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Law Of Arrest In Virginia

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NOTE

LAW OF ARREST IN VIRGINIA

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I. ARREST GENERALLY

I. *What Is an Arrest*

"Actual contact is not necessary to constitute arrest. . ."¹ This statement from an early case is the only Virginia authority on the technical elements of an arrest. Consequently, the law of arrest as it exists in Virginia, with a few statutory exceptions, is as generally understood at common law.² A legal encyclopedia gives the following definition.

"An arrest is the taking, seizing, or detaining of the person of another, either by touching or putting hands on him, or by any act which indicates an intention to take him into custody and subjects the person arrested to the actual control and will of the person making the arrest. The act relied upon as constituting an arrest must have been performed with the intent to effect an arrest and must have been so understood by the party arrest-

¹Womack v. Circle, 2 Va. L.J. 209, 219 (1878).

²See Va. Code Ann. § 1-10 (1950); Muscoe v. Commonwealth, 86 Va. 443, 10 S. E. 534 (1890); and Galliher v. Commonwealth, 161 Va. 1014, 170 S.E. 734 (1933).

ed. Also, the person making the arrest must be acting under some real or pretended legal authority for taking the person into custody. It is not necessary, however, that there be an application of actual force, or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest; it is sufficient if the person arrested understands that he is in the power of the one arresting and submits in consequence. However, in all cases in which there is no manual touching or seizure or any resistance, the intentions of the parties to the transaction are very important; there must have been intent on the part of one of them to arrest the other, and intent on the part of such other to submit, under the belief and impression that submission was necessary. There can be no arrest where the person sought to be arrested is not conscious of any restraint of his liberty. But the mere submission of a person, whether pretended or actual, will not constitute an arrest if he is not at the time actually within the power of the officer. If an officer having authority to make an arrest lays his hands upon the person of the prisoner, however slightly, with the intention of taking him into custody, it is an arrest, even though he may not succeed in stopping or holding him even for an instant."³

2. *Who may arrest.*

Persons authorized to arrest can be grouped in five classes, though they are not mutually exclusive.

2-1. Officers of the law.

This group includes persons who are regularly employed in general enforcement of the laws of the Commonwealth, and are called "law enforcement officers," "peace officers," "policemen," or by some similar term.

2-1.1. State police.

This group comprises state police, police of cities and towns, county police and sheriffs, the Capitol police, police officers of state agencies, and police officers of other states.

The authorizing statute provides:

"The superintendent of State Police, his several assistants and police officers appointed by him are vested with the powers

³4 Am. Jur. Arrest § 2 (1936). (Footnotes omitted.) See also 6 C.J.S. Arrest, § 1 (1937), a more detailed account of the technical elements of arrest; 1 Alexander, *The Law of Arrest*, section 45 (1949), a more elaborate and philosophical discussion of the definition of arrest; 4 Wharton, *Criminal Law and Procedure*, § 1581 (1957), a brief definition substantially identical to that in other sources cited.

of a sheriff for the purpose of enforcing all the criminal laws of this State, and it shall be the duty of the Superintendent, his several assistants and police officers appointed by him to use their best efforts to enforce the same."⁴

2-1.2. Police of cities and towns.

The authorizing statute provides:

"The officers and privates constituting the police force of cities and towns of the Commonwealth are hereby invested with all the power and authority which formerly belonged to the office of constable at common law in taking cognizance of, and in enforcing the criminal laws of the Commonwealth and the ordinances and regulations of the city or town, respectively, for which they are appointed or elected."⁵

2-1.3. Police of counties.

There is no authorizing statute specially for sheriffs and deputies of counties. These officers, therefore, presumably have the same authority as police, of cities and towns.⁶

There are, however, two pertinent statutes: one providing for the appointment by the county sheriff of a special police force in counties of population of more than 35,000;⁷ the other, for a "police department and police trial board" in counties of population 42,000 to 45,000.⁸ Although there is no explicit statute, police appointed pursuant to these statutes presumably have the same authority to arrest as police of cities and towns.⁹

For those counties not meeting these population requirements for an organized police force, provision is made for appointment of "special policemen":

"The circuit court of any county, or the judge thereof in vacation, may appoint special policemen for so much of such county as is not embraced within the incorporated town. . . ."¹⁰

These "special policemen" are given power to execute warrants and apprehend those persons "whom they have cause to suspect have violated, or intend to violate any law of the State. . . ."¹¹

⁴Va. Code Ann. § 52-8. (1950).

⁵Va. Code Ann. § 15-557 (1950).

⁶See statute cited *supra* note 5.

⁷Va. Code Ann. § 15-574.1 (1950).

⁸Va. Code Ann. section 15-574.2 (1950).

⁹See statute cited *supra* note 5.

¹⁰Va. Code Ann. § 15-562 (1950).

¹¹Va. Code Ann. § 15-571 (1950).

While their authority is generally confined to the county for which appointed, it extends throughout the state "when actually in pursuit of persons accused of crime and when acting under authority of a duly executed warrant. . . ."¹²

Under the language of cases construing the authority of such officers, it is plain that they have, within their own jurisdictions, the same power to arrest as other law enforcement officers have. It is not clear, though, whether they must have possession of a warrant when they pursue suspected criminals outside their own bailiwicks. One case says that there is no limitation upon the power of special policemen to arrest persons charged with a felony and found within their territorial jurisdiction, and when actually in pursuit to arrest persons outside of the counties for which they have been appointed.¹³

2-1.4. Police officers of state agencies.

General. The officers of several state agencies have authority to arrest for violations of laws applicable to their particular agency, as the Commissioner of Game and Inland Fisheries of the Department of Conservation and Development. Only the law enforcement officers of the Virginia Alcoholic Beverage Control Board, however, have statutory authority to enforce the general criminal laws of the state, as well as the laws relating to their agency; the authorizing statute gives them such power "as is now vested in sheriffs of counties and police of cities and towns" in enforcing the criminal laws.¹⁴ Other officers of state agencies who have authority to arrest are: probation and parole officers; forest wardens; game wardens; members of the Commission of Fisheries; and officers of societies for protecting animals.

Probation and parole officers. "Any probation and parole officer may arrest a parolee without a warrant, or may deputize any other officer with power of arrest to do so" where the parolee has violated the conditions of his parole.¹⁵

Forest wardens. Forest wardens have the authority and power of a common law constable and of other "arresting officers under the statutes of this State," so far as violations of forest fire regulations and law, or fish and game protection laws.¹⁶

¹²Va. Code Ann. § 15-570 (1950).

¹³Williams v. Commonwealth, 142 Va. 667, 670, 128 S.E. 572, 573 (1925).

¹⁴Va. Code Ann. § 4-8 (1950). As to the authority to arrest of sheriffs and police of cities and towns, see statute cited supra note 5.

¹⁵Va. Code Ann. § 53-259 (1950).

¹⁶Va. Code Ann. § 10-55 (1950).

Game wardens. Game wardens have power to arrest, upon displaying badge of office, any person found violating any provisions of hunting, trapping, inland fish and dog laws.¹⁷

Members of the Commission of Fisheries.

"The Commissioner or any member of the Commission of Fisheries, all inspectors, police captains of boats, and other employees designated by the Commissioner in the service, shall have the power, with or without warrant, to arrest any person or persons found violating any of the fish or shellfish laws. . . ."¹⁸

Capital police. Capital police have authority to arrest for offenses committed on the Capitol Square, the same as policemen of the city of Richmond may arrest for offenses committed within the jurisdiction of that city.¹⁹

2-1.5. Police of other states.

A policeman from a "peace unit" of another state in close pursuit of an alleged felon in this state has the same authority to arrest as police officers of this state, provided the other state extends the same privilege to this Commonwealth.²⁰ There is no authority as to whether an officer from another state may arrest in this state for a misdemeanor.

2-2. Conservators of the peace.

The terms "conservator of the peace" and "special policeman" are used interchangeably and apparently are synonymous, at least insofar as indicating authority to arrest. Some statutes declare that special policemen appointed thereunder have the power to arrest of conservators of the peace;²¹ others, that a conservator of the peace appointed thereunder has the power to arrest of a special policeman.²² The distinction here is based solely upon whichever term is used in the Code, and upon convenience of classification.

The office of conservator of the peace originated in early common law. Its purpose is to invest certain persons with quasi-judicial authority to maintain public order; consequently a limited authority to arrest also is given.

¹⁷Va. Code Ann. § 29-32 (1950).

¹⁸Va. Code Ann. section 28.1-185 (Supp. 1962).

¹⁹Va. Code Ann. § 2-77 (1950).

²⁰Va. Code Ann. § 19-1-97 (1950).

²¹Va. Code Ann. § 56-330 (1950).

