issue, the judgment appealed from will be reversed and the petition for mandamus will be dismissed.

Practice and Procedure — Detinue Statutes — Statutory Construction — Code § 8.01-114 — Seizure of Property — Pretrial — Mandamus

The appellee here, an attorney who represents clients who offer consumer goods on a "rent-to-own" basis, filed a petition for a writ of mandamus against the sheriff of a county, asserting that the sheriff had continuously refused to execute detinue seizure orders entered by judges of general district courts and magistrates. The sheriff asserted that he had attempted to execute all detinue seizure orders but that he is not authorized to break and enter an individual's premises to recover property without that individual's permission. Following a hearing, the trial court granted the attorney's petition, ruling that a forced entry by a sheriff pursuant to such an order does not constitute "an illegal breaking and entry in violation of any statutory or constitutional rights of a prejudgment debtor". The trial court issued a writ of mandamus directing the sheriff to use due diligence and reasonable means to execute all validly issued detinue seizure orders and to take all appropriate action necessary to seize personal property subject to such orders, including forced entry into the premises where such property is located or believed to be located. The sheriff appeals.

1. Mandamus is an extraordinary remedy that may be used to compel a public official to perform a purely ministerial duty imposed upon an official by law.

2. The writ will issue where the petitioner has a clear right to the relief sought, the respondent has a legal duty to perform the act which the petitioner seeks to compel, and there is no adequate remedy at law.

3. The common law of England continues in full force within the Commonwealth and is the rule of decision, except as altered by the General Assembly, [Page 278] and in order to abrogate the common law, the General Assembly's intent to do so must be plainly manifested.

4. Under the common law, it was unlawful for a sheriff to break the doors of a person's house to arrest that person in a civil suit in debt or trespass, and the General Assembly has not plainly manifested an intent to abrogate this principle.

5. In none of the statutes governing pretrial detinue seizure orders is there explicit authority for a sheriff to forcibly enter a dwelling house to execute such orders and there is no apparent intention by the General Assembly to sanction by implication forcible entry of houses pretrial, given the serious Fourth Amendment problems created by such entry.

6. Omission of express authorization for forcible entry relating to pretrial detinue seizure orders, when such authority is expressly given in similar statutes relating to the opportunity for forced entry, casts considerable doubt whether the General Assembly intended to authorize forced entry in connection with execution of pretrial detinue seizure orders and certainly there is no plain manifestation of an intent to abrogate the common law with reference to such orders.

7. Because the ruling on this issue disposes of the appeal, the sheriff's argument based on the Fourth Amendment warrant requirement is not addressed.

Appeal from a judgment of the Circuit Court of Chesterfield County. Hon. Timothy J. Hauler, judge presiding.

Reversed and dismissed.

Steven L. Micas, County Attorney (Jeffrey L. Mincks, Deputy County Attorney; Lisa C. Dewey, Assistant County Attorney, on briefs), for appellant.

D. Brock Matthews for appellee.

JUSTICE COMPTON delivered the opinion of the Court.

In this mandamus appeal, the dispositive question is whether Virginia's detinue statutes authorize and require a sheriff to break and enter a dwelling house, without the occupant's permission, for the purpose of seizing personal property pretrial, in execution of a court order entered ex parte in accord with such statutes.

Code § 8.01-114 governs proceedings in detinue to recover personal property unlawfully withheld from a plaintiff and requires a petition to be filed for pretrial seizure. Such petition shall describe "the kind, quantity and estimated fair market value of the specific [Page 279] personal property as to which plaintiff seeks possession;" the particular basis of the plaintiff's claim; and, specific facts to support the ground or grounds that require prompt action to recover the property.

The statute further provides that, upon filing of the petition, a judge or magistrate "may issue an order . . . directed to the sheriff . . . commanding him to seize the property . . . and deliver same to the plaintiff pendente lite. . . ." Code § 8.01-114(A) (3). The statute also provides that the "judge or magistrate may issue such an order . . . in accordance with the prayer of the petition after an ex parte review of the petition" only upon a determination that the petition is in proper form and that "there is reasonable cause to believe that the grounds for detinue seizure described in the petition exist." Code § 8.01-114(B).

The statute further provides that the judicial officer may receive evidence only in the form of a sworn petition filed with the papers in the case, Code § 8.01-114(C), and that the "order commanding the seizure of property" shall be served with a form for requesting a hearing on a claim of exemption from seizure, Code § 8.01-114(D).

Code § 8.01-115 provides that no such order shall be issued until a bond is posted in a penalty at least double the estimated fair market value of the property claimed, with a condition to redeliver the seized property to the defendant if the right to the possession shall be adjudged against the plaintiff. Code § 8.01-116 provides a procedure for return of the property to the defendant upon execution of a bond. Code § 8.01-119 establishes a procedure for a prompt hearing to review the issuance of the pretrial order, and Code § 8.01-121 provides for entry of final judgment in the detinue proceeding and for disposition of the property or proceeds according to the rights of the parties.

In the present case, appellee D. Brock Matthews filed a petition for a writ of mandamus against appellant Clarence G. Williams, Sheriff of Chesterfield County, asserting that defendant "has repeatedly and continuously refused to execute Detinue Seizure Orders" entered by judges of general district courts and magistrates, "thereby defeating the legislative mandate and ignoring Court orders." Matthews, an attorney representing certain creditors, alleged that defendant "has caused the loss of undeterminable quantities of property belonging to various plaintiffs" and that the refusal to execute the court orders has caused loss of bond premiums [Page 280] paid as required by Code § 8.01-115. The attorney asked the trial court to enter a writ of mandamus directed to the Sheriff "compelling him to execute Detinue Seizure Orders."

Responding, the Sheriff denied that he has defeated the legislative mandate or has ignored court orders. Instead, he asserted, he has diligently attempted to execute all detinue seizure orders but "he is not authorized to break and enter an individual's premises to recover the property without said individual's permission." Further, the Sheriff denied that Matthews was entitled to the relief sought.

The trial court conducted an evidentiary hearing on the mandamus petition at which both parties testified. Matthews represents clients that offer consumer goods on a "rent-to-own" basis. Such clients lease televisions, refrigerators, and other articles to consumers and apply some portion of the rental payment to the ultimate purchase price of the article. If the lessee fails to comply with the terms of the rental agreement, and there is evidence that the property will be destroyed, sold, or otherwise disposed of so as to be unavailable when there is a final judgment respecting it, Matthews, on behalf of his client, will seek a seizure order prior to the trial of the underlying proceeding in detinue.

During his testimony, Matthews presented as evidence several detinue seizure orders, with supporting court papers, entered by judges of general district courts. The orders, directed "To The Sheriff," state: "You are commanded to seize (levy and take into possession) the items listed on attached Detinue Seizure Petition, deliver the same to the Plaintiff(s), and make your return on the reverse side of this Order." Each order, entered without notice to the defendant, contains defendant's name and address and a summons to appear before the court for a hearing on the date and at the time set forth in the order.

Stating that he seeks a writ of mandamus requiring the Sheriff "to forcibly enter residences in order to execute pre-judgment detinue seizure orders," Matthews testified that the Sheriff has refused to enter premises without permission even though Matthews has offered to provide the Sheriff with the services of a locksmith to assist in the entry. Matthews also testified "that in the majority of cases, the property which is the subject of the pre-judgment detinue seizure order is not recovered."

The Sheriff testified that "his office executes every detinue seizure order by attempting to levy on the property and by serving [Page 281] the debtor with the proper papers." He said that if the debtor refuses entry, he will not break into the debtor's home or any other premises to recover property and that he refuses to use a locksmith for the purpose. The Sheriff maintained that neither the applicable statutes nor the detinue seizure order authorizes or requires him "to break into the debtor's home to recover property."

The Sheriff testified that no showing of probable cause is required for issuance of the seizure order; the order does not provide the location of the property but only provides the debtor's address. The Sheriff stated he is unable to verify that the property subject to the seizure order is located at the debtor's address. He maintained that "in the majority of cases the property subject to the prejudgment detinue seizure order is recovered."

Following the hearing, the trial court granted Matthews' petition. Observing that pretrial detinue seizure orders issued by judges and magistrates are based on "reasonable cause," the court ruled that a forced entry

by a sheriff pursuant to such an order does not constitute "an illegal breaking and entry in violation of any statutory or constitutional rights of a prejudgment debtor." The court further decided that the Sheriff's failure "to force entry into a premises where personal property is located subject to a detinue seizure order effectively undermines the statutory scheme for prejudgment levies and attachments."

Thus, the trial court issued a writ of mandamus directing the Sheriff "to use due diligence and reasonable means to execute all validly issued detinue seizure orders and to take all appropriate action necessary to seize personal property subject to such orders to include forced entry into the premises where such property is located or believed to be located." We awarded the Sheriff an appeal from the August 1993 order.

[1-2] Mandamus is an extraordinary remedy that may be used to compel a public official to perform a purely ministerial duty imposed upon the official by law. *Gannon v. State Corp. Comm'n*, 243 Va. 480, 481-82, 416 S.E.2d 446, 447 (1992). "The writ will issue where the petitioner has a clear right to the relief sought, the respondent has a legal duty to perform the act which the petitioner seeks to compel, and there is no adequate remedy at law." *Early Used Cars, Inc. v. Province*, 218 Va. 605, 609, 239 S.E.2d 98, 101 (1977).

On appeal, the Sheriff contends that Virginia law does not impose a clear, ministerial duty on him to forcibly enter houses to [Page 282] execute pretrial detinue seizure orders. Thus, he argues, mandamus does not lie.

The Sheriff also contends that even though Virginia's statutory scheme complies with Fourteenth Amendment due process standards, *see Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), he may not constitutionally enter a home forcibly to execute a pretrial detinue seizure order because the Fourth Amendment warrant requirement is not satisfied by the statutory procedure. Because Virginia law gives a sheriff no authority to break and enter a dwelling to seize property under such an order, he contends, he exposes himself to civil and criminal penalties if he attempts to do so.

Responding to the Sheriff's first contention, Matthews argues that mandamus is appropriate because "Virginia law authorizes breaking into a person's house if necessary" to execute a court's prejudgment detinue order. He notes that "Virginia's detinue seizure statute specifically provides for pretrial *seizure* of personal property unlawfully withheld from a plaintiff." Thus, he argues, "Statutory authority for pretrial seizure must, by necessary implication, if not by definition, include the authority to employ whatever means are necessary to effectuate the seizure."

Continuing, Matthews contends that when the General Assembly "authorized the court to *command* the seizure of property, it could scarcely have intended that such seizure would be lawful only if the defendant were present at the place of seizure and gave his permission for the property to be seized," thus giving "control of whether or not property could be seized under authority of the statute to the person who is unlawfully detaining the property." Concluding, he says that because "the forcible taking of particular

property is implicit in an order for seizure of such property, no further authorization is required." We do not agree that mandamus lies under these circumstances.

As we have said, the extraordinary remedy of mandamus is appropriate where the petitioner has a "clear right" to relief and the respondent has a "legal duty" to perform the act demanded. Therefore, we must turn to the statutes to determine whether such components exist.

[3] The common law of England continues in full force within the Commonwealth and is the rule of decision, "except as altered by the General Assembly." Code § 1-10. In order to abrogate the common law, the General Assembly's intent to do so must be [Page 283] plainly manifested. *Wackwitz v. Roy*, 244 Va. 60, 65, 418 S.E.2d 861, 864 (1992).

[4] Under the common law, it was unlawful for a sheriff to break the doors of a person's house to arrest that person in a civil suit in debt or trespass. "Such action invades the precious interest of privacy summed up in the ancient adage that a man's house is his castle." *Miller v. United States*, 357 U.S. 301, 307 (1958). This venerable principle underlies the whole law dealing with the right to break and enter a dwelling house for civil recovery of property. *Vanden Bogert v. May*, 55 N.W.2d 115, 117 (Mich. 1952).

The question then becomes whether the General Assembly has plainly manifested an intent to abrogate this common law principle. We hold that it has not.

[5] In none of the statutes governing pretrial detinue seizure orders is there explicit authority for a sheriff to forcibly enter a dwelling house to execute such orders. Matthews recognizes this, for he argues that the forcible taking of personal property "is implicit" in a seizure order.

The statutory authorization for issuance of such an order "commanding" the sheriff "to seize" based upon "reasonable" cause is not a plain manifestation of the General Assembly's intent to empower sheriffs to break and enter a dwelling pretrial to accomplish the seizure. Although one definition of the verb "seize" is "to take possession of forcibly," Black's Law Dictionary 1359 (6th ed. 1990), we do not discern an intention of the General Assembly to sanction by implication forcible entry of houses pretrial, given the serious Fourth Amendment problems created by such entry. *See Soldal v. Cook County*, 506 U.S. 56, ___; 113 S. Ct. 538, 546 n.11 (1992) ("the protection against unreasonable searches and seizures fully applies in the civil context"); *United States v. United States District Court*, 407 U.S. 297, 313 (1972) ("physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed").

This lack of a clear mandate from the legislature becomes even more significant when other statutes dealing with the law of creditors' rights are compared with the statutes in question. The common law principle at issue has been expressly abrogated by the General Assembly in connection with other types of seizures. For example, Code § 8.01-491 provides: "An officer into whose hands an execution is placed to be levied, may, if need be, break open [Page 284] the outer doors of a dwelling house in the daytime, after

having first demanded admittance of the occupant, in order to make a levy. . . .” Similarly, Code § 55-235 provides that an officer executing a distress warrant, or an attachment for rent, “if there be need for it, may, in the daytime, break open and enter into any house or close in which there may be goods liable to the distress or attachment, and may, either in the day or night, break open and enter any house or close wherein there may be any goods so liable which have been fraudulently or clandestinely removed from the demised premises.”

[6] When a statute contains a given provision with reference to one subject, the omission of such provision from a similar statute dealing with a related subject is significant to show the existence of a different legislative intent. 2B *Sutherland Statutory Construction* § 51.02 (5th ed. 1992). *See City of Virginia Beach v. Virginia Restaurant Ass'n, Inc.*, 231 Va. 130, 134, 341 S.E.2d 198, 200 (1986). Omission of express authorization for forcible entry relating to pretrial detinue seizure orders, when such authority is expressly given in similar statutes relating to the opportunity for forced entry, casts considerable doubt whether the General Assembly intended to authorize forced entry in connection with execution of pretrial detinue seizure orders. Certainly, there is no plain manifestation of an intent to abrogate the common law with reference to such orders.

[7] Because our ruling on the first issue raised by the Sheriff disposes of the appeal, we do not address his argument based on the Fourth Amendment warrant requirement.

Consequently, we hold that the trial court erred in issuing the writ of mandamus. Thus, the judgment appealed from will be reversed and the petition for mandamus will be dismissed.

Reversed and dismissed.

Williams v. Matthews, 248 Va. 277, 277-284, 448 S.E.2d 625, ___ (1994)

McCracken v. Commonwealth, 02 Vap UNP 2912003 (2002)

UNPUBLISHED
IN THE COURT OF APPEALS OF VIRGINIA
ARGUED AT SALEM, VIRGINIA

BENJAMIN WAYNE McCRACKEN
v.
COMMONWEALTH OF VIRGINIA

Record No. 2912-00-3
Decided: May 14, 2002

Present: Judges Benton, Elder and Bumgardner

FROM THE CIRCUIT COURT OF WASHINGTON COUNTY, Nicholas E. Persin, Judge

Affirmed, in part, and reversed
and dismissed, in part.

COUNSEL

John B. Coleman (Scyphers & Austin, P.C., on brief), for appellant.

Virginia B. Theisen, Assistant Attorney General (Randolph A. Beales, Attorney General, on brief), for appellee.

MEMORANDUM OPINION* BY JUDGE LARRY G. ELDER:

Benjamin Wayne McCracken (appellant) appeals from his jury trial convictions for marijuana possession and two counts of assault and battery on a law enforcement officer. On appeal, he contends the trial court erroneously denied his motion to suppress because the officer's warrantless entry and weapons frisk violated the Fourth Amendment proscription against unreasonable searches and seizures. As a result, appellant argues, his arrest for marijuana possession was unlawful. Because the arrest was unlawful and because the officers used excessive force in effecting the arrest, he contends, he was entitled to use reasonable force to resist.

We hold in Part II.A. that the trial court erred in refusing to suppress the marijuana discovered in the weapons frisk and to dismiss the marijuana possession charge. However, we hold in Part II.B. that appellant was not entitled to resist the warrantless arrest, which was based on probable cause and met the requirements of Code § 19.2-81. Thus, we reverse and dismiss appellant's conviction for marijuana possession and affirm his two convictions for assault and battery on a law enforcement officer.1

I.

BACKGROUND

As of April 8, 2000, appellant and Teresa Fields were romantically involved and had resided together in Fields' residence for about two-and-one-half years. That morning, Fields and appellant had an argument, and around noon, Fields called 911 to have appellant removed from her residence. Uniformed Sheriff's Deputies Resinol L. Dollar, Jr., and Jason D. Sexton responded to the "[911] domestic disturbance call at Teresa Fields' residence." Upon their arrival, the deputies heard "verbal arguing." Appellant was "irritable," but "[t]here was no violent confrontation[]," and Deputy Dollar said the situation "seemed to have been not very escalated." Appellant "agreed to leave" and go stay with his mother. The deputies supervised appellant's collection of his belongings, and they told Fields to call them "if [she] had anymore trouble." After forty-five minutes to an hour, appellant and the deputies departed.

After appellant arrived at his mother's residence, appellant telephoned Fields. During that conversation, appellant and Fields were "still agitated," "upset" and "very angry." Shortly after the conversation ended, appellant's mother called Fields to tell her that appellant was on his way back to Fields' residence. Fields then called 911 a second time and told the dispatcher that appellant was on his way back to her house. The dispatcher told her to "lock [her] doors," and he notified Deputies Dollar and Sexton to return to Fields' residence on a "domestic call."

When Deputy Dollar arrived, he found neighbors in the front yard "screaming" and "hollering," and he also "could hear [Fields and appellant inside the house] verbally arguing back and forth." Knowing that Fields had "called [the 911 dispatcher] for assistance," Deputy Dollar drew his weapon, pointed it at the ground, and entered the residence, without knocking, through the closed screen and partially open "main door."

Upon entering, Dollar saw Fields and appellant standing four to six feet apart. Dollar noticed nothing odd about Fields' condition or appearance. Appellant had nothing in his hands, but Dollar saw a bulge in appellant's right front pants pocket, and he asked appellant to place his hands on the wall so that Dollar could "make sure [appellant] didn't have any weapons." Appellant kept moving away from Dollar but finally put his hands on the back of a love seat.

While appellant leaned on the love seat, Dollar put one of his hands in the center of appellant's back, holstered his weapon and patted the bulge in appellant's pocket. The bulge was "a hard rigid object." When Dollar attempted to retrieve the object, he instead pulled out a baggie containing 2.1 grams of marijuana which had been on top of the hard object, and he asked appellant what he had found. Appellant "was becoming very agitated" and "jerked away" from Dollar, and Dollar was unable to "retrieve the rigid object out of [appellant's] pocket after that."

Dollar told appellant he was under arrest for marijuana possession, but appellant resisted Dollar's instructions to put his hands behind his back. Appellant "kept easing away" and told Dollar he was "just there to get some more of his belongings," including "his gun." Appellant then "started going from the living room to the kitchen at a real quick pace, going toward the back of the house."

Deputy Dollar told appellant to stop, "[got] ahold of [appellant]" from behind and "[tried] to subdue him." Appellant resisted, despite Dollar's verbal instructions. Dollar then used his baton, striking appellant on the thigh and leg, but appellant "was still fighting and kicking and trying to push off the wall back toward [Dollar]." Deputy Dollar then slipped while still holding onto appellant's waist, and appellant "struck [him] across the face when [Deputy Dollar] fell." Appellant put Dollar "in a sort of choking headlock" which covered Dollar's nose and mouth. Dollar was unable to breathe and "was getting very concerned for [his] safety."

About that time, Deputy Sexton arrived and saw appellant and Deputy Dollar on the floor of the kitchen. When Sexton attempted to get appellant to release his hold on Deputy Dollar, appellant "threw his left elbow back and struck [Sexton] in the ribs." Sexton then sprayed appellant with pepper spray in an effort to get appellant to release Deputy Dollar. Appellant, recognizing Sexton was a law enforcement officer, said, "'That tear gas ain't shit, cop,' and then he returned his attention to Deputy Dollar."

Deputy Dollar managed to grab one of appellant's arms. While Deputy Sexton held appellant's other arm, appellant kicked the right side of Sexton's face and his right knee. Appellant was "doing his best to keep Deputy Dollar from [handcuffing] him," but the deputies finally succeeded and transported him to the jail.

A search of Fields' residence revealed a rifle belonging to appellant was behind the door of the bedroom located five feet from the site in the kitchen where the struggle took place. A search of appellant at the jail revealed a folding knife in his right front pocket, the same pocket in which Deputy Dollar had felt the hard object and from which he had recovered the baggie of marijuana.

II.

ANALYSIS

A.

