

**REPORT OF THE
COMMITTEE ON DISTRICT COURTS**

**The Duties of Sheriffs
in Executing Judgments
and Attaching Property**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



HOUSE DOCUMENT NO. 30

**COMMONWEALTH OF VIRGINIA
RICHMOND
1989**

EXECUTIVE SECRETARY
ROBERT N. BALDWIN
ASST. EXECUTIVE SECRETARY
FREDERICK A. HODNETT, JR.

SUPREME COURT OF VIRGINIA
ADMINISTRATIVE OFFICES
THIRD FLOOR
100 NORTH NINTH STREET
RICHMOND, VIRGINIA 23219
(804) 786-6455

DIR., EDUCATIONAL SERVICES
WILLIAM T. CAPERS, III
DIR., FISCAL SERVICES
CHARLES P. WORD, JR.
DIR., JUDICIAL PLANNING
KATHY L. MAYS
DIR., LEGAL RESEARCH
KENNETH MONTERO
DIR., MGMT. INFORMATION SYSTEMS
KENNETH L. MITTENDORFF
DIR., PERSONNEL
CATHERINE F. WIEDEMER
DIR., TECHNICAL ASSISTANCE
R. MILTON CRUMP, JR.

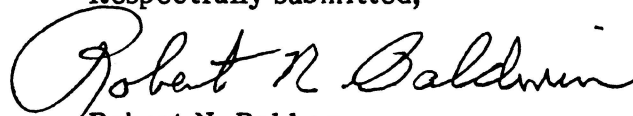
December 22, 1988

TO: The Honorable Gerald L. Baliles
Governor of Virginia
and
The General Assembly of Virginia

The report contained herein is pursuant to House Joint Resolution No. 144 of the 1988 Session of the General Assembly of Virginia.

This report represents the response of the Committee on District Courts to the legislative directive to study and report on the duties of sheriffs in executing judgments and attaching property. The report surveys and analyzes applicable statutes and case law relating to the following issues and areas of concern: (1) issuance, delivery and execution of writs of fieri facias; (2) indemnifying, forthcoming and suspending bonds; (3) sales and distribution of proceeds; (4) returns; (5) penalties for improper returns; (6) executions in favor of the Commonwealth; (7) service of garnishment summonses; (8) attachments; (9) constitutional considerations; (10) qualified official immunity; (11) duration of liability; and (12) statutory exemptions from levy. Suggested legislative amendments and cross-references for inclusion in the reviser's notes were also developed in an attempt to remedy some of the problems identified in the report. These suggestions are included as appendices to the report.

Respectfully submitted,


Robert N. Baldwin

RNB/mlh
Enclosure

TABLE OF CONTENTS

	<u>PAGE</u>
Executive Summary	1
Discussion.....	4
Appendix I - House Joint Resolution No. 144	21
Appendix II - Proposed Amendments	23
Appendix III - Proposed Cross-references	37

EXECUTIVE SUMMARY

House Joint Resolution No. 144 requested the Committee on District Courts to identify potential problems needing clarification in the statutory provisions concerning the duties of sheriffs in handling pre-judgment attachments and post-judgment garnishments and executions.

LEGISLATIVE REQUEST

The study was requested by the General Assembly because:

1. Each year Virginia's sheriffs and their deputies serve thousands of garnishments and levies, or seize property pursuant to pre-trial or post-trial civil process;
2. These sheriffs and their deputies are not immune from suit in the performance of these services and may be held liable for damages in the event of wrongful handling of a garnishment, levy or seizure in connection with a civil suit;
3. Numerous federal court case decisions have changed substantial portions of the procedures used in handling such garnishments, levies and seizures;
4. The existing statutory provisions regarding sheriffs' duties are scattered throughout the Code of Virginia, frequently written in archaic language, and often have gaps in their directives to sheriffs on the details of handling civil process;
5. Virginia case law interpreting these provisions are comparatively rare in modern times, with many of the controlling cases dating back over one hundred years; and
6. While some efforts have been made to conform Virginia's statutes to requirements of federal case decisions, there has been no comprehensive review of these statutes to determine what changes are needed to create clear statutory direction for sheriffs and their deputies to follow in seizures and

handling certain civil processes.

SYNOPSIS OF RECOMMENDATIONS

A review of the statutes and case law affecting the duties of sheriffs in executing judgments and attaching property indicates that the following changes would be helpful to enhance clarity and reduce the risk of liability:

1. Amend §§ 8.01-466 and 16.1-98 to require (a) a written application for a writ of fieri facias (fi.fa.), and (b) to authorize judgment creditors to deliver writs of fi.fa. to the sheriff in accordance with existing practice.
2. Amend §§ 8.01-365, 8.01-367, 8.01-474 and 8.01-480 so as to require the taking of an indemnity bond before the sheriff may proceed to execute a writ of fi.fa.
3. Harmonize the provisions for an action to try title under §§ 16.1-119 and 8.01-365.
4. Cross-reference under § 8.01-526 the provisions restricting the taking of forthcoming bonds from the debtor provided in §§ 8.01-531 and 8.01-209.
5. Amend § 8.01-477 to either (a) require a forthcoming bond before an order staying execution may be entered, or (b) conform to § 8.01-546.2 by eliminating the requirement of a forthcoming bond before an order staying execution becomes effective.
6. Cross-reference under § 8.01-478 the special rules of lien priority provided in §§ 46.1-77, 8.01-558, 8.01-488 and 8.9-501(5).
7. Amend § 8.01-372 to require an indemnity bond prior to issuance of an order for sale of property that is perishable or expensive to keep.
8. Amend § 15.1-80 to clarify that the penalties prescribed for improper return apply only in the case of noncompliance with the requirements of that section.
9. Cross-reference under § 15.1-80 the penalty provision for district court executions provided in § 16.1-101.

10. Amend § 15.1-80 to provide that the penalties provided in § 16.1-101 control in the case of district court executions.
11. Amend § 8.01-499 to clarify that the sheriff is required to prepare a return or official statement rather than return the sale proceeds to court.
12. Cross-reference under §§ 8.01-466 and 16.1-98 the special rules governing executions on judgments in favor of the Commonwealth provided in §§ 8.01-201 to 8.01-216.
13. Amend § 8.01-511 to either (a) provide a procedure for coordinating service of garnishment summons on a garnishee and debtor residing in different localities, or (b) clarify that sheriffs are not responsible and may not be held liable for the timing of service.
14. Cross-reference under § 8.01-367 the attachment provisions requiring indemnity bonds, §§ 8.01-537.1 and 8.01-551.
15. Cross-reference under §§ 8.01-526 and 8.01-371 the provisions concerning forthcoming bonds for property subject to attachment or distress, §§ 8.01-553 and 55-232.
16. Amend § 8.01-554 to eliminate the provision imposing primary liability on the sheriff for accepting a forthcoming bond from the defendant in attachment where the bond is later successfully attacked by the plaintiff.
17. Amend §§ 8.01-477 and 8.01-512.5 to allow the debtor to obtain a prompt post-seizure hearing on objections to garnishment and execution other than exemptions as is currently permitted under § 8.01-568 with respect to attachments.
18. Amend § 8.01-201 to make clear that the new provisions for serving notice of levy with an exemption claims form and the prompt hearing procedure under § 8.01-546.2 are applicable in the case of executions on judgments in favor of the Commonwealth (as in the case of private creditors under §§ 8.01-466, 8.01-

477.1 and 8.01-487.1).

19. Enact a statute of limitations provision specifically applicable to actions against or upon the bond of an officer responsible for serving an attachment or execution process.
20. Amend § 34-26 to modernize and clarify the list of exempt property.

