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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 5143

In the Supreme Court of Appeals of Virginia at Richmond

CITY OF RICHMOND

v.

MRS. MARGARET JOHNSON, ET AL.

FROM THE INDUSTRIAL COMMISSION OF VIRGINIA

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5143

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 19th day of January, 1960.

CITY OF RICHMOND, Appellant,

against

MRS. MARGARET JOHNSON, AUBREY JOHNSON, AN INFANT JOAN JOHNSON, AN INFANT, AND COMMONWEALTH OF VIRGINIA, Appellees.

From the Industrial Commission of Virginia

Upon the petition of City of Richmond, a municipal corporation, an appeal is awarded it from an award entered by the Industrial Commission of Virginia on the 15th day of September, 1959, in a certain proceeding then therein depending wherein Mrs. Margaret Johnson and others were claimants and City of Richmond was defendant; no bond being required.

RECORD

* * * * *

page 3 }

* * * * *

ANSWER OF CITY OF RICHMOND.

1. The City of Richmond denies that it was employer of the deceased within the meaning of Sec. 65-3 of the Code of Virginia, as amended.

2. City of Richmond denies that the deceased was an employee of the City of Richmond within the definition of Sec. 65-4 of the Code of Virginia, as amended.

3. If the deceased was an employee within the meaning of Sec. 65-4 he was an employee of the Commonwealth of Virginia and not of the City of Richmond.

4. Even if the deceased was an employee of the City of Richmond, which is expressly denied, the injury resulting in his death did not arise out of his employment within the meaning of Sec. 65-7 of the Code of Virginia, as amended.

Respectfully submitted,

CITY OF RICHMOND
By /s/ JAMES A. EICHNER
Counsel.

* * * * *

page 11 } Robert M. Johnson (Deceased), Employee Mrs. Margaret Johnson, Widow, et al., Claimants

v.

City of Richmond, High Constable's Office, Employer self insured and/or Commonwealth of Virginia, Employer self insured.

Claim No. 448-894.

Aubrey Johnson Son, Claimant, appeared in person.

Jesse M. Johnson, Attorney at Law, Mutual Building, Richmond, Virginia, for Claimants.

James A. Eichner, Assistant City Attorney, 402 City Hall, Richmond, Virginia, for the City of Richmond.

Reno S. Harp, III, Assistant Attorney General, Court-Library Building, Richmond, Virginia, for the Commonwealth of Virginia.

Hearing before EVANS, Chairman, at Richmond, Virginia, on April 29, 1959.

All witnesses having been duly sworn, the following testimony was taken:

By Chairman Evans: Gentlemen, can you agree that Mr. Johnson met his death during the hours of work prescribed for him?

By Mr. Jesse Johnson: If the Commission please, we have a stipulation of facts here which the City Attorney and I have agreed, and the Commonwealth wishes to remain silent for the time being, but I would like to read this statement as agreed to by the City Attorney and myself.

By Mr. Harp: Could I interrupt you just a second?

By Mr. Jesse Johnson: Yes, yes.

page 12 } By Mr. Harp: If the Commission please, the Commonwealth of course has filed nothing in this matter, but the Commonwealth is of the opinion that the man involved is a City and not a State official. Consequently, the Commonwealth is not properly a party herein, and we're wondering whether we could get a ruling at this particular point of the proceeding in order to determine what further action we would have to take, because I prefer not to stipulate anything until I find out what our—

By Chairman Evans: Until the evidence is in I certainly couldn't make a ruling because I do not know at this time.

By Mr. Eichner: Your Honor, I might state that among the papers filed by the City here was a motion to enjoin the Commonwealth and additionally to alter the style of the case slightly to eliminate what I consider being an assumption of one of the issues, namely, that the Department—rather, that the High Constable's Office is a Department of the City Government. Possibly this would be the proper time to rule on that, since I understand that it is standard procedure when there is an issue as to who is the employer to so inform the employer.

By Chairman Evans: Until we have the evidence before us, I don't see how I can rule. From the reading of the statute, 65-4 of the Act, without hearing any more than just that, what's contained in that statute, it seems to me that unquestionably this man would be an employee of the City. It provides that any officer of the—who renders service in the city, shall be deemed an employee of that City and it even goes

so far as to say that if the compensation is earned in the municipality he shall be deemed an employee of that municipality. So it's purely a question of law as I see it, an interpretation of the statutory provisions of Section

page 13 } 65-4.

By Mr. Eichner: Well, I would just like to get one thing clear, If Your Honor please. Both—I think the Commonwealth has been served with notice in the same manner as the City.

By Chairman Evans: Yes.

By Mr. Eichner: And the City and the Commonwealth each deny that he is the employee and so we are both on about the same standing as it now is, is that correct, sir?

By Chairman Evans: That's correct.

By Mr. Harp: Can I point out a few provisions of the Charter of the City of Richmond, Your Honor, to emphasize the fact that the gentleman was a City employee?

By Chairman Evans: Let's get these stipulations first, and it's possible we might eliminate some of this.

By Mr. Jesse Johnson: I think that's for him.

By Mr. Harp: I'll stipulate that.

By Mr. Jesse Johnson: You'll stipulate that, will you?

By Mr. Harp: With the understanding, of course, we're still objecting.

By Mr. Jesse Johnson: The stipulation reads as

page 14 } follows: "It is stipulated and agreed to between the parties hereto as follows: 1. That Robert M. Johnson, the deceased, was employed as a Deputy High Constable for the City of Richmond, Virginia, in the year 1953 and that he remained continuously as a Deputy High Constable for the City of Richmond until his death, which occurred in the office of the High Constable in the basement of the City Hall, Richmond, Virginia, on December 5, 1958, and that his average weekly earnings were $72.50. 2. That under date of December 28, 1932, the said Robert M. Johnson and Margaret Marie Hall were married in the City of Richmond, Virginia; that the said Robert M. Johnson and Margaret Johnson, the claimant herein, lived together as husband and wife continuously from the date of their marriage until the date of his death, namely, December 5, 1958. 3. That three children were born of the marriage of Robert M. Johnson and Margaret Marie Hall, the claimant herein, whose names and dates of birth are Robert Norman Johnson, born May 28, 1937, now a cadet at West Point Military Academy, Aubrey Philip Johnson, born February 11, 1942, now a student, and Joan Marie Johnson, born August 13, 1946, now a student. 4. That the said Robert M. Johnson was born December 31,

1906, and that his widow, Margaret Johnson, the claimant herein, was born December 3, 1913. 5. That the claimant, Margaret Johnson, and the two younger children, Aubrey Philip Johnson and Joan Marie Johnson, were dependents of the said Robert M. Johnson. 6. That the said Robert M. Johnson died December 5, 1958, in the office of the High Constable for the City of Richmond, Virginia, as the result of being struck by a bullet from a pistol discharged by Carlisle M. Slater, a fellow Deputy High Constable for the City of Richmond, Virginia." And this is signed by Jesse M. Johnson, attorney for complainer, and by the Assistant City Attorney and Assistant Attorney General. We'd like to file that. Now, I'd like to inquire at this point, since we have agreed upon all the facts it seems to me and that leaves us largely a matter of law, as to whether the Commission would like to hear any evidence? We have witnesses here, but I guess it's not—

page 15 } By Chairman Evans: Well, I have gone over this file, of course, before coming in, and as I see it the sole question here is a question of law as to whether or not he is an employee of the City of Richmond, or of the Commonwealth of Virginia. Now, gentlemen, I will appreciate any help you can get me, or citations on that. I think it's controlled primarily by 65-4 of the Act.

By Mr. Eichner: Your Honor, I have some evidence I would like to put on. I would like in addition to the stipulation which has just been read, the statement of facts as filed by the City earlier, filed in January, which duplicates the stipulation to some extent, but also adds some other relevant facts. Does counsel want to stipulate as to that, or not, I don't know. They both have copies of it.