WEAPONS FRISK

Appellant contends that the trial court erroneously denied his motion to suppress the marijuana because both Dollar's second entry of Fields' residence and his frisk of appellant for weapons were unreasonable. Assuming, for purposes of analyzing the frisk, that Deputy Dollar's second entry of Fields' residence was reasonable, we nevertheless hold that the frisk violated the Fourth Amendment because Dollar lacked reasonable suspicion to believe appellant was armed and dangerous.

On appeal of the denial of a motion to suppress, we view the evidence in the light most favorable to the Commonwealth. Commonwealth v. Grimstead, 12 Va. App. 1066, 1067, 407 S.E.2d 47, 48 (1991). "[W]e are bound by the trial court's findings of historical fact unless 'plainly wrong' or without evidence to support them," McGee v. Commonwealth, 25 Va. App. 193, 198, 487 S.E.2d 259, 261 (1997) (en banc), but we review de novo the trial court's

application of legal standards such as reasonable suspicion to the particular facts of the case, see Ornelas v. United States, 517 U.S. 690, 699, 116 S. Ct. 1657, 1663, 134 L. Ed. 2d 911 (1996).

In order for an officer to conduct a weapons frisk, two conditions must exist. First, the officer must rightly be in the presence of the party frisked so as to be endangered if the person is armed. See, e.g., 4 Wayne R. LaFave, Search and Seizure § 9.5, at 246 (3d ed. 1996). Second, the officer must be able to point to "'specific and articulable facts'" "which reasonably lead[] him to conclude, in light of his experience, . . . that the suspect 'may be armed and presently dangerous.'" Lansdown v. Commonwealth, 226 Va. 204, 209, 308 S.E.2d 106, 110 (1983) (quoting Terry v. Ohio, 392 U.S. 1, 21, 30, 88 S. Ct. 1868, 1880, 1884, 20 L. Ed. 2d 889 (1968)).

In assessing whether a particular person may be armed and dangerous, an officer may consider "characteristics of the area surrounding the stop, the time of the stop, the specific conduct of the suspect individual, the character of the offense under suspicion, and the unique perspective of a police officer trained and experienced in the detection of crime." Christian v. Commonwealth, 33 Va. App. 704, 714, 536 S.E.2d 477, 482 (2000) (en banc) (footnote omitted). "An officer may not, simply by observing some item causing a 'bulge' in one's clothing, conduct a general frisk where the nature of the bulge or the surrounding circumstances do not reasonably support the conclusion that . . . the person is armed and dangerous." Stanley v. Commonwealth, 16 Va. App. 873, 877, 433 S.E.2d 512, 515 (1993); see also United States v. Wilson, 953 F.2d 116, 125 (4th Cir. 1991) (holding that, absent additional evidence, seeing "a bulge [in clothing of person at airport] is not the sort of observation that has any significance"). Compare Stanley, 16 Va. App. at 876, 433 S.E.2d at 514 (holding the Fourth Amendment "does not legitimize a patdown search of someone stopped for a routine traffic offense simply because he is carrying an item the size and configuration of a wallet or checkbook in his front pants pocket"), with Troncoso v. Commonwealth, 12 Va. App. 942, 945, 407 S.E.2d 349, 350-51 (1991) (holding that if bulge observed in stomach area of driver during routine traffic stop is accompanied by fidgeting, nervousness, and effort to conceal bulge, officer's belief that subject may be armed and dangerous is reasonable).

Here, assuming without deciding that Deputy Dollar was rightly in the presence of appellant when he entered Fields' residence in response to her second 911 call, the evidence did not provide Deputy Dollar with reasonable, articulable suspicion to conclude that the object in appellant's pocket may have been a weapon. Although Deputy Dollar was responding to a 911 "domestic call" at Fields' residence for the second time that day, the first call involved only "verbal arguing," was "not very escalated," and resolved peacefully with no indication that either party possessed a weapon or was predisposed to use violence toward the other or toward the deputies. When Deputy Dollar returned the second time, neighbors were in the front yard yelling, and Dollar heard the parties inside "verbally arguing back and forth" while he stood on the front porch, but Dollar did not testify that he overheard either party threaten the other or that he heard anything indicating physical violence or abuse.

When Dollar entered unannounced, he immediately saw Fields and appellant standing at least four feet apart, he noticed nothing unusual about Fields' appearance, and he saw nothing in either party's hands. Although he noticed appellant's right front pocket was "bulging" and concluded that appellant had "something" inside his pocket, Dollar articulated no specific basis for believing that "something" might be a weapon. Before Deputy Dollar attempted to frisk appellant for weapons, appellant engaged in no additional behavior and made no statements tending to indicate that he

was armed and presently posed a danger to Fields or Deputy Dollar.

Thus, we conclude Deputy Dollar lacked reasonable articulable suspicion to believe appellant was both armed and presently dangerous when Dollar told appellant he intended to frisk appellant for weapons. We recognize that domestic disputes often are fraught with danger for both their participants and the law enforcement officers trying to diffuse them. See, e.g., Fletcher v. Town of Clinton, 196 F.3d 41, 50 (1st Cir. 1999) (noting that in domestic disputes, "violence may be lurking and explode with little warning"). Nevertheless, we are unwilling to hold that an officer responding to a verbal domestic dispute may frisk a party to the dispute solely because that party has an unidentified "bulge" in his pocket. Accordingly, we hold that Deputy Dollar's frisk of appellant and search of his pocket were unreasonable and that the fruits of that search should have been suppressed. Because no evidence other than the illegally seized marijuana supported appellant's conviction for marijuana possession, we reverse that conviction and dismiss the underlying charge.

B.

ASSAULT AND BATTERY ON A LAW ENFORCEMENT OFFICER2

"An unlawful arrest or an arrest utilizing excessive force is a battery because that touching is not justified or excused and therefore is unlawful." Gnadt v. Commonwealth, 27 Va. App. 148, 151, 497 S.E.2d 887, 888 (1998). In either case, the arrestee may use reasonable force to resist the arrest. See Palmer v. Commonwealth, 143 Va. 592, 602-03, 130 S.E. 398, 401 (1925); Foote v. Commonwealth, 11 Va. App. 61, 69, 396 S.E.2d 851, 856 (1990). Here, appellant was not entitled to use reasonable force to resist his arrest (1) because the arrest was not unlawful in the sense required to permit him to resist the arrest and (2) because the evidence, viewed in the light most favorable to the Commonwealth, establishes that the officers used no more force than was necessary to effect that arrest.

1. Lawfulness of Arrest

"In Virginia, . . . [t]he lawfulness of an attempted arrest [for purposes of assessing an arrestee's right to resist the arrest] is determined by [Code §§ 19.2-77, 19.2-81, and 19.2-100]." Brown v. Commonwealth, 27 Va. App. 111, 116, 497 S.E.2d 527, 530 (1998); see also Johnson v. United States, 333 U.S. 10, 15 & n.5, 68 S. Ct. 367, 370 & n.5, 92 L. Ed. 436, 441 & n.5 (1948) (in reviewing reasonableness of search claimed constitutional as incident to arrest, holding state law "determine[s] whether the arrest itself was lawful"). Code § 19.2-81, the statute applicable here, provides in pertinent part that a sheriff's deputy "may arrest, without a warrant, any person who commits any crime in the presence of the officer and any person whom he has reasonable grounds or probable cause to suspect of having committed a felony not in his presence." Thus, "[t]he dispositive question is whether the officers had probable cause to arrest . . . ." Smith v. Commonwealth, 30 Va. App. 737, 740, 519 S.E.2d 831, 832 (1999).

No Virginia appellate decision holds that an arrest is unlawful for purposes of entitling the arrestee to resist the arrest simply because the evidence which provides probable cause for the arrest is obtained in a search or seizure that is unreasonable under the Fourth Amendment. Cf. Hill v. Commonwealth, 37 Va. App. 1, 553 S.E.2d 529 (2001)

(holding detention not based on reasonable suspicion or probable cause was illegal and detainee was entitled to use reasonable force to resist). Further, the Ninth Circuit Court of Appeals has held that an arrest flowing from an unreasonable search which yields marijuana is not "unlawful" in the sense required to permit the arrestee to resist. United States v. Moore, 483 F.2d 1361, 1364-65 (9th Cir. 1973). As that Court explained,

> [t]he privilege [to resist] is available only if the arrest was "unlawful." The parties agree that appellant was arrested after the agents discovered the marihuana in his suitcase [while conducting an unreasonable search]. The agents then had probable cause to believe that a felony was being committed in their presence. The warrantless arrest was therefore lawful, in itself. It was "unlawful" only in the exclusionary-rule sense that it was "fruit" of the prior unlawful search. We have been cited no authority, and have found none, that permits resistance to an arrest that is unlawful only in this derivative sense.

Id. (emphasis added).

The Court in Moore examined "[t]he purposes of the privilege [to resist an unlawful arrest]," which it cited as "deter[ring] abuses of police authority" and "preserv[ing] the sense of personal liberty and integrity . . . by protecting from punishment persons who reasonably resist unlawful intrusions by government agents." Id. at 1365. It concluded that "the resolution of often difficult issues relating to the lawfulness of the search [upon which the challenged arrest was based] are surely best left to subsequent court proceedings." Id. As a result, the Court was "unwilling," under the facts of that case, "to initiate . . . an extension of the privilege [to resist]" an arrest that was unlawful only in a "derivative sense."3 Id.

Similarly, in appellant's case, the arrest was unlawful only in a "derivative sense." Id. Assuming the entry and the weapons frisk violated the Fourth Amendment's prohibition against unreasonable searches and seizures, the evidence establishes that "appellant was arrested after [Deputy Dollar] discovered the mari[j]uana in his [pocket]. [Deputy Dollar] then had probable cause to believe that a [crime] was being committed in [his] presence. The warrantless arrest was therefore lawful, in itself," even if unlawful in a "derivative sense." Id. at 1364-65; see Code § 19.2-81. Assuming without deciding that appellant would have been privileged to use reasonable force to resist the entry or the weapons frisk or both, see Hill, 37 Va. App. at 6-7, 553 S.E.2d at 532, appellant lost the privilege to resist his subsequent arrest once Deputy Dollar discovered marijuana in his possession, even if Dollar's discovery of the marijuana resulted from an unreasonable entry and search.

2. Force Used to Effect the Arrest

"[W]hen an officer attempts to arrest a person charged with a felony and uses more force than is reasonably necessary to make the arrest, the officer himself becomes a wrongdoer and the person whose arrest is sought, if himself without fault, can resist such excessive force . . . ." Palmer, 143 Va. at 602-03, 130 S.E. at 401. Whether the force used is reasonable is a mixed question of law and fact. See Brown, 27 Va. App. at 117, 497 S.E.2d at 530. In reviewing the factual predicate for the trial court's ruling, we view the evidence in the light most favorable to the Commonwealth. See Smith, 30 Va. App. at 740, 519 S.E.2d at 832.

None of Deputy Dollar's or Deputy Sexton's actions constituted excessive force in light of appellant's attempts to resist. Fields testified that Deputy Dollar pushed appellant's head into a window unnecessarily while frisking appellant for weapons. However, the fact finder was entitled to reject Fields' explanation as to how the window was broken and to conclude that the damage occurred either prior to Dollar's encounter with appellant or, if during the encounter, in an accidental fashion. Further, even accepting Fields' testimony as to what occurred during the weapons frisk, Fields admitted that appellant refused to comply with Deputy Dollar's request to him to remain still during the frisk, permitting the inference that Dollar was simply attempting to maintain control of appellant and did not use unreasonable force in doing so. Finally, Deputy Dollar's use of force during the weapons frisk did not entitle appellant to resist the subsequent arrest for marijuana possession by assaulting and battering the deputies. Assuming without deciding appellant was entitled to resist the frisk because it was not supported by reasonable suspicion, see Hill, 37 Va. App. at 6-7, 553 S.E.2d at 532, the arrest itself was based on probable cause resulting from Dollar's discovery of the marijuana.

When Deputy Dollar told appellant he was placing appellant under arrest, appellant refused to submit to Deputy Dollar's authority. Instead, appellant said he was "just there to get some more of his belongings," including "his gun," and he walked to the back of the house "at a real quick pace." When Deputy Dollar "[got] ahold of [appellant]" from behind, appellant refused to cooperate, despite Dollar's verbal instructions and efforts to subdue appellant physically. Only then did Dollar use his baton, striking appellant on the thigh and leg, but appellant "was still fighting and kicking." When Deputy Dollar slipped, appellant struck him across the face and placed him in a "choking headlock" which restricted Dollar's ability to breathe.

Dollar was very concerned for his safety at that time, as was Deputy Sexton when he entered the kitchen and found appellant had Deputy Dollar in a headlock. As Deputy Sexton attempted to assist Dollar, appellant struck Sexton in the ribs. Sexton then sprayed appellant with pepper spray in an effort to get appellant to release Dollar. Appellant, clearly recognizing Sexton as a law enforcement officer, said, "That tear gas ain't shit, cop," and continued to resist. When Dollar managed to wriggle free and the deputies tried again to subdue appellant, appellant kicked Sexton in the face and knee. Thus, the evidence supported a finding that, by that point in the altercation, appellant had assaulted and battered both deputies, who had exercised only as much force as was necessary to subdue appellant and take him into custody.

Because the deputies did not use excessive force to arrest and subdue appellant, the amount of force they did use did not entitle appellant to resist.

III.

For these reasons, we hold the weapons frisk violated the Fourth Amendment because the presence of a bulge in appellant's pocket was insufficient under the facts of this case to provide reasonable suspicion that appellant was armed and dangerous. However, appellant had no right to resist his arrest for possession of marijuana. Thus, we reverse and dismiss the marijuana possession conviction and affirm the two convictions for assault and battery of a law enforcement officer.

Affirmed, in part, and reversed
and dismissed, in part.

Benton, J., concurring, in part, and dissenting, in part.

I substantially concur in Parts I. and II.A. and, therefore, I concur in reversing the conviction for possession of marijuana and dismissing the underlying charge. I do not join in the remainder of the opinion. For the reasons that follow, I would also reverse and dismiss the assault and battery convictions.

I.

The evidence proved that Benjamin McCracken and Teresa Fields lived together for nearly three years in a house Fields' father owned. Fields testified that she and McCracken argued about noise she made while cleaning the house and that she called the police because she "had an excruciating headache, . . . was ill, irritable" and tired of arguing. Midday, on April 8, 2000, two officers went to the residence in response to Fields' telephone call. One of the officers testified that they responded to a complaint of "verbal arguing." No other evidence proved that Fields told the police anything else during her initial telephone call.

When the police arrived, McCracken was putting various personal items in his car. Fields and McCracken explained that "they'd had [a] verbal argument and that [there] had been no assault." When asked if he was able to calm the situation, the officer responded, "It seemed to have been not very escalated." The officers remained while McCracken gathered some of his personal belongings and put them in his car. One officer described the situation as "very peaceful" and said they helped McCracken load some of his items. The other officer testified that McCracken was "very friendly, he agreed to leave, and there were no problems whatsoever." Fields testified that she and McCracken declined "to fill out any type of papers to keep each other away" and said "there was no purpose for that."

McCracken went to his mother's residence and later telephoned Fields. During that conversation, McCracken and Fields were both agitated. McCracken's mother then telephoned Fields to inform her that McCracken was returning to collect more of his belongings. Before McCracken arrived at the residence, Fields telephoned the police dispatcher and requested that the officers return to her home. The officers received the second call about an hour and a half after they had left the residence. Fields testified that she wanted the officers to return because she had to go to work and did not want to be delayed by an argument with McCracken.

The first officer to arrive testified that before entering the residence, he heard neighbors hollering something to him. Fields' sister testified that when she saw the officer having difficulty opening the screen door, she called to him that "the front door drags." The officer testified that he heard Fields and McCracken "verbally arguing back and forth when he walked up on the porch." Fields testified, however, that she was talking to McCracken and that they were not arguing. The officer drew his weapon and walked into the house without knocking.

II.

McCracken contends the officers did not have either probable cause to believe a crime was being committed or exigent circumstances to justify their entry. The Commonwealth responds the "officers had probable cause at the time of their warrantless entry to believe that cognizable exigent circumstances were present."

The United States Supreme Court has held that, "absent probable cause and exigent circumstances, warrantless [entries and] arrests in the home are prohibited by the Fourth Amendment." Welsh v. Wisconsin, 466 U.S. 740, 741 (1984); Payton v. New York, 445 U.S. 573, 590 (1980). "[W]arrantless entries into dwellings, followed by searches, seizures, and arrests therein . . . are presumed to be unreasonable, in Fourth Amendment terms, casting upon the police a heavy burden of proving justification by exigent circumstances." Verez v. Commonwealth, 230 Va. 405, 410, 337 S.E.2d 749, 752-53 (1985); Welsh, 446 U.S. at 750. Furthermore, "[e]xigent circumstances justify a warrantless entry . . . only when the police have probable cause to obtain a search warrant." Alexander v. Commonwealth, 19 Va. App. 671, 674, 454 S.E.2d 39, 41 (1995).

The trial judge found that the officers acted reasonably in entering the residence and denied the motion to suppress. His findings included the following:

> There is no question or at least I haven't heard any evidence that would cause the Court to believe that the first call was not made by her complaining about the conduct of [McCracken]. The officers responded. When they got there, evidently a reasonable inference would be that . . . Fields and [McCracken] had come to some sort of agreement. The officers testified that there was no fighting or arguing, that he was in the process of removing his property. He was cooperative, he was loading his vehicle, his personal items, some of his stereo equipment. The officers even assisted him. So there is no evidence of any ill feeling or ill will from the first call. But the fact remains that . . . Fields called for help the first time. . . . Shortly thereafter, an hour or hour and a half later, a second call comes in. And the evidence is unrebutted that [McCracken] is back on her property where he was living with her. And the Jury has heard evidence that there was screaming on the outside, one of the officers heard it, the other one didn't. Officer Sexton says he didn't. And when they go inside of the house, the Court is of the opinion that that was reasonable. I mean, here you had a second call where the officers thought [McCracken] was leaving and was cooperative and left. Now he's back on the scene. And the owner of the property is calling the officers again for assistance. They respond. They come in, they observe, they know there's been prior problems.

We have held that a call to the police dispatcher for assistance does not, without more, give rise to probable cause to believe a crime is occurring. Id. at 674-75, 454 S.E.2d at 41. Indeed, the evidence proved that when Fields called the police on the second occasion, McCracken had not arrived. Fields knew the police dispatcher and told him "that [her problem with McCracken] was just verbal." She testified that she reported no crime, that she expected no trouble from McCracken, and that she wanted the officers there because she had to go to work and did not want to be delayed by an argument with McCracken. Thus, she had not given the police dispatcher or the officers any basis to believe McCracken would do anything other than continue to gather his property. "Probable cause for police officers to enter a person's [residence] must be based on more than speculation, suspicion, or surmise that a crime might be in progress." Id.

The evidence also proved that when the police arrived in response to the first call from Fields, McCracken had made no threats. Although he and Fields had had an argument, the officers testified that matters were peaceful and non-threatening. The evidence proved Fields had not even expressed fear of McCracken when she first called the police. Thus, the officers could not reasonably infer from their first visit to the house or the call before their second visit to the house that when McCracken returned to remove more of his property he either posed any threat to Fields or would commit a crime. Simply put, this evidence failed to prove the officer had probable cause to believe a crime had been or was being committed when he made the warrantless entry into the home.

In addition, the principle is well established that "no amount of probable cause can justify a warrantless [entry into a home] . . . absent 'exigent circumstances.'" Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971); Payton, 445 U.S. at 590. "Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." Welsh, 466 U.S. at 750. The evidence proved that McCracken had never physically abused Fields and that she had no fear of him. Moreover, Fields did not tell the police dispatcher McCracken had threatened her. She testified she has known the dispatcher "for years" and told him her only concern was the arguments. She merely wanted someone there to prevent another argument. Although the trial judge could believe the officer's testimony that he heard argument and disbelieve Fields' testimony that she and McCracken were not arguing, the mere occurrence of an argument is not indicative of a threat to life or serious injury. The officer had no other basis to believe an emergency existed. As in Shannon v. Commonwealth, 18 Va. App. 31, 34, 441 S.E.2d 225, 226, aff'd on reh'g en banc, 19 Va. App. 145, 449 S.E.2d 584 (1994), and Alexander, this evidence contains no basis upon which the police officers could have concluded that an emergency existed. Thus, the Commonwealth failed to meet its "heavy burden" of proving exigent circumstances existed justifying the warrantless entry. Alexander, 19 Va. App. at 674, 454 S.E.2d at 41.

III.

"At the very core [of the Fourth Amendment] stands the right of a [person] to retreat into his [or her] own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505, 511 (1961). "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" Welsh, 466 U.S. at 748 (citation omitted). "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house." Payton, 445 U.S. at 589-90. Thus, the Supreme Court has reiterated that it "held in Payton. . . that a suspect should not be arrested in his house without an arrest warrant, even though there is probable cause to arrest him." Minnesota v. Olson, 495 U.S. 91, 95 (1990).