DISCUSSION

A. Post-judgment executions

1. Issuance and delivery of writs of fieri facias (fi.fa.)

a. Application procedure

Under § 8.01-466, writs of fi.fa. may be issued "upon request of the judgment creditor, his assignee or his attorney." No requirements as to the form of the request or its contents are imposed, enabling creditors to orally request writs without specifying such important details as the nature of their interest (whether the applicant is a judgment creditor or an assignee, see § 8.01-466), the nature of the debt (see § 34-5 as to types of debts to which the homestead exemption does not apply), whether any prior executions have been issued and when, the amount and rates of any interest due on the judgment, whether any credits have been made on the judgment, the balance due at the time of filing the request, and the interest rate that applies to that balance. By contrast, a judgment creditor seeking garnishment must file a written application or suggestion providing statutorily required information bearing on the nature and amount of the judgment to be collected. See § 8.01-511. It would seem equally desirable to amend § 8.01-466 to require detailed written applications for writs of fi.fa. to avoid potential disputes on such matters as the amount of property that should be seized and the proper parties to receive distribution of sale proceeds, which could subject a sheriff to liability. Requiring creditors to supply the information on which the sheriff acts might also serve to lessen the incentive for suing sheriffs by improving the sheriffs'

ability to assert the defense qualified good faith immunity in an action alleging violation of federally protected rights. See Part F, infra.

b. Delivery of writ

Virginia Code § 8.01-466 directs the clerk to issue writs of fi.fa. and to deliver the writ to the proper officer for execution. In practice, however, creditors obtain the writ from the clerk and deliver it to the sheriff. See D. Rendleman, Enforcement of Judgments and Liens in Virginia 45 n.20 (1982). It may be desirable to amend § 8.01-466 to authorize specifically this time-saving practice.

2. Levy

a. Whether the sheriff is required to execute without an indemnifying bond

Virginia Code § 8.01-474 provides that by the writ of fi.fa., "the officer shall be commanded to make the money therein mentioned out of the goods and chattels" of the judgment debtor. Virginia Code § 8.01-367, on the other hand, provides that a sheriff who doubts whether property is subject to levy may require the plaintiff to give him an indemnifying bond and further specifies that the sheriff is not required to proceed with execution unless an indemnifying bond is given within a reasonable time. See Wilson v. Butler, 17 Va. (3 Munf.) 559, 564 (1813) (sheriff required to proceed with execution if indemnifying bond is given); Huffman v. Leffell's Exec., 73 Va. (32 Gratt.) 41, 46 (1879) (sheriff may refuse to levy if no bond is given). See generally Rendleman, supra at 50.

These statutory provisions create some potential for confusion in that the qualifying language of § 8.01-367 is located in a different statute from the general command of § 8.01-474 (i.e., you must levy but ...). In addition, the language of § 8.01-367 authorizing the sheriff to require a bond only when he is in doubt does not conform to existing practice in some localities where sheriffs routinely require bonds before proceeding with execution in any case. Perhaps even more importantly, both statutes seem to contemplate (if not encourage) the risky practice of proceeding with execution

without a bond indemnifying the sheriff from liability.

If the primary concern is to reduce the sheriff's potential exposure to liability (as opposed to facilitating collection), it would seem desirable to amend §§ 8.01-367 and 8.01-474 to make an indemnifying bond a prerequisite to execution of a writ of fi.fa. (except perhaps in the case of judgments in favor of the Commonwealth, although there is currently no provision to this effect in Title 8.01). An indemnifying bond is now a prerequisite to issuance of an attachment summons (§ 8.01-537.1), a detinue seizure order (§ 8.01-115) and a distress warrant (§§ 55-230 and 55-232.1). However, it should be noted that the requirement of a bond for issuance in these types of cases was added to deal with constitutional problems that were successfully addressed in Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), by among other things, requiring a bond for pretrial attachments.

b. What property the sheriff is required to seize

Under § 8.01-474, the writ of fi.fa. generally commands the sheriff to levy upon the debtor's tangible personal property. In practice, creditors direct the sheriff to the specific property that they wish him to seize. Such property may be encumbered by a prior security interest, subject to an adverse claim of title by a third party, or claimed as exempt by the debtor. Case law indicates that the sheriff is bound to execute the writ according to the executing creditor's instructions, subject, of course, to legally imposed limitations on the time, manner and geographical scope of the sheriff's duty to levy. See Rowe's Admin. v. Hardy's Admin., 97 Va. 674, 677 (1899); Rendleman, supra at 49. See also §§ 8.01-295, 8.01-481 (sheriff has no duty to levy outside his bailiwick); 8.01-490 (sheriff may not make unreasonable distress or levy).

The mandatory language of § 8.01-474 generally commanding the sheriff to seize the debtor's tangible personal property creates some potential for confusion where the creditor directs the sheriff to seize encumbered property. Section 8.01-480 provides that encumbered property "may nevertheless be levied on for the satisfaction of a fieri

facias," implying that the sheriff is not required to levy upon such property notwithstanding the general command of § 8.01-474 or the executing creditor's directions. While case law indicates that the statutory authorization to levy upon encumbered property is in derogation of common law making express authorization necessary (see Wheeler v. City Sav. & Loan, 156 Va. 402, 404, 157 S.E. 726 (1931)), it may be desirable to amend § 8.01-480 to make clear that its purpose is to make encumbered property subject to levy (and to the sheriff's duty to levy), rather than to grant the sheriff discretion to decline to levy upon such property.

The mandatory language of § 8.01-474 also creates some potential for confusion where the sheriff is directed to seize property claimed by a third party. Section 8.01-367 provides that the sheriff "shall proceed to execute" on such property unless the adverse claimant gives a suspending bond and brings an action to try title within 30 days. Under § 8.01-365, the sheriff may also bring an action to try title to property subject to an adverse claim, but only if no indemnifying bond has been given by the executing creditor. The implication is that the sheriff should not execute upon such property without an indemnifying bond, but should proceed to try title instead, an implication which conflicts with the mandatory language of §§ 8.01-474 and 8.01-367 commanding the sheriff to proceed with execution on such property unless a suspending bond is given by the adverse claimant. As a practical matter, it seems unlikely that the sheriff would seize property subject to an adverse claim without demanding an indemnifying bond pursuant to § 8.01-367. The giving of such bond would in turn preclude the sheriff from bringing an action to try title under § 8.01-365 and require him to proceed with execution unless a suspending bond was given by the adverse claimant.

A different implication arises from § 16.1-119, which authorizes the sheriff to bring a district court action to try title to property subject to an adverse claim without regard to whether an indemnifying bond has been given by the executing creditor. This section contains no provision directing the sheriff to proceed unless a suspending bond is given by

the adverse claimant, which may give rise to the implication that the sheriff may decline to execute on property subject to an adverse claim notwithstanding the provisions of § 8.01-367 which direct the sheriff to proceed depending on whether an indemnifying or suspending bond is given. To avoid confusion it may be desirable to harmonize the provisions for an action to try title under §§ 16.1-119 and 8.01-365.

Another area of potentially confusing directions that may expose a sheriff to liability arises by virtue of the sheriff's authority under § 8.01-526 to take a forthcoming bond from the debtor. While this statute provides merely that the sheriff "may" take such a bond, the sheriff is subject to liability to the executing creditor if he fails to seize and/or retain levied property without first demanding a forthcoming bond from the debtor, and further may be liable to the debtor if he wrongfully refuses to accept a forthcoming bond and seizes the property. See Hamilton v. Shrewsbury, 25 Va. (4 Rand.) 427, 431 (1826). While no changes to the language of § 8.01-526 appear necessary, it is an area of potential liability of which sheriffs should be aware. It may also be desirable to cross-reference under § 8.01-526 the statutes which restrict the circumstances in which a forthcoming bond may be taken. See §§ 8.01-531, 8.01-209.