By Mr. Jesse Johnson: Well, now, I don't know what—what are you asking me to stipulate on, what is the—

By Mr. Eichner: Well, the statement of facts, of which you have a copy which was filed in January some time, I believe.

By Mr. Jesse Johnson: Isn't that embodied in the stipulation that we just read?

By Mr. Eichner: In part, yes, sir, in part.

By Mr. Jesse Johnson: Let me see what—

By Mr. Eichner: There's some additional detail about the accident itself is about the only difference.

page 16 } By Chairman Evans: It just goes more into detail as to how the accident occurred, brings out how he was shot.

By Mr. Jesse Johnson: I think that we might stipulate on that. As you say, I think it just goes a little more in detail, that's all. So we can let the record show that as far as the

claimant is concerned that it is stipulated as to your statement of facts heretofore filed.

By Mr. Eichner: Your Honor, one other matter I'd like to point out as to the issues involved, the City also contends that the fatal injury did not arise out of and in the course of the employment, even if the deceased had been an employee of the City, and there is that additional issue before the Commission.

By Chairman Evans: You take the position that the carrying of weapons was unlawful. Apparently you all—

By Mr. Eichner: That's—the evidence will, I believe that will be the evidence, Your Honor.

By Chairman Evans: Well, whether or not it's a criminal offense to carry the gun, as to the deceased he was not a party to the criminal act, if it was a criminal act to carry the gun. The gun that he had was not the gun that caused him to be killed. And the action of the fellow employee, if he was at a place where he was reasonably expected to be and reasonably performing the duties of his office at the time this accident occurred, I think that unquestionably under the Compensation Law he would be deemed to have met a fatal accident arising out of and during the course of his employment.

By Mr. Eichner: We have some evidence bearing on that, Your Honor.

By Chairman Evans: All right, sir.

page 17 } By Mr. Jesse Johnson: May I answer that in part, Commissioner? That is this, the point is made here that both the deceased and the party that occasioned the death carried pistols. Well, Mr. Eichner is appearing as Assistant City Attorney for the City, and both of these pistols were bought and paid for by the City of Richmond. The High Constable's pistol is bought by the City of Richmond, and every Deputy out in the field in his office has a pistol and it is likewise bought by the City of Richmond. And under the Charter of the City of Richmond, referring to the High Constable, it gives the High Constable, "he shall have the same powers, duties, and authority as are prescribed by law for the Sheriff of the City of Richmond." Now, that's Section 19, headed 19 of the Charter of the City of Richmond, in effect February the 23rd, 1954.

By Chairman Evans: Mr. Eichner, if the City did in fact permit and authorize the wearing of guns by these men because of their occupation, can it be said that they violated any law? It's just an added hazard to the employment, whoever the employer might be.

By Mr. Eichner: The City, Your Honor, has no authority to authorize these men to do anything. It has—the Charter

is quite clear, I believe, that control and appointment and removal are entirely in the hands of the Judges of the Municipal Court, they in turn are subject solely to the control of the Judges of the Courts of record, who are of course elected by the Legislature. And the City government has absolutely no authority over them whatsoever except fixing salaries.

By Chairman Evans: Well, normally the employee-employer relationship is determined by who has the power of control.

By Mr. Eichner: Yes, sir.

page 18 } By Chairman Evans: The only exception to that being when by statute the Legislature states that he shall be the employee of such and such a party. As I read Section 65-4, the portion of which I am sure you are thoroughly familiar, says, "policemen and firemen, except policemen and firemen in cities containing more than two hundred thirty thousand inhabitants, and sheriffs and their deputies, town and city sergeants and town and city deputy sergeants, county and city commissioners of the revenue," and then the "attorneys for the Commonwealth, clerks of courts of record and county and municipal courts and their deputies, officers and employees, shall be deemed to be employees of the respective cities, counties or towns in which their services are employed and by whom their salaries are paid or in which their compensation is earnable." Now, doesn't the facts of this case place this deceased squarely within the definition here as given as to designations of a city or municipal employee?

By Mr. Eichner: We contend that they do not, sir, that he is not one of those enumerated, and we contend that he does not fall within any other—

By Chairman Evans: He is not an officer of the court, in other words, for the City of Richmond?

By Mr. Eichner: Not in the meaning of this statute, I believe. The statute is—I think could have been drafted more clearly, Your Honor, but I think it's probably a question of semantics. I have evidence that I'd like to put on concerning the whole case now.

By Chairman Evans: All right, go forward.

By Mr. Harp: Could I work a word in edge-

page 19 } wise?

By Chairman Evans: Yes, sir.

By Mr. Harp: If the Commissioner please, I'd like to direct your attention to Section 19.19 of the Charter of the City of Richmond which you'll find on page 270 of the Acts of the General Assembly of 1948, which provides that there shall be a High Constable who shall be appointed by a majority of the Judges, and it names the various Judges of the Courts in the

City of Richmond involved and it provides that the High Constable shall of course appoint such number of deputies as shall be determined by a majority of the judges. They shall hold office at the pleasure of the High Constable and shall receive such salaries as shall be fixed by Council. In addition, your attention is directed to Chapter 182 Acts of Assembly, 1952, which is found on page 187 of the Acts, which discusses the residence for the classified and unclassified services to the City of Richmond. And lastly, Section 9.07 of the Charter of the City of Richmond, as amended by the Acts of Assembly 1958, on page 244, dealing with the unclassified services of the City of Richmond and provides that the High Constable and his deputies shall be part of the unclassified services—unclassified service of the City of Richmond. And it is respectfully submitted by the Commonwealth that there can be no question but it's manifest on its face that the Deputy High Constable is an officer of the City of Richmond. Moreover, the Commission has in its file a copy of an opinion dated January 3rd, 1952, to Honorable Frank S. Richeson, State Senator, over the signature of the then Attorney General J. Lindsay Almond, Jr., ruling that the High Constable is a City official. Consequently, we request that the Commonwealth be dismissed as a party in this action.

By Chairman Evans: I will not pass on that. I will in the opinion. All right, if you will proceed with your

page 20 } evidence.

By Mr. Eichner: If I can just make one further statement. Apparently the—your office's opinion has been filed as an exhibit, is that correct?

By Mr. Harp: No, it's just been filed, that's all, requested by the Commission.

By Mr. Eichner: Well, I request that copy of the letter requesting that opinion be filed with the Commission also, as being necessary to explain it. And I feel that the City Attorney's opinion on the same general subject ought to also be filed, and make it in lieu of the brief for which—

By Chairman Evans: All three will be made a part of the record.

By Mr. Eichner: They are all of them, of course, argument by the Attorney General's office and by the City Attorney's office.

By Mr. Jesse Johnson: I'd like also to request this, if the Commissioner please; I was under the impression that there was also in the record a short opinion of the present Attorney General concurring in the opinion of the previous Attorney General, Mr. Almond, and if that's not the case, I'd like to request the—

Lt. Floyd S. Wakefield.

A. We interviewed him right after the incident occurred on December the 5th in Police Headquarters and he stated he was an employee of the City of Richmond at that particular time, the Deputy Constable, that he was in his office in the basement of the City Hall and he had received his work for the day, that he arose and proceeded to put his coat on, his inner coat, then a car coat which is a light-colored coat and about three-quarter length. He further stated that he saw Mr. Johnson who he had known for a long time and worked with for a long time, remove his pistol, lay it on the table, take the bullets out of it and proceed to clean it. So he decided that his pistol needed cleaning too, and this pistol was in the coat pocket of the car coat, the right-hand coat pocket. As he proceeded to try to lift the gun from the pocket, he pulled backwards on it and it fired within the pocket, penetrated the coat, and hit Mr. Johnson who was standing right opposite him.