Indeed, the principle is well established and long standing that an unlawful, warrantless entry by a police officer into a residence renders void an arrest which is founded upon a discovery inside the residence after the unlawful entry. Johnson v. United States, 333 U.S. 10, 15-17 (1948); see also Welsh, 466 U.S. at 748-50; Payton, 445 U.S. at 588-90; Jefferson v. Commonwealth, 27 Va. App. 1, 18, 497 S.E.2d 474, 482-83 (1998) (holding that the "arrest of appellant . . . executed after the officer entered the curtilage of appellant's home without a warrant . . . violated the Fourth Amendment"). The purpose of these decisions, holding the arrests to be void, is "to protect [the] home from entry."

Olson, 495 U.S. at 95.

> An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine "the right of the people to be secure in their persons, houses, papers, and effects," and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.

Johnson, 333 U.S. at 17 (footnote omitted).

"It has long been held in Virginia that where an officer attempts an unlawful arrest, the officer is an aggressor which gives the arrestee the right to use self-defense to resist so long as the force used is reasonable." See Brown v. Commonwealth, 27 Va. App. 111, 116-17, 497 S.E.2d 527, 530 (1998). This principle of law treats the unlawful arrest as an unauthorized touching and, thus, a battery against the attempted arrestee. Thus, the Supreme Court has held that where an officer attempts an unlawful arrest, the arrestee "could resist with such reasonable force as was necessary to repel that being exercised by the officer in that undertaking." Broaddus v. Standard Drug Co., 211 Va. 645, 652, 179 S.E.2d 497, 503 (1971).

The evidence proved that McCracken initially resisted being searched and then attempted to maneuver his way around the officer after the officer sought to arrest him. Because the arrest of McCracken was made after the police had unlawfully entered the home without a warrant, McCracken had a right to use reasonable force to resist any of the officer's conduct. The encounter escalated to a physical altercation only when the officer jumped onto McCracken's back. See Hill v. Commonwealth, 37 Va. App. 1, 7, 533 S.E.2d 529, 532 (2001) (holding that striking an officer after being assaulted by the officer during an unlawful arrest was not excessive force).

The events that gave rise to the search and arrest all occurred within the home, after the officers had unlawfully entered the home and upon the officer's discovery of evidence within the home during that unlawful entry. This is precisely the circumstance the Supreme Court's decision in Payton barred by holding that "'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" 445 U.S. at 585 (citation omitted). The rule in Payton was derived from the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." Id. at 601. By drawing a line at the entrance to a home, the Fourth Amendment protects the physical integrity of the home. As the Court noted in Johnson, "officers . . . thrust[ing] themselves into a home is . . . a grave concern not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." 333 U.S. at 14. Based on the unlawful entry, McCracken was not unreasonable in his attempt to resist the unlawful arrest and did not use excessive force in resisting.

IV.

For these reasons, I would hold that the officer's warrantless entry into the residence violated the Fourth Amendment. That unlawful entry negated the officer's authority to make an arrest for events occurring inside the home.

Therefore, I would reverse all the convictions and dismiss the indictments. See Alexander, 19 Va. App. at 675, 454 S.E.2d at 41.

Bumgardner, J., dissenting, in part, and concurring, in part.

I do not believe the police acted unreasonably and, therefore, conclude the trial court did not err. While I concur in the decision to affirm the convictions of assault and battery, I do not join that opinion.

Police officers responded to a domestic disturbance call from Teresa Fields because she wanted the defendant removed from her house. The defendant left voluntarily the first time. Ninety minutes later, Fields placed a second call to the 911 emergency dispatcher because the defendant was returning to her house. When the officers responded, neighbors were screaming that the defendant was inside, and the officers heard him inside arguing.

If the first officer had not entered Fields' house immediately and investigated the domestic disturbance complaint, he would have been derelict. Before entering the front door, the officer had probable cause to believe the defendant was trespassing, Code § 18.2-119, and at least, reasonable suspicion of assault on a family member, Code § 18.2-57.2.4

After the officer entered, he saw the bulge in the defendant's pocket. The defendant did not cooperate and refused to put his hands on the wall. When the defendant finally complied by putting his hands on the love seat, the officer patted the defendant's pocket. At that point, the officer was "authorized to take such steps as [are] reasonably necessary to protect [his and others'] personal safety and to maintain the status quo during the course of the stop." United States v. Hensley, 469 U.S. 221, 235 (1985). The officer felt a hard, rigid object, and when trying to remove it, the officer pulled out a bag of marijuana. From that point, the officer had probable cause to arrest for possession of marijuana, and the defendant had no right to resist.

I believe the decisions to reverse the trial court fail to view the evidence in the light most favorable to the Commonwealth. By failing to take the appropriate appellate perspective, each permits the lens of hindsight to distort its inspection of the reasonableness of the police response to this emergency call.

FOOTNOTES

* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

1 For the reasons set out in his attached opinion, Judge Benton "substantially concur[s]" in both the reasoning and result of Part II.A., which reverses and dismisses appellant's conviction for marijuana possession. Judge Bumgardner concurs in the result of Part II.B., which affirms appellant's convictions for assault and battery. Thus, the marijuana possession conviction is reversed and dismissed by Judges Elder and Benton, with Judge Bumgardner dissenting, and the assault and battery convictions are affirmed by Judges Elder and Bumgardner, with Judge Benton dissenting.

2 Part II.B. represents the opinion only of Judge Elder. Judge Bumgardner concurs only in the resulting affirmance of

the assault and battery convictions.

3 The Court indicated in Moore that it might be willing to extend the right to resist an arrest supported by probable cause if the arrestee "claim[ed] . . . bad faith, unreasonable force, or provocative conduct on the part of the arresting officer." 473 F.2d at 1365; see also United States v. Span, 970 F.2d 573, 579-80 (9th Cir. 1992).

Assuming that whether the officer acted in bad faith is relevant under Virginia law, see Brown, 27 Va. App. at 116, 497 S.E.2d at 530; Foote, 11 Va. App. at 67, 396 S.E.2d at 855, no evidence established that Deputy Dollar acted in bad faith. As counsel for appellant conceded in argument, "I don't need to come in here to Court and say, bad cop, bad cop, [I] don't believe that. The simple fact is these two officers have nine months of experience between them. . . . I think what happened was, adrenalin[e] took over, . . . and the Fourth Amendment went out the window."

Further, as discussed infra in the text, Virginia law recognizes a right to resist an arrest involving excessive force, and this right did not apply under the facts of this case.

4 In recognition of the difficulty of protecting against domestic violence, the General Assembly increased the duties of law-enforcement officers when responding to such incidents. See Code § 19.2-81.3. Police are entitled to arrest without a warrant when the violation does not occur in their presence. They must arrest "the primary physical aggressor" if they develop probable cause unless special circumstances exist. The police must make written report of any incident in which they have probable cause that "family abuse" occurred and written explanation of the special circumstances if they do not arrest.

_____

VIRGINIA
In the Court of Appeals of Virginia on Wednesday the 21st day of June, 2003.

Benjamin Wayne McCracken, Appellant,
against
Commonwealth of Virginia, Appellee.

Record No. 2912-00-3
Circuit Court Nos. CR00-259,
CR00-260 and CR00-262

UPON A PETITION FOR REHEARING EN BANC

Before the Full Court

On May 28, 2002 came the appellant, by court-appointed counsel, and filed a petition praying that the Court set

aside the judgment rendered herein on May 14, 2002, and grant a rehearing en banc thereof.

On consideration whereof, the petition for rehearing en banc is granted, the mandate entered herein on May 14, 2002 is stayed pending the decision of the Court en banc, and the appeal is reinstated on the docket of this Court.

The parties shall file briefs in compliance with Rule 5A:35. The appellant shall attach as an addendum to the opening brief upon rehearing en banc a copy of the opinion previously rendered by the Court in this matter. It is further ordered that the appellant shall file with the clerk of this Court twelve additional copies of the appendix previously filed in this case.

A Copy,
Teste:
Cynthia L. McCoy, Clerk
By:
Deputy Clerk

McCracken v. Commonwealth, 02 Vap UNP 2912003 (2002)

Gateway 2000, Inc. v. Daniel Limoges, 552 N.W.2d 591

GATEWAY 2000, INC.
a Delaware Corporation,
Plaintiff and Appelllant,

v.

DANIEL LIMOGES,
Sheriff of Union County, SD,
Defendant and Appellee
[1996 SD 81]

South Dakota Supreme Court
Appeal from the First Judicial Circuit, Union County, SD
Hon. Richard Bogue, Judge
#19375-------Reversed

Suzan E. Boden, Kent Vriezelaar
Vriezelaar, Rigges, Edgington, Rosi, Bottaro & Boden, Sioux City, IA
Attorneys for Plaintiff and Appellant.

John B. Slattery, Union County State's Attorney, Elk Point, SD
Attorney for Defendant and Appellee.

Argued April 23, 1996; Opinion Filed July 2, 1996

SABERS, Justice.

[1] Gateway 2000, Inc. appeals from a denial of an injunction and a grant of declaratory judgment to the sheriff of Union County, South Dakota. We reverse and remand.

FACTS

[2] Gateway is a corporation with its principal place of business in North Sioux City, Union County, South Dakota. Gateway manufactures and distributes personal computers throughout the world and employs more than 6000 people. Approximately 4000 of those employees work at the North Sioux City facility. The employees reside in Iowa, Nebraska and South Dakota.

[3] The sheriff comes to the Gateway facility in order to serve approximately thirty employees per week with civil

process. The matters sought to be served upon Gateway employees are for the most part summonses, garnishments and executions based on judgments from South Dakota and neighboring states. In order to facilitate this service and cooperate with the sheriff, Gateway security staff allows the sheriff to enter at the vistor's entrance. The sheriff advises the Gateway security staff of the names of individuals upon whom he seeks service of process. The employees are notified and informed that the sheriff is waiting at the visitor's entrance to serve papers on them. The employees have the option of going to the visitor's entrance to be served or remaining at their work station. Gateway management does not force it employees to accept service of civil matters. Each employee called for service of process results in approximately twenty minutes of lost productivity and sales to Gateway.

[4] The sheriff now demands entry and access to the employee work stations at Gateway. The sheriff has notified Gateway that any person who interferes or denies access to him or his deputies will be arrested, charged and prosecuted for obstruction of justice. On one occasion, an employee refused to accept service at the visitor's entrance and the sheriff "inadvertently obtained access" to the employee's work station and served in front of his co-workers. Gateway claims this causes undue disturbance and commotion in the private work areas.

[5] Gatway sued the sheriff in his official capacity and requested an injunction and declaratory judgment. Gateway alleged violation of its

> constitutional rights to be free and secure from unreasonable searches and seizures; its right to equal protection and due process of the law; and its right to privacy, all in violation of the First, Fourth and Fourteenth Amendments to the Constitution of the United States and Section 11, Article VI of the South Dakota Constitution.

The trial court denied the injunction and granted declaratory judgment to the sheriff stating:

> The case law gives Fourth Amendment rights to a person's home and to a lesser extent to business premises. Primarily the right applies to an area where there is an expectation of privacy. These would include lockers, bathrooms, areas set aside for personal use, or business files. There is no such expectation demonstated for areas where employees congregate or perform their work.

Gateway appeals.

[6] **1. Whether there is a justifiable expectation of privacy in Gateway's employee work area.**

[7] The fourth Amendment to the United State Constitution protects the rights of people against unreasonable intrusions by the State. "'[T]he security of one's privacy against arbitrary intrusion by the police' is fundamental to a free society and as such protected by the Fourteenth Amendment." Frank v. Maryland, 359 US 360, 362, 79SCt 804, 807, 3 Led 2nd 877, 880 (1959) overruled on other grounds by Camara v. Municipal Court, 387 US 523, 528, 87 Sct 1727, 1730, 18 LEd2d 930, 935, (1967) (quoting Wolf v. Colorado, 338 US 25, 27, 69 Sct 1359, 1361, 93 Led 1792, 1785 (1949) overruled on other grounds by Mapp v. Ohio, 367 US 643, 655, 81 Sct 1684, 6 LEd2d 1081, 1090

(1961)). The fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The South Dakota Constitution, Article VI, §§ 11 provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not violated, and no warrant shall issue but upon probable cause supported by affidavits, particularly describing the place to be searched and the person or thing to be seized.

[¶¶8] The Fourth Amendment condemns "unreasonable searches and seizures" and protects two rights.

> The first of these is the right to be secure from intrusion into personal privacy, the right to shut the door on officials of the state unless their entry is under proper authority of law. The second, and intimately related protection, is self-protection: the right to resist unauthorized entry which has as its design the security of information to fortify the coercive power of the state against the individual, information which may be used to effect a further deprivation of life or liberty or property.

Frank, 359 US at 365, 79 Sct at 808, 3 LEd2d at 881 (emphasis added).

[¶¶9] The United States Supreme Court has held business premises are protected by the Fourth Amendment. G.M. Leasing Corp. v. United States, 429 US 338, 353, 97 Sct 619, 629, 50 LEd2d 530, 544 (1977) (citing See v. City of Seattle, 387 US 541, 87 Sct 1737, 17 Ed2d 943 (1967); Go-Bart Co. v. United States, 282 US 344, 51 Sct 153, 75 Led 374 (1931); Silverthorne Lumber Co. v. United Sates, 251 US 385, 40 Sct 182, 64 Led 319 (1920)).

[¶¶10] Gateway concedes that the expectation of privacy in commercial premises is less than that in a person's home. New York v. Burger 482 US 691, 700, 107 Sct 2636, 2642, 96 LEd2d 601, 612 (1987). The United States Supreme Court "has recognized that a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context," like administrative searches in a highly regulated business. G.M. Leasing Corp., 429 US at 353-54, 97 Sct at 629, 50 LEd2nd at 544.

[¶¶11] Despite concerns over privacy, two state intrusions are traditionally sanctioned: police searches for evidence and administrative inspections. Burger, 482 US at 699-700, 107 Sct at 2642, 96 LEd2d at 612. However, the United States Supreme Court stated an intrusion to secure financial records and automobiles to enforce tax laws "was not based on the nature of its business, its license, or any regulation of its activities," G.M. Leasing Corp., 429 US at 354, 97 Sct at 629, 50 LEd2d at 544, and "involves nothing more than the normal enforcement of the tax laws, and we find no justification for treating petitioner [business] differently [than a private person] in the circumstances simply because it is a corporation." Id. The Fourth Amendment prohibits intrusions into privacy, but allows special exceptions for

gathering evidence and activities. The sheriff admits he is not on the Gateway premises to enforce criminal law or to gather evidence for a criminal investigation, but claims his conduct is not a "search" within the meaning of the Fourth Amendment.

[¶¶12] Whether the Fourth Amendment applies depends on whether Gateway

> "can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action. The inquiry ... normally embraces two discrete questions. The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy,' [Katz v. United States, 389 US 347, 361 (1967)] —— whether, in the words of the Katz majority, the individual has shown that 'he seeks to preserve [something] as private.' The second question is whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as "reasonable," ... whether, in the words of the Katz majority, the individual's expectation, viewed objectively, is 'justifiable' under the circumstances. [Katz, 389 US at 353]."

United States v. Knotts, 460 US 276, 280, 103 Sct 1081, 1084-85, 75 LEd2d 55, 61 (1983) (quoting Smith v. Maryland, 442 US 735, 740, 99 Sct 2577, 2580, 61 LEd2d 220, 226 (1979)).

[¶¶13] The first question is whether the individual has exhibited a subjective expectation of privacy. Gateway maintains an internal security department and prohibits access beyond the visitor center to members of the public for security and safety reasons. It compares its visitor center with the front porch of a home —— a place where the sheriff can present himself and request that employees come to the door. Beyond that, Gateway asserts "there is a clear expectation of privacy[,] the threshold of which cannot be crossed or violated absent the consent of the owner, a valid warrant or an exigent circumstance." We agree.

[¶¶14] The second question is whether society is prepared to recognize the individual's expectation of privacy as reasonable or justifiable under the circumstances. Gateway, like other businesses, has clearly-defined public areas. The employee work area is private. The United Supreme Court held that entry for the purpose of checking for compliance with administrative regulations, without consent, upon the portions of commercial premises which are not open to the public requires a warrant. City of Seattle, 387 US at 545-46, 87 Sct at 1740-41, 18 EDd2d at 947-48. The employee work area of Gateway is not open to the public and the closed door beyond the visitor center creates a threshold which the sheriff cannot cross. It is clear that Gateway has a justifiable expectation of privacy in its employee work areas which are not open to the public.

[¶¶15] **2. Whether the sheriff can enter a business for the purpose of service of civil process on employees where there is a justifiable expectation of privacy.**

[¶¶16] The service of process in a civil action differs from that in a criminal action. South Dakota law provides that criminal service shall be executed by a law enforcement officer. SDL 23A-2-7. The summons "shall be served ... by delivering a copy to [the defendant] personally or by leaving it at his dwelling house or usual place of abode with some

person over the age of fourteen years then residing therein." SC-DCL 23A-2-9. The sheriff is also required to keep the peace and "must pursue and apprehend all felons, and must execute all writs, warrants and other process from any court or magistrate which shall be directed to him by legal authority." SDCL 7-12-1.

[¶¶17] In certain criminal situations a sheriff is given greater powers than a civil process server. A law enforcement officer is given the authority to require citizens to aid him in making an arrest.1 provides: "An arrest is the taking of a person into custody so that he may be held to answer for the alleged commission of a public offense." SDCL 23A-3-6. Also a law enforcement officer with authority to make an arrest may "break open an outer or inner door or window of a dwelling house or other structure for the purpose of making the arrest if, after giving reasonable notice of his intention, he is refused admittance," and if the law enforcement officer has an arrest warrant or exigent circumstances exist which justify warrantless arrest. SDCL 23A-3-5, Law enforcement officers are given these special powers in order to make arrests in criminal cases. However, this case involves civil process, not a criminal arrest. Therefore, in this civil case, the sheriff cannot "claim the right to exercise the powers associated with the service of [a criminal arrest warrant]." Casselman v. State, 472 NE2d 1310, 1312 (IndCtApp 1985).

[¶¶18] In civil matters, the sheriff is recognized as one of several types of process servers.

> The summons may be served by the sheriff or a constable of the county ... or by any other person not a party to the action who at the time of making such service is an elector of the state in which such service is to be made.

SDCL 15-6-4©); Mueller v. Zelmer, 525 NW2d 49, 51 (SD 1994). Private process servers exist. See Mueller, 525 NW2d at 51; Schebo v. Laderer, 720 Fsupp 146, 148 (DSD 1989).

[¶¶19] The sheriff asserts that in serving civil process he is merely performing a ministerial act which could be accomplished by any other person, not a party to the pending action and entitled to vote in the state. We agree, but that fact support Gateway, not the sheriff. When he is operating in the same capacity as a private process server, the sheriff only has the authority of a private process server. He has no authority to threaten Gateway management or employees with a charge of "obstruction of justice." Nor does he have authority to forcibly enter beyond the visitor entrance.

[¶¶20] Initially, it is important to note that the sheriff has made no argument that he attempted to and was unable to serve the employees at their homes, in public areas of Gateway other than the visitor center, like the parking lot, or in other way. In this case, the sheriff has threatened Gateway management with arrest for obstruction of justice for failing to force employees to accept service of process and preventing his access to the employee work area. Obstruction of justice, a Class 3 misdemeanor, occurs when:

> Any person who, after being lawfully commanded to aid any law enforcement officer in arresting any person or in retaking any person who has escaped from legal custody, or in excuting any legal process, intentionally refuses, without lawful cause, to aid such officer... .

SDCL 22-11-3.1 (emphasis added). The question is whether the sheriff has the authority to "lawfully command" Gateway employees to aid him.

> As a general rule, under the common law an officer, in executing a civil writ or process, has no legal right or authority to break an outer door or other outside protection to a dwelling house or forcibly to enter a dwelling house for the purpose of executing a writ or process, even after request for and refusal of admittance. If he does so, the officer ordinarily commits a trespass which renders his subsequent acts unlawful and void.

70 AmJr2d §§ 110-t 314. The sheriff cannot force another citizen to do that which he cannot do, that is, forcibly enter a private area to serve civil process. In this case, he cannot cause Gateway management or security to force the employee being served to accept service of process.

The United States Supreme Court stated, in a discussion of municipal liability, that the Fourth Amendment rights of a physician had been violated when deputy sheriffs forced their way into his office to arrest two of his employees for failing to appear before a grand jury to testify against him. Pembaur v. City of Cincinnati, 475 US 469, 484, 106 Sct 1292, 1300, 89 LEd2d 452, 465 (1986).

[¶¶21] A defendant has the right to attempt to avoid service of process in civil matters. The indiana Court of Appeals held a deputy sheriff cannot interfere with a citizen's right to be secure in his home in order to forcibly serve civil process. Casselman, 472 NE2d at 1318. In Casselman, a deputy sheriff forced his way into a home in order to execute a writ of attachment upon Casselman, who failed to appear in court. Casselman refused to let the deputy enter and attempted to close the door. Casselman was convicted of resisting law enforcement, which included forcibly resisting the officer while the officer was lawfully engaged in the execution of his duties. The Casselman court vacated his conviction and held the deputy was not "lawfully engaged" in the execution of civil process when he prevented Casselman from closing the door to his home. Id. At 1314.