Another potential area of confusion arises from the different rules governing court-ordered stays of execution under §§ 8.01-546.2 and 8.01-477. Under § 8.01-546.2, an order staying execution pending a ruling on an exemption claim is effective regardless of whether the debtor gives a forthcoming bond. By contrast, an order staying execution pending a ruling on a motion to quash is not effective under § 8.01-477 until a bond is given. To avoid confusion, it may be desirable to amend § 8.01-477 to provide either that an order staying execution may not be issued unless a bond is given or that no bond is necessary for the order to be effective as is the case with respect to an order staying execution under § 8.01-546.2.

3. Sale and distribution of proceeds

a. Lien priority

A number of statutory rules govern the priority of liens and, consequently, the order in which sale proceeds should be distributed. Sections 8.01-478 and 8.01-557 provide as a general rule that the lien of a writ of fi.fa. or attachment arises at the time of levy with respect to tangible personal property. This general rule is subject to numerous qualifications, i.e., (1) § 46.1-77, which in the case of motor vehicles makes the lien effective only on DMV's receipt of notice of levy; (2) § 8.01-558, which in the case of property in the sheriff's possession under an attachment or other legal process, provides that levy occurs and a lien arises on delivery of another writ of attachment to the sheriff; (3) § 8.01-448, which generally resolves the priority of competing writs of fi.fa. according to the principle of first-in-time, first-in-right unless executions are delivered simultaneously (requiring satisfaction ratably) or unless not all lienholders have posted an indemnifying bond in which case priority is granted to those giving bond; and (4) § 8.9-501(5), which in the case of property encumbered by a security interest, makes the execution lien relate back to the date of perfection of the security interest. These special priority rules should be cross-referenced under § 8.01-478 to ensure that proceeds are distributed properly. As a practical matter, it would seem unlikely that a sheriff would proceed with execution, sale and distribution of proceeds in a case involving competing creditors without demanding an indemnifying bond to protect himself from liability. This potential risk of liability may be a further reason for making an indemnifying bond a prerequisite to execution of a writ of fi.fa., rather than a matter for the sheriff's discretion as is currently the case under § 8.01-367.

b. Sale without bond

Section 8.01-372 provides that the court may order the sale of property that is perishable or expensive to keep even though a forthcoming bond has been given. This provision does not require the executing creditor to give an indemnifying bond as a

prerequisite to sale and could expose the sheriff to liability if he did not require such a bond before proceeding to levy as permitted by § 8.01-367. Again, this potential exposure to liability may make it desirable to make an indemnifying bond a prerequisite to execution of a writ of fi.fa. At the very least, it would seem that such a bond should be a prerequisite to entry of an order of sale under § 8.01-372 due to the potential for erroneous distribution of sale proceeds and other defects in the sale which could subject the sheriff to liability.

4. Return

Virginia Code § 8.01-483 requires sheriffs executing writs of fi.fa. to make a return stating the amount of any money received and the date and time of any levy or payment. A "return" for purposes of the statute is a short official statement endorsed on the writ or other process in question reflecting the sheriff's compliance with applicable statutory provisions. See Slingluff v. Collins, 109 Va. 717, 719, 64 S.E. 1055 (1909).

Some confusion regarding the sheriff's duties in making a return is created by Virginia Code § 15.1-80, which sets forth an officer's duties in making a return on any process and prescribes penalties of \$20 for a noncomplying return and \$100 for a false return, respectively. The basic requirements of this section overlap the stricter requirements of § 8.01-483 for a valid return on a writ of fi.fa. See also Va. Code § 8.01-215 (requirements for return on execution on judgment in favor of the Commonwealth). The question thus arises whether a sheriff's noncompliance with § 8.01-483 (or § 8.01-215 in the case of judgments in favor of the Commonwealth) will give rise to liability under § 15.1-80 even though the more basic requirements of the latter section have been met. See Rendleman, supra, § 2.2 at 57. Any confusion in this regard could be eliminated by amending § 15.1-80 to clarify that the penalties it prescribes apply only in the case of noncompliance with the requirements of that section. See Rendleman, supra (noting the lack of limiting language in sanctions for noncompliance or false return under § 15.1-80).

It should also be noted that § 16.1-101 provides a different penalty schedule (from \$5

to \$20) for a sheriff's failure to make "due return" on any execution issued from a court not of record. These penalties presumably would control over those set forth in § 15.1-80 and should be cross-referenced under that section. It may also be desirable to amend § 15.1-80 to clarify this point. Both §§ 15.1-81 and 16.1-101 make clear that the penalties provided in §§ 15.1-80 and 16.1-101 do not foreclose a civil action for damages against the officer.

5. Distribution of proceeds

Another potential area of confusion regarding a sheriff's duties in executing a writ of fi.fa. is created by Virginia Code § 8.01-499, which provides that "[a]n officer receiving money under this chapter shall make return thereof forthwith to the court or the clerk's office of the court in which the judgment was rendered." Taken literally, this language seems to imply that the sheriff should return any money received to the court or clerk's office, an implication which conflicts with the remainder of § 8.01-499 and other statutory provisions directing the sheriff to distribute sale proceeds to the parties entitled. See, e.g., Va. Code §§ 8.01-483, 8.01-495, 8.01-373, 8.01-480, 8.01-496, 8.01-500. Any confusion in regard could be eliminated by amending § 8.01-499 to clarify that the officer is to make a return of the writ to the court or clerk, which return constitutes the officer's statement describing his execution of the writ and which includes a description of the sheriff's disbursement of the proceeds from the sale of the judgment debtor's assets.

B. Judgments in favor of the Commonwealth

Virginia Code §§ 8.01-201 through 8.01-216 prescribe rules specifically applicable to the execution of judgments in favor of the Commonwealth. To alert sheriffs to these specific rules, which often differ significantly from those applicable in the case of private creditors, it may be desirable to include in the Reviser's notes to §§ 8.01-466 and 16.1-98 a cross-reference to the statutes governing executions of judgments in favor

of the Commonwealth, i.e., §§ 8.01-201 through 8.01-216.

The principal differences in the statutes applicable to executions in favor of the Commonwealth derive from § 8.01-201, which extends the fi.fa. to real estate. Compare §§ 8.01-474, 8.01-478 (writ of fi.fa. to be levied on goods, chattels, money and bank notes). Thus, §§ 8.01-203 through 8.01-214 prescribe specific rules for executing the fi.fa. that extends to real estate as well as personalty.

Two other provisions applicable in the case of judgments in favor of the Commonwealth should also be noted. The first is § 8.01-215, which directs a sheriff who declines to levy on property subject to a prior encumbrance to note this fact on his return, together with a description of the encumbrance. No such provision is included in the statute applicable in the case of private judgment creditors, § 8.01-480, which provides that encumbered property may be seized and sold and prescribes notice requirements for effecting its sale. The implication is that the sheriff may be required to seize and sell encumbered property on behalf of private creditors who may be required to give an indemnifying bond under § 8.01-367, but may not be so required to act on behalf of the Commonwealth. See the discussion in part A.2.a. - b., supra.

The remaining statute of note in the context of executions in favor of the Commonwealth is § 8.01-212, which directs a sheriff to deliver goods and chattels to the sheriff to whom a writ of venditioni exponas is issued under § 8.01-211. The latter section authorizes a writ of venditioni exponas to be issued to a sheriff in an adjacent locality following an unsuccessful sale by the levying sheriff. Section 8.01-212 provides that a sheriff who fails to deliver property may be held liable for the entire amount of the execution, plus interest. This section is somewhat awkwardly worded and perhaps should be revised since it is another potential source of liability for sheriffs.

C. Garnishment

The sheriff's duties with respect to garnishments are basically confined to serving

process on the garnishee and the judgment debtor in accordance with the requirements of § 8.01-511. See also §§ 8.01-513 and 8.01-522 through 8.01-524, which prescribe specific rules for cases involving corporations and certain government employees, officials and entities.