Q. This is the same Mr. Johnson, the deceased, which you mentioned both times, only one Mr. Johnson?

A. Yes, sir, the deceased Mr. Johnson.

Q. What kind of a gun was this that caused the death?

A. It was a .38 caliber revolver.

Q. And what kind of a gun did the deceased, Mr. Johnson, have with him at that time?

A. A similar gun.

Q. Is that the same type you're wearing?

A. It's the same type, but it has a short barrel.

Q. And it is a revolver, is that correct?

A. Yes, sir.

page 23 } Q. Now, concerning the statement which was stipulated to that just prior to the accident which you have mentioned, the deceased, Mr. Johnson, was cleaning his pistol with a handkerchief and saying, "these guns get awful dusty," or something like that, is that approximately what was—you understood was said?

A. If I recall correctly, yes, sir.

Q. And that Mr. Slater then said that his gun needed cleaning too. Where was Mr. Johnson carrying his revolver just prior to the death, do you know?

A. No, sir, I do not.

Q. Do you know where it was?

A. I do not know.

Q. Now, how long have you been a police officer, Lieutenant?

A. Twenty-five years.

By Chairman Evans: Of course, they'll be guiding, they will be of help. They are not absolute.

By Mr. Jesse Johnson: Yes, sir. I understand.

By Chairman Evans: Frankly, I think the duty is upon us to interpret the statute and to determine whether or not in our opinion it is, and ultimately the Supreme Court if the aggrieved party doesn't agree.

page 21 } By Mr. Jesse Johnson: And if Mr. Harp will also file with that the copy of the opinion of Mr. Harrison, I think that also has been given—rendered in this case.

By Mr. Harp: As far as I know there has been no opinion rendered by the Attorney General that I have a copy of, sir. There may have been a letter. Let me check the file. I know of no such opinion, but if there is an opinion, I will secure it and file it and send copies to counsel. And I'll supply the Commission with a copy of the letter requesting the opinion by—from Senator Richeson, sir.

By Chairman Evans: All right, Mr. Eichner, if you will proceed.

LT. FLOYD S. WAKEFIELD,

By Mr. Eichner:

Q. Please state your name and title and occupation, Lieutenant?

A. Floyd S. Wakefield, a Lieutenant of the Police Department of the City of Richmond.

Q. Now, what Division are you in, sir?

A. At present I'm in the Traffic Division.

Q. And prior to that?

A. I was a Detective Sergeant in the Detective Division.

Q. And did you investigate this injury?

A. Yes, sir, I did.

Q. Did you interview all witnesses in the case?

A. Yes, sir, I did.

Q. Do you have their names?

A. Yes, sir, I have them written here.

Q. Will you read them to the Commission?

A. H. Calvin Farmer, Harry B. Johnson, James

page 22 } P. Welch, and Carlyle M. Slater. I also obtained a statement from Mrs. Robert Johnson, wife of the deceased.

Q. Could you tell the Commission, please, approximately what was told you by Mr. Slater, in simple words?

Sheriff James H. Young.

A. Not to my knowledge.
Q. Does the High Constable have to have one?
A. Again, not to my knowledge.
Q. Or his Deputies?
page 25 } A. Not to my knowledge.
Q. That's all.

By Mr. Eichner: That's asking Lieutenant Wakefield for a legal opinion there, I don't think that's proper.

(Witness excused).

SHERIFF JAMES H. YOUNG,

By Mr. Eichner:
Q. State your name and title and how long you have held that title, please.
A. I am James H. Young, Sheriff of the City of Richmond, for about seven and a half years.
Q. And will you just very briefly describe the duties of the Sheriff of the City of Richmond?
A. Well, we're ministerial officers for five courts of record of the City, we handle all of the *silver* papers originating out of those courts returnable to those courts, serve any other necessary processes that are directed to us from any other court in the State or elsewhere.
Q. How many deputy sheriffs serve in the office of the Richmond Sheriff?
A. Six.
Q. And what are their duties, are they broken down into different types of duties, or—
A. Yes, we have four court deputies that act as Deputy Sheriffs when the court's in session, wait on the judge, and do the necessary work that has to be done when court's in session. We have two men on the outside that handle all of the processes that are served by the Sheriff's office.
Q. Are the members of your office armed, Mr. Young?
A. We do have pistols that have been bought and purchased by the City and given to us for use.
page 26 } Q. How many members of your office are armed?
A. Well, Mr. Eichner, if you'll be more specific about armed.
Q. Well, how about court deputies?
A. Court deputies do not carry guns, no, sir. The men only

Lt. Floyd S. Wakefield.

Q. And how long have you been—how much of that was in the Detective Division?

A. Fourteen years.

Q. Were you in plain clothes during that time?

A. Yes, sir.

Q. And what kind of gun were you armed with at this time?

A. A .38 caliber revolver, a snub-nose, short barrel.

Q. The same type as the deceased and Mr. Slater had?

A. Yes, sir.

Q. Based on your experience, how did you usually carry your gun, what was the custom?

A. I carried mine in a holster back on my right hip, similar to where I have this one now, underneath my normal coat.

Q. Now, in the event that dust or lint or something like that were on a gun of this particular type revolver, would that seriously affect the operation of the revolver?

page 24 } A. It would have to be a considerable amount to stop a revolver from firing.

Q. How about any other type of pistol?

A. Well, an automatic pistol will jam with very little lint.

Q. I don't believe I have any further questions.

By Mr. Harp:

Q. Did you check to see whether the gentleman who had the gun had a permit for that gun, sir?

A. You mean Mr. Slater?

Q. Yes.

A. If I recall correctly, he told me he did not have a permit. You mean a permit to carry it?

Q. Yes.

A. No, sir.

Q. And did you check who owned the gun, sir?

A. Well, I was told by the—his employee—employer, Mr. Calvin Farmer, that the gun was the property of the City of Richmond, and I returned it to him, sir, that is to Mr. Farmer.

By Chairman Evans: Any questions, Mr. Johnson?

By Mr. Jesse Johnson:

Q. Do police officers of the City of Richmond have to have a permit to carry a revolver?

A. No, sir.

Q. Does the Sheriff of the City of Richmond have to have one?

H. Calvin Farmer, High Constable.

Q. May I ask one further question?

By Chairman Evans: If you like.

Q. Since you first came to the office, have arms been issued to Sheriffs and Deputy Sheriffs in the office? From the start, I mean.

A. No, sir. They were purchased I believe about two years after I began Sheriff, I believe that was about right. There was not any arms there when I went there. If it was, I couldn't find them.

Q. That's all.

page 28 } By Mr. Jesse Johnson: No questions.
By Mr. Harp: No questions.

(Witness excused).

MR. H. CALVIN FARMER, High Constable,

By Mr. Eichner:

Q. I would like to call Mr. Farmer as an adverse witness. Mr. Farmer, will you just state your full name and your title and how long you've held that title, sir?

A. H. Calvin Farmer, High Constable of the City of Richmond since January the 1st, 1926.

Q. Mr. Farmer, are the Deputy High Constables in your office ordered to carry revolvers with them?

A. Yeah, they carry revolvers.

Q. Well, are they ordered to?

A. Ordered to?

Q. Yes, sir.

A. The City purchased them and they've always carried them with them.

Q. Have you issued any orders to them to carry revolvers when they're carrying out their duties?

A. They always go along, yes.

Q. Have *you* issued them any orders to that effect?

A. I've always carried one with me myself.

Q. But have you issued specific orders to your Deputies to carry them too?

A. Didn't need to, never would.

Q. In other words, your answer is no, you have not, is that correct?

working on the outside and myself. We only have three guns in the Sheriff's Office, used by the Deputies.

Q. And do they wear them with them all the time?

A. No, sir.

Q. When are they actually armed with these guns?

A. We keep the guns locked up in the safe in the Sheriff's Office. The guns are issued to the Deputies if they have any night work to do at all, and more particular on arrest orders issued by the court. Those guns are given to them in the afternoons and they are checked back in in the mornings.