[¶¶22] In United States v. Olander, 584 F2d 876 (9thCir 1978), the Ninth Circuit Court of Appeals considered whether service of civil process can violate Fourth Amendment rights and held that as long as there was no breaking or entering to serve the civil process, there was no violation.

[¶¶23] "Breaking or entering" can be caused by the sheriff pushing his way past the blocked doorway of a home. The Court of Appeals of Michigan discussed sheriff's deputies attempting to serve civil process in Remes v. Duby, 244 NW2d 440 (MichCtApp 1976). In Remes, deputies forced their way into a dwelling house after the door was opened to allow a resident of the house to enter. The deputies were told they could not enter, but pushed past the person attempting to close the front door, stating theycould enter because they had papers. The trial court granted summary judgment because the door was already open and the deputies did not break it down. The Court of Appeals reversed and stated:

> In ruling that nothing short of "breaking down a door" will satisfy the requirement of a showing of force, we believe the learned trial judge was in error. In Stearnes v. Vincent, [15 NW 86, 91 (Mich 1883)] it was stated:

> The protection of the dwelling against entry for the service of process is in the outer door only, and it is optional with the owner to take it by closing the door against the officer, or to waive it by allowing him to enter. If the officer once gains entrance through the outer door with force or fraud, the privilege is gone, and he may force open any door if necessary to make complete service of his process.

Remes, 244 NW2d at 442. The arrangement at Gateway is like the closed door. While the sheriff has access to the visitor center, the employee work area is like the dwelling house. If Gateway chooses, it can open its interior employee work areas to the public and the sheriff, but one it "closes" tat area to the public, the sheriff may not use force or threats to enter.

[¶¶24] In these circumstances, the sheriff's entry by force or threat of arrest to serve civil process would constitute "breaking or entering." A person who wishes to avoid serice of civil process has the right to close the door to this home or to private areas of his business to keep a law enforcement office out. See Cassleman, 472 NE2d at 1313. The Casselman case continued:

> "... A man's house is deemed his castle, for safety and repose to himself and family; but the protection and repose would be illusive and imperfect if a man were deprived of the right of shutting his own door when he sees an officer approaching to execute civil process. If the officer cannot enter peacefully efore the door is shut, he out not to attempt it, for this unavoidably endangers a breach of the peace, and is as much a violation of the owner's right as if he had broken the door at first."

Id. (quoting State ex rel. McPherson v. Beckner, 31 NE 950, 952, (1892) (holding the officer's conduct amounted to a trespass)).

[¶¶25] Our constitutions guard against those searches which are unreasonable. Although the sheriff argues his entry is reasonable, it is not reasonable to force his way into Gateway's private work areas in order to serve an employee who chooses not to accept service of process. An employee can close the door to his home to avoid a process server. He may also avoid civil process in the private areas of the Gateway facility. As an employer, Gateway does not give up its constitutional rights to maintain a private work area merely because it has incorporated. To hold otherwise would violate Gateway's right to privacy and freedom from unreasonable searches.

[¶¶26] For these reasons, the sheriff's actions in using force or threatening arrest were improver and violate Gateway's rights. Therefore, the trial court erred in refusing to grant injunctive relief. Accordingly, we revers and remand for disposition consistent with this opinion.

[¶¶27] MILLER, Chief Justice, and AMNUNDSON, KONENKAP, and GILBERTSON, Justices, concur.

Footnotes

. SDCL 23A3-1

. The United States Supreme Court notes special concerns in criminal cases:

> "Crime, even in the privacy of one's own quarters, is of course of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also of grave concern, not only to the individual, but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

United States v. Knotts, 460 US 276, 282, 103 Sct 1081, 75 LEd2d 55, 62 (1983) (quoting Johnson v. United States, 333 US 10, 14, 68 Sct 367, 369, 92 Led 436, 440 (1942)) (emphasis added.)

. An "elector" is "a person qualified to register as a voter, whether or not such person is registered." SDCL 12-1-3

.

> There is a material difference between boarding a boat for the purpose of searching it and proceeding to do so, which did not happen here, and boarding to serve civil process [an injunction], which did happen here. There is no violation of the Fourth Amendment when an officer comes upon private property to serve legal process, so long as there is no breaking or entering of a dwelling or other building of a type protected by the Amendment. There is no search or seizure in such a case. So here, merely board to serve process is neither a search nor a seizure, and no search or seizure occurred after the boarding. Coming onto the deck of the boats is like coming onto a lot where a house is situated, or onto the porch or landing of the house. Nothing in the Fourth Amendment prohibits handing process to a man, in a peaceable manner, on his property, including his boat. To hold that does would be an extravagant extension of the Fourth Amendment.

United States v. Olander, 584 F2d 876 (9thCir 1978) (emphasis added), vacated on other grounds (determination of fishing rights), 443 US 914, 99 Sct 3104, 61 LEd2d 878.

Gateway 2000, Inc. v. Daniel Limoges, 552 N.W.2d 591

First Virginia Bank v. Sutherland, 217 Va. 588, 231 S.E.2d 706 (1977)

IN THE SUPREME COURT OF VIRGINIA

FIRST VIRGINIA BANK, A VIRGINIA BANKING CORPORATION
v.
WILLIAM E. SUTHERLAND, JR., T/A GROVETON ARCO.

Record No. 760091.
Decided: January 14, 1977

Present, I'Anson, C.J., Carrico, Harrison, Cochran, Harman and Poff, JJ.

(1) Automobiles — Garageman's Lien — Statutory Construction.

(2) Automobiles — Certificate of Title — Security Interest — Priority.

(3) Statutory Construction — "Owner" of Motor Vehicle.

(4) Appellate Review — Costs on Appeal.

1. Statutes and county ordinances are designed to assure any garageman, towing and storing a vehicle at the request of an officer, the legal right to recover from the owner charges and costs incident thereto, or to subject vehicle to payment thereof by sale. Other sections of Code determine priority given such charges.

2. Lien of bank's security agreement reflected on certificate of title is entitled to priority over claim asserted by garageman except to extent of $75 statutory amount for storage.

3. Status of lending bank was that of a lienholder, not an "owner" of vehicle involved.

4. Bank appellant, having substantially prevailed, is entitled to its costs.

Appeal from a decree of the Circuit Court of Fairfax County. Hon. Elliott Marshall, judge presiding.

Reversed and remanded.

James W. Patterson (Carol A. Sigmond; Miller, Miller, Patterson and Reese, on brief), for plaintiff in error.

Thomas J. Freaney, Jr., for defendant in error.

HARRISON, J., delivered the opinion of the court

The issue in this case is whether the charges of William E. Sutherland, Jr., trading as Groveton Arco, for towing and storing a motor vehicle are superior in dignity, by virtue of Code §§ 46.1-2 and 46.1-3, to the express lien of First Virginia Bank, [Page 589] created by Code § 46.1-73. The court below ruled that Sutherland's charges were superior, and the bank appealed.

On July 25, 1973, Warren Preston, Jr. purchased from Brown Pontiac, Inc. a Pontiac automobile on an installment contract financed by the First Virginia Bank. For some reason not fully explained in the record, the Division of Motor Vehicles did not issue a title to Preston until February 15, 1974. However, the lien of the bank, dated July 25, 1973, in the amount of $5,078.16, is reflected on the certificate of title to the vehicle and is evidenced by a security agreement.

On February 2, 1974, Preston was involved in an accident while operating his automobile. At that time the vehicle was impounded because the investigating police officer noted a discrepancy between its license plates and its registration certificate. At the request of the officer, Sutherland, in accordance with his agreement with Fairfax County, towed the vehicle to appellee's storage lot. In March, 1974, Preston defaulted in the payment of a monthly installment due on his contract. The bank, in an attempt to protect its security interest, asserted a claim to possession of the vehicle.

Sutherland testified that he sent Preston and the bank notices of his charges for the towing and storage of the automobile. One notice, dated March 20, 1974, recites that a total of $197.50 was due Sutherland. The second notice, dated May 31, 1974, recites that the amount then due was $557.50. Each purports to give Preston five days notice to contact Sutherland and advise as to his “intentions” concerning the Pontiac automobile. Preston was advised that unless he responded Sutherland would “be forced to dispose of the car as salvage and apply the proceeds to your account”, and that, as a last resort Sutherland would “forward your balance to our attorneys for whatever action they might deem necessary”.

The first notice was sent by certified mail, and Preston acknowledged receiving it. He denied receiving the second notice, and the bank denied receiving either notice. Michael S. Berry, an employee of the bank, testified that on or about May 7, 1974, he contacted a Mr. Caldwell, an employee of Sutherland's, and that Caldwell told him the Preston vehicle could be recovered if the bank paid Sutherland $197.50, and presented a release from the police department. Berry said that when he presented the release and the $197.50 requested, he was informed that the [Page 590] storage balance was then $480. Sutherland denied that the bank ever offered to pay him any amount in excess of $75. The bank refused to pay the charge of $480 allegedly demanded by appellee and instituted the action in detinue under review to recover possession of the automobile.

[1] Code § 46.1-2 concerns generally the removal and disposition of unattended, abandoned or immobile vehicles left outside the corporate limits of any city or town, or on an interstate highway inside such corporate limits. Code § 46.1-3 applies to such vehicles found on the public streets, public grounds or private property and gives to localities the right to adopt ordinances with provisions substantially similar to the provisions of Code § 46.1-2.

Section 16-133 of the Fairfax County Code, adopted pursuant to authority granted it by Code § 46.1-3, provides that each removal of a vehicle "shall be reported immediately to the chief of police, who shall give notice to the owner of the motor vehicle . . . as promptly as possible". Should the owner be unknown, or fail to pay the costs incidental to the removal and storage, County Code § 16-133 provides that after notice to the owner at his last known address and to the holder of any lien of record in the Division of Motor Vehicles against the vehicle, "the chief of police may, after holding the motor vehicle . . . ninety days and after due notice of sale dispose of the same at public sale and the proceeds from the sale shall be forwarded by the chief of police to the county treasurer".

County Code § 16-133 further provides, in part, that:

> "The treasurer shall pay from the proceeds of sale the cost of removal, storage, investigation as to the ownership and liens and notice of sale, and the balance of such funds shall be held by him for the owner and paid to the owner upon satisfactory proof of ownership."

Under similar circumstances, and pursuant to Code § 46.1-2, the Commissioner of Motor Vehicle's, after a lapse of thirty days, is given the authority to dispose of a vehicle towed into a garage, and he is directed to pay the proceeds from any sale of such vehicle into the state treasury. This statute also makes provision for payment from the proceeds of the costs of removal, storage, investigation as to ownership, appraisement and sale.

Significantly, neither the Code sections involved here nor [Page 591] § 16-133 of the Fairfax County Code specifically provide that there shall be a lien on the vehicle, or on the proceeds from a sale thereof, for the costs incident to removal, storage and sale. And neither the State Treasurer, the Commissioner of Motor Vehicles, nor the County Treasurer is given any guidance as to the priority to be accorded the holder of a security interest when making disbursement of the proceeds of sale.

We do not regard this omission as a legislative oversight. The statutes and the county ordinance involved are designed primarily to give police officers the authority to have unattended, abandoned or immobile vehicles removed from the highways and streets of this state, and from private property under certain circumstances, without prior permission of the owners; and to assure any garageman towing and storing a vehicle at the request of an officer the legal right to recover from the owner the charges and costs incident thereto, or to subject the vehicle to the payment thereof by sale. The amount to be recovered depends upon the facts in each case, the distance a vehicle is towed, the length of time stored and the cost and effort expended in locating the owner. We must look to other sections of the Code to determine what priority is given such charges for storage and towing in instances when the vehicle is sold and the proceeds of sale must be disbursed.

[2] Code § 46.1-73 fixes the priority of a security interest shown on the certificate of title to a motor vehicle. The section provides as follows:

> "The security interests, except security interests in motor vehicles, trailers and semitrailers which are inventory held for sale and are perfected under §§ 8.9-301 to 8.9-407 (§§ 8.9-301 to 8.9-408), shown upon

such certificates of title issued by the Division pursuant to applications for same shall have priority over any other liens or security interests against such motor vehicle, trailer or semitrailer, however created and recorded, except that lien of mechanics for repairs to the extent of seventy-five dollars given by § 43-33 if the requirements therefor exist, provided the mechanic furnishes the holder of any such recorded lien who may request it with an itemized sworn statement of the work done and materials supplied for which the said lien is claimed. (Code 1950, § 46-73; 1958, c. 541; 1966, c. 558.)" [Page 592]

Code § 43-32 gives a garageman a lien for, the storage of a vehicle. However, if the vehicle stored is subject to a security instrument the lien of the garageman thereon shall be "for his just and reasonable charges for storage under this section and for alteration and repair under § 43-33 to the extent of seventy-five dollars and in addition, such keeper [a garageman] shall be entitled to a lien against the proceeds if any, remaining after the satisfaction of all prior security interests or liens, and may retain possession of such property until such charges are paid".

Code § 43-33 gives a mechanic who alters or repairs personal property at the request of the owner a lien thereon for his charges. But, if the article of personal property is subject to a security instrument, the mechanic "shall have a lien thereon for his just and reasonable charges therefor to the extent of one hundred and fifty dollars and in addition, such mechanic shall be entitled to a lien against the proceeds, if any, remaining after the satisfaction of all prior security interests or liens, and may retain possession of such property until such charges are paid".

Code § 8.9-310, apart of the Uniform Commercial Code, provides:

"Priority of certain liens arising by operation of law. — When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise. (1964, c. 219.)"

The Code sections quoted immediately above were involved in Checkered Flag Motor v. Grulke, 209 Va. 427, 164 S.E.2d 660 (1968). There the holder of a conditional sales contract brought an action in detinue to recover a vehicle from a garageman who claimed a lien thereon for storage charges and for repairs. We held that the garageman's lien for repairs did not have priority over the security interest shown on the certificate of title to the motor vehicle, except to the extent of the then $75.00 statutory amount for repairs. We noted the following statement in the Virginia Comment to Code § 8.9-310: "The Virginia statute giving a garageman a lien, Code 1950, § 43-32, does not contain [Page 593] any provision regarding priorities, and so the UCC operates to give the garageman a priority without limitation in regard to other secured parties." We disagreed and said:

"Code, § 43-32, giving a garageman a lien for storage, does not, as the Comment states, contain any provision regarding priorities. But Code, § 46.1-73, a part of the Motor Vehicle Code, contains specific provision with respect to the priority of a lien shown on the certificate of title to a motor vehicle, and is, in our opinion, controlling as to the priority of such a lien over a storage lien as well as, to a limited extent, a repair

lien claimed against such vehicle." 209 Va. at 431, 164 S.E.2d at 663.

In Checkered Flag we said that the limitation found in Code § 43-33 on the lien of a mechanic for repairs where there is a security instrument on the property involved "is an effective provision fixing the priority between a lien for repairs and one of the listed encumbrances otherwise than is provided by Code § 8.9-310. Except for the $75.00 statutory amount, Code, § 43-33 places the lien for repairs in inferior position to that occupied by the encumbrance on the property". 209 Va. at 431, 164 S.E.2d at 663. We then found that the language in Code § 46.1-73, "shall have priority over any other liens", was broad enough to include storage liens and that it necessarily subordinates such latter liens to a lien shown on the certificate of title.

However, in 1970, the General Assembly amended Code § 43-32 by adding the provision heretofore quoted giving a garageman a lien for storage to the extent of $75.00 where the vehicle stored is subject to a security instrument. Acts 1970, c. 56. Consistent with Checkered Flag, and in view of the 1970 amendment, we hold that the lien of the bank's security agreement is entitled to priority over the claim asserted by Sutherland, except to the extent of the $75.00 statutory amount for storage.

[3] We find no merit in the contention of appellee that the bank was an "owner" of the vehicle involved within the contemplation of Code §§ 46.1-2 and 46.1-3. "Owner" is defined in Code § 46.1-1(18) as one who holds legal title to a vehicle or one entitled to immediate possession under a conditional sales lease or agreement. In the instant case the owner of the automobile was Preston. The status of the bank was that of a [Page 594] lien holder with the right upon default to exercise all the rights "of a secured party under the Uniform Commercial Code", as is provided in the security instrument.

We find no evidence of any action by Sutherland, or by anyone, to effect a sale of the Preston vehicle in the manner provided by Code §§ 46.1-2 and 46.1-3, or by § 16-33 of the Fairfax County Code. Neither do we find that any action has been taken by Sutherland to enforce any lien he may have acquired by virtue of Code § 43-32 for storage, in the manner provided by Code § 43-34 which specifically gives a garage keeper, to whom a motor vehicle has been delivered pursuant to Code §§ 46.1-2 and 46.1-3, or 46.1-3.2, the authority to take action after ninety days from the date of delivery.

[4] Accordingly, the judgment of the lower court is reversed, and the cause is remanded for the entry of a judgment awarding the bank possession of the Pontiac automobile owned by Warren Preston, and ordering Sutherland to release the said vehicle upon receipt of the sum of $75.00 on account of storage charges due him, as provided by Code § 43-32. The appellant, having substantially prevailed, will be entitled to its costs.

Reversed and remanded.

First Virginia Bank v. Sutherland, 217 Va. 588, 231 S.E.2d 706 (1977)

18 Gratt Va. 526

(13)*Walker & als.

V.

Commonwealth of Va.

October Term, 1897, Richmond

1. **Fieri Facias–Levy–Effect upon Title–Sheriff a Mere Bailee***— The levy of an execution of a fi. fa. does not divest the defendant in the execution of the property, and transfer the title to the plaintiff or the sheriff. Only a special interest is vested in the sheriff as a mere bailee, to enable him to keep the property safely, and defend it against wrongdoers. It is in the custody of the law, and the sheriff has a naked power to sell it and pass the title of the owner to the purchaser.
2. **Same–Same–Abandonment by Consent of Defendants–New Executions.**— A plaintiff may always with the consent of all the defendants, abandon a levy upon the property of all or any of them, and afterwards sue out a new execution.
3. **Same–Same–Same–Same.†**— If the defendants in an execution be a principal and his sureties, and the property levied on be that of the sureties, the plaintiff may, with the consent of the sureties only, abandon the levy, and afterwards sue out executions against all the defendants.
4. **Same–Same–Abandonment without Consent of Plaintiff–New Execution.↕**—If the levy be abandoned by the sheriff, with the consent of the defendants, without the concurrence or authority of the plaintiff: or if the property is eloigned or removed by the defendant out of the reach of the sheriff, without the consent of the sheriff or the plaintiff, the latter may sue out a new execution.
5. **Same–Same–Loss of Property by Neglect of Sheriff–Effect§**— But if the property levied on be lost to the defendant by the misconduct or neglect of the sheriff, the execution is thereby satisfied, to the extent of the value of the property: and the plaintiff can then only look to the sheriff for indemnity.
6. **Same–Same–Suspension of Proceedings–Cast at Bar**.— A mere suspension of proceedings on a levied execution does not authorize a restoration of the property to the possession of the defendant, or release the levy. And if, by a misunderstanding of the directions of the plaintiff by the sheriff and the defendants, the property is released by the sheriff to them, the plaintiff may have a new execution.

(14)*7. **Judgments–Entered at Different Times–One Execution.**— In a proceeding at law against several parties, judgments against one or more are entered at one time, one execution may be issued against all.

8. **Execution–Return–Amendment by Sheriff.‖**— Upon a motion to quash a second execution in vacation, the judge may, in vacation, allow the sheriff to amend his return on the first execution.

***Fieri Facias—Levy—Effect upon Title.**— The principal case is cited and followed in Rhea v. Preston, 75 Va. 772.

†Liability of Surety—Effect of New Contract by Principal.— In Knight v. Charter, 22 W. Va. 420. it is said: "It is well settled that mere indulgence granted to the principal debtor will not release the surety. Shannon v. McMullin 25 Gratt 211; Humphrey v. Hitt, 6 Gratt. 509; Walker v. Commonwealth, 18 Gratt. 13; Sneeds v. White, 3 J. J. Mar 525; Alcock v. Hill, 4 Leigh 622; McKenny v. Waller, 1 Leigh 434. But the authorities are equally clear that if the creditor, upon a sufficient consideration, enter into a valid and binding contract or agreement with the principal

debtor whereby without the consent of the surety he 'ties his hands' so that he has suspended his right or disabled himself, for any definite period of time, however short, from proceeding to enforce the performance of the original contract, the surety will, in a court of equity, be thereby discharged. Norris v. Crummey, 2 Rand. 323; Hunter v. Jett, 4 Rand. 104; McKenny v. Waller, 1 Leigh 434; Alcock v. Hill, 4 Leigh 622; Renick v. Ludington, 14 W. Va. 367; Sayre v. King, 17 W. Va. 562."

See also, on the same subject, 2 Va. Law Reg. 770, where there is a collection of authorities, among others the principal case, also, Shannon v. McMullin, 25 Gratt. 229 and *note*, citing the principal case.

↕**Fieri Facias—Levy—Abandonment without Consent of Plaintiff—New Executions**.— The principal case is distinguished in Sutton v. Marye, 81Va. 333.