A practical difficulty presented by the requirements of § 8.01-511 is the provision for serving the judgment debtor "promptly after service on the garnishee." (Emphasis added). While there do not appear to be any reported cases imposing liability on a sheriff for noncompliance with this provision, it was intended to protect judgment creditors from the risk of their debtors removing assets from the control of garnishees and arguably could give rise to liability to a judgment creditor damaged by premature service on the debtor before the garnishee. The risk of such premature service is particularly acute where the garnishee and judgment debtor reside in different jurisdictions, requiring service by two different sheriff's departments (unless the localities are contiguous, in which case a sheriff has the discretion to serve the process under § 8.01-295). There is currently no statutory provision for coordinating service between sheriffs' departments, nor any provision specifying whether a sheriff may be held liable for premature service on a judgment debtor before the garnishee. It accordingly may be desirable to amend § 8.01-511 to either exonerate sheriffs from liability for the order of service or to direct the sheriff serving the garnishee to forward the garnishment summons to the appropriate officer for service on a judgment debtor residing in a different locality.

D. Attachment

From the sheriff's standpoint, an attachment summons could be easily confused with a writ of fi.fa. in that both processes direct the sheriff to levy on a defendant's property. The statutes governing a sheriff's duties in executing attachments, however, differ in several important respects from those applicable to writs of fi.fa. due to the pre-judgment issuance of the attachment and the increased concern for the rights of a

putative debtor before a judicial determination of liability on the merits. See generally, Rendleman, supra, § 2.4. To ensure that sheriffs are aware of the different requirements applicable to writs to attachment, it may be desirable to cross-reference the following attachment provisions in the Reviser's notes to the corresponding provisions applicable to writs of fi.fa.:

1. §§ 8.01-537.1 and 8.01-551: Required bond and certificate of fair value

Section 8.01-537.1 requires the plaintiff seeking attachment to file an indemnity bond with his petition. The giving of such bond must be endorsed on the writ or certified by the clerk to the serving officer. Section 8.01-551 further provides that where the summons directs the sheriff to take possession of specific property, the sheriff must first make a certificate of the fair value of the property and secure a double indemnity bond from the plaintiff. These specific provisions requiring the plaintiff in attachment to file an indemnity bond should be cross-referenced under § 8.01-367, which authorizes a sheriff levying a fi.fa., attachment or distress warrant to demand an indemnity bond before proceeding where he "doubts whether such property is liable to such levy." See the discussion in part A.2.a., supra.

2. § 8.01-553: Forthcoming bonds

Section 8.01-553 provides that a defendant may secure the release of property subject to a writ of attachment by giving the sheriff a forthcoming bond in accordance with the requirements of that section. This provision should be cross-referenced under §§ 8.01-526 and 8.01-371, which govern the taking of forthcoming bonds for property subject to a writ of fi.fa. or distress warrant. It may also be desirable to include a cross-reference to § 55-232, which provides that a debtor who is unable to give a forthcoming bond for property subject to a lien of distress may nevertheless retain the property at his own risk.

In the context of forthcoming bonds for property subject to attachment, it should be noted that section 8.01-554 authorizes the plaintiff to file exceptions to a defendant's

forthcoming bond and requires the sheriff to file a good bond where the plaintiff's exception is sustained. The sheriff is left to his remedies against the parties to the defendant's forthcoming bond. § 8.01-554. No such provision specifically imposing liability on the sheriff is included in the statutes authorizing him to take forthcoming bonds for property subject to a writ of fi.fa. or distress warrant. See §§ 8.01-526, 8.01-371, 55-232. The legislature may want to consider whether the sheriff should continue to be liable in the attachment situation.

E. Constitutional Considerations

In the context of pre-judgment attachments, the requirements of a bond, ex parte review by a judge or magistrate, notice of exemptions, and a prompt post-levy hearing within 10 days (see Va. Code §§ 8.01-537, -537.1, -538, -540, -546.2, -568) appear to be sufficient to satisfy due process requirements. See Mitchell v. W.T. Grant Co., *supra*; T. Boyd, E. Graves, & L. Middleditch, Virginia Civil Procedure, ch. 14 (Supp. 1988).

By contrast, in the context of post-judgment garnishments and executions, the requirements of due process are less clear. The United States Court of Appeals for the Fourth Circuit has upheld the constitutionality of a post-judgment garnishment process that accorded the debtor notice and a prompt post-seizure hearing on exemption claims. Reigh v. Schleigh, 784 F.2d 1191 (4th Cir. 1986), cert. denied, 107 S. Ct. 167 (1986). Accord, D. Motz and A. Baida, The Due Process Rights of Postjudgment Debtors and Child Support Obligors, 45 Md. L. Rev. 61, 89-90 (1986) (due process requires only notice and prompt post-seizure hearing). Other lower federal courts and commentators, however, have taken the position that the debtor ought to be accorded a pre-seizure hearing even in the post-judgment context, at least where other procedural protections against erroneous deprivation, such as a bond and review by a neutral judicial officer are not present. See M. Greenfield, A Constitutional Limitation On The Enforcement of Judgments - Due Process and Exemptions, 1975 Wash. U. L. Q. 877, 923 (1975);

Comment, Due Process, Postjudgment Garnishment and "Brutal Need" Exemptions, 1982 Duke L. J. 192 (1982); Nelson v. Regan, 560 F. Supp. 1101, 1111 (Conn. 1983), *aff'd* on other grounds, 731 F.2d 105 (2d Cir. 1984), cert. denied sub nom. Manning v. Nelson, 469 U.S. 853 (1984); Marcello v. Regan, 574 F. Supp. 586, 596-98 (R.I. 1983). Cf. McClelland v. Massinga, 786 F.2d 1205 (4th Cir. 1986) (upholding post-judgment tax refund intercept process that accorded child support obligor (1) notice; (2) administrative investigation on request; (3) "prompt" post-intercept administrative hearing to be completed within 60 days of request; and (4) an opportunity for judicial review of administrative decision).

Virginia's post-judgment execution and garnishment procedures currently provide the requisite notice and prompt post-seizure hearing on exemption claims that the Fourth Circuit found constitutional in Reigh v. Schleigh, *supra*. Under Virginia Code § 8.01-466, writs of fi.fa. may be issued by a clerk without bond, but the debtor is entitled to notice of levy and exemptions, and a prompt post-levy hearing on exemption claims within 10 days. See Va. Code §§ 8.01-466, 8.01-477.1. (Under § 8.01-477, the debtor may also move to quash the execution, but there is no specified time limit for a hearing. Compare § 8.01-568.) Garnishment summonses may likewise be issued by a clerk, but the debtor is entitled to notice and a prompt post-seizure hearing on exemption claims within 7 days. See Va. Code §§ 8.01-511, -512.4, -512.5. (As in the case of executions, however, no provision is made for a prompt post-seizure hearing on objections other than exemptions. Compare Va. Code § 8.01-568.)

Because Virginia's post-judgment execution and garnishment procedures accord the debtor notice and a prompt post-seizure hearing on exemption claims, both processes appear to comply with recent federal court decisions. With respect to writs of fi.fa., however, it may be desirable to add the additional procedural protection of a bond prior to execution and a provision for a prompt post-seizure hearing on a motion to quash the execution not only to guard against constitutional challenges in the future, but also to protect sheriffs from liability. In the context of post-judgment garnishments, it may also

be desirable to amend § 8.01-512.5 to include a provision allowing the debtor to raise both exemptions and other objections at the post-seizure hearing that is to take place within 7 days. The decisions of the Fourth Circuit in Reigh v. Schleigh, supra and McClelland v. Massinga, supra indicate that in the post-judgment context, pre-seizure judicial review is not a constitutional requirement.