²²Va. Code Ann. § 56-394 (1950).

The basic statute provides that the circuit, corporation, or hustings courts may appoint conservators of the peace for certain places such as colleges, hospitals, penal institutions, etc.²³

Other statutes provide that the following persons also shall be conservators of the peace; every judge, justice of the peace,²⁴ commissioner in chancery and county surveyor (while performing the duties of his office);²⁵ judges of courts not of record having criminal jurisdiction and judges of municipal courts;²⁶ clerks of municipal courts having criminal jurisdiction and clerks of juvenile courts;²⁷ the superintendent or person in charge of any fair grounds or public or private cemetery;²⁸ the superintendent and resident officers of any hospital or colony for insane, epileptic, feeble-minded or inebriate persons;²⁹ masters of steamships or steamboats and wharf or landing agents;³⁰ conductors on trains, motormen, station and railroad depot agents;³¹ conductors and motormen on electric railway cars;³² operators of motor buses which are common carriers, and bus station and depot agents.³³

Some conservators of the peace have an authority to arrest as broad as that of regular law officers; Code section 19.1-20 provides that a conservator of the peace who is appointed thereunder "shall arrest without warrant for felonies committed in his presence, or upon reasonable suspicion of felony, and for breaches of the peace and all misdemeanors of whatever character committed in his presence." Other conservators have authority to arrest limited to particular times³⁴ or places.³⁵ In particular cases, the appropriate Code section must be consulted.

²³Va. Code Ann. § 19.1-28 (1950).

²⁴As to arrest by a justice of the peace for felony committed in his presence, see *Randolph v. Commonwealth*, 145 Va. 883, 891, 134 S.E. 544, 546 (1926). As to arrest by a justice of the peace for misdemeanor committed in his presence, see *Muscoe v. Commonwealth*, *supra* note 2, at 449, 10 S.E. at 536.

²⁵Va. Code Ann. § 19-1-20 (1950).

²⁶Va. Code Ann. § 16.1-28 (1950).

²⁷Va. Code Ann. §§ 16.1-59, 16.1-146 (1950).

²⁸Va. Code Ann. § 19.1-32 (1950).

²⁹Va. Code Ann. § 37-15 (1950).

³⁰Va. Code Ann. § 56-456 (1950).

³¹Va. Code Ann. § 56-354 (1950). As applying Va. Code Ann. § 1294 (d) (1904), a predecessor statute to section 56-354, see *Norfolk & W. Ry. v. Birchfield*, 105 Va. 809, 54 S.E. 879 (1906).

³²Va. Code Ann. § 56-394 (1950).

³³Va. Code Ann. § 56-324.1 (1950).

³⁴See Va. Code Ann. § 19.1-20 (1950), providing a county surveyor is a conservator of the peace *while performing the duties of his office*.

³⁵See Va. Code Ann. § 56-456 (1950), providing masters of steamships are conservators of the peace, *but only on board their respective vessels*.

2-3. Special policemen.

Officers of the law appointed under the various special policemen statutes generally have the same authority to make arrests as "regular" policemen, but, as they have been appointed for more restricted purposes, their jurisdiction may be limited to certain places or situations. The apparent aim of these statutes is to provide for enforcing public peace or particular laws at times and places where there is a temporary need beyond what can be met by regular officers.

It is provided that the supervisor or justice of the peace of a magisterial district may appoint temporary police to preserve order at religious or camp meetings.³⁶ Special police also may be appointed for colleges, hospitals, and penal institutions,³⁷ for railroads,³⁸ and steamship companies.³⁹ The driver, operator, or other person in charge of a motor vehicle carrying passengers for hire is a special policeman for the limited purpose of enforcing specified statutes.⁴⁰

Except where otherwise specified, special police appointed in one of the above situations have the same authority to arrest as special police appointed in counties.⁴¹

Any officer or agent of an incorporated society for the prevention of cruelty to animals may arrest without warrant any person violating in his presence the provisions of the laws relating to cruelty to animals.⁴²

A judge of an election may order the arrest of any person committing specified offenses at the polls: disturbing an election, intimidating voters, or carrying away a ballot.⁴³

2-4. Arrest by private persons.

A private person may make a citizen's arrest, as at common law. When empowered to execute a warrant, a private citizen is clothed with the authority of a law officer while acting in this capacity.⁴⁴

³⁶Va. Code Ann. § 19.1-32 (1950).

³⁷Va. Code Ann. § 19.1-28, 19.1-30 (1950).

³⁸Va. Code Ann. § 56-353 (1950). As applying Va. Code Ann. § 3944 (1930), a predecessor statute to section 56-353, See *Norfolk & W. Ry. v. Haun*, 167 Va. 157, 187 S.E. 481 (1936).

³⁹Va. Code Ann. § 56-455 (1950).

⁴⁰Va. Code Ann. § 56-330 (1950). Applied in *New v. Atlantic Greyhound Corp.*, 186 Va. 726, 43 S.E.2d 872 (1947).

⁴¹Cross-reference: As to power to arrest of special policemen appointed in counties, see section 2-1.3 *supra*.

⁴²Va. Code Ann. § 18.1-217 (1950).

⁴³Va. Code Ann. §§ 24-190, 24-192, 24-236 (1950).

⁴⁴*Randolph v. Commonwealth*, 145 Va. at 891, 134 S.E. at 546 (1926). Cross-reference: As to arrest by private persons *without* warrant, see *infra* § 9.

3. *Who is subject to arrest: certain limitations and immunities.*

Although all persons are subject to criminal arrest, some, as certain public officials, have a limited immunity, and others, as minors, are subject only within prescribed procedural limits.

Members of the United States Congress are immune from arrest during sessions of their respective houses, except for treason, felony, and breach of peace.⁴⁵ Members of the Virginia General Assembly⁴⁶ and their clerks and assistants⁴⁷ have a similar immunity.⁴⁸

There also are limitations on the criminal arrest of members of the national guard under certain circumstances⁴⁹ and out-of-state citizens summoned here to testify.⁵⁰

The most detailed procedural limitations in criminal arrest concern minors.⁵¹ Only specified persons may issue, or authorize issuance of, warrants for minors,⁵² and a minor may be arrested only under certain circumstances.⁵³ Generally however, an officer may arrest, even without a warrant, a minor who has committed an offense in his presence.

As to exact limitations applicable Code sections should be consulted.⁵⁴

II. ARREST UNDER AUTHORITY OF WARRANT

A. *The warrant of arrest.*

Since the main purpose of a criminal warrant is to apprise the accused of the offense,⁵⁵ one is not necessary when the offense is committed in the arresting officer's presence,⁵⁶ though the offense be but a

⁴⁵U.S. Const. art. I § 6.

⁴⁶Va. Const. § 48; Va. Code Ann. §§ 30-6, 30-7 (1950).

⁴⁷Va. Code Ann. §§ 30-6, 30-7 (1950).

⁴⁸Neither the Virginia Constitution nor the Code contain any provision conferring immunity from arrest on the Governor and other state officials.

⁴⁹Va. Code Ann. § 44-97 (1950).

⁵⁰Va. Code Ann. § 19.1-277 (1950).

⁵¹Va. Code Ann. §§ 16.1-194, 16.1-195, 16.1-197 (1950).

⁵²Va. Code Ann. § 16.1-195 (1950). For construction of the predecessor statute to section 16.1-195, see *Mickens v. Commonwealth*, 178 Va. 273, 16 S.E.2d 641 (1941).

⁵³Va. Code Ann. § 16.1-194 (1950).

⁵⁴See particularly statutes cited supra notes 52, 53.

⁵⁵*Word v. Commonwealth*, 30 Va. (3 Leigh) 743, 747; *Robinson v. Commonwealth*, 118 Va. 785, 788, 87 S.E. 553, 554 (1916).

⁵⁶Va. Code Ann. § 16.1-129.1 (1950). Applied in *Gooch v. City of Lynchburg*, 201 Va. 172, 110 S.E.2d 236 (1959).

misdemeanor.⁵⁷ Nor is a warrant required when accused already is in custody under an indictment.⁵⁸

If the offense is a misdemeanor, so as not to require an indictment, the accused may demand that the charges be reduced to writing in the form of a warrant.⁵⁹ But if he does not make such a request the lack of a warrant is not grounds for reversal on due process grounds.⁶⁰

4-1. Who may issue warrants.

The basic statute⁶¹ provides that any of the following persons may issue warrants: (1) a judge, in vacation of term, or clerk of any circuit or corporation court with criminal jurisdiction; (2) a judge or clerk of any county or municipal court with criminal jurisdiction; (3) a judge of any juvenile and domestic relations court; (4) any justice of the peace, unless otherwise provided by law; (5) any police justice;⁶² (6) any person authorized by statute.