§**Same—Same—Lost of Property by Neglect of Sheriff—Effect.** — For the proposition that, if the property leved on be lost to the defendant by the misconduct or neglect of the sheriff, the execution is thereby satisfied to the extent of the value of the property, and the plaintiff can then only look to the sheriff for indemnity, the principal case is cited and followed in the following authorities: Patterson v. Crawford, 97 Va. 662, 34 S.E. Rep. 458; McKenzie v. Wiley, 27 W. Va. 663. See, in accord, Cranmer v. McSwords, 26 W. Va. 412; Campbell v. Wyant, 26 W. Va. 702.

In Com. v. Bryne, 20 Gratt. 207, the rule laid down above is quoted, but the case at bar is distinguished from the principal case upon the facts.

‖**Executions—Return—Amendment by Sheriff**.— In Hopkins v. Baltimore & O R. R. Co., 42 W. Va. 537, 26 S.E. Rep. 188, the court said: "A court should allow amendment of a return upon a summons event at the hearing of a motion to reverse the judgment for that case. Anderson v. Doolittle, 38 W. Va. 633, 18 S.E. Rep 726; Capehart v. Cunningham, 12 W. Va. 750. See Stone v. Wilson, 10 Gratt. 530, 533; Walker v. Com., 18 Gratt. 13."

For the above proposition the principal is cited and followed in the following cases; Commercial, etc., Co. v. Everhart, 88 Va. 954, 14 S.E. Rep. 836; Goolsby v. St. John, 25 Gratt. 160; Shenandoah Valley R. R. Co. V. Ashby, 86 Va. 236, 9 S. E. Rep. 1003. See, in accord, Stotz v. Collins 83 Va. 423, 2 S.E. Rep. 737; Bullitt v. Winstons, 1 Munf. 269; Smith v. Triplett, 4 Leigh 590; Wardsworth v. Miller, 4 Gratt. 99; Stone v. Wilson, 10 Gratt. 529; Lee v. Chilton, 5 Munf. 407; Rucker v. Harrison, 6 Munf. 181, where the sheriff's return was allowed to be amended after a lapse of seven years.

These were motions in vacation before the judge of the Circuit Court of the city of Richmond to quash three alias writs of fieri facias which issued from the clerk's office of that court in favor of the Commonwealth of Virginia; two of them against C. W. Watkins, sergeant of the town of Danville, and James M. Walker, W. W. Keen and Edward D. Withers, as his sureties, and the other against the said Watkins and William P. Graves, W. W. Keen and J. J. Hankins as his sureties. The motions were by consent, heard together as one motion.

It appears that, on the 16th of December, 1866, the Commonwealth recovered two judgments against Walker, Keen and Withers, as the sureties of Watkins, sergeant of the town of Danville—the first for $1,388.47, the balance of the land, property and capitation taxes of the same year, with interest thereon at the rate of twelve per cent. Per annum from the 25th of March, 1966, till payments, and $208.27 for damages thereon according to law, and the costs of the motion; the second for $5,817.09, the May license taxes of 1866, with like interest from the 30th of May, 1866, till paid, and $870.72 damages, and the costs of the motion. And on the 18th of December judgments for the same amounts and causes were recovered against Watkins, the principal. And one execution was issued upon each set of the judgments against Watkins and the sureties. The executions were placed in the hands of C. L. Powell, sheriff of

Pittsylvania county, and he endorsed the same (15)*on both of them as follows: Property levied upon the 14th day of January, 1867, consisting of thirty thousand pounds of leaf tobacco belonging to W. W. Keen, a large lot of groceries, consisting of bacon, whiskey, sugar and coffee, the property of James M. Walker, and about seven thousand pounds of leaf tobacco, the property of E. D. Withers. And on the 16th January, 1867, I received orders from the Auditor of Public Accounts of Virginia to stay proceedings for sixty days. A short time thereafter an act was passed by the General Assembly of Virginia, giving the defendants until the 1st of August, 1867, to make payment, and the property thereby taken out of my hands.

On the 14th of January, 1867, the third judgment was recovered against Watkins, Graves, Keen and Hankins for the sum of $1,288.61, for three-fourths of the land, property, and capitation of taxes of 1866, with interest thereon at twelve per cent, per annum from the 20th day of December, 1866, till payment, and $193.29 for damages, and the costs of the motion. On the 19th of January, 1867, a fieri facias was issued on this judgment, which went into the hands of the sheriff of Pittsylvania county on the same day; on which he returned: Property levied upon February 14th, 1867, and proceedings stayed by special act of the Legislature of Virginia, dated 22d February, 1867. See page 664, Sess. Acts 1866-67.

On each of these judgments, it appears that another execution issued from the clerk's office on the 29th of July 1867; and these are the executions which the plaintiffs in this motion sought to quash.

Whilst the motions were pending before the judge in vacation, and before the evidence in support of the motions had been concluded, C. Powell, the sheriff in whose hands the original as well as the said alias writs of fieri facias had been successively placed, moved the judge for leave to (16)*amend his returns upon the original writs of fieri facias; the said writs in the transcripts of the records offered in evidence by the plaintiffs. To this motion the plaintiffs objected; but the court over-ruled the objection, and permitted the sheriff to amend his return. The amended return on the first two executions is as follows:

Levied 14th January, 1867, on thirty thousand pounds of leaf tobacco the property of W. W. Keen; on a lot of groceries, consisting of bacon, whiskey, sugar and coffee, the property of James M. Walker; and on about seven thousand pounds of leaf tobacco, the property of E. D. Withers. The property so levied upon each of the defendants aforesaid, was sufficient to satisfy the share of each defendant. On the 16th of January, 1867, I received from Thos. R. Bowden, Attorney General of the commonwealth of Virginia, orders not to serve this execution, but to hold it for further orders. On the same day, namely, January 16th, 1867, I received orders from Wm. F. Taylor, Auditor of State of Virginia, to stay proceedings for sixty days. On the 22d of February, 1867, an act was passed by the General Assembly of Virginia, relieving defendants from payment of damages on condition that payment of debt and costs were paid by 1st of August, 1867. In consequence of the foregoing facts, I refrained from any further action in the premises.

The amended return on the third execution was: Levied 14th February, 1867, upon seven tobacco screws and all the household furniture of James J. Hankins; and on three head of horses and one wagon, and all the household furniture, consisting of beds, &c., the property of Wm. P. Graves; and on ten thousand pounds of leaf tobacco, the property of W. W. Keen. On the 16th of February, 1867, I received from Wm. F. Taylor, the auditor of the State of Virginia, orders to stay proceedings for sixty (17)*days; and on the 22d of February, 1867, the act was passed, &c., as in the returns on the other executions.

There were several disputed questions of fact, which, though much discussed by counsel, wer not considered by the court, and therefore, it is unnecessary to state the evidence bearing upon them. The only question of the kind considered by the court is, whether the sureties consented to the discharge of the property by the sheriff from the

executions. On this question there could be no doubt as to Walker and Keen, the sureties in the first two executions, and of all the sureties in the second execution All these parties were united in making the application for relief. Keen, with the concurrence of Walker, telegraphed to his brother, who was a member of the Senate; and Hankins, with the concurrence of his co-sureties went himself to Richmond to endeavor to obtain relief for them. Watkins, the principal, was not consulted, and had no part in the application; he being insolvent, and having left Danville. The only question about which there could be any doubt, is whether Withers assented to the discharge of the property. On that question the evidence is stated by Judge Moncure in hi opinion, and need not be repeated here.

The judge refused to quash the executions; and the plaintiffs excepted. This bill sets out all the facts proved, and is an exception to the permission to the sheriff to amend his return, as well as to the judgment of the court upon the merits: and upon the applications, a writ of error was allowed.

Page & Maury, and C. E. Dabney, for the appellants.

1st. The motion to quash these executions was made, and heard by the judge, in vacation, under the authority of the act, Code of 1860, ch. 187, § 23, p. 776. But there is no act authorizing the court to hear and act on a (18)*motion, in vacation, by the sheriff to be permitted to amend his return; and as executions and returns thereon, are among the records of the court in the clerk's office and can not be taken from thence, the judge in vacation can not have them before him, so as to act upon them.

2d. But te great question in this case is, are the judgments discharged by the release of the property by the sheriff under the circumstances. That there was a valid levy upon property, much more than enough to satisfy the executions, cannot be questioned successfully. Bullitt's ex'ors v. Winstons, 1 Munf. 269; Roth v. Wells, 29 New York R. 471. And if there was a valid levy in each of the cases, we insist that it could not have been released by the sheriff. He is a mere ministerial officer, and derives his authority from the writ, which is his warrant of attorney and without which he is wholly unauthorized to act The writ prescribes his duties, and confers a special, not a general, authority. Hence at common law the sheriff had no authority to receive money from a debtor charged in execution under a ca. Sa.; for his business is only to execute the writ. Tidd's Prac. 1029. So if a sheriff levies under a fi. fa. and pays the plaintiff with his own money, yet he cannot keep the goods to his own use; for the authority by which he acted was to sell the goods. And so the sheriff cannot deliver the goods seized under a fi. fa. to the plaintiff in satisfaction; for the authority is to sell.

So soon as the levy of a fi. fa. is consummate, the goods are in custodiam legis. The plaintiff's right to satisfaction out of the property levied on, cannot be defeated by the act of the sheriff. It was otherwise when the debtor was charged in execution under a ca. sa. There the least indulgence would sometimes put a prisoner out of the sheriff's power even though he should voluntarily return, and (19)*go into prison. But this exception grows out of the peculiar nature of the ca. sa.; and the reason of it was to deter the sheriff from alleviating the duress of debtors, and thereby defeating the object of the process; which was to compel satisfaction by holding the debtor's body in close custody.

After a levy on property sufficient to satisfy the execution, there can be no other execution upon that judgment, except by agreement of the parties. The property levied on is at the peril of the sheriff, and nothing will excuse him from properly applying it, but the act of God or the king's enemies. He may constitute the debtor his bailee or he may leave his bailiff in charge of the goods; but this is altogether at the sheriff's risk; and if the levy comes to naught, whether from the act of the debtor or not, the sheriff makes the debt his own: he becomes instantly debtor exdelicto; and there can be no new execution. In fact there is no need for a new writ; for the sheriff can pursue the property wherever it may be; and if necessary, he may sue the defendant for it. If, therefore, the defendant is solvent,

the sheriff will pay the money or go against him: if he is insolvent, then an alias writ would be worthless. In Ladd v. Blunt, 4 Mass. R. 402, Parsons, Ch. J., said: "When goods sufficient to satisfy the judgment are seized on fieri facias, the debtor is discharged, even if the sheriff wastes the goods or misapplies the money arising from the sale, or does not return the execution."

It is spirit and policy of the law that the sheriff should execute writs of execution with dispatch, and have as little temptation as possible to grant indulgence to debtors. If it should be said that hte sheriff and his sureties may be worthless, it is answered that the law tolerates no such presumption Sir Bartholomew Shower said arguendo in Buxton v. Horne, 1 Show. R. 174 "as to (20)*the sheriff's being a poor man, that is never to be presumed, for the law has provided otherwise."

The law manifests wisdom in thus putting the creditor at the end of his suit, and compelling him to pursue the sheriff. In some cases it may work hardship; but whilst it seems hard to confine the plaintiff's redress to a proceeding against the sheriff, the real effect of the rule is to make necessity of going against the sheriff, much less frequent than it would otherwise be, because the law makes it so very hazardous for the sheriff to grant indulgence to a debtor, and makes it so plainly his duty to go right on make the money: for the office of the execution is to make the money at once; and to thwart that object is to run counter to public policy. Therefore, whilst is not essential to a valid levy of an execution, that the sheriff shall take property of the debtor's possession, yet the law does not commend any such practice. The law has provided only one way of indulging an execution debtor; and that is upon his giving a forthcoming bond.

For the creditor's safety and protection, the law has armed the sheriff with a power commensurate with his responsibility. The posse comitatis is at his command; and as was said by Doddrige, J., in Mary v. Proby, 3 Bulst. R. 200, "no power by the intendment of law is able to resist the sheriff and his power, who hath posse comitatus at his command." Hence it is that "rescous" is no return. It is said by the same judge, in the same case: It is greatly in derogation of the king, that the sheriff should return that he could not have the body there propter resistentiam. And when a sheriff returned to Replevin, that he could not have the beasts, he was amerced. And hence, after the destruction of the gaols in the Britis metropolis by the rioters in 1780, it was found necessary t pass an act of Parliament to indemnify the gaolers from the consequences (21)*of the prisoners' escaping, thought no actual negligence could be imputed to them; as it was impossible for them to prevent such escape. Le Blanc and Runnington, arguendo, in Alsept v. Eyles, 2 Hen. Bl. R. 111; Comy. Dig. Rescous D. 7; Mildmay v. Smith, 2 Wms. Saund. R. 344.

At common law, if a debtor died charged in execution under a ca. sa., the credi to could have no other execution. The statute 21 James 1, ch. 24, was passed to remedy this. By 8 & 9 William 3, ch. 26, the plaintiff was authorized to have a new execution when the debtor escaped by any ways or means howsoever; and by 41 George 3, ch. 64, the plaintiff might consent to the debtor's discharge without losing the benefit of his judgment, except that the body of the debtor could not be taken in execution again. This statute, however, expired by its own limitation in three years.

But while the legislature has thus innovated upon the law in relation to the ca. sa., the law in relation to the fi. fa. Has remained unchanged. And the reason seems to be this: The ca. sa. is not of the class of valuable executions. 5 Rep. 87a, 87b. It is not in the strict sense final, but only quousque the defendant shall satisfy the plaintiff; but execution is final when the plaintiff is satisfied. The debtor's body was deemed but a pledge for the debt. But there is no law giving the plaintiff more than one sufficient fi. fa.

It seems to be clear, then, that no act of the sheriff could release a levy of an execution of fi. fa. But the act of

the creditor could release the levy; for he has plenary power over this execution, and the sheriff must do his bidding. And when the creditor releases the levy the judgment is "discharged, upon the principle that volenti non fit injuria. Root v. Wagner, 3 Tiff. R.I.17. It is familiar law, that if a creditor consents to release his debtor from (22)*custody, it was in law a satisfaction.

The law conclusively presumed a satisfaction. Said a distinguished judge: "When a party voluntarily extinguishes his own judgment, he cannot afterwards complain of it. If indeed, after having levied the execution on the body, the creditor consents to release his debtor from custody, and agrees that he may go at large, then the law regards the execution, the levy and the discharge, as amounting to a satisfaction of the judgment. No new execution on the judgment ever can issue. 2 Tuck. Com. 355. And so it is where satisfaction is entered on the roll by the plaintiff. Ward v. Vass, 6 Leigh 135.

If a plaintiff gives up a levy without the consent of the defendant, his case is irremediable, and he has himself alone to blame. In language of Judge Roane, in Bullitt's ex'ors v. Winstons, 1 Munf. 269, "The law does not permit our citizens to be harassed by repeated and unnecessary execution." In Green v. Burke, 23 Wend. R. 496, 501, the Court says: "The plaintiff may, by tampering with the levy himself, lose his debtor: as if he release the property from arrest which is sufficient to pay the debt." And it was held in Smith v. Hughes, 24 Illinois R. 270, that when a levy has been made, unless released by agreement of the defendant, it can only be removed by a sale, or by an order of the court issuing the execution.

If, notwithstanding the debtor's release from custody was in favorem libertatis, the law presumed from such release a satisfaction of the judgment, though the debtor's body was a mer pledge to enforce payment of the debt, it would seem to follow multo fortiori that a creditor's release of a valuable satisfaction, such as a levy, would justify a conclusive presumption of satisfaction, It is, in fact, inconsistent with any other supposition. And such is the law of Virginia. Bullitt's ex'ors v. Winstons, 1 Munf. 269; 2 Tuck. Com. 364, 365. In the case of Bullitt (23)*v. Winstons the creditor's hands were not tied as there was in fact, no consideration moving from Littlepage to induce the plaintiff to give time. It is no consideration for a party to perform when he was under a previous obligation to. 1 Parsons' Cont. 437, edi. 1864. Hence, where a party promised a witness who was in attendance under a subpoena, that he would compensate him for his loss of time if he would stay and testify, it was held there was no consideration for the promise. Willis v. Peckha, 1 Brod. & Bingh, 515; Collins v. Godefroy, 1 Barn. & Ad. 950.

That the State is bound by the same rule as private parties, is well settled. United States v. Watkins, 4 Cr. Cir. Ct. R. 270; United States v. Stansberry, 1 Peter's U.S. R. 573; Untied States v. Thompson, Gilpin's R. 614.

It needs no argument to prove that the Commonwealth did release the levy made under her execution. We are here not asking this court to quash, not writs of venditioni exponas, directing the sheriff to sell property in his hands levied under former executions, but alias writs of fieri facias, commanding the sheriff to levy as well as sell. And we insist that the Commonwealth, having released the levies, the judgments are discharged; for the defendants, Withers, Graves, Hankins and Watkins were not consenting to the release. And we insist, if any did not assent, the judgment is released as to him and all his fellows.

A suspension of a right of action for an instant, as to one, extinguishes the right as to all; and the effect of a release to one is the same. In Foster v. Jackson, Hobart 52a, 59a, joint debtors are said to be one that could not have a capias against one, and another kind of executions as to others; which you might have done if you had sued them severally. (24)*And so a technical release to one is a bar to all others, because it is an admission by the creditor that his debt is paid. Savage, Ch. J., Catskill Ban v. Messenger, 9 Cow. R. 37; and it is tantamount to a receipt in full. Crane

adm'r v. Alling, 3 Green C. L. R. 425. And so a discharge of one is the discharge of all. Cheetham v. Ward, 1 Bos. & Pul. R. 630; 1 Parsons Cont. P. 27. And a release by operation of law fulfills the whole requirement of the law; it amounts to a forgiving of the debt, and an extinguishment of the bond, so as to leave no debt remaining. It proves everything that cold be proved by a technical release, Craine adm'r v. Alling, supra.

Upon the effect of releases, whether technical or by operation of law, we refer to Bower v. Suadlin, 1 Atk. R. 294; Slater ex parte, 6 Ves. R. 146; Ex part Gifford, 6 Id. 805; Robertson v. Smith, 18 John R. 459; Ward v. Motter, 2 Rob. R. 536; Clark v. Clement, 6 T. R. 525; Nicholson v. Revill, 4 Ad. & Ell. 675, 31 Eng. C. L. R. 166; North v. Wakefield, 13 Queen's Bench R. 536, 66 Eng. C. L. R. 535; 2 Tuck. Com. 356; Bac. Abr. Release G. (Bouvier's edi.); 8 Rep. 136a. And that equity follows the law. 1 Story's Equ. Jur. § 113; Hunt v. Rousmanier, 8 Wheat. R. 174.

The science of pleading knew nothing of the title or relation of suretyship. 2 Amer. Lead. Cas. 395. In a court of law the principal and surety are joint debtors, fixed in the same obligation; and what will discharge one will discharge all. Id. 396.

For the purpose of enforcing contribution among co-sureties, one surety who pays the debt is entitled to be substituted to all the rights and remedies of the creditor, as against his co-sureties, in precisely the same manner as against the principal debtor; and although payment of the debt may have discharged the other sureties as law, equity will keep it alive for this purpose. And this principle applies (25)*to bonds, judgments, decrees, mortgages and all other securities whatsoever. Amer. Not to Dering v. Earl of Winchelsea, 1 White & Tud. Lead. Cas. In Equ. 117. And while the cases fully establish the creditor's right to remain quiescent; they treat him as a defaulter in instance in which any hold is surrendered or lien is waived, which might have resulted in the discharge of the debt and the exoneration of the surety. 2 Amer Lead. Cas. 343. And thus it is a well settled principle of equity, that a creditor who has the personal contract of his debtor with a surety, and has also, or afterwards takes, property from the principal as a pledge or security for his debt, is to hold the property fairly and impartially for the benefit of the surety as well as himself; and if he parts with it without the knowledge or against the consent of the surety, he shall lose his claim against the surety to the amount of the property so surrendered. Id. 345.

The release or relinquishment of a security which bonds the estate of one co-surety injures the other, because he would have been entitled to subrogation on paying the debt. 2 Amer. Lead. Cas. 355, 356, citing Rice v. Morton, 19 Missouri R. 263. And the same acts are held to discharge the remaining sureties quoad the shares which such co-surety would otherwise have been required to contribute as would, if done to the principal debtor, discharge the surety. And when a co-surety has been released, the remaining co-sureties will be exonerated as to so much as the discharged co-surety would have been compellable to pay except for the release. In this case, each party had a right to satisfy the debt and to be subrogated to all the creditors' rights under the executions. But the release of the levies defeated this right, and so discharged the defendants to the extent of the levies.

As to the remedy—The court is armed with plenary power over its own process; and to prevent the abuse of (26)*that process, the court will give effect to any defence that would be available in equity. Steele v. Boyd, 6 Leigh 541. The remedy by motion has supplanted the audita querela; which is defined in 2 Sellon's Prac. 253, to be an action in the nature of a bill in equity to be relieved against oppression.

Robt. Johnson, for the Commonwealth.