A more serious potential constitutional difficulty is presented by the statutes governing execution of judgments in favor of the Commonwealth. Sections 8.01-202 and 8.01-203 provide for issuance and execution of a writ of fi.fa. by the sheriff, but do not incorporate the provisions for service of notice of levy with an exemption claims form and the prompt hearing procedure that were added by §§ 8.01-466, 8.01-477.1, 8.01-487.1, 8.01-546.1 and 8.01-546.2 with respect to executions generally. While it may be arguable that these provisions are necessarily incorporated in the special procedures for executions in favor of the Commonwealth, it would seem desirable to amend § 8.01-201 to clarify this point.

F. Qualified official immunity

The Supreme Court of the United States has recognized a defense of qualified immunity for the actions of public officials which "could reasonably have been thought consistent with the rights they are alleged to have violated." See Anderson v. Creighton, ___ U.S. ___, 107 S. Ct. 3034, 3038 (1987). The Supreme Court of Virginia has also held that public officials are not absolutely immune from tort liability, but may be held liable for misfeasance of "ministerial" acts. See First Virginia Bank-Colonial v. Baker, 225 Va. 72, 78-80, 301 S.E.2d 8 (1983). See also Jeffres v. Countryside Homes of Lincoln, Inc., 214 Neb. 104, 333 N.W.2d 754, 762-764 (1983) (constable executing writ of assistance was acting ministerially and was not immune from liability for negligence).

In actions alleging violation of constitutional rights in connection with a pre-judgment attachment or post-judgment execution, the availability of the defense of

qualified immunity is questionable in that the sheriff is arguably acting on behalf of a private party. See Part A. 2.b., supra. The federal circuit courts of appeals have split on the issue whether the defense of qualified immunity is available to private parties. For a recent discussion of this split of authority, see Jones v. Preuit & Mauldin, 851 F.2d 1321, 1324 (11th Cir. 1988) (en banc) and the cases therein cited. In Jones, the United States Court of Appeals for the Eleventh Circuit held that private creditors were entitled to assert the defense of qualified good faith immunity in an action under 42 U.S.C. § 1983 for an alleged unconstitutional seizure pursuant to Alabama's pre-judgment attachment law. The court in Jones also noted that the constitutionality of Alabama's pre-judgment attachment procedure was questionable in that it allowed issuance of writs by nonjudicial officers, but declined to invalidate the Alabama statute since the writ in that case had been issued by a judge. 857 F.2d at 1328-29.

As discussed in detail in Part E supra, Virginia's post-judgment garnishment and execution procedures allow issuance of writs of fi.fa. and garnishment summonses by clerks, but accord the debtor notice and a prompt post-seizure hearing on exemption claims. Because these procedures appear sufficient to satisfy the requirements of due process in the post-judgment context under recent federal court decisions, a sheriff acting in accordance with these procedures would seem to have a strong basis for asserting the defense of qualified good faith immunity even in the event of a successful constitutional attack.

G. Duration of liability

There is currently no statute of limitations provision specifying the duration of the civil liability of a sheriff or his surety in an action for damages arising out of levy, sale and distribution of proceeds pursuant to a pre-judgment attachment or post-judgment execution. The statutory provisions for indemnity, forthcoming, and suspending bonds likewise do not specify the bond's duration. See §§ 8.01-367, 8.01-371, 8.01-477,

8.01-526, 8.01-537.1, 8.01-551, 8.01-553. Absent such a specific statutory provision, an action on a sheriff's bond or for tortious injury to property presumably would be subject to a five-year statute of limitations. See §§ 8.01-246(2), 8.01-243(B). See also 16 Michie's Jur. Sheriffs § 47 at 610 n.3 (Repl. Vol. 1987) (noting that it is arguable that there is no limitation on action on sheriff's bond which is in the name of the Commonwealth, and to which Va. Code § 8.01-231 would apply). An action under 42 U.S.C. § 1983 for an alleged violation of constitutional rights, however, presumably would be subject to the two-year statute of limitations for personal injury under § 8.01-243(A). See Wilson v. Garcia, 471 U.S. 261 (1985); J. Pagan, Civil Rights and "Personal Injuries": Virginia's Statute of Limitations for Section 1983 Suits, 26 Wm. & Mary L. Rev. 199 (1985) (arguing that § 8.01-243(A) as presently worded is inadequate to accommodate all section 1983 actions).

In order to resolve this uncertainty as well as limit the exposure of sheriffs and their sureties, it may be desirable to enact in Title 8.01 a specific statute of limitations provision for actions involving a sheriff's alleged misconduct in connection with levy, sale and distribution of proceeds pursuant to a pre-judgment attachment or post-judgment execution. Such a provision could also be made specifically applicable to actions on a sheriff's bond. See 11 U.S.C. § 322(d) (imposing two-year statute of limitations for actions on bankruptcy trustee's bond). Professor Rendleman suggested that a one-year statute of limitations would seem strike an appropriate balance between the interests of debtors (who now must be given notice of an attachment or execution), interested third-parties and the surety companies that issue bonds insuring sheriffs against liability. Provision could also be made for allowing a surety to petition the court for release of a sheriff's bond upon expiration of the applicable limitations period.

H. Clarification of statutory exemptions from levy

A potentially significant area of liability for sheriffs lies in the list of exemptions

from levy under § 34-26 that dates back in part to the colonial era. It includes such antiquated items as "chifforobes," an "icebox," a "loom and its appurtenances," and a "spinning wheel" in a list of over seventy specific items. While § 8.01-546.2 provides a post-seizure procedure for resolving disputed exemption claims, a sheriff's potential liability for effecting an improper seizure of exempt property would seem to make it desirable to modernize the statutory exemption list. Alternatively, federal bankruptcy statutes could be used as a guide. See 11 U.S.C. § 522(d) (listing property individual debtor may exempt from bankruptcy estate). In addition, it may be desirable to include in the statutes relating to the sheriff's return a provision for listing exempt property that was not seized because it was "exempt" property, but such a change could have a drastic workload impact upon sheriffs. See §§ 8.01-483, 8.01-215, 8.01-559.

I. Continuing training

Finally, measures designed to ensure that sheriffs receive thorough plain English training on the law relating to exemptions could provide another mechanism for avoiding potential liability arising out of the improper seizure of exempt property. Cf. Annot., Liability of Supervisory Officials and Governmental Entities for Having Failed to Adequately Train, Supervise, or Control Individual Peace Officers Who Violate Plaintiff's Civil Rights under 42 USCS § 1983, 70 A.L.R. Fed. 17 (1984). For example, if no major statutory changes are made, circulating to sheriffs and the training academies a final draft of this report of the problems identified in current statutory provisions would be one way of alerting sheriffs to the need for caution in certain areas.

"APPENDIX 1"

1988 SESSION
ENGROSSED

HP4225455

HOUSE JOINT RESOLUTION NO. 144

House Amendments in [] - February 16, 1988

[*Establishing a joint subcommittee Requesting the Committee on District Courts*] to
study sheriffs' duties concerning service of process and seizure of property.

Patron--Dicks

Referred to the Committee on Rules

WHEREAS, each year Virginia's sheriffs and their deputies serve thousands of garnishments and levies, or seize property pursuant to pre-trial or post-trial civil process; and

WHEREAS, these sheriffs and their deputies are not immune from suit in the performance of these services and may be held liable for damages in the event of wrongful handling of a garnishment, levy or seizure in connection with a civil suit; and

WHEREAS, numerous federal court case decisions have changed substantial portions of the procedures used in handling such garnishments, levies and seizures; and

WHEREAS, the existing statutory provisions regarding sheriffs' duties are scattered throughout the Code of Virginia, frequently written in archaic language, and which often have gaps in their directives to sheriffs on the details of handling civil process; and

WHEREAS, Virginia case law interpreting these provisions are comparatively rare in modern times, with many of the controlling cases dating back over one hundred years; and

WHEREAS, while some efforts have been made to conform Virginia's statutes to requirements of federal case decisions, there has been no comprehensive review of these statutes to determine what changes are needed to create clear statutory direction for sheriffs and their deputies to follow in seizures and handling certain civil process; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That [a joint subcommittee be established the Committee on District Courts is requested] to study revising the statutory provisions regarding the duties of the sheriffs in handling garnishments, levies and seizures issued in connection with civil cases.

