

OPINIONS  
OF THE  
ATTORNEY GENERAL  
AND  
REPORT  
TO THE  
GOVERNOR OF VIRGINIA

*From July 1948, to June, 30, 1949*

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RICHMOND:  
DIVISION OF PURCHASING AND PRINTING  
1949



## LETTER OF TRANSMITTAL

September 26, 1949

HONORABLE WILLIAM M. TUCK,  
Governor of Virginia,  
Richmond, Virginia.

My dear Governor Tuck:

In accordance with the provisions of section 374a of the Code of Virginia, I herewith transmit to you my annual report.

Pursuant to the statute, I have included in my report such official opinions rendered by me as would seem to be of general interest or helpful in promoting uniformity in the construction of the laws of the State, together with the required statement of cases now pending and cases disposed of since the time of my last report.

Respectfully submitted,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

## PERSONNEL OF THE OFFICE

(Postoffice address, Richmond)

Name	County	Official Title
J. Lindsay Almond, Jr.	Roanoke City	Attorney General
Kenneth C. Patty	Tazewell	Assistant
G. Stanley Clarke	Henrico	Assistant
D. Gardiner Tyler, Jr.	Charles City	Assistant
Walter E. Rogers	Richmond City	Assistant
C. Champion Bowles	Goochland	Assistant
Ernest Ballard Baker	Richmond City	Assistant
Henry T. Wickham	Richmond City	Assistant
H. T. Williams, Jr.	Richmond City	Special Assistant
Louise W. Poore	Richmond City	Secretary
Pearl K. Bain	Roanoke City	Secretary
Eleanor W. Tilley	Smyth	Secretary
Mabel G. Hurt	Tazewell	Secretary
Helen M. Owen	Richmond City	Secretary

## ATTORNEYS GENERAL OF VIRGINIA

From 1776 to 1949

Edmund Randolph .....	1776-1786
James Innes .....	1786-1796
Robert Brooke .....	1796-1799
Philip Norborne Nicholas .....	1799-1819
James Robertson .....	1819-1834
Sidney S. Baxter .....	1834-1852
Willis P. Bocock .....	1852-1857
John Randolph Tucker .....	1857-1865
Thomas Russell Bowden .....	1865-1869
Charles Whittlesey (military appointee) .....	1869-1870
James C. Taylor .....	1870-1874
Raleigh T. Daniel .....	1874-1877
James G. Field .....	1877-1882
Frank S. Blair .....	1882-1886
Rufus A. Ayres .....	1886-1890
R. Taylor Scott .....	1890-1897
R. Carter Scott .....	1897-1898
A. J. Montague .....	1898-1902
William A. Anderson .....	1902-1910
Samuel W. Williams .....	1910-1914
John Garland Pollard .....	1914-1918
*J. D. Hanks, Jr. ....	1918-1918
John R. Saunders .....	1918-1934
**Abram P. Staples .....	1934-1947
***Harvey B. Apperson .....	1947-1948
****J. Lindsay Almond, Jr. ....	1948-

\*Hon. J. D. Hank, Jr., was appointed Attorney General on January 5, 1918, to fill the unexpired term of Hon. John Garland Pollard and served until February 1, 1918.

\*\*Hon. Abram P. Staples was appointed Attorney General on March 22, 1934, to fill the unexpired term of Hon. Jno. R. Saunders and served until October 6, 1947.

\*\*\*Hon. Harvey B. Apperson was appointed Attorney General on October 7, 1947 to fill the unexpired term of Hon. Abram P. Staples and served until his death on January 31, 1948.

\*\*\*\*Hon. J. Lindsay Almond, Jr., was elected Attorney General by the General Assembly on February 11, 1948, to fill the unexpired term of Hon. Harvey B. Apperson.



## CASES PENDING BEFORE THE SUPREME COURT OF APPEALS

1. *Grubb, Grover v. Commonwealth*. From Circuit Court of Wythe County. Voluntary manslaughter.
2. *Hevener, Jacob, Jr. v. Commonwealth*. From Corporation Court of City of Staunton. Second degree murder.
3. *Lee, Norvell, v. Commonwealth*. From Circuit Court of Alleghany County. Violation of section 3983 of Code of Virginia. Failure of person to take seat assigned to him on train.
4. *Menefee, Henry A. v. Commonwealth*. From Circuit Court of Pittsylvania County. Robbery.
5. *McClain, Louis v. Commonwealth*. From Circuit Court of Augusta County. Statutory Rape.
6. *Williams, James v. Commonwealth*. From Corporation Court of City of Norfolk. Involuntary manslaughter.
7. *Willis, James Edward v. Commonwealth*. From Hustings Court of the City of Roanoke. Appeal from the action of the Motor Vehicle Commissioner in revoking operator's license of plaintiff.
8. *Zirkle, J. Arnold v. Commonwealth*. From Circuit Court of Nelson County. Involuntary manslaughter.