Q. And then when they're checked back in, what is done with them?

A. They are put back in the safe until we have some more arrest orders to execute.

Q. And how are—

By Mr. Jesse Johnson: Commissioner, I'd like to interpose an objection here. As far as I'm personally concerned and the claimant, we have no objection at all, but it seems to me that this is rather irrelevant and going right far afield and building up the record here. As to what's done in the Sheriff's Office, who cares about it? I don't think it matters.

By Chairman Evans: Well, I think what's done in the High Constable's Office would be more in point. I assume that the Sheriff is the one who made these rules, page 27 } if the Sheriff should decide that they'd carry them at all times, they'd carry them at all times.

A. It's been a policy of the office since I've been there, Your Honor, that—well, that is the policy, that they'll only be issued when we have arrest orders or else papers to execute at night in maybe undesirable neighborhood, or something.

By Chairman Evans: Well, I don't see that this would make one particle of difference.

By Mr. Jesse Johnson: No.

By Chairman Evans: The City of Richmond issued the guns to these Constables, they certainly had them with permission, and if they gave them to them, I assume they cared for them. And I think it was a hazard of the employment. Now, if it was criminal to carry them, the City itself was criminal in purchasing them and giving them the guns. I don't think there's any merit to that defense, Mr. Eichner.

H. Calvin Farmer, High Constable.

Q. Will you just—I just want to ask you if you are familiar with papers of that type, Mr. Farmer?

A. I am, but one of the main ones is not here.

Q. Pardon me, sir?

A. You haven't got a copy of a capias.

Q. Those are—have you got any idea about how many different kinds there are issuing out of Richmond courts?

A. I'd say all these came from Civil Justice courts, yes.

Q. They are not out of the courts but these are meant to be examples, not exhaustive.

A. I want to call to your attention too, the fact that we have to break and enter, break in and enter.

Q. Would you just identify each of those papers you have there, please, sir?

A. (Read papers handed him).

Q. Just read off what title each paper has.

A. Copy of civil warrant, the other one is the subpoena for a witness, writ of possession, and a detainer, garnishee summons.

Q. These are among the standard types of papers that are issued from the Civil Justice Court to the High Constable for the City of Richmond, is that correct, sir?

A. These are—

Q. Those are the type of papers, or among the types of papers that you serve?

A. —among them, yes, sir.

Q. I just ask that that be filed.

A. We have others.

page 31 } Q. Yes, sir. No need to clutter up the record with them all. I have no further questions. All three witnesses so far as I am concerned, may be excused, Your Honor, if—

By Chairman Evans: Be glad to. You witnesses may be excused.

(Witness excused).

By Mr. Eichner: I have here, Your Honor, three affidavits which I have discussed over the telephone with Mr. Johnson but which I do not believe he has actually seen with one possible exception. I would like to introduce them in evidence. They are affidavits of Mr. Haddon, Attorney for the Commonwealth for the City of Richmond; of O. D. Garton, Chief of Police of the City of Richmond, and Glenn Jordan, Commissioner of Revenue for the City of Richmond.

H. Calvin Farmer, High Constable.

A. What is that?

page 29 } Q. The question is whether you had issued any specific orders to your Deputies.

A. I wouldn't say I had issued any specific orders, but they've been carrying revolvers even when I was Deputy Constable myself.

Q. Yes, sir. Do you carry a revolver yourself in the normal course in—

A. I do, carry one in the pocket of the car. I've been out here all hours of the night, seizing cars, and then when I locate the car as a rule I call the police officer, but I always take my gun and put it in my pocket.

Q. Do you have a permit to carry a concealed weapon, Mr. Farmer?

A. Don't need it.

Q. You do not have one?

A. No, I haven't don't need a permit.

Q. And how about, do you happen to know whether any of the Deputies—

A. They're all registered, the revolvers are all registered.

Q. But have they received from the court, to your own personal knowledge, from the Hustings Court permits to carry concealed weapons as provided in Title 18 of the Code, 18-146? Code of Virginia.

A. No, don't have permits.

Q. They do not. Now, I have certain papers I would just like for you very briefly to identify if you would, sir, and I have here, Your Honor, about five papers which can be one exhibit, if—they are copies of court papers.

By Chairman Evans: All right, sir.

By Mr. Jesse Johnson: Let me find out what they are, please.

Q. I believe you are familiar with these. We'll call it Defendant's Exhibt "A."

By Chairman Evans: All right.

By Mr. Jesse Johnson: I don't see the relevancy

page 30 } of them, but if he wants to exhibit, I have no objection.

By Chairman Evans: I'll receive them for whatever value they might have.

By Chairman Evans: He gave no opinion. If so, I have none.

By Mr. Eichner: I'm sorry, who requested that, sir? I requested this letter.

By Mr. Jesse Johnson: I'll read this into the record. It's a photo copy of a letter dated February the 2nd, 1959, to Honorable James A. Eichner, Assistant City Attorney, City Hall, Richmond, Virginia, *Re*: claim No. 448-894, Robert M. Johnson *v.* City of Richmond. "Dear Mr. Eichner: This is in reply to your letter of January the 27th, 1959, in which you state that the City contends that Robert M. Johnson, a deputy High Constable for the City of Richmond,
page 34 } was a State officer at the time of his death. You ask whether certain officers of the Commonwealth, named by you in your letter of January 27 to Mr. W. L. Robinson, Examiner, Industrial Commission, are the proper officers to receive notice of the City's motion to join the Commonwealth as a defendant. Please be advised that it is the position of the Commonwealth that the High Constable of the City of Richmond is a City officer, as are each of his deputies. I enclose a copy of an opinion rendered under date of January 30, 1952, to Honorable Frank S. Richeson by my predecessor in office in which this view was expressed. Examination of legislation adopted subsequent to the enactment of the new charter of the City of Richmond does not reveal anything which would cause me to change this opinion. Very cordially yours, A. S. Harrison, Jr., Attorney General."

By Mr. Harp: Mr. Commissioner, if I may point out, that is not an official opinion, Mr. Johnson, for several reasons. In the first place, the request came from somebody other than as provided in 2-86 of the Code and the form is not the same, but it is a letter of information which does not have the same force and effect of an opinion but it is still the present opinion of the Attorney General.

By Mr. Johnson: Well, whatever you call it.

By Chairman Evans: As I see it, gentlemen, regardless of the opinion of the Attorney General, and I have a
page 35 } high regard for it, but he is not the one who has to decide this case. It's a question that I'm going to decide and ultimately the Appellate Court.

By Mr. Eichner: Well, I think, Your Honor, since that is in the record maybe we ought to put in the rest of the correspondence, I—certainly no opinion was requested, it was—.

By Mr. Jesse Johnson: There's the letter.

By Mr. Eichner: There was a letter—I filed some papers in this case, and I filed a motion to join the additional defendant; I received an inquiry from Mr. W. L. Robinson asking

By Mr. Jesse Johnson: If the Commissioner please, I don't see any relevancy here as to the affidavit of Mr. Glenn Jordan, the Commissioner of Revenue, or the Judge Gray Haddon, present in court, or the statement from the Chief of Police, but we have no objection to them.

By Chairman Evans: I will allow them in for the record you may want on appeal. I think it's perfectly obvious that the revolver was issued to both the deceased and the person who accidentally fired the gun and it was issued to them in conjunction with their employment and the accidental firing of it I think was a hazard of the employment.

page 32 } Whether it was necessary to have a permit or not would have no bearing on the compensability of the injury.

By Mr. Eichner: If it please Your Honor, these affidavits are not offered in—of course the Police Chief one is in connection with the concealed weapon statute; the other ones are in connection with the point raised about the interpretation of the word "officer" in Section 65-4, I believe it is, and I believe they are very relevant.

By Mr. Harp: The Commonwealth objects to them as being immaterial, irrelevant and having nothing to do with the case at all, Your Honor.

By Mr. Eichner: Must we argue that point now, or—

By Chairman Evans: There's no point, I will receive it for such value as it may have. We have no rules of evidence, we'll take anything in the record!