[The joint subcommittee shall be composed of eleven members, as follows: five members of the House Committee for Courts of Justice to be appointed by the Speaker of the House; two members of the Senate Committee for Courts of Justice to be appointed by the Senate Committee on Privileges and Elections; one circuit court judge and one general district court judge to be appointed by the Chief Justice of the Supreme Court; one sheriff, and one attorney associated with a legal aid society to be appointed by the Speaker of the House.

The joint subcommittee shall make its report and recommendations, if any, to the 1989 Session of the General Assembly-

The indirect costs of this study are estimated to be \$10,650; the direct costs of this study shall not exceed \$7,020. The Committee shall report to the Governor and the General Assembly prior to the 1989 Session as provided in procedures of the Division of Legislative Automated Systems.]

"APPENDIX II"

A BILL to amend and re-enact §§ 8.01-201, 8.01-365, 8.01-367, 8.01-370, 8.01-466, 8.01-477, 8.01-478, 8.01-478.1, 8.01-480, 8.01-499, 8.01-511, 8.01-512.5, 8.01-554, 15.1-80, 16.1-98, and 34-26 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 8.01-245.1 and 8.01-478.2 and to repeal §§ 8.01-368 and 8.01-369 of the Code of Virginia relating to the service of process and execution of attachments, distress, garnishments and writs of execution.

1. That §§ 8.01-201, 8.01-365, 8.01-367, 8.01-370, 8.01-466, 8.01-477, 8.01-478, 8.01-478.1, 8.01-480, 8.01-499, 8.01-511, 8.01-512.5, 8.01-554, 15.1-80, 16.1-98 and 34-26 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 8.01-245.1 and 8.01-478.2 as follows:

§ 8.01-201. Execution; real estate to be sold. — In a writ of fieri facias upon a judgment or decree against any person indebted or liable to the Commonwealth, or against any surety of his, after the words "we command you that of the," the clerk shall insert the words "goods, chattels, and real estate," and conform the subsequent part of such writ thereto. And under any writ so issued, real estate may be taken and sold. The writ shall be issued together with the form for requesting a hearing on a claim of exemption from levy as provided in § 8.01-546.1 and shall be served in accordance with § 8.01-487.1. The procedures specified in § 8.01-477 and 8.01-546.2 shall govern further proceedings regarding motions to quash execution and claims of exemption from levy.

§ 8.01-245.1. Limitation on actions against or upon the bond of an officer serving attachment or execution process. — No action shall be brought against or upon the bond of any officer who is responsible for serving a writ of attachment or any execution

process except within one year after the officer's final return on such process is filed with the clerk of the issuing court.

§ 8.01-365. How claim of third party tried. — 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 or 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.

§ 8.01-367. Property claimed by third party. Indemnifying bond to officer. — If any officer levies or is required to levy a fieri facias, an attachment, or a warrant of distress on property, and the officer doubts whether such property is liable to such levy, he may give the plaintiff, his agent or attorney-at-law, notice that an indemnifying bond is required in the case; bond may thereupon be given by any person, with good security payable to the officer in a penalty equal to the value of the property in the case of a fieri facias or a warrant of distress on property and equal to double the value of the property in case of an attachment, with condition to indemnify him against all damage which he may sustain in consequence of the seizure or sale of such property and to pay to any claimant of such property all damage which he may sustain in consequence of such seizure or sale, and also to warrant and defend to any purchaser of the property such estate or interest therein as is sold. Provided, however, that when When the property claimed to be liable by virtue of a fieri facias, an attachment, or a warrant of distress

the process aforesaid is in the possession of any of the parties against whom such process was issued but is claimed by any other person or is claimed to belong to any other person, the officer having such process in his hands to be executed shall, if an indemnifying bond has been given, proceed to execute the same notwithstanding such claim unless the claimant of the property or someone for him shall give a suspending bond as provided by § 8.01-370 and shall within thirty days after such suspending bond is given proceed to have the title to the property settled in accordance with the provisions of this chapter. And in case such claimant or someone for him fails to give such suspending bond, or having given such bond fails to have such proceedings instituted to settle the title thereto, the claimant shall be barred from asserting such claim to the property and the officer shall proceed to execute the process, and the officer who executes such process shall not be liable to any such claimant for any damages resulting from the proper execution of such process as is required by this section. ~~If an indemnifying bond be not given within a reasonable time after such notice, the officer may refuse to levy on such property, or may restore it to the person from whose possession it was taken. If such bond be given, the officer shall proceed to levy (i) if he has not already done so, or (ii) if necessary to restore a levy previously released.~~

§ 8.01-370. Claimant may give suspending bond; proceedings to have title settled; action on indemnifying or suspending bond. — The sale of any property levied on under a fieri facias or distress warrant shall be suspended at the instance of any claimant thereof who will deliver to the officer a suspending bond, with good security, in a penalty equal to double the value thereof, payable to such officer, with condition to pay to all persons who may be injured by suspending the sale thereof, until the claim thereto is adjudicated or otherwise adjusted, such damage as they may sustain by such suspension. If the property claimed to be liable by virtue of such process is in the possession of any of the parties against whom such process was issued, but is claimed by any other person, or is

claimed to belong to any other person, the officer having such process in his hands to be executed shall, whether provided that an indemnifying bond has been given ~~or not~~, after notice to the claimant, or his agent, proceed to execute the same notwithstanding such claim, unless the claimant of such property or someone for him shall give the suspending bond aforesaid, and shall within thirty days after such bond is given proceed to have the title to such property settled in accordance with the provisions of this chapter. And in case such claimant or someone for him fails to give a suspending bond, or having given such bond fails to have such proceedings instituted to settle the title thereto, the claimant shall be barred from asserting such claim to the property and the sale of the property shall proceed. For the purpose of this section, a person making a claim of ownership of property on behalf of another shall be deemed to be the latter's agent, and the notice required by this section may be verbal or in writing. Upon any such indemnifying or suspending bond as is mentioned in this section or ~~§ 8.01-369~~ § 8.01-478.2 an action may be prosecuted in the name of the officer for the benefit of the claimant, creditor, purchaser, or other person injured, and such damages recovered in such action as a jury may assess. The action may be prosecuted and a writ of fieri facias had in the name of such officer when he is dead in like manner as if he were alive.

§ 8.01-466. Clerk to issue fieri facias on judgment for money.—On a judgment for money, it shall be the duty of the clerk of the court in which such judgment was rendered, upon written application ~~request~~ of the judgment creditor, his assignee or attorney, to issue a writ of fieri facias at the expiration of twenty-one days from the date of entry of the judgment unless the court for good cause orders an execution to be issued earlier. The written application shall be on a form provided by the clerk which shall contain entries for the following information: (1) the style of the case; (2) the case number; (3) the date that judgment was entered; (4) the name of the party seeking execution; (5) whether the party seeking execution is the judgment creditor or an

assignee; (6) the names and addresses of the parties against whom execution is sought; (7) the total amount of unpaid judgment principal plus interest which is due at the time of the application; (8) the interest rate applicable to the judgment; (9) the amount of unpaid judgment principal to which the interest rate applies; and (10) a description of any specific items of tangible personal property that the applicant seeks to have levied. The application form shall contain a notice that the writ of fieri facias will be executed only after an indemnifying bond is posted with the officer to whom the writ of fieri facias has been delivered. The writ shall be issued together with the form for requesting a hearing on a claim of exemption from levy as provided in § 8.01-546.1. The clerk, the judgment creditor, his attorney or assignee shall deliver the writ and hearing request form to the proper officer for execution and shall take his receipt therefor. The officer shall transmit his receipt to the clerk if delivery of and receipt for such writ is not made pursuant to § 8.01-294. For good cause the court may order an execution to issue on judgments and decrees at an earlier period.