## CASES DECIDED IN THE SUPREME COURT OF APPEALS OF VIRGINIA

1. *Almond, J. Lindsay, Jr., v. Henry G. Gilmer*. On petition for a writ of mandamus. Constitutionality of Section 18 of the Virginia Retirement Act. Mandamus denied.
2. *Almond, J. Lindsay, Jr., v. Henry G. Gilmer*. On petition for a writ of mandamus. Constitutionality of "State Revenue Bond Act". Mandamus awarded.
3. *Bryant, Wilbur and Leonard v. Commonwealth*. From Circuit Court of Buckingham County. Unlawful wounding. Affirmed.
4. *Builer, James T. v. Commonwealth*. From Circuit Court of Mecklenburg County. Suspension of license to drive automobile. Reversed and remanded.
5. *Carson, Walter J. v. Commonwealth*. From Corporation Court City of Bristol. Second degree murder. Reversed and remanded.
6. *Coffman, Iva Rodeffer Davis v. Commonwealth*. From Circuit Court of Rockingham County. Abortion. Affirmed.
7. *Commonwealth of Virginia, ex rel. v. Lewis McGuire, Guardian, etc.* From Industrial Commission of Virginia. Interpretation of Section 40 of Workmen's Compensation Act. Affirmed.
8. *Cleek, Katherine v. Commonwealth*. From Circuit Court of Lee County. Forfeiture of automobile. Reversed and final judgment.
9. *Coffey, Edwell D. v. Commonwealth*. From Circuit Court of Rockbridge County. Involuntary manslaughter. Affirmed.
10. *Cox, Edward P., Jr. v. Commonwealth*. From Corporation Court City of Norfolk. Violation of A. B. C. Act. Confessed error.
11. *Dean, Lawrence and Floyd Shiflett v. Commonwealth*. From Circuit Court of Rockingham County. Malicious wounding. Reversed and remanded.
12. *Danville, City of, et als. v. James A. Anderson, State Highway Commissioner*. From Circuit Court of Pittsylvania County. Relocation of road. Reversed and remanded.
13. *Fuller, Guy H. v. Commonwealth*. From Circuit Court of Arlington County. Seduction. Writ dismissed.
14. *Foster, E. C., Owner, etc. v. Commonwealth*. From Circuit Court of Mecklenburg County. Illegal transportation of alcoholic beverages. Confessed error.

15. *Hall, Dan Leroy v. Commonwealth.* From Hustings Court City of Richmond. Violation of Section 4480-a of Code. Door to door distribution of religious literature. Affirmed.
16. *Haughton, J. R., et als. v. Chas. M. Lankford, Commissioner of Fisheries.* From Circuit Court City of Richmond. Oyster law. Affirmed.
17. *Johnson, Julius v. Commonwealth.* From Circuit Court of Buchanan County. Second degree murder. Affirmed.
18. *Lee, Robert Edward v. Commonwealth.* From Circuit Court of King William County. Voluntary manslaughter. Reversed and remanded.
19. *McMillan, Christopher Columbus v. Commonwealth.* From Corporation Court City of Bristol. Pandering. Affirmed.
20. *McMinn, et als. v. J. A. Anderson, et als.* From Circuit Court of Lancaster County. Relocation of highway. Affirmed.
21. *Penn, John Henry v. W. Frank Smyth, Jr. Supt. Virginia State Penitentiary.* From Hustings Court City of Richmond, Part II. Habeas corpus. Affirmed.
22. *Parris, Joe v. Commonwealth.* From Circuit Court of Washington County. Seduction. Reversed and remanded.
23. *Rice, Spurgeon S. et als. v. Commonwealth.* From Circuit Court of Nottoway County. Compulsory school attendance. Affirmed.
24. *Robinson, Reginal, etc. v. Edgar L. Winstead, etc.* From Hustings Court City of Roanoke. Habeas corpus. Reversed and final judgment.
25. *Spangler, Fred M. v. Commonwealth.* From Circuit Court of Botetourt County. Seduction. Reversed and dismissed.
26. *Smyth, W. Frank, Jr. v. Charles M. Godwin.* From Hustings Court City of Richmond, Part II. Habeas corpus. Reversed and final judgment.
27. *Sinclair Refining Company, et al. v. Unemployment Compensation Commission.* From Circuit Court City of Richmond. Question as to whether or not the wholesale distributors of Sinclair Oil Company are employees of the Company within the definition of employment as used in the Unemployment Compensation Act. Affirmed.
28. *Teasley, Junius v. Commonwealth.* From Circuit Court of Hanover County. Burglary. Affirmed.
29. *Toler, Charles, Jr. v. Commonwealth.* From Corporation Court of Lynchburg. Petit larceny. Affirmed.
30. *Travelers Health Association v. Commonwealth.* From State Corporation Commission. Virginia securities law. Affirmed.
31. *Winston, Francis Allen v. Commonwealth.* From Circuit Court of Charlotte County. Operating motor vehicle while intoxicated. Reversed and dismissed.
32. *Williams, Raymond v. Commonwealth.* From Circuit Court of Surry County. Housebreaking and larceny. Affirmed.
33. *Whitt, Crowder P. v. Commonwealth.* From Circuit Court of Halifax County. Driving motor vehicle after operator's license revoked. Reversed and dismissed.
34. *Waltrip, R. E. v. Commonwealth.* From Circuit Court of York County. Unlawfully killing a rabbit at Camp Peary. (Jurisdiction). Affirmed.