By Mr. Eichner: Fine! We'll call them then I think Exhibits "B," "C," and "D" respectively, and I have one further exhibit which is a certified copy of the General Fund Budget Ordinance for the City of Richmond for the fiscal year commencing July 1, 1958 and ending June 30, 1959, which is Exhibit "E," I believe. I have one further thing here which Mr. Harp said he would supply, it is a copy of the letter requesting the opinion of Attorney General Almond

page 33 } referred to, a letter from Senator Richeson. If it would expedite things, I will—

By Chairman Evans: I have a copy of it in our file.

By Mr. Eichner: —put in the copy Mr. Harp sent to me, if you so desire.

By Chairman Evans: If you have it.

By Mr. Eichner: All right.

By Mr. Jesse Johnson: And I wonder if the Assistant City Attorney will also do this, as I understand he also requested an opinion of the present Attorney General, and I'd like for you to file that, if you will.

By Chairman Evans: This is not in the way of argument, is it?

By Mr. Jesse Johnson: No, sir. No, sir. It is under Section 65-97 which reads, "If the Industrial Commission or any court before whom any proceedings are brought or defended by the employer under this Act shall determine that such proceedings have been brought, prosecuted or defended without reasonable grounds, it may assess against the employer who has so brought, prosecuted or defended them the whole cost of the proceedings, including a reasonable attorney fee to be fixed by the Commission." And in line with that, I'd like to file this motion: "The claimant, Margaret Johnson, moves the Commission, under Section 65-97 of the Code of Virginia 1950, as amended, to assess against the City of Richmond, the employer herein, the whole cost of this proceedings, including reasonable attorney's fee to Jesse M. Johnson, attorney for the complainant, to be fixed by the Com-
page 38 } mission, for the reason that such proceedings have been defended by the employer, the City of Richmond, without reasonable grounds."

By Mr. Eichner: Naturally I object to granting that, and I—well, of course, you—I have some further—the opinion which I filed with the Commission is part of the argument of the City, it is not the entire argument, there are other points to be raised, and I do not understand whether the—Your Honor desires to hear oral argument?

By Chairman Evans: We accept no argument.

By Mr. Eichner: No argument?

By Chairman Evans: We only receive evidence. On review is when we have arguments and no evidence. We only hear argument on review, and then you appeal direct to the Supreme Court.

By Mr. Eichner: Yes, sir. Well, then I would like to know the status of the motion to join the Commonwealth now, as this—

By Chairman Evans: Well, in my opinion is that the Commonwealth is not the employer. I feel that it's absolutely clear from the evidence before us, the stipulations before us, and in view of the statutory provisions of 65-4, that Mr. Johnson was the employee of the City of Richmond within the meaning of the statute, and that his accident arose out of and during the course of his employment with the City
page 39 } of Richmond.

By Mr. Eichner: Well, Your Honor, I feel we are in exactly the same position, that is, the Commonwealth—

me who he thought I ought to serve motion to join additional defendant on and I wrote to him on January the 27th, and I'd like to make that copy part of the record, if this is necessary.

By Chairman Evans: So ordered.

By Mr. Eichner: Stating that I thought it was the Comptroller, but requesting in case of doubt, he serve the Comptroller and the Attorney General, the Secretary of the Commonwealth, and the Governor. I sent a copy of that to the Attorney General along with a—on that same date, saying here's a copy of my letter to Mr. Robinson and if you do not consider any of the officials named the proper ones, I wish you'd notify Mr. Robinson and me. And I stated to him, to

page 36 } Attorney General Harrison what the City contends, that he, meaning the Deputy High Constable, is a State and not a City officer. Then the letter read by Mr. Johnson was given to me in response to that, I replied to that one on February 5th, and a copy of which went to Mr. Robinson which I ask be part of the record, saying we had considered that opinion referred to in making our opinion, copy of which I enclosed to him, No. 1469, which I wish to file now, and stating further that that opinion, referring to the Attorney General's opinion, dealt with an entirely different question, had nothing to do with workmen's compensation, had to do with something to do with State Compensation Board and was during the heat of a Legislative Session, was answered the day after it was requested.

By Mr. Harp: That is the usual policy of the Attorney General's office.

By Chairman Evans: Nothing supersedes the statutory provisions of 65-4 of the Code. All right, are there any other witnesses?

By Mr. Eichner: No, sir, I have no further witnesses. either as a—as argument I consider the Attorney's opinions nothing but argument. I want to leave this. And I apologize for it being a carbon copy, Mr. Farmer has the original.

By Chairman Evans: That's quite all right. Do you have any witnesses, Mr. Johnson?

page 37 } By Mr. Jesse Johnson: If Your Honor please, we have but they bear on the question as to how the accident took place and I take it that the Commissioner does not need that.

By Chairman Evans: No, on the stipulation, that would not be necessary. Is that the case, gentlemen?

By Mr. Eichner: I have—

By Mr. Jesse Johnson: If—I would like to read this and file this with the Commissioner.

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page 60 }

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Hearing before Chairman EVANS at Richmond, Virginia, on April 29, 1959.

EVANS, Chairman, rendered the opinion.

FINDINGS OF FACT.

Margaret Johnson claims compensation benefits under the Virginia Workmen's Compensation Law for herself and two infant children on the grounds that her husband, Robert M. Johnson, was fatally injured on December 5, 1958, in an accident arising out of and during the course of his employment as a Deputy Constable for the City of Richmond. The Commonwealth of Virginia was joined as a party defendant at the request of the City of Richmond. Both defendants deny liability on its part under the Virginia Workmen's Compensation Law, each contending that Robert M. Johnson was the employee of the other.

The following stipulation of facts was made by the parties at issue:

"It is stipulated and agreed to between the parties hereto as follows:

page 61 } "1. That Robert M. Johnson, the deceased, was employed as a Deputy High Constable for the City of Richmond, Virginia, in the year 1953 and that he remained continuously as a Deputy High Constable for the City of Richmond until his death, which occurred in the office of the High Constable in the basement of the City Hall, Richmond, Virginia, on December 5, 1958, and that his average weekly earnings were $72.50.

"2. That under date of December 28, 1932, the said Robert M. Johnson and Margaret Marie Hall were married in the City of Richmond, Virginia; that the said Robert M. Johnson and Margaret Johnson, the claimant herein, lived together as husband and wife continuously from the date of their marriage until the date of his death, namely, December 5, 1958.

"3. That three children were born of the marriage of Robert M. Johnson and Margaret Marie Hall, the claimant herein, whose names and dates of birth are Robert Norman

we've both been served with notice, we both say we are not the employer, we—

By Chairman Evans: Well, I say that you are by virtue of the statutory provisions, and they didn't exercise any control.

By Eichner: I believe, Your Honor, that the style of the case is now the City of Richmond and/or the Commonwealth of Virginia. Now, does that not indicate the Commonwealth having been served as a defendant?

By Chairman Evans: Well, they're both before us here today.

By Mr. Eichner: Yes, sir. Well, that's—I just wanted—

By Chairman Evans: But I thought you wanted my opinion. My opinion is going to be and I'm going to so hold, that Mr. Johnson was an employee of the City of Richmond, entitled to compensation, and dismiss the claim as to the Commonwealth of Virginia.

By Mr. Eichner: No, sir, I was not asking—well, that assumes then that the Commonwealth of Virginia was joined as a defendant.

By Chairman Evans: That is true. They are now before the Court.

By Mr. Harp: We were here, but I didn't know whether we'd ever been joined formally, or not.

page 40 } By Chairman Evans: Well, I assume that you are, I haven't checked the service, and I don't know who you sue with the State, I think you've gotten everybody that could conceivably receive process.

By Mr. Harp: He served the right people; they called us.

By Chairman Evans: Well, I'm sure that they are defendants.