~~§ 8.01-477. When executions may be quashed; how proceedings thereon stayed. — A motion to quash an execution may, after reasonable notice to the adverse party, be heard and decided by the court which issued the execution. Such court, on the application of the plaintiff in the motion, may make an order staying the proceedings on the execution until the motion be heard and determined, the order not to be effectual until bond be given in such penalty and with such condition, and either with or without surety, as the court may prescribe. The clerk from whose office the execution issued, shall take the bond and make as many copies of the order as may be necessary and endorse thereon that the bond required has been given, and a copy shall be served on the plaintiff in the execution and on the officer in whose hands the execution is placed.~~

§ 8.01-477. When executions may be quashed; how proceedings thereon stayed. — A judgment debtor shall have the right to a hearing on a motion to quash an execution. If a judgment debtor files a motion to quash in which he requests a hearing, the clerk shall (i) schedule a hearing no later than ten business days from the date that the motion is filed with the court, and (ii) notify the parties of the date, time and place of hearing and the objection being asserted. This hearing may be combined with a hearing pursuant to § 8.01-477.1 on a claim of exemption from levy.

The clerk shall notify the parties and the sheriff of the date, time and place of hearing and the objection being asserted. The court may stay the sale pending this hearing by interlocutory order and shall require the judgment debtor to give a suspending bond before such order is entered. The sheriff shall comply with the writ unless and until ordered otherwise in writing by the court. The order shall take effect upon receipt by the sheriff. The clerk is required to provide a copy of the order or the hearing disposition to the sheriff. If the execution is quashed, the court shall order the sheriff to return all property seized under such process to the parties entitled.

§ 8.01-478. On what property writ of fieri facias levied; when lien commences; when indemnifying bond required.—The writ of fieri facias may be levied as well on the current money and bank notes, as on the goods and chattels of the judgment debtor, except such as are exempt from levy under Title 34, and shall bind what is capable of being levied on only from the time it is actually levied by the officer to whom it has been delivered to be executed. The officer shall refuse to levy on such property or to proceed further with execution until an indemnifying bond is given and shall not be liable to the judgment creditor for any damages sustained as a consequence of such refusal.

§ 8.01-478.1. Return of such bond to clerk's office.—Any indemnifying bond taken by an officer under the preceding section shall be returned by him together with his

return on the process to the clerk's office of the circuit court of the county or city wherein the property to be levied on is located.

§ 8.01-478.2. Effect of such bond. — The claimant or purchaser of such property shall, after such bond is so returned, be barred from any action against the officer levying thereon, provided the security therein be good at the time of taking it.

8.01-480. Prior security interest on property levied on. — Subject to the requirements of § 8.01-478 and this section, 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, seized and sold 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.

§ 8.01-499. Officer receiving money to make return thereof and pay net proceeds; commission, etc. — An officer receiving money under this chapter shall forthwith make a return reflecting the amount received by the officer 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.

§ 8.01-511. Institution of garnishment proceedings. — On a suggestion by the judgment creditor that, by reason of the lien of his writ of fieri facias, there is a liability on any person other than the judgment debtor, or, that there is in the hands of some person in his capacity as personal representative of some decedent a sum of money to which a judgment debtor is or may be entitled as creditor or distributee of such decedent, upon which sum when determined such writ of fieri facias is a lien, a summons in the form prescribed by § 8.01-512.3 may (i) be sued out of the clerk's office of the court from which an execution on the judgment is issued so long as the judgment shall remain enforceable as provided in § 8.01-251, (ii) be sued out of the clerk's office to which an execution issued thereon has been returned as provided in § 16.1-99 against such person or (iii) be sued out of the clerk's office from which an execution issued as provided in § 16.1-279 I. The summons and the notice and claim for exemption form required pursuant to § 8.01-512.4 shall be served on the garnishee, and shall be served on the judgment debtor promptly after service on the garnishee. When the garnishee and the judgment debtor reside in different jurisdictions within the Commonwealth, the sheriff serving the garnishee, promptly after service on the garnishee and mailing a copy to the judgment debtor as hereinafter provided, shall forward the summons and the claim for

exemption form required pursuant to § 8.01-512.4 to the sheriff of the city or county wherein the judgment debtor resides for service on the judgment debtor, and each sheriff shall make a separate return of process to the court, with the sheriff serving the garnishee showing in his return the sheriff to whom he forwarded the summons and the claims for exemption form for service on the judgment debtor. Service on the judgment debtor and the garnishee shall be made pursuant to subdivision 1 or 2 of § 8.01-296.

When making an application for garnishment, the judgment creditor shall set forth on the suggestion for summons in garnishment the last known address of the judgment debtor, and shall furnish the clerk with an envelope, with first-class postage attached, addressed to such address, whereupon a copy of the summons and the notice and claim for exemptions form required under § 8.01-512.4 shall be inserted into such envelope by the clerk and sent to the sheriff with the process to be served. The sheriff, promptly after service on the garnishee, shall mail such envelope by first-class mail to the judgment debtor at his last known address. If the serving officer of the city or county wherein the judgment debtor resides is unable to serve the judgment debtor pursuant to subdivision 1 of § 8.01-296, such mailing shall satisfy the mailing requirements of subdivision 2 b of § 8.01-296. The sheriff serving the garnishee shall note on his return the date of such mailing which, with the notation "copy mailed to judgment debtor" shall be sufficient proof of the mailing of such envelope with the required copy of the summons and the notice and claim for exemption form inserted by the clerk with no examination of such contents being required by the sheriff nor separate certification by the clerk that the appropriate documents have been so inserted. If the serving officer of the city or county wherein the judgment debtor resides is unable to serve the judgment debtor pursuant to subdivision 1 or 2 of § 8.01-296, such mailing shall constitute service of process on the judgment debtor. The judgment creditor shall furnish the social security number of the judgment debtor to the clerk, except as hereinafter provided.

* * *

§ 8.01-512.5. Hearing on claim of exemption from garnishment or motion to dismiss garnishment. — A judgment debtor shall have the right to a hearing on his claim of exemption from garnishment or a motion to dismiss garnishment no later than seven business days from the date that the claim or motion is filed with the court.

The clerk shall notify the parties of the date, time and place of the hearing and the exemption being claimed or the objection being asserted. The garnishee shall comply with the garnishment summons unless and until ordered otherwise in writing by the court. The order shall take effect upon receipt by the garnishee. The clerk is required to provide a copy of the order or other hearing disposition to the garnishee only if the garnishment summons is dismissed or is modified by the judge.