#### CASES PENDING IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

1. *Martin, Maceo Conrad v. Department of Conservation and Development.* Civil Action No. 823. Alleged racial discrimination as to parks. Pending.

#### CASES DECIDED IN THE UNITED STATES CIRCUIT COURT OF APPEALS—FOURTH CIRCUIT

1. *Haughey, James P. v. W. Frank Smyth, Jr., Supt. of Virginia State Penitentiary.* Habeas Corpus. Petitioner remanded. Writ dismissed.

## CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES

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1. *Travelers Health Association and R. E. Pratt, etc. v. Commonwealth of Virginia, etc.* On petition for appeal to the Supreme Court of Appeals of Virginia. Validity of certain provisions of Virginia Securities Law.

## CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES

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1. *Godwin, Charles v. W. Frank Smyth, Jr., Supt. of Virginia State Penitentiary.* On petition for writ of certiorari to the Supreme Court of Appeals of Virginia. Habeas Corpus. Writ denied June 20, 1949.
2. *Hall, Dan Leroy v. Commonwealth of Virginia.* On petition for appeal to the Supreme Court of Appeals of Virginia. Trespass. Writ denied January 17, 1949.

## CASES PENDING OR TRIED IN THE CIRCUIT, LAW AND EQUITY, CHANCERY AND CORPORATION COURTS OF THE STATE

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1. *Avery, Daisy Lester v. Wm. A. Wright, Director, etc.* Law and Equity Court of City of Richmond, Part II. Lease of building in R. E. Lee Camp Memorial Park to Virginia Institute of Scientific Research. Commonwealth's demurrer sustained.
2. *Boone, James O. v. Standard Accident Insurance Company and C. F. Joyner, Jr., Commissioner, Division of Motor Vehicles.* Circuit Court for the County or Roanoke. Pending.
3. *Bova, C. C. t/a C. C. Bova and Co. and F. S. Cooper v. C. F. Joyner, Jr., Commissioner of the Virginia Division of Motor Vehicles.* Hustings Court of City of Roanoke. Proceeding for declaratory judgment. Pending.
4. *Bruce-Flournoy Motor Co., v. Commonwealth.* Circuit Court of City of Norfolk. Application for exoneration of State license tax. Denied.
5. *Bullock, Robert v. W. Frank Smyth, Jr., Supt. of Virginia State Penitentiary.* Hustings Court of City of Richmond, Part II. Habeas Corpus. Petitioner remanded. Writ dismissed.
6. *Central Housing Corp., In re matter of.* Hustings Court City of Roanoke. Alleged erroneous assessment of taxes on intangible personal property. Pending.
7. *Cobb, W. W., t/a Cobb Frozen Food Locker Plant v. Commonwealth.* Circuit Court of Nansemond County. Storage license tax. Relief denied.
8. *Commonwealth v. Finnie Belle Barb, Executrix of the estate of Basil Kyle Barb, Deceased.* Circuit Court of City of Richmond. Motor Vehicle license tax, due under the provisions of section 35-aa of the Motor Vehicle Code. Judgment for Commonwealth.
9. 230 cases, similar to the one listed immediately above, were instituted in the Circuit Court of City of Richmond. In about 90% of these cases, the amounts due the Commonwealth have been paid; and in the remaining cases, either judgment has been rendered for the Commonwealth or the suits are still pending.
10. *Commonwealth v. R. R. Smith, an individual trading as Smith Transfer Company.* Circuit Court of City of Richmond. Proceeding for declaratory judgment motor vehicle license tax. Judgment for Commonwealth. Writ of error denied.
11. *Commonwealth v. H. A. McGuire, trading as Mac's Truck Center.* Circuit Court of City of Richmond. Judgment for Motor Fuel Tax. Commonwealth intervened as a party in suit of *A. W. Murden, et als v. H. A. McGuire, t/a Mac's Truck Center*, pending in the Circuit Court of Shenandoah County. Compromise settlement.