Into this last group fall various persons in official or semi-official capacities. All have limited authority to issue warrants, though some are less restricted than others. A judge of a court not of record may, "within the scope of his general jurisdiction within the area which his court serves, issue warrants, summons and subpoenas . . . in civil and criminal cases . . . and may also issue fugitive warrants . . .,"⁶³ while the Parole Board may issue warrants only for the arrest of a parolee who has violated the terms of his parole.⁶⁴

The power of the State Corporation Commission to issue warrants in arson investigations,⁶⁵ and of the superintendent of any hospital for the insane, epileptic, mentally deficient or inebriate (for arrest of escapees),⁶⁶ is similarly limited to specified situations.

Conservators of the peace may issue warrants of arrest upon complaint that there is "good cause" to believe a crime is intended.⁶⁷ This statute appears to have been little used in practice, and it has been ap-

⁵⁷Gooch v. City of Lynchburg, 201 Va. at 175, 110 S.E.2d at 238.

⁵⁸Waller & Boggs v. Commonwealth, 84 Va. 492, 5 S.E. 364 (1888).

⁵⁹Va. Code Ann. § 16.1-129.1 (1950); Gooch v. City of Lynchburg, 201 Va. 56 at 175, 10 S.E.2d at 238.

⁶⁰Gooch v. City of Lynchburg, 201 Va. at 175, 10 S.E.2d at 238.

⁶¹Va. Code Ann. § 19.1-90 (1950).

⁶²For a definition of "police justice," see Va. Code Ann. § 16.1-70 (1950).

⁶³Va. Code Ann. § 16.1-27 (1950).

⁶⁴Va. Code Ann. § 53-258 (1950).

⁶⁵Va. Code Ann. §§ 27-59, 27-60 (1950).

⁶⁶Va. Code Ann. § 37-97 (1950).

⁶⁷Va. Code Ann. § 19.1-21 (1950).

plied only in a very early case.⁶⁸ It might be questioned whether the legislature intended bus drivers or wharf agents, both of whom are conservators of the peace,⁶⁹ to have authority to issue warrants merely upon the belief that a crime is to be committed.

The Governor has authority to issue extradition warrants.⁷⁰

4-2. Grounds for issuing warrants.

The "probable cause" requirement of the Virginia Constitution, although phrased differently,⁷¹ is essentially the same as that of the fourth amendment of the United States Constitution. And while there are some statutes using other language to express the necessary basis for issuance of a warrant, all amount to probable cause.

"Probable cause is knowledge of such a state of facts and circumstances as to excite the belief in a reasonable mind, acting on such facts and circumstances, that the . . . [accused] is guilty of the crime of which he is suspected."⁷² Probable cause is a question of law for the court,⁷³ although the *existence* of facts sufficient to establish it is a question for the jury.⁷⁴

Statutes not using the term "probable cause" use language substantially similar in meaning: "good reason to believe an offense has been committed";⁷⁵ "complaint of a respectable citizen";⁷⁶ "affidavit of a credible person";⁷⁷ "substantial evidence."⁷⁸

4-3. Form and contents of warrant.

Besides technical formalities, the essentials of a warrant are that

⁶⁸Wells v. Jackson, 17 Va. (3 Munf.) 458, 460 (1811). (The conservator here was a justice of the peace.)

⁶⁹See supra notes 33, 30.

⁷⁰Va. Code Ann. § 19.1-56 (1950).

⁷¹"That general warrants . . . to seize any person . . . whose offense is not particularly described and supported by evidence . . . ought not to be granted." Va. Const. § 10. (Emphasis added.)

⁷²Virginia Ry. & Power Co. v. Klaff, 123 Va. 260, 266, 96 S.E. 244, 246 (1918). See also Scot & Boyd v. Shelor, 1 Va. L.J. 539, 548 (1877).

⁷³Clinchfield Coal Corp. v. Redd, 123 Va. 420, 443, 96 S.E. 836, 843 (1918).

⁷⁴Womack v. Circle, 2 Va. L.J. at 217.

⁷⁵Va. Code Ann. § 19.1-91 (1950), the basic statute governing issuance of criminal warrants.

⁷⁶Va. Code Ann. § 37-61 (1950), providing for arrest of mentally ill, epileptic, mentally deficient or inebriate persons.

⁷⁷Va. Code Ann. § 19.1-63 (1950), providing for arrest of persons alleged to have committed crimes in another state.

⁷⁸Va. Code Ann. § 19.1-93 (1950), providing for arrest of certain railroad employees in cases of deaths in train accidents.

it describes the accused and offense. The person must be described sufficiently to avoid the prohibition against general warrants;⁷⁹ describing him, e.g., as an "associate" of a named person is not sufficient.⁸⁰

As to the offense, if set forth in substance and apprising the accused of the charge, this is adequate.⁸¹ The particularity of an indictment is not required.⁸² For example, unless included in the applicable statute, terms of art such as "feloniously"⁸³ or "unlawful"⁸⁴ may be omitted.

The adequacy of language setting forth the offense is tested by whether it gives the "accused notice of the charge; such notice as may be of some use to him; such as may give him an opportunity of defending himself . . . no nicety is required. . . ."⁸⁵

An allegation, in a bootlegging prosecution, that accused "did unlawfully sell" is adequate,⁸⁶ as is an allegation, not specifying any statute, that accused violated the "fish and game laws of this State."⁸⁷ Nor is it necessary to quash proceedings because there is a difference of wording among formal papers prepared at various stages of a suit.⁸⁸

However, a warrant for alleged violation of the motor vehicle code, citing "chapter 342, section 35" without further specifying the applicable body of statutes, is void on its face because vague and indefinite,⁸⁹ as is one charging violation of "section 36 of Code of Virginia" when the intended reference is to section 36, chapter 247 of the Acts of 1930.⁹⁰

Citing the Michie Code has been held sufficient statutory refer-

⁷⁹Va. Const. § 10; *Wells v. Jackson*, 17 Va. (3 Munf.) at 473.

⁸⁰*Ibid.*

⁸¹*Word v. Commonwealth*, 30 Va. (3 Leigh) at 747.

⁸²*Lacy v. Palmer*, 93 Va. 159, 24 S.E. 930, 934 (1896); *Jones v. Morris*, 97 Va. 43, 48, 33 S.E. 377, 378 (1899); *Harding v. Commonwealth*, 105 Va. 858, 861, 52 S.E. 832, 833 (1906); *Flint v. Commonwealth*, 114 Va. 820, 822, 76 S.E. 308, 309 (1912); *Bissell v. Commonwealth*, 199 Va. 397, 399, 100 S.E.2d 1, 3 (1957).

⁸³*Satterfield v. Commonwealth*, 105 Va. 867, 870, 52 S.E. 979, 980 (1906).

⁸⁴*Collins v. City of Radford*, 134 Va. 518, 530, 113 S.E. 735, 739 (1922). See also *Burks v. Commonwealth*, 126 Va. 763, 101 S.E. 230 (1919).

⁸⁵*Word v. Commonwealth*, 30 Va. (3 Leigh) at 747.

⁸⁶*Harding v. Commonwealth*, supra note 82; *Flint v. Commonwealth*, supra note 82.

⁸⁷*Burks v. Commonwealth*, supra note 84.

⁸⁸*Halkem v. Commonwealth*, 4 Va. (2 Va. Cas.) 4 (1815).

⁸⁹*Commonwealth v. Doss*, 159 Va. 968, 167 S.E. 371 (1933).

⁹⁰*Smith v. Commonwealth*, 160 Va. 943, 169 S.E. 550 (1933). Also as to vague warrants, see *Bissell v. Commonwealth*, supra note 82.

ence,⁹¹ although apparently, if the offense is otherwise substantially alleged, an applicable statute need not be specified.⁹²

Omission of the time and place of the offense is not a defect requiring reversal on appeal, though a warrant properly should bear this information.⁹³

Apparently there is no special form for concluding a warrant, so that the error of concluding one issued by a *city* "in behalf of the *Commonwealth*" is not fatal.⁹⁴

More particularly are technical defects not fatal when the objection is initially raised collaterally⁹⁵ or on appeal.⁹⁶

4-4. Amending the warrant.

Courts' statutory power to amend warrants⁹⁷ is liberally construed,⁹⁸ and where an accused does not avail himself of this power, appellate courts "will not reverse the judgment of the trial court for formal imperfections of the warrant unless the ends of justice require it."⁹⁹

⁹¹*Dorchincoz v. Commonwealth*, 191 Va. 33, 59 S.E.2d 863 (1950).