By Mr. Eichner: I simply would like to call the Commissioner's attention to the reasons stated in the motion to join, namely, that there is an issue as to who is the employer and therefore that it would accomodate all parties, save everybody's time, to have both the Commonwealth and City before it originally rather than to run the risk of having two proceedings.

By Chairman Evans: Yes, we certainly wanted them both here and both were here.

By Mr. Eichner: That is the—very explicitly stated, Your Honor, in the motion and so I guess we can consider that motion as having been granted, or at least up to now.

By Chairman Evans: That's right. I prepared for it and sustain the Commonwealth's record.

(Case concluded).

wardens, and all other officers and employees of the State, except only such as are elected by the people or by the General Assembly, or appointed by the Governor, either with or without the confirmation of the Senate, provided that this exception shall not apply to any 'State employee' as defined in paragraph (5) of section 51-111.10 nor to members of the Industrial Commission and the State Corporation Commission, nor to the Superintendent of State Police; as relating to municipal corporations and political divisions of the State, the term 'employee' includes all officers and employees thereof, except such as are elected by the people or by the governing body of the municipal corporation or political division, who act in purely administrative capacities and are to serve for a definite term of office. Policemen and firemen, except policemen and firemen in cities containing more than two hundred thirty thousand inhabitants, and sheriffs and their deputies, town and city sergeants and town and city deputy sergeants, county and city commissioners of the revenue, county and city treasurers, attorneys for the Commonwealth, clerks of courts of record and county and municipal courts, and their deputies, officers and employees, shall be deemed to be employees of the respective cities, counties or towns in which their services are employed and by whom their salaries are paid or in which their compensation is earnable."

The High Constable for the City of Richmond is appointed by a majority of the Judges of the Civil Justice and Police Courts of the City of Richmond and holds office at their pleasure. This is in accordance with the charter provisions of the City of Richmond. The High Constable in turn employs his deputies. Their services are employed exclusively in the City of Richmond, and their salaries are fixed by the Richmond City Council and paid out of the treasury of the City of Richmond. There is no direct contract of employment between the City of Richmond and the Deputy High Constable as usually found when the relationship of master and servant is created. However, the employer-employee re-
page 63 } lationship can be established by statute as well as by a contract of hire.

Section 65-4 of the Act expressly provides that officers of a municipality shall be deemed to be employees of the respective cities, counties or towns in which their services are employed and by whom their salaries are paid or in which their compensation is earnable. The City of Richmond concedes that Johnson was an officer but strenuously contends that he was a State officer rather than a City officer and as such would be entitled to compensation benefits as a State employee

Johnson, born May 28, 1937, now a cadet at West Point Military Academy, Aubrey Philip Johnson, born February 11, 1942, now a student, and Joan Marie Johnson, born August 13, 1946, now a student.

"4. That the said Robert M. Johnson was born December 31, 1906, and that his widow, Margaret Johnson, the claimant herein, was born December 3, 1913.

"5. That the claimant, Margaret Johnson, and the two younger children, Aubrey Philip Johnson and Joan Marie Johnson, were dependents of the said Robert M. Johnson.

"6. That the said Robert M. Johnson died December 5, 1958, in the office of the High Constable for the City of Richmond, Virginia, as the result of being struck by a bullet from a pistol discharged by Carlisle M. Slater, a fellow Deputy High Constable for the City of Richmond, Virginia."

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"Mr. Slater, a Deputy High Constable for the City of Richmond, arrived at the High Constable's office approximately 8:30 A. M. on December 5, 1958. He took papers out of his box to arrange them for the day's work, and while arranging them talked with the deceased and other witnesses.

"After arranging his papers Mr. Slater put on his suit coat and overcoat. Then he noticed the deceased, who was standing, cleaning his pistol with a handkerchief, and saying 'These guns get awful dusty.'

"Mr. Slater said 'Yes, mine needs cleaning too' and reached into his left-hand coat pocket for his pistol. As he reached to pull his pistol from his pocket it discharged and the bullet struck the deceased. Mr. Slater said he apparently placed his finger on the trigger when he reached into his pocket to remove the pistol."

page 62 } Section 65-4 of the Compensation Act as amended in 1958 provides in part as follows:

"Unless the context otherwise requires 'employee' includes every person, including a minor, in the service of another under any contract of hire or apprenticeship, written or implied, except one whose employment is not in the usual course of the trade, business, occupation or profession of the employer; and as relating to those so employed by the State the term 'employee' includes the officers and members of the National Guard, the Virginia State Guard and the Virginia Reserve Militia, registered members on duty or in training of the United States Civil Defense Corps of this State, the forest

In addition to the compensation awarded, the City of Richmond shall pay to Margaret Johnson the sum of $300.00 as funeral expense.

All accrued compensation due under this award shall be paid upon receipt of same and future payments made each two weeks thereafter.

From the compensation awarded there shall be deducted the sum of $900.00 to be paid to Jesse M. Johnson, Attorney at Law, Richmond, Virginia, for legal assistance rendered the claimants.

Claimant's request that her attorney fee be taxed against the City of Richmond, in addition to the compensation, under the provisions of Section 65-97 of the Act as amended, is denied since a substantial question of law was at issue which had not been previously adjudicated.

page 65 }

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NOTICE OF AWARD.

Date May 22, 1959.

You are hereby notified that a hearing was held in the above styled claim before Evans, Chairman, at Richmond, Virginia, on April 29, 1959, and an opinion rendered by Evans, Chairman, on May 22, 1959, finding that Robert M. Johnson was an employee of the City of Richmond and that he was fatally injured in an accident arising out of and during the course of his employment with the City of Richmond on December 5, 1958, and directing an award of compensation to the dependents of the deceased, as follows:

To Mrs. Margaret Johnson, $33.00 per week for the joint and equal use of herself and Aubrey Philip Johnson and Joan Marie Johnson, beginning December 5, 1958 and to continue for the statutory period of 300 weeks, or until such time as subsequent conditions may justify a modification. The right of each of the infant dependents to share in the compensation award shall terminate on the day such dependent attains the age of eighteen years. All accrued compensation due under this award shall be paid upon receipt of same and future payments made each two weeks thereafter.

In addition to the compensation awarded, the City of Richmond shall pay to Mrs. Margaret Johnson the sum
page 66 } of $300.00 as funeral expense. It is directed that the sum of $900.00 be deducted from the compensa-

rather than a City employee. I cannot agree with this contention. The position held by Johnson was titled "Deputy High Constable for the City of Richmond"; his services were employed exclusively in the City of Richmond and his salary fixed and paid by the City of Richmond. The title of the position held by Johnson is in itself indicative of City employment. Section 65-4 of the Act expressly provides that an officer is deemed to be an employee of the respective city in which his services are employed and by whom his salary is paid and in which his compensation is earnable. It follows that Johnson was certainly a statutory employee of the City of Richmond if not an actual employee, and it is so held.

The City of Richmond asserted an additional defense to the claim on the basis that Johnson's death was a proximate result of a violation of Section 18-146 of the Code of Virginia 1950. This section deals with the criminal offense of carrying a concealed weapon.

The evidence in this case conclusively establishes that the pistols in possession of both Mr. Johnson and his fellow worker were purchased by the City of Richmond and given to these two officers. Whether or not the carrying of concealed weapons by the Deputy High Constables constituted a criminal offense is immaterial and of no value as evidence in determining the compensability of the instant case. The City of Richmond by purchasing the firearms and placing them in possession of these officers certainly expressed an intent that they be used. Mere possession of the firearms constituted an added hazard to the employment. If Johnson were violating the criminal statute in carrying a concealed weapon the violation on his part was in no way responsible for the accidental discharge of the gun of his fellow employee which proximately caused his death.

page 64

The evidence in this case clearly preponderates in establishing that Robert M. Johnson was an employee of the City of Richmond and that he was fatally injured in an accident arising out of and during the course of his employment with the City of Richmond on December 5, 1958, and a finding is so made.