12. *Cooper, David M. and Rose v. Commonwealth.* Circuit Court of Warwick County. Income tax. Pending.
13. *Cooper, John Wesley v. W. Frank Smyth, Jr., Supt. of Virginia State Penitentiary.* Hustings Court of City of Richmond. Habeas Corpus. Petitioner remanded. Writ dismissed.
14. *Davis, J. W. and Alice G. v. Commonwealth.* Hustings Court of City of Roanoke. Alleged erroneous assessment of income taxes. Pending.
15. *Dempsey, George Hulon v. C. F. Joyner, Jr., Commissioner of the Division of Motor Vehicles.* Circuit Court of Chesterfield County. Suspension of license to drive automobile. Relief denied; Commissioner's order confirmed.
16. *Downing, Robert Henry v. C. F. Joyner, Jr., Commissioner, Division of Motor Vehicles.* Corporation Court of City of Charlottesville. Suspension of license to drive automobiles. Pending.
17. *Eanes, Hiawatha Wayne, v. Commonwealth of Virginia.* Circuit Court of Floyd County. Suspension of license to drive automobiles. Pending.
18. *Faw, Earl Bennie v. Commonwealth.* Circuit Court of Pulaski County. Suspension of license to drive automobiles. Relief denied.
19. *First National Bank of Alexandria, Trustee and Arlington Hall Junior College v. Commonwealth.* Corporation Court of City of Alexandria. Tax on intangible property. Pending.
20. *Fitzsimons, Whiteford R., In re Estate of.* Circuit Court of Arlington County. Application for relief from State inheritance tax. Pending.
21. *Frye, Clarence v. W. Frank Smyth, Jr., Supt. of Virginia State Penitentiary.* Hustings Court of City of Richmond, Part II. Habeas Corpus. Pending.
22. *Green, Paul Edwin v. C. F. Joyner, Jr., Commissioner of Motor Vehicles of Virginia.* Circuit Court for Fairfax County. Suspension of license to drive automobiles. Relief denied.
23. *Grubb, John Herbert v. Bituminous Casualty Corp. and C. F. Joyner, Jr., Commissioner of Motor Vehicles of Virginia.* Circuit Court of Botetourt County. Pending.
24. *Ham, Delmar Roscoe v. Commonwealth of Virginia.* Corporation Court of City of Newport News. Suspension of license to drive automobiles. Relief granted and Commissioner's order vacated.
25. *Hancock, Claude William v. C. F. Joyner, Jr., Commissioner, Division of Motor Vehicles.* Circuit Court of Roanoke County. Suspension of license to drive automobiles. Pending.
26. *Hayes, Robert E. v. Commonwealth.* Circuit Court of Wise County. Petitioner complied with requirements and action was withdrawn.
27. *Hogge, Melson Vernon v. Commonwealth.* Circuit Court for the County of Elizabeth City. Suspension of license to drive automobiles. Relief denied.
28. *Irby, Herman W. v. W. Frank Smyth, Jr., Supt. of Virginia State Penitentiary.* Hustings Court of City of Richmond. Habeas Corpus. Petitioner remanded. Writ dismissed.
29. *Jones, Welton v. C. F. Joyner, Jr., Commissioner of the Division of Motor Vehicles of Virginia.* Hustings Court of the City of Richmond. Suspension of license to drive automobiles. Proceedings withdrawn.
30. *Kirk, William v. Brantner Sraver and C. F. Joyner, Jr., Commissioner of Motor Vehicles.* Circuit Court of Nansemond County. Attachment of funds deposited under Safety Responsibility Act. Settled.
31. *Macalester, Charles, In re Estate of.* Circuit Court of Wythe County. Alleged erroneous assessment of State inheritance tax. Pending.
32. *Major, Leo John v. W. Frank Smyth, Jr., Supt. of Virginia State Penitentiary.* Hustings Court of City of Petersburg. Habeas Corpus. Pending.
33. *Martin, William C. v. Commonwealth.* Circuit Court of Henrico County. Suspension of license to drive automobiles. Pending.
34. *Miller Manual Labor School of Albemarle County v. J. L. Almond, Jr., Attorney General.* Circuit Court of City of Richmond. Administration of charitable trust fund. Authority granted to the Miller School to accept boarding students.