1. The first question which we have to consider is, whether there was a levy by the sheriff upon the property of these debtors. And on this point, it is obvious that the sheriff was arrested before he finished the levy. He never took

possession of the property, either personal or vicarious. He never designed to leave the property in the possession of these debtors as his bailees; but seeing that there would be an effort by them to obtain indulgence, he waited the result of that application. And so, clearly, the matter was understood by the parties; and they went on to use and sell the property, after what occurred, as they had done before. Walker sold his goods, and the others used whatever was in a condition to be used, without any regard to what the sheriff had done.

Whatever may be the rule adopted to define a levy of an execution, it must necessarily include the element, that possession must have been taken by the officer. The continuity of the debtor's possession, as debtor, must have been broken. That was the case in Bullitt's ex'or v. Winstons, 1 Munf. 269, such much relied on by the appellants' counsel. In that case the property was in the power of the officer, and he appointed a bailee to hold it. And if it is said that the debtor may be constituted the bailee, still if so, it must be done by some unequivocal act. Such as will break the continuity of the debtor's possession; and the possession of the officer must be continuing possession. Barnes v. Billington, 1 Was. C. C. R. 29; Lloyd (27)*v. Wyckoff, 66 Halst. R. 218; Beckman v. Lansing, 3 Wend. R. 446; Blades v. Arundale, 1 Mau. & Sel. R. 711. In the case of Roth v. Wells, 29 New York R. 471, cited on the other side, there was possession in the officer through the agency of the debtor.

If there was no valid possession, then the case comes clearly within the principle of McKenney's ex'or v. Waller, 1 Leigh 434; Alcock v. Hill, 4 Leigh 622; and Humphrey v. Hitt, 6 Gratt. 509. This last case refers to all the other cases, and they establish clearly that a creditor may withdraw his execution though it is about to be levied on the property of the principal debtor.

But if the levy was made in these cases, it was immediately released and abandoned by the sheriff. He did not remove the property, or provide for the care of it; and there is not the slightest evidence to show that he appointed the debtors his bailees to keep possession of it for him. Upon the assumption that there was a levy, the property was in the custody of the law. The creditor had no authority to control the sheriff; but the sheriff was a trustee of the debtor as well as the creditor; and he was also the trustee of the sureties. His was a public duty, and he was bound to act for all. If, then the release and abandoned the levy without the concurrence of the commonwealth, clearly his act did not discharge the judgments. Ward v. Vass, 7 Leigh 135; Winston v. Whitlocke, 5 Call 435; Randolph's adm'r v. Randolph, 3 Rand. 490; Dyke v Mercer, 2 Show. R. 394; Allen J., in Garland v. Lynch, 1 Rob. R. 545, 560, 564; Norris v. Crummy, 2 Rand. 323; Carr's adm'rs v. Glasscock's adm'r, 3 Gratt., 343; 2 Tuck. Com. 365.

This case has been argued for the appellants as if the State had consented to the release. But the State could only consent through the General Assembly. The auditor of accounts cannot receive a dollar for the commonwealth. (28)*A debt can only be paid to or by the State in the mode prescribed by the statute. A payment to the auditor, and his receipt for it would be worthless. Code of 1860, ch. 45, § 3, p. 267. The auditor cannot release an obligation to the State. He cannot dismiss a prosecution for a claim without the concurrence of the attorney-general. There is but one case in which he can release a claim, and that is, when it has been standing for more than twenty years he may with the concurrence of the attorney-general, adjust and settle it upon equitable principles. Code of 1860, ch. 42 § 24, p. 255. A sheriff cannot pay money to the auditor or attorney-general collected upon execution, and though an agent to sell delinquent lands may receive the money from the purchaser, he must pay it into the treasury in the mode prescribed by the statute in all cases. Nay, an officer cannot even make a mistake against the commonwealth; not even a court of justice. Id. Ch. 42 § 6, p. 252. And if these statutory provisions are not sufficient for the protection of the commonwealth, the prerogative of the crown, except so far as it is inconsistent with our institutions or has been changed by statute, and especially with reference to the revenue, is in force in favor of the government. United States v.

Kirkpatrick, 9 Wheat. R. 735; Leake v. Ferguson, 2 Gratt. 419; United States v. Stansberry, 1 Peters R. 573; Locke v. The Postmaster General, 3 Masons R. 446; United States v. Nicholl, 12 Wheat. R. 505; Martin v. The Commonwealth, 1 Mass R. 347. These acts and authorities show that the auditor and attorney-general had no power to give up the debt or release it, or in any way to defeat a just claim of the commonwealth. And even if the acts done would have been binding between man and man, they are not bonding upon the commonwealth.

But, in fact, there was no assent by these officers to the release of the property from the operation of the levy. (29)*There could be no such assent, for they knew nothing of a levy. The attorney-general directed the sheriff not to levy; and the auditor directed a stay of execution for sixty days; but neither directed a release of the property. The mere postponement of a sale will not affect the rights of a creditor. Fisher v. Vanmeter, 9 Leigh 18. These orders moreover were without consideration, and might be recalled at any moment.

If the levy was released, and the commonwealth was entitled to her money, then new fi. fa's. were necessary. There is no doubt of the fact that the levy, if ever made, was released. The appellants held possession of the property, and have disposed of it; and no writ of venditioni exponas could enable the sheriff to get hold of it or sell it. And yet it is said the issue of the new writs of fi. fa. Is an assent by the commonwealth to release made months before. It is certain that the commonwealth can enforce her judgments by the issue of new writs of fi. fa., and yet it is insisted that the issue of these writs is the expression of her assent to that which, according to the view of the other side, discharges her judgments. But the clerk in issuing a new writ, is not confined to the return on the first; but if satisfied the return is wrong, will issue another fi. fa. And if he refuses to do so, the plaintiff may apply to the court on the ground of the clerks refusal; and the court will order the issue. Of course, if the execution is improperly issued, it may be quashed; but it is not so clear that where on fi. fa. Has been levied you may not take out another and sell under it. McKey v. Garth, 2 Rob. R. 33; Eckhols v. Graham, 1 Call 492.

The only act done by the General Assembly was the act passed at the instance of certainly some of these parties, whereby they were released from the damages recovered against the, provided that the whole amount of principal, interest and costs were aid into the public treasury on or (30)*before the 1st day of August, 1867.

This act was passed on the 22d of February. Here is a simple grant of indulgence, without any consideration, either of benefit to the Commonwealth or injury to the other parties. Such acts of grace and favor, done by the king or his officers., or parliament, are presumed to be done at the instance of those favored, and are to be taken most strongly against the grantee. And it was to avoid the operation of this rule of construction that the clause ex mero motu was introduced into the king's grants.

But we are not left to rely upon this rule, which would be sufficient, at least until the contrary appeared; and the evidence is abundant to show that all these sureties concurred in the abandonment or release of the levy by the sheriff, and in accepting the terms granted them by the General Assembly. (The counsel went into an examination of the testimony, and insisted that it showed that all the sureties except Withers were active in obtaining the release of the levy and the act of the General Assembly; that they assumed to act for him, and that he afterwards approved and ratified what was done and took the benefit of it. And to show how far the courts would go in presuming the consent of 'the parties, he referred to Hunter's adm'rs v. Jett. 4 Rand. 104, and Ward v. Vass, 7 Leigh 135. And he said that whether or not the act of assembly released the levy, the sheriff and sureties so considered and treated it.)

But it is insisted that Withers is discharged, and that the release of one is the release of all.

We are not dealing with the question of the effect of a release of one by contract. There the contract is to be looked to with respect to its intention. Nor are we considering the effect of a release by contract without respect to

intention. Nor are considering the effect of a contract not to sue. That, we are told, is a release in equity (31)*of the covenantee. But we know that in such a case the covenant would release both technically; but only in equity. Waggener v. Dyer, 11 Leigh 384. We are here considering the effect of an act—the supposed act of the creditor releasing the levy on Withers' property. The motion here is in fact a motion for an exoneretur, though in form a motion to quash the executions.

In Steele v. Boyd, 6 Leigh 547, a case similar to this, Judge Tucker says: "It is not conceived to be sure that the exoneretur of one party judicially pronounced, is a necessary release of all others, upon the principle that a release of one inures to all; for if this was, then in all cases when the surety is discharged by the creditor's conduct, the principal would be discharged also; which can not be pretended." "When, as in the case of a forthcoming bond, which is always joint and several, one party is absolved by any other means than what the law deems a release, the right to recover is not impaired as to the rest." This position is approved, and a part of the language quoted by Judge Allen in delivering the opinion of the court in the case of Mills v. The Central Savings Bank, 16 Gratt. 94. And indeed, it seems to be well settled, that the release of one surety is not a release of a co-surety in equity. 1 Story's Equ. Jur. § 498a and note 3; Pitman Prin. * Surety, 193 marg.; 40 Law Libr. Citing ex parte Gifford, 6 Ves. R. 805; Stirling v Forrester, 3 Bligh, P. Cas. 575; Dunn v. Slee, 1 J. B. Moore 2.

The doctrine of subrogation is not applicable between principal co-sureties. This doctrine existed in the civil law, but has never been imported into the common law in this country; certainly not in Virginia. The case of McMahon v. Fawcett, 2 Rand. 514. does not sustain it. That case does not touch the question. There is a security given by the principal debtor to one of the sureties was (32)*held to inure to the benefit of all. In the English books there are cases of substitution by one surety for another; but they were in different ranks; as in the case of bail and a surety. And so in Virginia where there is a judgment and execution against a principal, who gives a forthcoming bond; there the first surety may go against the surety in the forthcoming bond. But where the sureties are on the same level, there is contribution between the sureties for the share of each but no substitution. Preston v. Preston & als., 4 Gratt. 88; Buchanan v. Clark, 10 Id. 154.

But let us consider this doctrine of substitution with reference to the case of the levy of a fi. fa. In Carr's adm'rs v. Glasscock's adm'r, 3 Gratt, 343, Baldwin, J., says: A lien by levy is temporary, and expires if there is no sale, when the right to sell ceases; and a surety who pays the debt has no right to be substituted to the lien. Suppose that, in this case, the whole debt had been made by the sale of the property of Withers. The levy upon the property of Walker and Keene would have still been in existence, but the right of the sheriff to sell would have ceased. He could not sell after the debt was paid, When Withers had paid the debt, how could the sheriff refuse to deliver up their property to them? What defence could the sheriff make to an action of trover or detinue by them for it? Must he retain the property until withers should come for contribution? Shall he be required to determine that Withers is entitled to contribution; that the principal debtor is insolvent; for unless he is insolvent Withers would not be entitled to contribution from the sureties. This question of the insolvency of the principal may be one very difficult to solve; as was seen in the case of Harrison v. Lane, 5 Leigh 414.

What equity exists between these parties? Withers has not paid the debt, non constat he ever will pay; and non (33)*constat the principal will be insolvent when Withers pays. Non constat that either surety will be insolvent when called upon for contribution There is no right or duty of contribution at present; not even an inchoate right. In cases like the present, when sureties are released, the law proceeds on the ground of injury; and the party asking relief must show the extent of his injury; and then he will have relief pro tanto. Ward v. Vass, 7 Leigh 135, Norris v. Crummy, 2

Rand. 323; Carr's adm'r v. Glassocks' adm'r, 3 Gratt. 343; Baldwin, J., in Humphrey v. Hitt, 6 Gratt. 509; Adams' Dqu. 268 Marg. Note 2; 2 Amer. Lead. Cas. 4th edi., Hare & Wall, notes 343, 344, 345, 348, 353, 355, 367, 368, 369.

What injury has been done to these parties? The release of the property to the debtors respectively was surely no injury to them. If withers was injured by the release of the property to the other parties, he was injured as a surety. At lease he is bound for his aliquot part of the debt, and he is only not bound as surety of Walker and Keen. He cannot have this remedy at law after execution sued out and levied. To quash the execution would produce irreparable injury to the plaintiff; and therefore equity is the remedy for the defendants in the executions.

MONCURE, P. This case has been argued with the signal ability by the counsel on both sides. All the points discussed are interesting, but many of them are immaterial to the decision of the case, in my view of it, and will not, therefore, be considered. Without intending to decide, I will assume, for the purposes of the case, that the first execution which issued on the judgments referred to in the proceedings were, in fact, levied, as stated in the returns on said executions; that the auditor ha authority by law to control the said execution, and to stay proceedings (34)*thereon, even after they were levied; and that the effect of his act in staying such proceedings, either by itself or in connection with the act of the attorney-general and the act of the General Assembly, passed February 22, 1867, entitled "an act for relief of J. M. Walker and others, securities of C. W. Watkins, sergeant of Danville," (Sess. Acts, ch. 229, p. 664,) was to discharge the property levied on from the said executions. And upon that assumption I will proceed to consider —Whether the sureties, who were the owners of said property, did not, in fact, consent to the act or acts by which it was discharged as aforesaid, and to the new executions issued upon said judgments were not lawfully and properly issued, notwithstanding there may have been no such consent on the part of the principal debtor.

First. Did the sureties consent? That all of them did, except Withers, seem to me to be very clear. All of them, at least with that exception only, as soon as the executions were levied, or about to be levied, on their property, earnestly appeal to the authorities at Richmond for indulgence, which was accordingly granted to them, without any other consideration or motive than pure benevolence. Such as the urgency of the pressure upon them; the sheriff having levied upon the goods of the first set of sureties—Walker, Keen and Withers—and being about to advertise them; that two of said sureties, walker and Keen, made their first application for indulgence by telegraphic dispatch to a brother of one of them in Richmond Colonel E. F. Keen, a member of the Legislature, then in session; and the answer came promptly back in the same way, in a direction to the sheriff first from the attorney-general, and then from the auditor, to stay proceedings on the execution then in the hands of said sheriff. A few days thereafter the sheriff received the execution against Watkins (35)*and his second set of sureties—Hankins, Graves and Keen—and levied it on the property of said sureties, who thereupon had a meeting, and agreed that Hankins should apply in person to the auditor for indulgence on the same execution, which was accordingly done; and on the 16th of February, two days after the said levy, the sheriff received a dispatch from the auditor staying proceedings on said last mentioned execution. And six days thereafter, to-wit: on the 22d of February, an act of the legislature was passed for the relief of all the sureties, releasing the damages recovered against them, amounting to twelve or fifteen hundred dollars, on condition of the payment of principal, interest and costs by the 1st of August, 1867. After the passage of the act, Walker informed the sheriff that he had gotten indulgence to the 1st of August and the first thing the sheriff knew of the passage of the act was that he saw a manuscript copy of it in the hands of Walker and Keen, sent to them by Colonel E. F. Keen. The sheriff expressly says that Walker and Keen approved of and ratified the said indulgence. But that all of the sureties approved of and ratified it is conclusively proved in the record. How, then, can it be said that they did not consent to it? It is argued, that they only asked for, and consented to, a stay of the proceedings and not a discharge of the levy. But

this is certainly not so. The conduct and declarations, and the thing itself in its very nature, conclusively prove that this is not so. The sheriff expressly proves that Keen and Walker not only claimed that the act operated as an indulgence till the 1st of August, but sought a release of their property from the levy, and claimed that the proceedings did operate as a release of said levy, which effect was produced, as they contended, by the suspension of the auditor and attorney-general, and the act of assembly aforesaid. And the sheriff took the same view of the subject, and acted accordingly. (36)*All of the sureties knew that the sheriff took this view of the subject, and acted upon it; and ll of them either expressly insisted on the same view, or acquiesced in it by continuing to use and enjoy their property which had been levied on, or dispose of it at pleasure, without regard to the levy, and inconsistently therewith. No surety made any sequential discharge of the levy, and none at any time required that the sheriff should proceed to sell under the execution any of the property that had been levied on. Each of them took the full benefit of the indulgence, and accorded it to his co-sureties. The nature of the most of the property levied on, and the business of some of the parties, was such aas to require the property to be discharged from the levy as a consequence of the suspension of the proceedings. Walker was a merchant, in full and active operation, with a large stock of goods in his store, all of which were levied on. His business could not go on without a release of the levy. So important did he, and even the sheriff, consider it that his mercantile operations should not be suspended for the moment, that those operations continued to go on even while the parties were applying for indulgence by telegraphic dispatch. In asking for indulgence, therefore, Walker asked for a release of this merchandise from the levy as the chief object he had in view. The sheriff told Keen and Walker, after the indulgence was given by the auditor, that he would not do anything further until the indulgence was at an end; and Walker told him to expected to have his part of the money ready: Have it ready, no doubt, by means of his mercantile operations. Keen and Withers were producers, and Keen a manufacturer of tobacco. Their tobacco had been levied on in the leaf; and it was necessary, as well for the preservation of the subject as to provide the means of paying off the judgments, that the tobacco levied on should (37)*be prepared for sale, and carried to market and sold. And this was accordingly done by the parties themselves. It surely cannot be necessary to say anything more to show the consent of all the sureties, except Withers, to the discharge of the levy.

An now as to Withers. A good deal has already been said incidentally, tending to show his consent also; but what remains to be said will, I think, make his consent almost as clear as that of this co-sureties. He was not in Danville when the executions were levied and the application for indulgence was made by his co-sureties; but was at his home in southwestern Virginia. He had a farm and crop of tobacco in Pittsylvania, on which tobacco the execution in which he was a defendant were levied. His overseer was informed of the levy at the time it was made, and no doubt promptly informed him of it. He knew that the judgments had been obtained, for he had been duly notified of the motions, and must have known that executions would soon be out against him. He knew that his principal Watkins was insolvent, and that the burden of the judgments would have to be shouldered by the sureties. It was natural that the sureties should confer together as to the best means of meeting the difficulty and bearing the burden, and they doubtless did so confer. That an appeal to the public authorities was spoken of and contemplated by them in their conferences is very probable. The executions came out and were promptly levied when he was far away; and of course he could not actively join in the measures, at once from necessity used, to prevent a forced sale and sacrifice of the property of the sureties. There can not be a doubt that he would have so joined had he been present. It was his manifest interest to do so, and his conduct and declarations afterwards prove that he would. Being absent, his associates applied for him and them, and obtained indulgence for both. The appeal must (38)*have been presented to the auditor,, attorney-general and legislature in behalf of all the sureties, and relief was accordingly granted to all. The order given by the attorney-

general and auditor was, generally, the stay the executions. And the act of the legislature was for the relief of the sureties generally. It is impossible to believe that this general indulgence would have been given had it been imagined by those who gave it that the boon was not desired by all who were intended to be benefitted by it. Keen and Walker certainly intended to make the application on behalf of all. They did not expect or desire that their property should be discharged, and not that of their associate Withers. They, therefore, applied for the indulgence in general terms, believing it would be as acceptable to Withers as it certainly was to them. To grant the indulgence in the terms in which it was asked would be to discharge the levy as to Withers as well as themselves. They surely did not mean, by asking the indulgence, to discharge Withers, and shoulder his part of the burden as well as their own. They must, therefore, have intended to act for Withers, either because he had authorized them, or because they knew or believed that he would sanction it. And now let us enquire whether it does not appear, by what he afterwards said and did, that he either authorized it beforehand, or at least afterwards sanctioned it. Withers, though not present when the executions were levied and the applications for indulgence were made, yet came to Pittsylvania very soon thereafter, and before the passage of the act of the legislature; having come over, as he said, for the purpose of meeting the executions like a man, and making some arrangement to pay them. On that occasion, he said to the sheriff that he was very glad the indulgence had been granted, and expressed the hope that something might be made out of the assets of Watkins (the principal) to alleviate the liability. The sheriff judged (39)*from Withers' conversation that he had been to Danville, and heard of the indulgence. Now where it will be remarked, that the proceedings to obtain the desired indulgence to all the sureties were not then completed, but were still in course of execution. The act of assembly, which was expected to give indulgence to the 1st of August, had not been passed, but its probable passage was no doubt communicated to Withers by his associates. Did he object to what had been done, or protest against what was about to be done, either to his associates or to the sheriff, or to the auditor, or to the legislature, or to any person whatever? Not a word of any such thing is to be found in the record, where it would certainly have been if it had existed. On the contrary, what he said to the sheriff shows that he approved and sanctioned what had been done and doing in his behalf, and "was very glad the indulgence had been granted," not only because it was an indulgence to his associates, but especially because it was an indulgence to himself. And he "expressed the hope that something might be made out of the assets of Watkins to alleviate the liability"—that is, the liability of the sureties, himself in the number, thus admitting that their liability was to continue, and was only to be alleviated by means of the indulgence. We see, in this expression of Withers, a common object between him and his co-sureties, thus showing that they had conferred together and concurred in regard to one of the benefits to be expected from the indulgence. A similar expression was made by Keen and Walker, when they claimed to the sheriff that they had received an indulgence till the 1st of August, 1867, "by which time they hoped that Watkins would settle up his business, and that they would realize something from that source." and Withers accepted, and had enjoyed, the full benefit of the indulgence thus granted to him and his associates. Instead of his tobacco being sold in the (40)*leaf, in his barns in the country, at a forced sheriff's sale, he has had the advantage of preparing it for sale and carrying it to the best market, and selling it for the best price. And in May or June, 1867, we find him speaking to the sheriff of the fine price he had gotten for his crop of tobacco—the very crop on which the execution had been levied, by the discharge of which levy he had been enabled to obtain such a price. It thus appears, from all the circumstances of the case, that Withers either previously authorized his associates, Keen and Walker, to apply for the indulgence which was granted to him and them, or sanctioned the application after it had been made, and even before it had been fully granted, and accepted and has enjoyed the benefit of the indulgence. And in either view it may be said, that he as much consented as did the other sureties to the indulgence which was given, and the effect of it

(if it had that effect) in discharging the levy of the first executions. And now I proceed to enquire.