An award shall enter in behalf of Margaret Johnson providing for the payment of death benefits at the rate of $33.00 per week beginning December 5, 1958, and to continue for the statutory period or until such time as subsequent conditions may justify a modification. The compensation awarded shall be for the joint and equal use of Margaret Johnson, Aubrey Philip Johnson and Joan Marie Johnson. The right of each of the infant dependents to share in the compensation award shall terminate on the day such dependent attains the age of eighteen years.

"Mr. Slater, a Deputy High Constable for the City of Richmond, arrived at the High Constable's office approximately 8:30 A. M. on December 5, 1958. He took papers out of his box to arrange them for the day's work, and while arranging them talked with the deceased and other witnesses.

"After arranging his papers Mr. Slater put on his suit coat and overcoat. Then he noticed the deceased, who was standing, cleaning his pistol with a handkerchief, and saying 'These guns get awful dusty.'

"Mr. Slater said 'Yes, mine needs cleaning too' and reached into his left-hand coat pocket for his pistol. As he reached to pull his pistol from his pocket it discharged and the bullet struck the deceased. Mr. Slater said he apparently placed his finger on the trigger when he reached into his pocket to remove the pistol."

The evidence discloses that the pistol which caused Johnson's death was purchased by the City of Richmond and given to the High Constable for use in the work of his office. It has been customary for many years for the High Constable and his deputies to carry pistols on their persons while engaged in duties of the office.

The Commonwealth of Virginia takes the position that decedent was not an officer or employee of the State. The City of Richmond defends the case on the following grounds: "(1) the deceased, if he was an employee of anyone, was an 'employee' of the defendant Commonwealth of Virginia and not the defendant City; and (2) if the deceased *was* a City 'employee,' his injury did not arise out of and in the course of his employment."

The contentions of the defendants concerning the employment status of the Deputy High Constable present for our determination an unusually interesting and difficult question. The answer to this question turns upon proper construction of Section 65-4, Code of Virginia, 1950, as amended, page 69 } and applicable sections of the Charter of the City of Richmond.

The pertinent provisions of Section 65-4 read as follows:

"Unless the context otherwise requires 'employee' includes every person, including a minor, in the service of another under any contract of hire or apprenticeship, written or implied, except one whose employment is not in the usual course of the trade, business, occupation or profession of the employer; and as relating to those so employed by the state the term 'employee' includes the officers and members of the Na-

tion and paid to Jesse M. Johnson, Attorney at Law, for legal assistance rendered the claimants.

INDUSTRIAL COMMISSION OF
VIRGINIA
/s/ M. E. EVANS
Chairman.

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page 67 }

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REVIEW before the full Commission at Richmond, Virginia, on July 6, 1959.

CRENSHAW, Chairman, rendered the opinion.

This case is before the full Commission for review upon the application of the City of Richmond, which is aggrieved by the decision and award of May 22, 1959.

The parties entered into a stipulation which is here set out insofar as germane to the issues presented:

"It is stipulated and agreed to between the parties hereto as follows:

"1. That Robert M. Johnson, the deceased, was employed as a Deputy High Constable for the City of Richmond, Virginia, in the year 1953 and that he remained continuously as a Deputy High Constable for the City of Richmond until his death, which occurred in the office of the High Constable in the basement of the City Hall, Richmond, Virginia, on December 5, 1958, and that his average weekly earnings were $72.50.

* * * * *

"5. That the claimant, Margaret Johnson, and the two younger children, Aubrey Philip Johnson and Joan Marie Johnson, were dependents of the said Robert M. Johnson.

page 68 }

"6. That the said Robert M. Johnson died December 5, 1958, in the office of the High Constable for the City of Richmond, Virginia, as the result of being struck by a bullet from a pistol discharged by Carlisle M. Slater, a fellow Deputy High Constable for the City of Richmond, Virginia."

* * * * *

shall have the same powers, duties and authority as are prescribed by law for the sheriff of the city of Richmond with respect to the execution of such process, warrants and summonses. He shall appoint such number of deputies as shall be determined by a majority of the judges of the civil justice court, civil justice court, part II, and police court, part II, and approved by the council. They shall hold office at the pleasure of the high constable and shall receive such salaries as shall be fixed by the council to be paid by the city."

In *Burch* v. *Hardwicke,* 30 Gratt. 24, 34 (1878) our Court of Appeals states by way of *doiter dictum* that a high constable is a state officer. In our opinion this statement is no longer true under existing law applicable to the office of High Constable of the City of Richmond. This office is not now an elective one and the salaries of the Richmond High Constable and his deputies is a matter exclusively within the control of the city council. Under the provisions of Section 19.19 of the city charter the High Constable is declared to be the ministerial officer of various municipal courts in their exercise of civil jurisdiction. His services are rendered exclusively within the limits of the City of Richmond and the Commonwealth of Virginia has no jurisdiction or control over this officer in the performance of his duties.

Section 9.07 of the City Charter contains this language:

"Unclassified Service.—*The service of the city* shall be divided into the unclassified and classified services. The unclassified service shall consist of: (a) officers elected by the people and persons appointed to fill vacancies in elective offices; (b) the members of boards and commissions, all officers appointed by the council, and persons appointed by the judges of the courts of record and by officers elected by the people; (c) judges, substitute judges and clerks of the municipal courts and the referees of the juvenile and domestic relations court; (d) *the high constable and his deputies* and the justices of the peace provided for in this charter." (Italics added)

In our opinion what has already been said provides ample basis for holding that the High Constable and his deputies are officers of the City of Richmond within the meaning of Section 65-4, however, there are additional reasons compelling this conclusion.

page 71 } Section 51-111.31, Code of Virginia, 1950, as amended, provides in part:

tional Guard, the Virginia State Guard and the Virginia Reserve Militia, registered members on duty or in training of the United States Civil Defense Corps of this State, the forest wardens, and all other officers and employees of the State, except only such as are elected by the people or by the General Assembly, or appointed by the Governor, either with or without the confirmation of the Senate, provided that this exception shall not apply to any 'State employee' as defined in paragraph (5) of §51-111.10 nor to members of the Industrial Commission and the State Corporation Commission, nor to the Superintendent of State Police; as relating to municipal corporations and political divisions of the State, the term 'employee' includes all officers and employees thereof, except such as are elected by the people or by the governing body of the municipal corporation or political division, who act in purely administrative capacities and are to serve for a definite term of office. Policemen and firemen, except policemen and firemen in cities containing more than two hundred thirty thousand inhabitants, and sheriffs and their deputies, town and city sergeants and town and city deputy sergeants, *county and city commissioners of the revenue, *county and city treasurers, attorneys for the Commonwealth, clerks of courts of record and county and municipal courts, and their deputies, officers and employees, shall be deemed to be employees of the respective cities, counties or towns in which their services are employed and by whom their salaries are paid or in which their compensation is earnable."

Prior to the enactment of the new charter of Richmond in 1948, the High Constable of the City of Richmond was an elected officer and as such clearly excluded from coverage under the Workmen's Compensation Act, as were his deputies. *Board of Supervisors* v. *Lucas,* 142 Va. 84, 128 S. E. 574.

Section 19.19 of the 1948 charter of the City of Richmond provides in part:

"There shall be a high constable who shall be appointed by a majority of the judges of the civil justice court, civil justice court, part II, and of the police court, part II, and shall hold office at their pleasure. He shall receive such salary as shall be fixed by the council to be paid by the city. He shall be the ministerial officer of the civil justice court, civil justice court, part II, and of police court, part II, in their exer-
page 70 } cise of civil jurisdiction, and shall execute all civil process, warrants and summonses emanating from or returnable to said courts for service within the city, and

tions and political divisions of the state so as to include officers thereof except those elected by the people or
page 72 } by the governing body, who act in purely administrative capacities and are to serve for a definite term of office. Prior to the enactment of this amendment there was no reference in the section to "officers." If the words inserted by the 1922 enactment have any meaning they must be applied in factual situations such as that presented in the instant case. We perceive nothing in the decision of the Court in *Board of Supervisors* v. *Lucas*, 142 Va. 84, 128 S. E. 574, requiring a different interpretation.