⁹²*Collins v. City of Radford*, supra note 84, at 525, 113 S.E. at 737. See also *Burks v. Commonwealth*, supra note 84.

⁹³*Word v. Commonwealth*, supra note 55, at 759. See also *Commonwealth v. Murray*, 4 Va. (2 Va. Cas.) 504 (1826)), involving an erroneous date on a warrant of commitment.

⁹⁴*Collins v. City of Radford*, supra note 84, at 524, 113 S.E. at 737. (Emphasis added.)

⁹⁵*Jones v. Morris*, supra note 82, larceny warrant omitting term "feloniously" held not subject to attack in subsequent malicious prosecution suit; *Lacey v. Palmer*, supra note 82, in habeas corpus proceeding, held proper a warrant averring in general terms that accused was guilty of all acts named in applicable statute without charging him with any specific act. See also *Jones v. Timberlake*, 27 Va. (6 Rand.) 678 (1828), objection in a habeas corpus proceeding to failure to note on the face of an escape warrant the issuing officer's title, overruled and held that warrant sufficient.

⁹⁶*Flint v. Commonwealth*, supra note 82, allegation "did unlawfully sell" in bootlegging prosecution held not so vague as to require overturning judgment when objection made for first time on appeal; *Word v. Commonwealth*, supra, note 55, objection to omission in warrant of time and place of offense first made in bill of exceptions, held, conviction affirmed. See also *Burks v. Commonwealth* supra note 84, and *Dorchincoz v. Commonwealth*, supra note 91.

.. ⁹⁷"Upon the trial of the warrant on appeal the court may, upon its own motion or upon the request either of the attorney for the prosecution or for the accused, amend the form of the warrant in any respect in which it appears to be defective." Va. Code Ann. § 16.1-137 (1950).

⁹⁸See *McWilliams v. Commonwealth*, 165 Va. 725, 181 S.E. 391 (1935); *Robinson v. Commonwealth*, 111 Va. 844, 69 S.E. 518 (1910); *Flint v. Commonwealth*, supra note 82; *Robinson v. Commonwealth*, supra note 55.

⁹⁹*Harley v. Commonwealth*, 131 Va. 664, 667, 108 S.E. 648, 649 (1921). See also *Flint v. Commonwealth*, supra note 82, at 822, 823, 76 S.E. at 309, 310.

A warrant may, for example, be amended: to change the wording of the offense;¹⁰⁰ to include a previously omitted element of the offense;¹⁰¹ to make allegedly vague language more specific;¹⁰² or to change the date of the offense.¹⁰³ The amending power does not, however, include substituting into the record for appeal a new warrant charging violation of a different statute carrying a higher penalty.¹⁰⁴

5. *Executing the warrant.*

5-1. Who may execute a warrant.

Any person to whom a warrant is directed may execute it. And proceedings thereon are void when it is executed by one other than to whom directed,¹⁰⁵ or by an unauthorized substitute.¹⁰⁶

One other than the officer to whom a warrant is directed may execute it if delivered to him for that purpose.¹⁰⁷ This includes a private person,¹⁰⁸ who may summon other private persons to assist him,¹⁰⁹ although he may not delegate his authority of execution of the warrant to another private person.¹¹⁰

Where a warrant is directed "to any policeman" of a named city or town, it may be executed by any such officer who gets it.¹¹¹

5-2. Where warrant may be executed.

When a court *in session* in a criminal proceeding issues a warrant for an accused party (or witness), expedition makes it desirable that authority of execution run state-wide, and the statute so provides.¹¹²

Ordinarily, however,

"Every officer to whom any order, warrant, or process may be lawfully directed, shall execute the same *within his county*

¹⁰⁰Robinson v. Commonwealth, supra note 98. Court allowed language in warrant to be changed from "attempt to take, steal and carry away" to "attempt to obtain money under false pretenses."

¹⁰¹Byrd v. Commonwealth, 124 Va. 833, 98 S.E. 632 (1919).

¹⁰²McWilliams v. Commonwealth, supra note 98.

¹⁰³Humphreys v. Commonwealth, 186 Va. 756, 43 S.E.2d 890 (1947).

¹⁰⁴Eddy v. Commonwealth, 119 Va. 873, 89 S.E. 899 (1916).

¹⁰⁵Randolph v. Commonwealth, supra note 24, at 892, 134 S.E. at 546.

¹⁰⁶Wells v. Jackson, supra note 68.

¹⁰⁷Crosswhite v. Barnes, 139 Va. 471, 482, 124 S.E. 242, 245 (1924).

¹⁰⁸Randolph v. Commonwealth, 145 Va. at 891, 134 S.E. at 546.

¹⁰⁹Ibid.

¹¹⁰Ibid.

¹¹¹Va. Code Ann. § 19.1-91 (1950). (Although this statute does not expressly include police of counties, there seems no reason why a warrant to a county officer could not be so addressed and so executed.)

¹¹²Va. Code Ann. § 19.1-182 (1950).

or corporation. . . . The word 'county' as hereinbefore used shall embrace any city included within the boundaries of such county, and the word 'corporation' as hereinbefore used shall embrace all the property belonging to the county within the territorial limits of such corporation."¹¹³

The limitation of the officer's authority to "his county" is directory and not mandatory.¹¹⁴ By virtue of statute the warrant may be executed anywhere in the state when an accused flees.¹¹⁵

The statute delineating the authority of *special policemen*¹¹⁶ is similar:

"The jurisdiction and authority of . . . [special police] shall extend no further than the limits of the county in which they are appointed. . . . [except that] it shall extend throughout the State when actually in pursuit of persons accused of crime and when acting under the authority of a duly executed warrant. . . ."¹¹⁷

Special policemen appointed for railroads¹¹⁸ have state-wide authority to arrest, even without warrant, but only in matters involving the railroad.¹¹⁹

Authority of execution also may run state-wide in several other particular situations, viz., warrants for escapees of any hospital or colony for the insane, epileptic, mentally deficient or inebriate,¹²⁰ and extradition warrants.¹²¹

As to boundary offenses, committed within 300 yards of a county line, any police officer of either county may arrest within that distance on either side of the boundary.¹²²

5-3. Possession of warrant at time of arrest.

The rule seems to be that an officer must possess the warrant when

¹¹³Va. Code Ann. § 15-514 (1950). (Emphasis added.)

¹¹⁴Va. Code Ann. § 15-514 (1950), especially annotation citing *Dellastatious v. Boyce*, 152 Va. 368, 147 S.E. 267 (1929), holding that an officer may properly summon to his assistance in an arrest people of another county than his own.

¹¹⁵"If a person charged with an offense shall . . . escape from . . . the county or corporation in which the offense is alleged to have been committed, the officer to whom the warrant is directed may pursue and arrest him anywhere in the State. . . ." Va. Code Ann. § 19.1-94 (1950).

¹¹⁶Cross reference: As to special policemen's authority to arrest, see *supra* § 2-3.

¹¹⁷Va. Code Ann. § 15-570 (1950).

¹¹⁸Va. Code Ann. § 56-353 (1950). And see *supra* note 38.

¹¹⁹*Norfolk & W. Ry. v. Haun*, 167 Va. at 162, 187 S.E. at 483.

¹²⁰Va. Code Ann. § 37-97 (1950).

¹²¹Va. Code Ann. § 19.1-57 (1950).

¹²²Va. Code Ann. § 19.1-222 (1950).

arresting for a misdemeanor not committed in his presence,¹²³ while arrest for a felony, whether or not committed in the officer's presence, may be made without his having the warrant with him.¹²⁴

There is misleading dicta contra in one case,¹²⁵ but other language in the same opinion¹²⁶ is unambiguously in accord with the general rule. Besides, the case involved a felony, for which an officer may properly arrest without having the warrant with him.

5-4. Informing accused.

An accused is entitled to know the charges against him.¹²⁷ This applies whether the arrest is made under authority of a warrant or without a warrant.

Where the arrest is under authority of a warrant the process must be shown on request.¹²⁸ Refusal may give accused a right to resist.¹²⁹ A statute pertinent to arrest under authority of warrant provides that "except as provided in section 46.1-178,¹³⁰ any process issued against a person charged with a criminal offense shall be in duplicate and the officer serving such process shall leave a copy with the person charged."¹³¹

The purpose of requiring a copy of the warrant to be left with an accused is to inform him of the charge against him so that he may intelligently prepare his defense.¹³² But, "while it is the duty of the arresting officer to comply with this statute, his failure to do so does not constitute reversible error unless it affirmatively appears that de-

¹²³Muscoe v. Commonwealth, 86 Va. at 447, 10 S.E. at 535; Crosswhite v. Barnes, 139 Va. at 478, 124 S.E. at 244; Montgomery Ward & Co. v. Wickline, 188 Va. 485, 489, 50 S.E.2d 387, 389 (1948).