Secondly, Were the new executions which were issued upon the judgments lawfully and properly issued, notwithstanding there may have been no such consent on the part of the principal debtor. If all the defendants, principal as well as sureties, had consented to the discharge of the first levy, it is abundantly proved by the authorities, and indeed admitted on all hands, that it would have been no bar to new executions. It is not pretended that there was any new contract which satisfied the judgments or tied the hands of the commonwealth, even for an instant; but there was simply a voluntary release of the levy, and if all the defendants had consented to such release, there would have been no question in the case. All the sureties did consent, and there is no evidence whether the principal, who is the only remaining defendant, consented or not. If he had been consulted, he would no doubt have (41)*consented to that or any other courts which his sureties might have thought would be a benefit to them, or which they might have desired to pursue. He as insolvent, and really had not interest in the subject. The executions were not levied on the property, for he had none, but only the property of the sureties. And they, and all others concerned, doubtless thought it wholly unnecessary to consult him as to whether his sureties should be indulged or not in the payment of his debt. His consent might fairly be presumed and inferred in the case, if it could be affected by such consent. He is not here complaining. He made no motion to quash the new executions, and of course did not join in this appeal from the judgment overruling this motion of the sureties.

We might, therefore, properly stop at this point. But let us proceed further, and treat him as not having given his consent. And then how does the matter stand?

The learned counsel for the plaintiffs in error contend, that though the sureties may have consented to the indulgence which released the levy upon their property; though such indulgence may have been granted only at their request and for their benefit; though they may have received and enjoyed the full benefit of the indulgence; and though they may be in no danger of sustaining any loss by reason of it; yet because their insolvent principal did not also consent (thought there is no evidence whatever of his dissent) they, by reason of such indulgence and its effect, forever released from the debt! And not only so, but that the principal debtor himself is thereby released from the debt, and must go quit thereof forever! The counsel maintain that this strange effect is produced by a technical, unbending rule of law, that when the plaintiff in an execution against several defendants which has been levied on sufficient personal property, voluntarily discharges the levy without the consent of all the defendants (42)*he thereby releases such of the defendants as do not consent to such discharge; and that a release of one or more of several joint, or joint and several debtors, is a release of all. They maintain that the rule applies to this case, and therefore, that the discharge of the levy on the property of the sureties, (though at their request,) without the consent of the insolvent principal, (supposing that he did not consent,) was a release of the principal, and that a release of the principal was, by operation of law, a release of the sureties also. Now if there be such a technical, unbending rule of law, and it applies to this case, we will have to be governed by it, unjust and unreasonable as the operation would certainly be. But surely a rule of law which would lead to such consequences ought to be well and firmly established by authority before we are required to follow it. Is there such a rule of law? I think not.

It has been often said by judges, in general terms, that a levy of an execution, on personal property sufficient to discharge it is a satisfaction of the judgment; but this is certainly no so. Clark v. Withers, 2 Ld. Raym. R. 1072, is the source from which the expression seems to have been derived; and though there may be dicta to that effect in the opinions of some of the judges who decided that case, there is certainly nothing in the decision itself which gives any warrant to the expression. Nobody can find any fault with that decision. A sheriff had levied an execution in favor of an

administrator on the property of the defendant, and before the sale of the property the plaintiff died. The defendant then sued the sheriff for his property, upon the grand that the death of the plaintiff put an end to further proceedings on the execution. But the court held, that the sheriff was bound to go on and make the sale, and pay the money into court, according to the mandate of the writ. This case if fully reviewed and commented upon in the opinions of the judges in Giles v. Grover, 6 Bligh's (43)*R. 277, decided in 1832, in which the effect of a levy, and the nature of the lien thereby acquired, are subjects of much observation. All the cases show that the mere levy of the execution on property of the defendant is not satisfaction of the judgment, but only a step towards it. A levy on property is not the object of the execution, but payment of the money. The levy does not divest the defendant of the property and transfer the title to the plaintiff, or even to the sheriff. The property still remains in the defendant, notwithstanding the levy, and only a special interest is vested in the sheriff, as a mere bailee, to enable him to keep the property safely, and defend it against wrongdoers. While subject to the levy it is in the custody of the law, and the sheriff has a naked power to sell it and pass the title from the owner to the purchaser. Several successive steps are to be taken between the issuing of the execution and the satisfaction of the judgment. The first step is, to place the execution in the hands of the sheriff. The effect of this step is, to make it a lien on the property of the defendant to a certain extent and of a certain character. The nature of this lien is commented on and explained in Humphrey v. Hitt, 6 Gratt. 509, as well as elsewhere. It is of so imperfect a nature as that the plaintiff may e it at pleasure by withdrawing his execution from the hands of the sheriff, or directing him not to levy it, without discharging the judgment, or even affecting the liability of a surety who may be one of several defendants. Id. And the cases therein cited of McKenney v. Waller, 1 Leigh 434, and Alcock v. Hill, 4 Id. 622. The second step is, to levy the execution on specific property, by which such property is set apart from the general property of the defendant and placed in the custody of the law until it can be sold and applied to the payment of the execution. The third and last step is, the sale of the property. Then, and not till then, the plaintiff (44)*may be said to have gotten to the end of his suit, at least so far as the defendant is concerned, and to the extent of the value of the property, unless indeed the property be lost by the neglect or misconduct of the sheriff, without the defendant's consent; in which case also the plaintiff may be said to have gotten to the end of his suit. Now until this last step is taken, the thing remains in fieri, and may, in a certain manner and under certain circumstances, be so undone as that the plaintiff may be placed in the same situation in which he was before he sued out execution, and may therefore sue out a new execution. But by taking the second step, to wit: the levying of the execution, the plaintiff increases his responsibilities and makes it more difficult to withdraw the execution without endangering the debt. He has thereby acquired a specific and better lien; still not perfect, but yet so nearly so, as that the cannot always safely release it of his own accord. He then becomes, as has been said, a trustee of the execution for the benefit of all parties concerned. The defendant is interested; because a specific portion of his property having been seized and placed in the custody of the law for the payment of the execution, he has a right to be protected against another seizure under a new execution for the same debt, without his consent, or unless there be a necessity for it. The sureties, if there be any, of the defendant on whose property the levy is made, are also interested, in having he property of their principal, thus specifically bound for the payment of that debt, applied to the purpose, in their exoneration in whole or in part, according to the value of the property. They also, therefore, have a right to be consulted by the plaintiff in giving up the levy, and must consent thereto in order to make them liable to a new execution; at least without having credit for the amount of the first levy. Until the plaintiff "has gotten to the end of is suit;" in other words until (45)*he has gotten satisfaction of his demand, of what is equivalent thereto, he may continue to prosecute his remedy to judgment and sue out execution after execution thereon; taking care not to oppress or injure the defendant to his sureties, if there by any. The court in which

the judgment is rendered has ample power to superintend and control the execution of process thereon, and will take care to prevent its being perverted to purposes of injustice or oppression. A plaintiff, therefore, may always, with the consent of the defendants, abandon a levy upon the property of all or any of them, and sue out a new execution. If the defendants be a principal and his sureties, and the property levied on be that of the sureties, the plaintiff may, with the consent of the sureties only, abandon the levy and sue out a new execution against all the defendants. No injury is done to the principal by releasing the lien on the property of the sureties, for that lien cannot enure to his benefit in ay possible event. If his sureties are satisfied, he, certainly, has no cause to complain. So also if the levy be abandoned by the sheriff with the consent of the defendant, without the concurrence or authority of the plaintiff; or, if the property be by the defendant eloigned or removed out of the reach of the sheriff, without the reach of the sheriff, without the consent either of him or the plaintiff, the latter may sue out a new execution. But if the property levied on be lost to the defendant by the misconduct or neglect of the sheriff, the execution is thereby satisfied to the extent of the value of the property, and the plaintiff can then look only to the sheriff for indemnity. The reason of this is plain. The plaintiff, by pursuing his remedy, has caused the defendant's property to be taken out of his hands and placed in the custody of the law for the satisfaction of the debt. If that property be lost by the default of the officer of the law, who in this respect may be said to be the agent of the plaintiff, and without the consent of the defendant (46)*it is reasonable and proper that the loss should not fall on the defendant, and he be thus, to that extent, compelled to pay the debt twice. The plaintiff must incur the risk of ultimate loss in this respect, as the result of an inherent defect of his legal remedy.

Those principles seem to be fully sustained by the cases, especially the most recent; among which are Green v. Burke, 23 Wend. R. 496; Ostrander v. Walter, 2 Hill's N. Y. R. 329, Taylor v. Ranney, 4 Id. 619; The People v. Hopson,1 Denio's R. 574, Peck v. Tiffany, 2 Comst. R. 451; United States v. Dashiel, 3 Wall. U. S. R. 688. In the People v. Hopson, the court, Bronson, Ch. J., said: "If the broad ground has not yet been taken, it is time it should be asserted, that a mere levy upon sufficient personal property, without anything more, never amounts to a satisfaction of the judgment. So long as the property remains in legal custody, the other remedies of the creditor will be suspended. He cannot have a new execution," &c. "But without something more than a mere levy, the judgment is not extinguished. There is no foundation in reason for a different rule. The mere levy neither gives anything to the creditor, nor takes anything from the debtor. It does not divest a title; it only creates a lien on the property. It often happens that the levy is overreached by some other lien, is abandoned for the benefit of the debtor, or defeated by his misconduct. In such cases there is no color for saying that the judgment is gone; and yet they are included in the notion that a levy satisfies the debt." "The true rule I take to be this: the judgment is satisfied when the execution has been so used as to change the title, or in some other way deprive the debtor of his property. This includes the case of a levy and sale; and also the case of a loss or destruction of the goods after they have been taken out of the debtor's possession by virtue of the process. When the property (47)*is lost to the debtor in consequence of the legal measures which the creditor has pursued, the debt is gone, although the creditor may not have been paid. He must take his remedy against the officer, if he has been in fault; and if there be no such remedy, the creditor must bear the loss. But until the debt is paid, or the debtor has lost his property in consequence of his levy, the judgment remains in force." In Peck v. Tiffany, the court, Hoyt, J., clearly states in effect the same doctrine thus: "There are some old cases in which dicta are found that a levy upon sufficient property to satisfy an execution, is a satisfaction; but that doctrine has long since been exploded. When a sheriff levies upon sufficient property, and through his negligence or misconduct it is lost, destroyed, or otherwise disposed of, so that the defendant is deprived of the benefit of it, there is no doubt it should be regarded as a satisfaction of the execution, and the plaintiff must in such case seek his remedy against the sheriff. But when the

debtor has neither paid the debt, or been deprived of his property, the simple act of levying upon it is not satisfaction, whether the debtor has been permitted to retain the property either by his own misconduct or by his request, or the voluntary act of the officer; because neither works any wrong to him." In United States v. Dashiel, decided in 1865, the last case we have on this subject, it was decided that the levy of an execution, even if made on personal property sufficient to satisfy the execution, is not a satisfaction of the judgment, and accordingly, therefore, does not extinguish it, if the levy have been abandoned at the request of the debtor, or for his advantage; as for example, the better to enable him to find purchasers for his property. In the opinion of the court delivered by Justice Clifford, the rule is laid down in the same words in which it is laid down by Ch. J. Bronson as before mentioned (48)*which words were repeated by the latter in Taylor v. Ranney, referred to by the former.

There is nothing in any case decided by this court , so far as I am aware, at all in conflict with the principle before stated. The decision of this court which were relied on in the argument as having a bearing upon this subject, are cases in which sureties sought relief, generally by motions to quash executions on account of some act of the creditor done, as they supposed, in derogation of their rights; as by making a new contract with the principal debtor which tied the hands of the creditor, or by releasing the lien of a levy on the property of the principal debtor, without the consent of the sureties. In this case there was no contract between the creditor and debtor, principal or sureties, which tied the hands of the creditor for an instant; indeed, no contract at all between them, except that on which the judgments were obtained. The orders given by the attorney-general and auditor were founded on no valuable consideration, and were recoverable at pleasure, though that of the auditor was for a stay of proceedings for sixty days. And the act of assembly, as was properly conceded in the argument, merely released the damages on condition of the payment of principal, interest and costs into the treasury on or before the 1st day of August, 1867, and did not give a moment's stay of proceedings on the executions, or in any manner affect the levy thereof. And in addition to all this, as I think I have shown, the sureties not only consented to the said orders and act, but solicited and obtained them for their speical relief and accommodation; the executions having been levied alone on their property, and their principal being insolvent. What analogy there can be between this case and the decision of this court above referred to, and how any title to relief can be worked out by the sureties (49)*or any of them on the authority of those decisions, or otherwise, upon the facts as I think I have conclusively shown them to be, I confess I cannot comprehend. If I am right as to the facts, I think I am certainly right in my conclusion. If the facts were different, I would have some interesting questions yet to consider, but as they are not, it is unnecessary to notice them. I intended to have reviewed at some length the cases of Baird v. Rice, 1 Call 18; Bullitt's ex'ors v. Winstons, 1 Munf. 269; Steele v. Boyd, 6 Leigh 547; and Ward v. Vass, 7 Id. 135; but I do not think it necessary to do so and the length of this opinion admonishes me of the propriety of drawing it to close. Before I do so, however, I must notice one or two other matters.

I have thus far considered the case as if the Commonwealth, through her agents, had consented to and concurred with the sheriff and the sureties in the discharge of the levy. But such I think is not the fact. Evidently neither the attorney-general nor the auditor knew anything of the executions having been levied when they gave their order of suspension. The question of levy or no levy was one of doubt upon the facts—at least as to some of the parties—and it does not appear that any of the facts were communicated these officers of government. Indeed, it appears that even Keen and Walker were probably under the impression that no levy had been made when they applied by telegraphic dispatch to Richmond for indulgence; for the sheriff proves that they made no objection to the levy otherwise than they desired the levy delayed until they could hear the result of the application. But however that may be, the attorney-general and auditor, even if they knew when they gave their orders that the executions were levied, did not intend

thereby to discharge the levy, but merely to suspend proceedings on the executions; and such is the true construction of the (50)*acts. They did not direct the property to be restored to the possession of the defendants. A mere suspension of proceedings on a levied execution does not authorize restoration of the property to the possession of the defendant, nor release the levy. Fisher v. Vanmeter, 9 Leigh 18. That the auditor did not intend to release the levy of the first execution is shown by th conversation which occurred between the sheriff and the auditor's clerk, when the first executions were returned, from which it is obvious that the auditor expected the money to be made on the first executions if not paid on or before the 1st of August. That the act of assembly did not operate a discharge of the levy has already been shown. So that if this view be, as it seems, correct, the release of the levy in this case has resulted, not from any act or consent of the Commonwealth or her agents, but solely from a misconception by the sheriff and the sureties, of the meaning and effect of the orders of the attorney-general and auditor and act of assembly aforesaid, and from consequent abandonment of the property the by sheriff and conversion of it by the sureties to their own use. In this view of the case, the right of the Commonwealth to sue out the new executions, would, if possible be still more manifest.

In regard to the last assignment of error, which was not relied on or noticed, if it was not in fact withdrawn, in the argument, to wit, that the judgments rendered against Walker, Keen and Withers a one time, and the judgments rendered against Watkins at another time, the first process not having been executed as to him are not joint judgments against all the said parties, whereas the executions are against all the said parties jointly, and therefore do not pursue or correspond with the judgment. If that be an defect at all, it is only formal and not substantial, and has not injured, but rather benefitted, the plaintiff in error. I therefore think it is not a good ground for reversing (51)*the judgment, especially as it does not court below. The commonwealth had a right to have her motion against the sureties continued until the notice was served on the principal, and then to take a joint judgment against all; or she had a right to take several judgments against the sureties and the principal, as they were respectively served with notice, as she did; and she might lawfully have sued out several executions on the judgments as they were obtained. But she chose to wait after getting judgments against the sureties until she had also gotten judgments against the principal in the joint proceedings against all, and then to sue out joint executions against all. I can see nothing objectionable in this, and certainly nothing of which the plaintiffs in error have an reason to complain.

In regard to the right of the Judge in vacation to give the sheriff leave to amend his returns; there can be no doubt, I think, but the he has that right, as incidental to the right expressly given him by the Cod, cap. 187, § 23, to hear and decide on in vacation, a motion to quash an execution. A return on a former execution is generally very material evidence on the hearing of such a motion, and it is often import, in the course of the proceedings, to permit the sheriff to make or amend his return according to the truth of the case, and with a view to its effect upon the decision of the motion. Such permission has always been given by our courts. Bullitt's ex'ors v. Winstons is an instance of this kind. When, therefore, the statute gave to the judge a vacation power to quash an execution, it gave him also, by implication, power to permit the sheriff to make or amend his return, as the case may be, on the former execution, and I think the Judge did not err in permitting the amendments in this case. But whether we took to the original or the amended returns, the result will not be varied. In either case, we (52)*must look also to all the facts of the case as contained in the record, and decide accordingly. Ward v. Vass, 7 Leigh 135. There is, indeed, no material conflict between either these two sets of returns and the other facts of the case.

I am of the opinion that there is no error in the judgment, and it ought to be affirmed.

The other judges concurred in the opinion of Moncure. P.

Judgment affirmed.

Walker v. Commonwealth, 18 Gratt Va. 526

Rowe v. Hardy, 97 Va. 674, 34 S.E. 625 (1899)

IN THE SUPREME COURT OF APPEALS OF VIRGINIA
RICHMOND

ROWE'S ADM'R
v.
HARDY'S ADM'R.

December 7, 1899.

1. PROCESS — *Return — What Sufficient.* — A return on a writ or process is the short official statement of the officer endorsed thereon of what he has done in obedience to the mandate of the writ, or why he has done nothing. He may have been prevented from obeying the mandate of the writ by an injunction, or by a *supersedeas*, or by the order of the plaintiff or his attorney. A return of any of these facts endorsed on the writ is a sufficient return.

2. FIERI FACIAS — *Control of Beneficial Plaintiff — Sheriff His Agent.* — In executing a writ of *fieri facias* the sheriff is the agent of the beneficial plaintiff, and he and his attorney have the right to control the execution of the writ, and to say whether the sheriff shall levy it, or return it without doing so.

3. PROCESS — *Return — Presumption as to Date.* — In the absence of a date, or other evidence showing when the return of an officer on a writ was made, it is presumed to have been made at a time when he had the right to make it, and in due time, as the *prima facie* presumption is that the officer has done his duty.

4. FIERI FACIAS — *Return After Return Day.* — The validity of the return of an officer on a writ of *fieri facias* is not affected by the fact that the writ is not returned to the office till after the return day thereof. The record is incomplete till the writ is returned, but when returned, the return becomes competent evidence of the facts therein stated, and the parties are entitled to the benefit of their legal effect.

5. FIERI FACIAS — *Return — Conclusiveness — Return Day — Enforcing Return by Officer.* — A return upon an execution which the officer has the right to make is conclusive between the parties, and they are interested to have the officer make his return and file the writ with the proper custodian. But neither of the parties can be deprived of the benefit of the return by the failure of the officer to make it at the return day of the writ. The officer may be thereafter [Page 675] compelled to make his return by process of contempt, or by proceeding to enforce the forfeitures and penalties prescribed by law.

6. JUDGMENTS — *Abatement of Interest — Creditor Within Enemy's Lines.* — After judgment for principal and interest of a debt, courts are without power to abate the interest on the debt for any time on the ground that the creditor was within the lines of the enemy.

Appeal from two decrees of the Circuit Court of Gloucester county, pronounced July 15, 1893, and April 19, 1897, respectively, in a suit in chancery under the style of *Marchant v. Rowe's Adm'r*, wherein the appellee proved his debt against the appellant, Rowe's Adm'r.

Affirmed.

The opinion states the case.

H. R. Pollard and *W. W. Woodward*, for the appellant.

J. B. Donovan, for the appellee.

RIELY, J., delivered the opinion of the court.

It is asserted that the court erred in not holding that the judgment of the appellee was barred by the statute of limitations.

The plea of the statute was based upon the contention that more than ten years had elapsed since the date of the judgment, without an execution having been issued upon it on which there was a valid return by an officer.

The judgment was obtained in the Circuit Court of Gloucester county at its October term, 1869, and a writ of *fieri facias* issued upon it on November 24, 1869, returnable to February rules 1870. It went into the hands of the sheriff of Gloucester county on December 20, 1869, and while in his hands it was endorsed by the attorneys for the plaintiff as follows: "The sheriff is hereby directed to return this execution without levying it, January 3, 1870. Donovan & Page, p. q." In pursuance of this order, it was endorsed by the officer as follows: "Return this execution by order of the attorney for the plaintiff. J. C. Rowe, [Page 676] D. for J. L. Waterman, S. G. C."; and on March 19, 1870, it was filed in the clerk's office from which it issued.

By sections 12 and 13, chapter 186 of the Code of 1860, a judgment is barred after the lapse of "ten years from the return day of an execution on which there is no return by an officer," but a *scire facias* or action may be brought "within twenty years from the return day of an execution on which there is such rement.