Upon careful consideration of all the facts and circumstances here presented we are convinced that Robert M. Johnson was an officer of the City of Richmond within the purview of Sectoin 65-4 of the Workmen's Compensation Act of Virginia and so hold. Under the provisions of the section the term "employee" includes all officers of municipal corporations except as are elected by the people or by the governing body, who act in purely administrative capacities and are to serve for a definite term of office. Thus the deceased officer was an employee of the City of Richmond within the meaning of the Act and as such entitled to the benefits therein provided.

In our view, there is no merit in the contention of the City that Johnson's death did not result from injury by accident arising out of and in the course of the employment.

The evidence clearly shows that Johnson was "in the course of" his employment at the time of the fatal accident. The accident occurred during the hours of the employment, at a place where the officers was required to be and while he was reasonably fulfilling the duties of his employment. The only remaining question is whether or not the accident "arose out of" the employment.

In *Wright Motor Co.* v. *Steinhilber,* 157 Va. 793, 162 S. E. 192, a service station manager, whose duty it was to meet persons who came to his employer's place of business, to talk to them and find out what they wanted, was accidentally shot and killed by a policeman, who came into the em-
page 73 } ployer's place of business to see about getting an automobile repaired. The ruling of the Industrial Commission that the death of the employee was due to an injury by accident "arising out of" the employment was sustained by our Court of Appeals in a divided opinion.

In *Pittman* v. *Hofler's Gulf Station,* 33 O. I. C. 339, 34 O. I. C. 109, (Appeal denied April 22, 1952) a gasoline filling station attendant was accidentally shot by a homemade pistol in the hands of a man who had entered the

"The governing body of any county, city or town, and the Commission, directing or governing body of any political entity, subdivision, branch or unit of the Commonwealth or of any commission or public authority or body corporate created by or under an act of the General Assembly and subdivision of any of the foregoing, may, by resolution legally adopted and approved by the Board, *elect to have its employees* become eligible to participate in the retirement system." (Italics added)

Pursuant to the provisions of the foregoing section, the Council of the City of Richmond on June 30, 1958, adopted a resolution which reads in part as follows:

"Be It Resolved By the Council of the City of Richmond:

"§1. The City of Richmond hereby elects to have the city treasurer, commissioner of the revenue, attorney for the commonwealth, city sergeant, clerks of the courts of record for the city, sheriff, general registrar, high constable, justices of the peace and bailiffs of the courts of record and their assistants, deputies and employees to become eligible, effective as of July 1, 1958, to participate in the Virginia Supplemental Retirement System, under the conditions set forth in Title 51, chapter 3.2, section 51-111.9 through section 51-111.67 of the Code of Virginia, as has been or may be amended from time to time.

"§2. The City of Richmond hereby agrees: (a) to pay its cost of participation of such officers, assistants, deputies and employees for all services performed and authorized prior to July 1, 1958, as established on forms required by the Board of Trustees of the Virginia Supplemental Retirement System, (b) for membership service in the Virginia Supplemental Retirement System after July 1, 1958, and (c) to deduct from the salaries, wages or other income of such officers, assistants, deputies and employees and to pay over to the Commonwealth of Virginia in the manner prescribed, the respective sums of money required by law to be paid for participation of such officers, assistants, deputies and employees in said system.

"§3. For the purpose of enabling such officers and employees to participate in the benefits of the Virginia Supplemental Retirement System, they are hereby declared to be officers and employees of the City."

To meet the holding in *Mann* v. *Lynchburg,* 129 Va. 453, 106 S. E. 371, the General Assembly, in 1922, amended what is now Section 65-4 of the Act as it related to municipal corpora-

(2d) 511, 62 Arizona 398; *Ruckgaber* v. *Clark,* 131 Conn. 341, 39 A. (2d) 881; and *Simmons National Bank* v. *Brown,* 210 Ark. 311, 195 S. W. (2d) 539."

The pistol which caused Johnson's death was owned by the City of Richmond and in the possession of a fellow deputy by virtue of long established custom. It is reasonable to infer that the pistols used in the office of the High Constable would require cleaning from time to time to insure their proper operation when needed. The very presence of these pistols on the persons of the High Constable and his deputies effectively increased the hazard of the employment and exposed Johnson to a risk not shared by the public at large. We therefore conclude that the Deputy High Constable met his death as the result of an accident arising out of his employment.

For the reasons stated the award of May 22, 1959, is hereby Affirmed.

page 75 }

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NOTICE OF AWARD.

Date September 15, 1959.

You are hereby notified that a Review was held in the above styled claim before the full Commission at Richmond, Virginia, on July 6, 1959, and a decision rendered September 15, 1959, by Crenshaw, Chairman, finding that the Deputy High Constable met his death as the result of an accident arising out of his employment and affirming the award of May 22, 1959.

INDUSTRIAL COMMISSION OF
VIRGINIA
/s/ J. G. CRENSHAW
Chairman.

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A Copy—Teste:

H. G. TURNER, Clerk.

employer's place of business for the purpose of making a telephone call. After a comprehensive review of relevant case law, the Commission arrived at the conclusion that Pittman met his death as a result of an accident "arising out of" his employment, Commissioner Nickels dissenting. Although the facts here presented make out a much stronger case for compensation than did those presented in the *Steinhilber* and *Pittman* cases, *supra*, the principles there set out by the Commission are equally applicable. For this reason we quote briefly from the opinion in the Pittman case as follows:

"Frequently quoted in our decisions has been the early (1913) *McNicol's Case,* 215 Mass. 497, 102 N. E. 697, L. R. A. 1916 A, 306, wherein Chief Justice Bugg undertook to define the troublesome phrase 'arising out of.' The instant case, when tried by the test in the *McNicol's Case,* is compensable. However, the *McNicol's Case* has, in effect, been partially repudiated by the Massachusetts court itself in *Caswell's Case* (1940), 305 Mass. 500, 26 N. E. (2d) 328, 330, where the court gave effect to the more modern and liberal view and said:

" 'An injury arises out of the employment if it arises out of the nature, conditions, obligations or incidents of the employment; in other words, out of the employment looked at in any of its aspects.'

"The Massachusetts court cites the case of *Thom* v. *Sinclair,* A. C. 127, 142, 143, Ann. Cas. 1917D, 188, which case was cited with approval by our court in the case of *Scott County School Board* v. *Mary Ava Carter, Elizabeth Carter, Claimant,* 156 Va. 815, 822, and there Mr. Justice Browning quoted at length from Viscount Haldane's opinion.

"6 *Schneider* 18, discusses the subsequent development and broadening of the view since the *McNicol's Case* was decided and states:

" 'But the more adaptable rule is that an injury may be said to arise out of the employment when it arises out of the nature, condition, obligation, or incident of the em-
page 74 } ployment, and it is enough if there be a causal connection between the injury and the business, a connection substantially contributory though it need not be the sole or proximate cause."

"The doctrine laid down in *Caswell's Case* has been approved and adopted in many jurisdictions. See *Dravo Corporation* v. *Strosneider,* 45 A. (2d) 542 (Del.); *Spencer* v. *Chesapeake Paper Board Co.,* 47 A. (2d) 385 (Md.); *Smith* v. *University of Idaho, et als.,* 170 P. (2d) 404 (Idaho); *Goodyear Aircraft Corporation* v. *Industrial Commission,* 158 P.

INDEX TO RECORD

	Page
Appeal Awarded	1
Record	2
Answer of City of Richmond	2
Proceedings	2, 16
Witnesses:	
Lt. Floyd S. Wakefield	9
Sheriff James H. Young	12
H. Calvin Farmer, High Constable	14
Opinion	22
Award—May 22, 1959	26
Opinion on Review	27
Award—September 15, 1959	34