¹²⁴Muscoe v. Commonwealth, 86 Va. at 447, 10 S.E. at 535; Crosswhite v. Barnes, 139 Va. at 477, 124 S.E. at 244; Byrd v. Commonwealth, 158 Va. 897, 902, 164 S.E. 400, 402 (1932).

¹²⁵When an officer has a warrant directing an arrest he has the power to call others to his assistance... and if the arrest be lawful the absence of a warrant is immaterial." Byrd v. Commonwealth, 158 Va. at 901, 164 S.E. at 402. (Emphasis added.)

¹²⁶"[An officer]... has the power to arrest without warrant one charged with a felony... He may also arrest without warrant where a misdemeanor is committed in his presence." Ibid. (Emphasis added.)

¹²⁷Bourne v. Richardson, 133 Va. 441, 457, 458, 113 S.E. 893, 899 (1922); Randolph v. Commonwealth, 145 Va. at 891, 134 S.E. at 546.

¹²⁸Crosswhite v. Barnes, 139 Va. at 478, 124 S.E. at 244; Randolph v. Commonwealth, 145 Va. at 891, 134 S.E. at 546.

¹²⁹Bourne v. Richardson, 133 Va. at 458, 113 S.E. at 899.

¹³⁰Section 46.1-178 relates to arrest for motor vehicle code violations.

¹³¹Va. Code Ann. § 19.1-92 (1950).

¹³²Dorchincoz v. Commonwealth, 191 Va. at 36, 59 S.E.2d at 864.

fendant was prejudiced thereby."¹³³ Furthermore, this statute governs only service of process once it actually issues; it is not determinative whether, in the first instance, any process *must* issue before an accused may be tried,¹³⁴ or even arrested.

III. ARREST WITHOUT WARRANT

6. Generally.

6-1. Virginia and common law compared.

Since police officers in Virginia are vested by statute with the power of a common law constable,¹³⁵ and Virginia follows the common law where not repugnant to its Constitution,¹³⁶ it is reasonable to conclude that the rules of arrest without warrant are substantially those of the common law. The leading case so declares.¹³⁷

Simply stated, the rule is this: a police officer always may arrest without warrant for an offense, of whatever nature, committed *in his presence*.¹³⁸

If the officer was not present when the offense occurred, an arrest without warrant is authorized only if it was a felony.¹³⁹ An officer also may arrest without warrant when a felony is in progress,¹⁴⁰ or is about to be committed.¹⁴¹

There is little modern Virginia authority on the common law exception to the general rule, which allowed arrest without warrant for a breach of peace, though this is but a misdemeanor. An officer's authority to make such arrest seems settled in early cases,¹⁴² but since 1900 there is only dictum saying there might be an arrest without warrant "when a breach of the peace is imminent."¹⁴³

6-2. Felonies and misdemeanors defined in Virginia.

Those crimes carrying capital punishment or confinement in the

¹³³Ibid.

¹³⁴Gooch v. City of Lynchburg, 201 Va. at 175, 110 S.E.2d at 238.

¹³⁵Va. Code Ann. § 15-557 (1950).

¹³⁶Va. Code Ann. § 1-10 (1950).

¹³⁷Muscoe v. Commonwealth, 86 Va. at 447, 10 S.E. at 535.

¹³⁸See Lane v. Commonwealth, 190 Va. 58, 73, 55 S.E.2d 450, 457 (1949). And cf. Va. Code Ann. § 19.1-20 (1950).

¹³⁹Muscoe v. Commonwealth, 86 Va. at 447, 10 S.E. at 535; Crosswhite v. Barnes, 139 Va. at 477, 124 S.E. at 244; Williams v. Commonwealth, 142 Va. at 670, 128 S.E. at 573; Byrd v. Commonwealth, 158 Va. at 901, 164 S.E. at 402.

¹⁴⁰Byrd v. Commonwealth, 158 Va. at 902, 164 S.E. at 402.

¹⁴¹Ibid.

¹⁴²As to arrest without warrant for misdemeanors, see *infra* § 8.

¹⁴³Byrd v. Commonwealth, 158 Va. at 902, 164 S.E. at 402.

penitentiary are felonies;¹⁴⁴ other offenses are misdemeanors.¹⁴⁵ This distinction remains even where the prison sentence is not mandatory,¹⁴⁶ or where the court or jury, in its discretion, reduces the prison sentence or imposes a fine in lieu of sentence to prison.¹⁴⁷

The applicable statute¹⁴⁸ follows the definitions just stated.

7. *Arrest without warrant: felony.*

7-1. Reasonable belief a felony has been committed.

The rule of arrest without warrant for felony requires that the officer have reasonable belief a felony has been committed. It is commonly phrased in terms of "reasonable suspicion";¹⁴⁹ but also, "good faith" belief,¹⁵⁰ reasonably reliable information,¹⁵¹ "reason to believe,"¹⁵² and "reasonable grounds to believe."¹⁵³

"Reasonable suspicion" may be based on one of the grounds noted below.

7-1.1. Personal knowledge.

A police officer may arrest without warrant for a felony when he has personal knowledge of the crime sufficient to create a reasonable suspicion that the one arrested is the culprit. This authority is implicit in his job, and is so basic a proposition that no case law has developed in Virginia on the point.

There are, however, pertinent statutes. For example, state police at the scene of motor vehicle accidents or in apprehending persons charged with motor vehicle theft, may arrest without warrant "upon reasonable grounds to believe, *based upon personal investigation . . .* that a crime has been committed. . . ."¹⁵⁴ Similar authority is given sheriffs, deputies, county and city police and certain special policemen.¹⁵⁵

¹⁴⁴Barker v. Commonwealth, 4 Va. (2 Va. Cas.) 122 (1817). Benton v. Commonwealth, 89 Va. 570, 16 S.E. 725 (1893).

¹⁴⁵Benton v. Commonwealth, *supra* note 144.

¹⁴⁶Benton v. Commonwealth, 89 Va. at 573, 16 S.E. at 725, 726.

¹⁴⁷Quillin v. Commonwealth, 105 Va. 874, 883, 54 S.E. 333, 336 (1906).

¹⁴⁸Va. Code Ann. § 18.1-6 (1950).

¹⁴⁹Muscoe v. Commonwealth, 86 Va. at 447, 10 S.E. at 535; Crosswhite v. Barnes, 139 Va. at 477, 124 S.E. at 244; Hendricks v. Commonwealth, 163 Va. 1102, 1108, 178 S.E. 8, 11 (1935).

¹⁵⁰Bourne v. Richardson, 133 Va. at 450, 113 S.E. at 896.

¹⁵¹Hill v. Smith, 107 Va. 848, 851, 59 S.E. 475, 476 (1907).

¹⁵²Va. Code Ann. § 4-56 (1950).

¹⁵³Va. Code Ann. § 52-20 (1950).

¹⁵⁴Va. Code Ann. § 19.1-100 (1950). (Emphasis added.)

¹⁵⁵*Ibid.*

7-1.2. Knowledge a warrant has been issued.

An officer is under a legal duty to arrest one for whom a warrant has been issued charging a felony, where the officer knows of the issuance of such warrant.¹⁵⁶

7-1.3. Message from law enforcement agency.

"Members of the State Police force . . . may arrest, without a warrant, persons duly charged with crime in another jurisdiction upon receipt of a telegram, a radio or teletype message, in which . . . shall be given the name or a reasonably accurate description of such person wanted, the crime alleged and an allegation that such person is likely to flee the jurisdiction of the Commonwealth."¹⁵⁷

A similar provision covers sheriffs and deputies, county and city police, and certain special policemen.¹⁵⁸

7-1.4. Information from a private person.

Where a private person, bleeding from a head wound, told officers at the police station that one Fuller had assaulted him at a certain place and that a woman might be dead there, this was held sufficient to justify the arrest of Fuller without a warrant.¹⁵⁹

There seems to be no other authority on this point.

7-2. Belief that accused may escape if not arrested immediately.

The statute covering arrests on request of another jurisdiction provides that a telegram, radio or teletype message to the state police from a jurisdiction where the crime is alleged to have occurred must contain an "allegation that such person is likely to flee the jurisdiction of the Commonwealth."¹⁶⁰ This is but a statutory condition, however, applicable only to specific situations, and is not a part of the general rules governing arrest without warrant for felony.

7-3. Felony committed in another state.

An arrest without warrant may lawfully be made by any private

¹⁵⁶ *Palmer v. Commonwealth*, 143 Va. 592, 602, 130 S.E. 398, 401 (1925). See also *Mullins v. Saunders*, 189 Va. 624, 54 S.E.2d 116 (1949), as to arrest when officer knows of issuance of out-of-state warrant.