In the account of debts ordered by the court to be taken in this cause by one of its commissioners, the judgment in controversy, subject to certain credits, was reported as a debt against the estate of the intestate of the appellants by the commissioner on November 10, 1886, which was less than twenty years from the return day of the execution issued upon it, and also less than twenty years (about seventeen years) from the date of the judgment.

It is objected that the statutory bar to the judgment is ten and not twenty years, because the return endorsed on the execution by the officer is not such a return to keep alive the judgment as is contemplated by the statute, but that the officer should have returned whether the money was or could not be made, or if there were only part thereof which was or could not be made, he should have returned the amount of such part. This, however, is not the only sufficient return which the officer can make. His return may also be of the existence of such a state of facts as, without fault or negligence on his part, prevented a compliance with the mandate of the writ. A return on a writ or process is the short official statement of the officer endorsed thereon of what he has done in obedience to the mandate of the writ, or why he has done nothing. He may have been prevented from obeying the mandate of the writ by an injunction, or by a *supersedeas*, or by the order of the plaintiff or his attorney directing him to hold it up, or to return it to the clerk's office without levying it. A return of any of these facts, endorsed [Page 677] upon the writ, is a sufficient return. 3 Blackstone's Com. 273; 2 Bouvier's Law Dic. 919; Freeman on Ex., secs. 355, 356; Herman on Ex., sec. 237; *McKenney's Ex'ors v. Waller*, 1 Leigh 434; *State v. Bulkeley*, 61 Conn. 363; *McCrory v. Chaffin*, 1 Swan 307; *Eaken v. Boyd*, 5 Sneed 206; *Union Bank v. Barnes*, 10 Humph. 244; *State v. McDonald*, 9 Humph. 606; and *Patton v. Marr*, 44 N. C. 377.

In the case at bar, the order of the attorneys for the plaintiff to the sheriff, to return the execution without levying it, was endorsed by them on the writ shortly after it came to the hands of the officer, and relieved him from the duty of levying the execution and making the money. In executing the writ, the sheriff was the agent of the plaintiff, who was entitled to its proceeds, and he and his attorneys had the right to control the execution and to say whether the officer should levy it or return it without doing so. Crocker on Sheriffs, sec. 412; Freeman on Ex., secs. 108, 368; *Levy v. Abbott*, 19 L. J. (N. S.), 62; *State v. McDonald*, 9 Humph. 606; *Jackson v. Anderson*, 4 Wend. 480; *Walters v. Sykes*, 22 Wend. 568; *State v. Boyd*, 63 Ind. 428; *Humphrey v. Hitt*, 6 Gratt. 509; and *Walker v. Com.*, 18 Gratt. 43.

In *Hamilton v. McConkey's Adm'r*, 83 Va. 533, the execution was returned thus endorsed: “Not levied by reason of the stay law”; and the return was held to be sufficient. In that case, the statute in question was construed, and the decision is conclusive against the objection of the insufficiency of the return. The court there said: “But whether the return is true or false, sufficient or insufficient, is not a question which can arise under the statute in question. The statute does not prescribe concerning a true or sufficient return, but concerning a ‘return of an officer.’ * * * But it provides that the limitation, where there is a return by an officer, shall be twenty years; and if the return of the officer is endorsed on the execution, it brings the same within [Page 678] the meaning of the twelfth section of chapter 186 of the Code of 1860.”

The revision of the statute law made by the Code of 1887 now defines the character of the return which will prevent the bar of the statute for twenty years from the return day thereof, and prescribes that “any return by an officer on an execution showing that the same has not been satisfied, shall be a sufficient return within the meaning” of the statute. Code 1887, sec. 3577.

The return of the sheriff on the execution in this case bears no date, and the execution was not filed in

the clerk's office from which it issued until March 19, 1870, which was after the return day. It was argued that the return to be valid and to have the effect of keeping the judgment alive must have been endorsed on the execution by the sheriff on or before the return day, and the execution returned by him to the clerk's office on or before that day, and that if the return was thereafter endorsed on the execution, or the execution thereafter returned to the clerk's office, the return had "no legal effect," and was "inadequate to enlarge the limitation from ten to twenty years, and, as a consequence, the judgment was not enforceable after October, 1879."

The presumption of law is, until the contrary is proved, that the officer has performed his duty (1 Greenl. on Ev., sec. 40; Freeman on Ex., sec. 355; *O'Bannon v. Saunders*, 24 Gratt. 138; H *artwell v. Root*, 19 John. 345; *Maury v. Cooper*, 3 J. J. Marshall 224; and *Egery v. Buchanan*, 5 Cal. 53) and it is, therefore, to be presumed, in the absence of evidence to the contrary, that the return on the execution in this cause, being without date, was made while the sheriff had the right to make it, and in due time.

As to the other part of the objection that the execution was not returned and filed in the clerk's office until after the return day, the failure to return it on the return day did not destroy the legal effect of the return endorsed upon it. All that can be [Page 679] said is that the record of the execution was not complete until the execution, with the return thereon of the officer, was deposited by him in the clerk's office, and that the return upon the execution did not become a matter of record and competent evidence as such until the execution was so returned. But when deposited by the sheriff in the clerk's office from which it issued, the return of the sheriff, being such as he was authorized to make, completed the record of the execution, and became thenceforth competent record evidence of the facts stated in the return, although the execution was not filed in the clerk's office until after the return day thereof. 1 Greenl. on Ev., sec. 521; Crocker on Sheriffs, secs. 40, 43, 45; Freeman on Ex., sec. 353; Herman on Ex., sec. 241; *Whitmore v. Rooke*, Sayer 299; *Cyfford v. Woodgate*, 11 East 299; *Pigot v. Davis*, 3 Hawks 25; *Hardy v. Gascoignes*, 6 Port. (Ala.) 447; *Welsh v. Joy*, 13 Pick. 477; *Nelson v. Cook*, 19 Ill. 440; *Davis v. Clements*, 2 N. H. 390; and *Remington v. Sinthicum*, 14 Peters 84.

It is the duty of a sheriff or other ministerial officer to return all writs on the return day thereof with a short account in writing endorsed by him thereon of the manner in which he has executed the same, or why he has done nothing. A return upon an execution, which is sufficient in law; that is, a return which the officer had the right to make, is conclusive between the parties, and they are interested to have the officer perform his full duty, to make his return and file the writ with its proper custodian. Neither of the parties can be deprived of the return by his neglect or failure to return the writ by the return day, and the court in which the judgment was obtained, upon which the execution issued, may, if the writ be not returned in due time, award a rule against the officer to return it, and if he do not obey the rule, compel him to make his return upon the writ and to return it by attaching and fining him for contempt. 2 Bouvier's Law Dict., 919; Crocker on Sheriffs, sec. 40; *State v. Bulkeley*, 61 Conn. 363; and *People v. Everest*, 4 Hill. 71. [Page 680]

The failure of an officer to make due return on and of any process subjects him to a forfeiture of twenty

dollars; and provision is also made in case of continued failure for further forfeitures and fines. Code, 1860, ch. 49, secs. 27, 28; and Code, 1887, secs. 900, 901.

And it is made the official duty of the clerk, from whose office the process issued, if it be not returned on the return day, to issue a rule against the officer, returnable to the next succeeding term of the court, to appear and show cause why he should not be fined for his said default. Code 1887, sec. 900.

Why these provisions to force the return of process, if nothing is to be gained, no good purpose to be served? Why power in the court to oblige the officer to do so, if it is uselessly exerted? Why subject him to forfeitures and penalties to compel him to make return upon the writ and to return it, if the return, when it is made and the writ is returned, however sufficient in law the return may be, is a mere nullity and without legal effect, only because it was not made and the writ returned on the return day? The answer is that the return on the writ is not null, but that when made and the writ returned, it completes the record of the writ, becomes competent record evidence of the facts returned, and the parties are entitled to the benefit of their legal effect.

It is next asserted that the court erred in not holding that the debt was paid.

The debt, as stated above, is due by judgment, and is a matter of record. The burden of establishing payments and proving that there was no longer any balance due upon it devolved upon the administrators of the debtor. Credit was allowed for all payments of which they produced any evidence. At their instance, the commissioner required the administrator of the creditor and his attorney to produce before him all books and papers in their possession or under their control showing the amounts that had been paid on account of the debt, or a certified statement [Page 681] thereof from the books. They did so, and furnished, among other credits, some for which no receipts were produced. All payments that were acknowledged, or of which there was any evidence, were allowed. There is no evidence that any payment was made for which credit was not allowed by the commissioner. His statement of the debt and report of the balance found to be due on the judgment, with the exception of an abatement of interest for the three years that the creditor was within the lines of the Federal army, was approved by the court and a decree entered for its payment. The decree accords with the evidence, and is proper and right.

The debtor died in May, 1885, and only a few months before his death made two payments on account of the judgment, to wit: The sum of $265 on January 9, 1885, and $100 on March 7, 1885, which was an admission on his part that up to that time the judgment had not been discharged. *Updike's Adm'r v. Lane*, 78 Va. 132; and *Cole's Adm'r v. Ballard*, 78 Va. 139.

The exception to the report of the commissioner abating interest for three years during the war, because the creditor was for that period within the lines of the Federal army, was properly sustained. Judgment had been obtained for the debt, both principal and interest, and there was no power to abate any part of the interest any more than there would have been to abate a part of the principal. The matter had passed into

judgment, and it was too late to raise the question of an abatement of the interest. *Ratcliffe v. Anderson*, 31 Gratt. 105; *Robert's Adm'r v. Cocke*, 28 Gratt. 207; and *Marpole v. Cather's Adm'r*, 78 Va. 239.

Cross error was assigned by the appellee to the allowance of two credits on the judgment of $100 each, one on January 5, 1883, and the other on March 7, 1885. They are sustained by the evidence, and were properly allowed.

The decree of the Circuit Court must be affirmed.
Rowe v. Hardy, 97 Va. 674, 34 S.E. 625 (1899)

Washburn v. Angle H'ware Co., 144 Va. 508, 132 S.E. 310 (1926)

IN THE SUPREME COURT OF VIRGINIA
RICHMOND

N. I. WASHBURN, ET ALS.
v.
ANGLE HARDWARE COMPANY, INC.

Decided: March 18, 1926

1. SERVICE OF PROCESS — *Substituted Service — Strict Construction of Statutes.* — Statutes allowing substituted service of process are to be strictly construed. Their terms must be strictly complied with. Courts cannot dispense with any of the statutory requirements even though satisfied that the method actually adopted for giving the defendant notice was better than that prescribed by law.

2. SERVICE OF PROCESS — *Usual Place of Abode — Substituted Service — Return.* — Personal service may be on the defendant anywhere he may be found in the officer's bailiwick, but the officer is not required to search for him at but one place, and that is at his usual place of abode, and if he be not found at his usual place of abode, then the officer may make the substituted service, but his return must show why he made the substituted service, and that reason must be the one given in the statute, else the return will be bad.

3. SERVICE OF PROCESS — *Substituted Service — Section 3207 of the Code of 1919.* — The different methods of service provided by section 3207 of the Code of 1919 are not cumulative but successive. Service cannot be made upon a member of the family if the defendant be found at his place of abode, and there can be no posting if a member of the family above the age of sixteen years be found at the place of abode of the defendant; and, when one method of service is substituted for another, the return must show a right to adopt the inferior method of service by negativing ability to get the better service.

4. SERVICE OF PROCESS — *Substituted Service — Last Home of Defendant — Usual Place of Abode or Home — Case at Bar.* — Notice of motion of judgment was attempted to be served under section 3207 of the Code of 1919 allowing substituted service, which provides that "if he" (the defendant) "be not found at his usual place of abode," (service may be had) "by delivering such copy and giving information of its purpose to his wife or any person found *there*, who is a member of his family, and above the age of sixteen years." The officer delivered a copy of the notice to a brother of the defendant over the age of sixteen years, who was described as a member of defendant's [Page 509] family, and explained the purport of the notice to him, but the copy was delivered to the brother, not at the *usual* place of abode or home, but at the *last* home of the defendant.

Held: That the officer's return was fatally defective and that the judgment obtained was therefore

void.

5. SERVICE OF PROCESS — *Last Home or Residence — Usual Place of Abode.* — Last home, or residence, or place of abode, are not synonymous with the usual place of abode, etc., and, in making substituted service, under section 3207 of the Code of 1919, the copy of the notice must be left at defendant's usual place of abode and not elsewhere.

6. CREDITOR'S SUIT — *Decree Directing Sale — Sale Subject to Secured Debt.* — Defendant in a creditor's suit complained that the decree directing sale of his real estate to satisfy the liens thereon, provided that the same should be sold subject to the debt secured thereon, in favor of the Federal Land Bank of Baltimore.

Held: That there was no error in this as it was a matter in the discretion of the court and there was nothing in the record to show that such discretion had been abused, or that its exercise was to the prejudice of defendant.

Appeal from a decree of the Circuit Court of Henry county. Decree for complainants. Appellants appeal.

Reversed.

The opinion states the case.

Jno. R. Smith and W. H. Graverly, for the plaintiffs in error.

S. G. Whittle, Jr., for the defendant in error.

CHICHESTER, J., delivered the opinion of the court.

This is a creditors' suit. On March 3, 1924, the Angle Hardware Company, Inc., filed its bill, on its own behalf, and on behalf of "such other judgment creditors of N. I. Washburn as shall come in and contribute to the costs of this suit."

At a subsequent term of the circuit court the cause [Page 510] was referred to John W. Carter, commissioner in chancery, with direction, among other things, to report an account of the liens on the real estate of the defendant, N. I. Washburn, and their priorities.

Among the claims submitted to the commissioner was an alleged judgment in favor of G. J. Penn, dated January 2, 1911, and docketed on January 26, 1911, originally for $566.66, with costs, $5.53, with credits as follows: June 13, 1913, $50.00; May, 1913, $135.00; June 24, 1916, $150.00. The judgment was assigned by Penn to T. C. Coleman, and at the time of the hearing before the commissioner in chancery,

with accrued interest, amounted to $704.40. The validity of this judgment was contested by N. I. Washburn upon the ground that it was obtained by default, upon a notice of motion for judgment, whereon the officer's return was fatally defective upon its face. The commissioner reported that the judgment was void and did not constitute a lien on the land involved in the proceedings. The assignee of the judgment, Coleman, excepted to the report so far as it held the judgment invalid, and the circuit court sustained the exception, and declared the judgment valid and a subsisting lien upon the real estate of N. I. Washburn. An appeal from this decree, duly allowed, brings before this court for review the action of the trial court in the premises.

As appears from a certified copy of the record, filed before the commissioner, the nature of the action was a notice of motion for a personal judgment against N. I. Washburn and D. M. Washburn. A copy of said notice was served on one J. E. Washburn by J. W. Kelly, deputy sheriff of J. M. Davis, sheriff of Henry county. The deputy sheriff made the following return on the original notice: [Page 511]

"Notice:

"Executed Dec. 17th, 1910, on D.M. and N. I. Washburn by delivering a true copy of the within for each of them to J. E. Washburn, he being a brother of the said N. I. Washburn, and a member of his family over the age of sixteen years and at the last home of the said N. I. Washburn. The said N. I. Washburn not being found at his usual place of abode and explaining within notice to said J. E. Washburn.

(Signed) J. W. KELLY, D.S.
for J. M. Davis, Sheriff."

In passing upon the validity of this return, Commissioner Carter says, in part:

"The case was called in the circuit court, on the above notice and return, and judgment was entered by default.

"It is plainly apparent that the above return is fatally defective in so far as D. M. Washburn is concerned.

"The deposition of N. I. Washburn hereto attached is not relevant to the question before your commissioner. Everything that the said N. I. Washburn deposes may be true, yet if the return of the sheriff shows a strict compliance with the statute authorizing substituted service the judgment cannot be attached collaterally. The sheriff's return is final, even though the facts stated in the return are false; and a judgment obtained where such return is not fatally defective on its face is good. The remedy is against the sheriff on his bond.

"The question for your commissioner to determine is: Whether or not the return above is good; if it is defective on its face, is such defect fatal to a judgment obtained by default?"

After stating that the service, under the statute, [Page 512] could be either personal or substituted, and that the attempted service in this case was under the provision of the statute allowing substituted service, that is, by delivering a copy to the wife or some member of defendant's family over the age of sixteen years, at his usual place of abode, and explaining its purport, and that the law required strict compliance with its provisions, the commissioner proceeds:

"Does the above return show a fatal defect on its face, or is it such a substantial compliance with the statute that a judgment obtained by default is valid? Your commissioner is of the opinion that the return is fatally defective in the following line, '* * and at the last home of the said N. I. Washburn * *.' The use of the word last, qualifying the word home, renders the return so defective that a judgment obtained by default is void.

"Your commissioner is familiar with the two cases in Virginia deciding that the word 'home' and the word 'residence,' respectively, when used by a sheriff in his return, are synonymous with the words in the statute, 'usual place of abode.' That is undoubtedly true; at the home or the residence of a man is certainly his usual place of abode, giving to those words their accepted meaning. If the sheriff in this return had used the word 'home' unqualified by any other word, the return would be valid. Substituting the words of the statute for the word 'home' used by the sheriff in the above return, we have the following return, 'at the last usual place of abode of the said N. I. Washburn.' Nowhere in the statute can there be found any authorization for serving a notice at the last usual place of abode. The statute doesn't contemplate any such service, but it is mandatory in its command that the sheriff must make such substituted service at the 'usual [Page 513] place of abode,' the then present, usual place of abode, the place of abode where the defendant resided at the time of the service, as distinguished from the place of abode where the defendant had resided. The word 'last,' as used by the sheriff in this return, indicates that the place at which the service was made has ceased to be the 'then' usual place of abode and the defendant had moved to some other place, either in the same county, in this State, or even out of the State, and that the service was made, not at the usual place of abode, but at a place that at one time had been the defendant's usual place of abode while in this county, or that section of the country.

"For the same reasons your commissioner is of the opinion that the word 'last' is not surplusage that can be stricken out and not change the entire meaning of the return.

"For these reasons, your commissioner is of the opinion that the judgment obtained by G. J. Penn is void."

We concur in the view of the commissioner that the return was fatally defective; that the judgment was, therefore, void, and that the court erred in holding that it was a valid lien upon the real estate of N. I. Washburn.

Service of process is either personal or substituted. In the instant case the notice was attempted to be

served under the provision of the statute allowing substituted service (section 3207, Code), which provides that "if he" (the defendant) "be not found at his usual place of abode," (service may be had) "by delivering such copy and giving information of its purpose to his wife or any person found *there*, who is a member of his family, and above the age of sixteen years."

[1, 2, 3] At page 297, Burks' Pleading and Practice, [Page 514] it is said: "Where statutes have been enacted allowing substituted service, they are to be strictly construed." Citing *Staunton P. G. & L. Co. v. Haden*, 92 Va. 201, 23 S.E. 285. And at page 288, the learned author says: "Personal service may be on the defendant anywhere he may be found in the officer's bailiwick, but the officer is not required to search for him at but one place, and that is at his usual place of abode, and if he be not found 'at his usual place of abode,' then the officer may make the substituted service, but his return must show why he made the substituted service, and that reason must be the one given in the statute, else the return will be bad. The different methods of service provided by this section are not cumulative but successive. Service cannot be made upon a member of the family if the defendant be found at his place of abode, and there can be no posting if a member of the family above the age of sixteen years be found at the place of abode of the defendant; and, when one method of service is substituted for another, the return must show a right to adopt the inferior method of service by negativing ability to get the better service. The officer has no right to make the substituted service except when the statute so provides. The substituted service may be upon the defendant's wife or any person found there who is a member of his family above the age of sixteen years. But whether served on the wife or member of the family, the service can only be made at the defendant's usual place of abode *and not elsewhere.* (Italics ours.) "To authorize a personal judgment on substituted service of process, the terms of the statute authorizing such service must be strictly complied with. Courts cannot dispense with any of the statutory requirements, even though satisfied that the method actually adopted for giving the defendant notice was better than that prescribed by law." [Page 515]

[4, 5] In the instant case, the officer delivered a copy of the notice to a brother of the defendant over the age of sixteen years, who was described as a member of defendant's family, and explained the purport of the notice to him, but the copy was delivered to the brother, not at the *usual* place of abode or home, but at the *last* home of the defendant. Last home, or residence, or place of abode, are not synonymous with usual place of abode, etc., and, as we have seen, in making substituted service, under the statute, the copy of the notice must be left at the defendant's usual place of abode and not elsewhere.

[6] Appellant also complains that the decree directing sale of his real estate to satisfy the liens thereon provides that same shall be sold subject to the debt secured thereon in favor of the Federal Land Bank of Baltimore. We see no error in this. It was a matter in the discretion of the court, and there is nothing in the record to show that such discretion has been abused, or that its exercise was to the prejudice of appellant.

For the reasons, however, heretofore set out, the decree of the circuit court will be reversed so far as it related to the Penn judgment, and this court will enter a decree declaring the said judgment void for lack of sufficient service of process.

Reversed.
Washburn v. Angle H'ware Co., 144 Va. 508, 132 S.E. 310 (1926)