§ 8.01-554. Where bond returned and filed; exceptions to bond. — Every such bond shall be returned by the officer to and filed by the clerk of the court in which the attachment is pending, or to which the attachment is returnable, and the plaintiff may, within thirty days after the return thereof, file exceptions to the same, or to the sufficiency of the surety therein. If such exception be sustained, the court shall order the ~~officer~~ defendant or other person who gave bond under § 8.01-553 to file a good bond, with sufficient surety, to be approved by it, on or before a certain day to be fixed by the court. If he fail to do so, the court shall order the sheriff to proceed to levy the attachment and take possession of the property as provided in §§ 8.01-550 and 8.01-551. ~~he and his sureties in his official bond shall be liable to the plaintiff as for a breach of such bond; but the officer shall have the same rights and remedies against the parties to any bonds so adjudged bad as if he were a surety for them.~~

§ 15.1-80. Return of process; bond; account of sales; failure of officer. — Every officer to whom any order, warrant or process may be lawfully directed, shall make true return thereon of the day and manner of executing the same, and subscribe his name to

such return. When the service is by a deputy, such deputy shall subscribe to the return his own name as well as that of his principal. With such order, warrant or process there shall be returned any bond taken and an account of sales made under the same, specifying therein the several articles sold, the persons to whom sold, and the prices thereof. Such return shall be to the court from which such order, warrant or process emanates, or to which it is returnable, and in other cases, not specifically provided for, shall be to the circuit court of the county or the city in or for which the officer was elected or appointed. When a sale is made under any such order, warrant or process and no particular time for such return is prescribed therein, or by statute, the return shall be made forthwith after the sale. Any officer failing to comply with the requirements set out in this section shall forfeit twenty dollars and if he make a false return shall forfeit therefor one hundred dollars, provided that in the case of an execution issued from a court not of record, the fines provided in § 16.1-101 shall control. And if upon the return day of any process issued by a clerk of a court of record, the process shall not have been returned, the clerk shall issue a rule against the officer to whom the process was directed, returnable to the first day of the next succeeding term of the court, to appear and show cause why he shall not be fined for such default.

§ 16.1-98. Fieri facias or writ of possession on judgment.—Upon a judgment being rendered in a general district court a writ of fieri facias or a writ of possession shall be issued thereon only upon request written application of the judgment creditor, his assignee or his attorney. The written application shall be on a form provided by the clerk which shall contain entries for the information required by § 8.01-466. When the judgment is for personal property and the defendant is not given the option under § 8.01-121 to pay the amount of the judgment or surrender the property, the plaintiff may, at his option, have a writ of possession for the specific property and a writ of fieri facias for the damages or profits and costs, and if the writ of possession prove ineffectual he

may have a writ of fieri facias for the alternate value. The judge or clerk shall write or stamp upon the docket of the court, or upon the original warrant or motion, the issuing of each such writ and the date of issuance.

§ 34-26. Exempt articles enumerated. — In addition to the estate, not exceeding in value \$5,000, which every householder residing in this Commonwealth State shall be entitled to hold exempt, as provided in Chapter 2 (§ 34-4 et seq.) of this title, he shall also be entitled to hold exempt from levy or distress the following articles or so much or so many thereof as he may have, to be selected by him or his agents:

(1) The family Bible.

(1a) Wedding and engagement rings.

(2) Family pictures, schoolbooks and books library for the use of the family.

(3) A lot in a burial ground.

(4) (a) All necessary clothing wearing apparel of the debtor and his family;

(b) two pieces of furniture for the storage of such clothing;

(c) all beds, bedsteads and bedding necessary for the use of such family; 2 dressers or 2 dressing tables, wardrobes, chifforobes or chests of drawers or a dresser and a dressing table;

(d) any necessary carpets, rugs, linoleum or other floor covering; and

(e) all heaters and stoves and appendages put up and kept for the use of the family not exceeding 2 and one axe if wood is used for fuel by any of the stoves.

(5) (a) All cats, dogs, birds, squirrels, rabbits and other pets not kept or raised for sale;

(b) 1 cow and her calf until 1 year old;

(c) all necessary dinnerware, eating, cooking and serving utensils of the debtor and his family and 2 pieces of furniture for the storage of the same; 1 horse, 6 chairs, 6 plates, 1 table, 12 knives, 12 forks, 2 dozen spoons, 12 dishes, or if the

family consists of more than 12, then a plate, knife, fork and 2 spoons, and a dish for each member thereof; 2 basins, 1 pot, 1 oven, 6 pieces of wooden or earthenware;

(d) 1 dining room table together with 6 chairs or, if the family consists of more than 6; then 1 chair for each member of the family; 1 buffet, china press,

(e) 1 ~~icebox~~, freezer or refrigerator of any construction;

(f) 1 washing machine;

(g) 1 clothes dryer; not to exceed \$150 in value; 1 loom and its appurtenances, 1 kitchen safe or 1 kitchen cabinet or press, 1 spinning wheel, 1 pair of cards,

(h) groceries 1 axe and provisions other than those hereinafter set out of the value of \$50; 2 hoes; 50 bushels of shelled corn, or, in lieu thereof, 25 bushels of rye or buckwheat; 5 bushels of wheat, or 1 barrel of flour; 20 bushels of potatoes; 200 pounds of bacon or pork; 2 hogs, fewer not exceeding in value \$25; all canned and frozen goods; canned fruits; preserved, fruits or home-prepared food put up and prepared for use and consumption of the family; \$25 in value of forage or hay;

(i) 1 cooking stove; and utensils for cooking therewith;

(j) 1 sewing machine; and

(k) in case of a mechanic, the tools and utensils of his trade; and

(l) in case of an oysterman or fisherman his boat and tackle, not exceeding ~~\$1,500~~ \$3,000 in value; if the boat and tackle exceed ~~\$1,500~~ \$3,000 in value the same shall be sold, and out of the proceeds the oysterman or fisherman shall first receive ~~\$1,500~~ \$3,000 in lieu of such boat and tackle.

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.

2. That §§ 8.01-368 and 8.01-369 of the Code of Virginia are repealed.

"APPENDIX III"

Proposed Cross-References

1. Under § 8.01-526, which authorizes the taking of a forthcoming bond from the debtor, the following sections restricting the taking of such bonds should be cross-referenced: §§ 8.01-531, 8.01-209.
2. Under §§ 8.01-478 and 8.01-557, which set forth the general rules as to when the lien of a writ of fi. fa. or attachment arises, a list of the special rules of lien priority provided in §§ 46.1-77, 8.01-558, 8.01-488, 8.9-501(5) should be cross-referenced.
3. Cross-reference under § 15.1-80, which prescribes penalties for noncompliance with return requirements, § 16.1-101, which prescribes specific penalties in the case of noncompliance with return requirements for district court executions. Such a cross-reference would be unnecessary, however, if the proposed amendment to § 15.1-80 referring to § 16.1-101 were adopted.
4. Cross-reference under §§ 8.01-466 and 16.1-98, which govern executions generally, the special rules governing execution of judgments in favor of the Commonwealth, §§ 8.01-201 through 8.01-216.
5. Cross-reference under § 8.01-367, which provides for the taking of an indemnity bond before executing a writ of fi. fa., the sections requiring an indemnity bond in the case of writs of attachment, §§ 8.01-537.1 and 8.01-551.
6. Cross-reference under both §§ 8.01-526 and 8.01-371, which concern the taking of forthcoming bonds for property subject to a writ of fi. fa., the sections concerning the taking of such bonds for property subject to attachment or distress, §§ 8.01-553 and 55-232. (The cross-references to § 8.01-526 currently include §§ 8.01-371, 8.01-553 and 55-230 et seq.)
7. Cross-reference under § 8.01-548, which describes property subject to attachment, the statutes concerning property exempt from levy, §§ 34-1 to 34-33.

Explanatory Notes to be added to existing sections

1. Note to § 8.01-201 — see §§ 8.01-466, 8.01-477.1, 8.01-487.1
2. Note to § 8.01-365 — see § 16.1-119
3. Note to § 8.01-368 if repealed — see § 8.01-478.1
4. Note to § 8.01-369 if repealed — see § 8.01-478.2
5. Note to § 8.01-477 — see § 8.01-546.2
6. Note to § 8.01-478 — see § 8.01-367
7. Note to § 8.01-478.1 — for former provisions, see former § 8.01-368
8. Note to § 8.01-478.2 — see §§ 8.01-369 and 8.01-554