¹⁵⁷ Va. Code Ann. § 52-20 (1950).

¹⁵⁸ Va. Code Ann. § 19.1-100 (1950).

¹⁵⁹ *Fuller v. Commonwealth*, 201 Va. 724, 113 S.E.2d 667 (1960).

¹⁶⁰ Va. Code Ann. § 52-20 (1950). See also Va. Code Ann. § 19.1-100 (1950), as to arrest in similar cases by sheriffs, deputies, county and city police.

person¹⁶¹ or peace officer acting upon "reasonable information that the accused stands charged in the courts of a state¹⁶² with a crime punishable by death or imprisonment for a term exceeding one year."¹⁶³ A message from an out-of-state law enforcement agency is sufficient "reasonable information,"¹⁶⁴ as is an out-of-state warrant, charging felony, which is shown the arresting officer in this state.¹⁶⁵

7-4. Preventing felony; halting felony in progress.

There are apparently no statutes on this point, and only one case, but its language is unequivocal: "... it appears that an arrest without warrant is lawful, (1) where a felony has been committed, (2) where it is being committed, (3) when it is about to be committed. . . ." ¹⁶⁶

7-5. Flight as an element.

Officers of counties, cities, and towns have authority to arrest throughout the State, without warrant, when pursuing a fleeing felon.¹⁶⁷ While there is no directly applicable statute, state police presumably have similar authority.

8. *Arrest without warrant: misdemeanor.*

8-1. Generally.

Except for a breach of peace, the common law did not allow an arrest without warrant for misdemeanors unless the offense was committed in the officer's presence.¹⁶⁸ Virginia follows the common law here,¹⁶⁹ even to the exception about breaches of the peace, although there is not much authority on this latter point.¹⁷⁰

"It is the duty of a police officer to make an arrest, without a warrant, for a misdemeanor committed in his presence,"¹⁷¹ and the cases are numerous holding that such an arrest is a lawful exercise of the

¹⁶¹As to arrest without warrant by private persons, see § 9 *infra*.

¹⁶²Presumably this means a state other than Virginia.

¹⁶³Va. Code Ann. § 19.1-64 (1950). See also *Williams v. Commonwealth*, 142 Va. at 672, 128 S.E. at 574.

¹⁶⁴Va. Code Ann. § 52-20, 19.1-100 (1950).

¹⁶⁵*Mullins v. Saunders*, *supra* note 156.

¹⁶⁶*Byrd v. Commonwealth*, 158 Va. at 902, 164 S.E. at 402.

¹⁶⁷Va. Code Ann. § 19.1-94 (1950).

¹⁶⁸*Muscoe v. Commonwealth*, 86 Va. at 447, 10 S.E. at 535.

¹⁶⁹*Ibid.*

¹⁷⁰See *supra* note 143.

¹⁷¹*Norfolk & W. Ry. v. Haun*, 167 Va. at 164, 187 S.E. at 484.

officer's authority.¹⁷² Equally ample is the authority that no arrest without warrant may be made for a misdemeanor not committed in the officer's presence.¹⁷³

There are particular situations where certain persons have statutory authority to arrest without warrant: (1) certain conservators of the peace, for any misdemeanor committed in their presence;¹⁷⁴ (2) any officer of any county, city or town, in an adjoining county, city or town, in close pursuit of one who has committed a misdemeanor in his presence and jurisdiction;¹⁷⁵ (3) probation and parole officers, parolees for violations of their parole;¹⁷⁶ (4) officers and agents of societies for prevention of cruelty to animals, any person violating in their presence the laws concerning cruelty to animals;¹⁷⁷ (5) members of the Commission of Fisheries and certain other persons, for violations of the fish and shellfish laws;¹⁷⁸ (6) any person authorized to make arrests, persons disturbing an election;¹⁷⁹ (7) judges of election, may order the arrest of any person intimidating voters at an election;¹⁸⁰ and (8) a conservator of the peace, any person carrying a dangerous weapon to a place of worship on Sunday.¹⁸¹

Not only does an officer lack authority to arrest without warrant for a misdemeanor not committed in his presence, but such arrest is unlawful, constitutes false imprisonment,¹⁸² and may be resisted by one sought to be taken into custody.¹⁸³ The right to resist such an unlawful arrest does not, however, include the right to kill the arresting officer unless the arrestee's own life is in danger.¹⁸⁴

One important statutory exception has been engrafted upon the general common law rule prohibiting arrests without warrants for mis-

¹⁷²Muscoe v. Commonwealth, supra note 2; Crosswhite v. Barnes, supra note 107; Byrd v. Commonwealth, supra note 124. See also Montgomery Ward & Co. v. Wickline, supra note 123, holding invalid an arrest without warrant for a misdemeanor not committed in the officer's presence.

¹⁷³Muscoe v. Commonwealth, 86 Va. at 447, 10 S.E. at 535; Bourne v. Richardson, 133 Va. at 450, 113 S.E. at 896; Crosswhite v. Barnes, 139 Va. at 478, 124 S.E. at 244; Williams v. Commonwealth, 142 Va. at 671, 128 S.E. at 574; Montgomery Ward & Co. v. Wickline, 188 Va. at 489, 50 S.E.2d at 389.

¹⁷⁴Va. Code Ann. § 19.1-20 (1950).

¹⁷⁵Va. Code Ann. § 19.1-94 (1950).

¹⁷⁶Va. Code Ann. § 53-259(1950).

¹⁷⁷Va. Code Ann. § 18.1-217 (1950).

¹⁷⁸Va. Code Ann. § 28.1-185 (1950).

¹⁷⁹Va. Code Ann. § 24-192 (1950).

¹⁸⁰Va. Code Ann. § 24-190 (1950).

¹⁸¹Va. Code Ann. § 18.1-241 (1950).

¹⁸²Montgomery Ward & Co. v. Wickline, 188 Va. at 489, 50 S.E.2d at 389.

¹⁸³Briggs v. Commonwealth, 82 Va. 554, 564 (1886).

¹⁸⁴Ibid. See also McReynolds v. Commonwealth, 177 Va. 933, 15 S.E.2d 70 (1941).

demeanors not committed in the officer's presence. State Police, sheriffs, deputies, city and county police, and certain special policemen may arrest, without warrant, under authority of a message received from a law enforcement agency, even for misdemeanor.¹⁸⁵

8-2. Breach of the peace.

At common law, a breach of the peace was the only non-felony for which an arrest could be made without warrant when the offense did not occur in the officer's presence.

One Virginia case¹⁸⁶ says an officer may arrest without warrant "where a breach of the peace is imminent." Except for this, which is dictum since the case involved a felony, there is no case authority on the point. And so, one can only say that Virginia follows the common law on arrest,¹⁸⁷ except as changed by the Constitution.¹⁸⁸ An early federal circuit court case in Virginia said of the common law: "[O]fficers . . . have, at common law, the right to arrest without warrant all persons who are guilty of a breach of the peace. . . ." ¹⁸⁹ it held that this arrest rule does not violate the due process clause of the fourteenth amendment.

The Supreme Court of Appeals has said this of a breach of the peace:

"By 'peace' . . . is meant the tranquillity enjoyed by the citizens of a municipality or community where good order reigns among its members. It is the natural right of all persons in a political society, and any intentional violation of that right is a 'breach of the peace.' It is the offense of disturbing the public peace, or a violation of public order or public decorum. Actual personal violence is not an essential element of the offense."¹⁹⁰

Drunkness is generally held a breach of the peace within the meaning of rules relating to arrest.¹⁹¹

While law officers retain the common law authority to arrest without warrant for past breaches of the peace, certain conservators of the

¹⁸⁵Va. Code Ann. §§ 52-20, 19.1-100 (1950). See also Va. Code Ann. § 52-22 (1950). See also § 7-1.3 *supra*.

¹⁸⁶*Byrd v. Commonwealth*, 158 Va. at 902, 164 S.E. at 402.

¹⁸⁷*Muscoe v. Commonwealth*, 86 Va. at 447, 10 S.E. at 535; *Galliher v. Commonwealth*, 161 Va. at 1021, 170 S.E. at 736.

¹⁸⁸Va. Code Ann. § 1-10 (1950).

¹⁸⁹*Cox v. Gilmer*, 4 Va. L. Reg. 229, 235, 88 Fed. 343, 349 (1898).

¹⁹⁰*Byrd v. Commonwealth*, 158 Va. at 903, 164 S.E. at 402.

¹⁹¹*Galliher v. Commonwealth*, 161 Va. at 1022, 170 S.E. at 736.

peace also have authority to arrest for such offenses, but the language of the applicable statutes seems to indicate the crime must occur in their presence.¹⁹²

8-3. What is the officer's presence.

"An offense is committed within the presence of an officer . . . when he has direct personal knowledge, through his sight, hearing, or other senses that it is then and there being committed."¹⁹³

"The law is not so unreasonable as to require the officer to be an eye or ear witness of what passes, and to render all his authority null and void, except when he is so present."¹⁹⁴

8-4. Other factors.

There are other considerations regarding arrest without warrant, such as whether there is a time limitation (after the offense) on arresting without warrant for felony, or whether an arrest without warrant may be made in a private home, and if so, under what circumstances. Since, however, these matters have not been dealt with in Virginia by either case or statute, it is assumed they are governed by the common law as generally understood.¹⁹⁵

9. *Arrest without warrant: by private persons.*

Language in the cases is suggestive of the common law rule that a private person may arrest for crimes, be they felonies or misdemeanors, committed in his presence, but never is there an unequivocal statement that this is the law. It may, however, be assumed so, since the law of arrest in Virginia follows, for the most part, the common law.¹⁹⁶

As to felonies, the following comes closest to an explicit statement of the common law rule:

" . . . to prevent the consummation of this felony any officer had the right to arrest him with or without a warrant, and *any private citizen* had that right whether to aid an officer or not."¹⁹⁷

¹⁹²See, e.g., Va. Code Ann. §§ 18.1-247, 19.1-20 (1950). The former allows judges and justices of the peace to order arrest of persons engaged in riots, routs and unlawful assemblies. The latter provides that certain conservators of the peace shall arrest for breaches of the peace committed in their presence.

¹⁹³Gallihier v. Commonwealth, 161 Va. at 1021, 170 S.E. at 736.

¹⁹⁴Byrd v. Commonwealth, 158 Va. at 902, 164 S.E. at 402.

¹⁹⁵See supra notes 2, 187, 188.

¹⁹⁶Muscoe v. Commonwealth, 86 Va. at 447, 10 S.E. at 535; Va. Code Ann. § 1-10 (1950).

¹⁹⁷Byrd v. Commonwealth, 158 Va. at 903, 164 S.E. at 402. (Emphasis added.)

In another case,¹⁹⁸ it is said a private person may arrest, *if a felony has been committed* and there are reasonable grounds of suspicion, presumably meaning suspicion that the one sought to be arrested is the felon.

As to misdemeanors, it is said:

"But, in general, in cases of misdemeanor, a constable or other peace officer cannot, *any more than a private person*, justify the arrest of the offender without warrant when the offense was not committed in his presence."¹⁹⁹

As to breaches of the peace, a treatise asserts²⁰⁰ that a private citizen may arrest without warrant for a breach of the peace committed in his presence; but the case cited in support is a *federal* case, from Virginia, and there seems to be no state decision on the point.

Of course a private person may arrest under authority of a warrant when he has been deputized for that purpose.²⁰¹

IV. MAKING THE ARREST²⁰²

10. *Use of force.*

10-1. General rule.

In determining the degree of force an officer may lawfully use in an arrest, a rule of "reasonableness" applies. What is reasonable will, of course, vary with the circumstances. For example, an officer who shoots and wounds one engaging in "riotous and disorderly conduct" and resisting arrest has been held to have used only "necessary" force, and therefore not to have been guilty of assault and battery.²⁰³

This general rule logically precludes use of any but nominal force where the accused submits voluntarily. The problems arise when there is resistance, requiring some actual physical force to effect the arrest. Resistance obviously affects the degree of force permissible.

Meeting resistance, an officer has not only the right of self-defense, but also a "special protection" of the law under which he may press forward to accomplish the arrest, since he must of necessity be the aggressor.²⁰⁴ Still however, the use of *excessive* force makes him a

¹⁹⁸Hill v. Smith, 107 Va. at 851, 59 S.E. at 476.

¹⁹⁹Muscoe v. Commonwealth, 86 Va. at 447, 10 S.E. at 535. (Emphasis added.)

²⁰⁰2 Michie's Jurisprudence: Virginia and West Virginia 91 (1948).

²⁰¹Randolph v. Commonwealth, 145 Va. at 891, 134 S.E. at 546.

²⁰²See also supra §§ 5-3 ("Possession of warrant at time of arrest") and 5-4 ("Informing accused").

²⁰³Mesmer v. Commonwealth, 67 Va. (26 Gratt.) 976 (1875).

²⁰⁴Mercer v. Commonwealth, 150 Va. 588, 600, 142 S.E. 369, 372 (1928).

wrongdoer,²⁰⁵ and the arrestee may resist, though he may not resist to the point of killing the officer unless his own life be in danger.²⁰⁶ And such killing will not be murder if the arrestee was without fault in provoking the affray.²⁰⁷

Should the officer meet force with force and one party be killed, the culpability of the slayer is governed, again, by a rule of reasonableness. One resisting a wrongful arrest, if himself without fault,²⁰⁸ may kill the officer *if necessary to save his own life*.²⁰⁹

Conversely, an officer may kill a fleeing felon, if, "within reasonable limits the necessity for homicide" appear,²¹⁰ and there is no other way of effecting the arrest.²¹¹ Absent these conditions, the officer may be liable for some grade of criminal homicide.²¹²

The arresting officer is, of course, the judge of how much force is reasonable.²¹³ Where in issue at trial, this is for the jury,²¹⁴ and "courts . . . will recognize the fact that emergencies arise when . . . [officers] are not expected to exercise that cool and deliberate judgment which courts and juries exercise afterwards upon investigations in courts."²¹⁵ "The utmost good judgment is not to be expected at all times from [officers]. . . ." ²¹⁶ "Frequently . . . [an officer] has little time for deliberation, and must use his best judgment, under the circumstances, as reasonably appear to him."²¹⁷

As an arresting officer is presumed to act lawfully,²¹⁸ the burden of justifying resistance is upon one who resists.²¹⁹

10-2. Resistance.

Resistance by an arrestee is a major determinant as to how much

²⁰⁵Palmer v. Commonwealth, 143 Va. at 602, 603, 130 S.E. at 401.

²⁰⁶Palmer v. Commonwealth, 143 Va. at 602, 130 S.E. at 401; Briggs v. Commonwealth 82 Va. at 564.

²⁰⁷Looney v. Commonwealth, 115 Va. 921, 931, 78 S.E. 625, 628 (1913); Palmer v. Commonwealth 143 Va. at 603, 130 S.E. at 401.

²⁰⁸Ibid.

²⁰⁹Palmer v. Commonwealth, 143 Va. 602, 603, 130 S.E. at 401.

²¹⁰Hendricks v. Commonwealth, 163 Va. at 1108, 178 S.E. at 11.

²¹¹Hendricks v. Commonwealth, 163 Va. at 1109, 178 S.E. at 11.

²¹²See, e.g., McReynolds v. Commonwealth, supra note 184.

²¹³Davidson v. Allam, 143 Va. 367, 373, 130 S.E. 245, 246 (1925).

²¹⁴143 at 372, 130 S.E. at 246; Hendricks v. Commonwealth, 163 Va. at 1108, 1109, 178 S.E. at 11. See also Norfolk & W. Ry. v. Haun, supra note 38.

²¹⁵Davidson v. Allam, 143 Va. at 373, 130 S.E. at 246.

²¹⁶Hendricks v. Commonwealth, 163 Va. at 1108, 178 S.E. at 11.

²¹⁷Lane v. Commonwealth, 190 Va. at 73, 55 S.E.2d at 457.

²¹⁸Looney v. Commonwealth, 115 Va. at 931, 78 S.E. at 628; Mercer v. Commonwealth, 150 Va. at 596, 142 S.E. at 371.

²¹⁹Looney v. Commonwealth, 115 Va. at 931, 78 S.E. at 628.

force is reasonable under the circumstances. Whether the accused's alleged offense be felony or misdemeanor is only one relevant circumstance.

"Where an accused strikes the officer before the officer strikes him or uses any unnecessary force against him, he is guilty of resisting arrest; and the fact that the officer subsequently uses more force than is necessary and does the accused unnecessary bodily harm in effecting his arrest does not exculpate the accused from the offense of resisting the officer. This is true even though the officer may have subsequently used so much more force than was necessary that he committed a crime in so doing which is deserving of a much severer punishment than that committed by the accused in resisting the arrest."²²⁰

One may resist an unlawful arrest²²¹ "with such reasonable force as . . . [is] necessary to repel that being exercised by the officer in his unwarranted undertaking."²²² Resistance has been held justified also when the accused was not shown any warrant or informed of the charges against him.²²³

Just as an officer may use only reasonable force to effect an arrest, one lawfully resisting an arrest, for whatever reason, may use only "such . . . force as [is] . . . necessary to repel that being exercised by the officer,"²²⁴ i.e., reasonable force. He may kill the officer but only if his own life is in danger and if he himself is blameless in provoking the violence.²²⁵

Absent malice, such killing is only manslaughter,²²⁶ but where malicious and deliberate, the killing is murder even though the attempted arrest was not lawful.²²⁷ The rule is that "in cases of homicide a defendant who has been illegally arrested may successfully interpose that defense [of illegal arrest] only when he acts in hot blood induced by the indignity which has been offered him."²²⁸

²²⁰Galliher v. Commonwealth, 161 Va. at 1020, 170 S.E. at 736.

²²¹Briggs v. Commonwealth, 82 Va. at 564; Muscoe v. Commonwealth, 86 Va. at 448, 10 S.E. at 535.

²²²Banks v. Bradley, 192 Va. 598, 603, 66 S.E.2d 526, 529 (1951).

²²³Bourne v. Richardson, supra note 127. As to informing accused, see supra § 5-4.

²²⁴Banks v. Bradley, 192 Va. at 603, 66 S.E.2d at 529.

²²⁵Briggs v. Commonwealth, 82 Va. at 564; Looney v. Commonwealth, 115 Va. at 931, 78 S.E. at 628; Banks v. Bradley, 192 Va. at 604, 66 S.E.2d at 529, 530. See also Clinton v. Commonwealth, 161 Va. 1084, 172 S.E. 272 (1934).

²²⁶Muscoe v. Commonwealth, 86 Va. at 448, 10 S.E. at 536.

²²⁷Clinton v. Commonwealth, 161 Va. at 1094, 172 S.E. at 275.

²²⁸161 Va. at 1093, 172 S.E. at 275. See also Banks v. Bradley, 192 Va. at 604, 66 S.E.2d at 529, 530.

An officer encountering resistance may use reasonable force to protect himself,²²⁹ but since he must be the aggressor and press forward to effect the arrest he also has a special protection,²³⁰ still limited however, by the rule of reasonableness. "[When] . . . extreme measures are resorted to in making arrests, it must appear that such measures were necessary, and that the felon could not otherwise be taken."²³¹

Under the general rule, an officer whose life was endangered by the resistance of an alleged misdemeanor probably could slay the arrestee in self-defense.²³² Only extreme circumstances, however, permit such action, whether the offense be felony or misdemeanor.

"The law does not clothe an officer with the authority to judge arbitrarily of the necessity of killing a person to secure him. . . . He cannot kill unless there is a necessity for it, and the jury must determine upon the testimony the existence or absence of the necessity. They must judge of the reasonableness of the grounds upon which the officer acted."²³³

10-3. Flight.²³⁴

Flight is not resistance to arrest, but avoidance thereof.²³⁵

10-3.1. Minor felony or misdemeanor.

The grade of the offense is a factor in determining how much force is reasonable, since "extreme measures . . . which might be resorted to in capital felonies, would shock us if resorted to in inferior felonies."²³⁶ A fortiori, the same rule would apply to misdemeanors.

It is said that "officers have no right to inflict serious bodily harm upon one who is simply fleeing arrest for a misdemeanor."²³⁷

An early secondary authority states:

"While an officer may have a right under certain circumstances to kill a felon in order to prevent his escape, or in mak-

²²⁹Lane v. Commonwealth, 190 Va. at 73, 55 S.E.2d at 457.

²³⁰Mercer v. Commonwealth, 150 Va. at 599, 142 S.E. at 372.

²³¹Hendricks v. Commonwealth, 163 Va. at 1110, 178 S.E. at 11.

²³²See Mercer v. Commonwealth, 150 Va. at 599, 600, 142 S.E. at 371, 372.

²³³Hendricks v. Commonwealth, 163 Va. at 1109, 178 S.E. at 11.

²³⁴While the force which may be used in making arrests is governed by the rule of reason, some cases, in applying the rule, have distinguished the situation of flight from that of resistance only. Practically, however, whether the accused submits, or resists, or flees, or resists and flees, the officer still may use only force reasonable under the circumstances. Distinguishing these situations, therefore, seems academic. Nevertheless, the distinction is found in cases, so is retained here.

²³⁵Jones v. Commonwealth, 141 Va. 471, 478, 126 S.E. 74, 76, 77 (1925).

²³⁶Hendricks v. Commonwealth, 163 Va. at 1109, 1110, 178 S.E. at 11.

²³⁷Crosswhite v. Barnes, 139 Va. at 480, 124 S.E. at 245.

ing an arrest, there is absolutely no question that the officer has no right to wound or shoot a man, for whom he even has a warrant, for a misdemeanor unless the man uses violence in resisting arrest; *but the mere fact that he flees to avoid arrest does not give the officer any right whatever to shoot at him, much less to wound or kill him.* Neither a private citizen nor an officer attempting to arrest one guilty of misdemeanor, is justified in killing the alleged offender merely to effect the arrest, whether the offender be fleeing to avoid arrest or to escape from custody."²³⁸

10-3.2. Major felony.

An officer has a duty to pursue a fleeing suspected felon "and use whatever force . . . [is] reasonably necessary to apprehend him."²³⁹ Thus an officer may slay the arrestee in such a situation, but only if there be necessity for it, since " 'in any case where extreme measures are resorted to in making arrests, it must appear that they were necessary, and that the felon could not be otherwise taken.' "²⁴⁰ And the jury²⁴¹ will determine the existence of such necessity.²⁴²

10-4. Determining whether force is reasonable or excessive.

"Officers, within reasonable limits, are the judges of the force necessary to enable them to make arrests. . . . When acting in good faith, the courts will afford them the utmost protection, and they will recognize the fact that emergencies arise when they are not expected to exercise that cool and deliberate judgment which courts and juries exercise afterwards upon investigations in court."²⁴³

Even further, an arresting officer is *presumed* to act lawfully, i.e., to have used reasonable force. Thus, "the burden rests upon the accused, who undertakes to resist the arrest, to show that the officer's conduct was such as to justify such resistance."²⁴⁴ Where in issue, it is a jury question whether force used was reasonable.²⁴⁵

On these matters, the cases are plain. There seems confusion, however, whether the necessity for force, of whatever degree, need be *actual* or *apparent*. In a leading case both these statements appear on

²³⁸4 Va. L. Reg. (N.S.) 624 (1918). (Emphasis added.)

²³⁹Berry v. Hamman, 203 Va. 596, 599, 125 S.E.2d 851, 854 (1962).

²⁴⁰Hendricks v. Commonwealth, 163 Va. at 1110, 178 S.E. at 11.

²⁴¹Davidson v. Allam, 143 Va. at 372, 130 S.E. at 246.

²⁴²Norfolk & W. Ry. v. Haun, 167 Va. at 164, 187 S.E. 484.

²⁴³Davidson v. Allam, 143 Va. at 373, 130 S.E. at 246.

²⁴⁴Looney v. Commonwealth, 115 Va. at 931, 78 S.E. at 628. See also § 10-4 supra.

²⁴⁵Davidson v. Allam, 143 Va. 372, 373, 130 S.E. at 246.

the same page: (1) "where extreme measures are resorted to in making arrests, it must *appear* that they were necessary, and that the felon could not be otherwise taken."; (2) "[An arresting officer] . . . cannot kill, except in cases of *actual necessity*. . . ." ²⁴⁶

10-5. Other considerations.

There are other factors which also may influence the permissible degree of force: Whether the accused resists *and* flees; whether, being already in custody, he attempts escape; whether the officer is attempting to arrest to *prevent* crime. On these situations, and others which might be conceived, there is no Virginia authority.

11. *Summoning assistance.*

"An officer attempting to execute a lawful warrant may, in case of resistance made or apprehended, summon so many of the people of his county, or corporation, or require the commandant of any regiment therein to call out such portion of his regiment to aid him, as may be sufficient." ²⁴⁷

The "*his county*" provision of this statute has been construed as directory, not mandatory, so that the officer may command assistance from persons of a county *other than* his own. ²⁴⁸ And they are not trespassers, nor does their assistance invalidate the arrest. ²⁴⁹

Similar authority to summon assistance is specially given to officers acting under extradition warrants. ²⁵⁰

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²⁴⁶Hendricks v. Commonwealth, 136 Va. at 1110, 178 S.E. at 11. (Emphasis added.)

²⁴⁷Va. Code Ann. § 15-514 (1950).

²⁴⁸Dellastatious v. Boyce, 152 Va. 368, 147 S.E. 267 (1929).

²⁴⁹Ibid.

²⁵⁰Va. Code Ann. §§ 19.1-57, 19.1-58 (1950).

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