35. *Moore, Willard v. Commonwealth*. Circuit Court of Dickenson County. Alleged erroneous assessment of State income tax. Relief denied.
36. *Myers, Victor Jackson, v. Commonwealth*. Trial Justice Court of Rockingham County. Suspension of license to drive automobiles. Relief granted.
37. *Nelson, H. F. v. C. F. Joyner, Jr., Commissioner of Motor Vehicles of Virginia*. Action to avoid payment of penalty under the provisions of section 2154(217) of the 1948 supplement of the Virginia Code of 1942. Circuit Court of City of Richmond. Pending.
38. *Norvell, John N., Adm. of Marie Louise Kerr v. Commonwealth, et als.* Chancery Court of City of Richmond. Recovery by State of property derelict. Decree in favor of Commonwealth.
39. *Nutter, John Ennis v. Commonwealth*. Circuit Court of Montgomery County. Suspension of license to drive automobiles. Relief denied.
40. *Parsons, George M. v. Commonwealth*. Circuit Court of Lee County. Appeal from action of Motor Vehicle Commissioner in refusing to renew operator's license. Judgment for Plaintiff.
41. *Peters, James Edison v. Commonwealth*. Circuit Court of Floyd County. Suspension of license to drive automobiles. Pending.
42. *Povich, Stephen v. W. Frank Smyth, Jr., Supt. of Virginia State Penitentiary*. Hustings Court of City of Richmond, Part II. Habeas Corpus. Pending.
43. *Roane, Elvira v. Commissioner of Public Welfare*. Circuit Court of City of Richmond. License to operate children's home. Denied. Appeal to Supreme Court of Appeals denied.
44. *Robinson, Oliver v. W. Frank Smyth, Jr., Supt. of Virginia State Penitentiary*. Hustings Court of City of Richmond. Habeas Corpus. Petitioner remanded. Writ dismissed.
45. *Secrist, David Roland v. C. F. Joyner, Jr., Commissioner of Motor Vehicles, et al.* Hustings Court of the City of Roanoke. Suit to declare Commissioner's revocation order null and void. Judgment for plaintiff.
46. *Shelhorse, J. C. v. W. Frank Smyth, Jr., Supt. of Virginia State Penitentiary*. Hustings Court of City of Richmond, Part II. Habeas Corpus. Petitioner remanded. Writ dismissed.
47. *Short, Edgar v. W. Frank Smyth, Jr., Supt. of Virginia State Penitentiary*. Hustings Court of City of Richmond, Part II. Habeas Corpus. Petitioner remanded. Writ dismissed.
48. *Smith, McCalvin and Milton v. Commonwealth*. Circuit Court of Mecklenburg County. Mandatory suspension of license to drive automobiles. Petitioner met requirements of law and license was reinstated. Action withdrawn.
49. *State-Planters Bank and Trust Co., Ex'ors, Virginia F. Beveridge v. Thompson*. Chancery Court of City of Richmond. Applicability of Section 5440-b of the Code to estates of decedents who died on or prior to June 19, 1946. Held not applicable.
50. *Stearn, Richard Lee v. Commonwealth*. Trial Justice Court of Rockingham County. Suspension of license to drive automobiles. Relief granted.
51. *Thomas, A. E. and D. D., t/a Thomas Brothers Wholesale Produce v. C. F. Joyner, Jr., Commissioner of the Division of Motor Vehicles of Virginia*. Hustings Court for City of Roanoke. Proceeding for declaratory judgment. Pending.
52. *Thomas, Paul Munsey v. W. Frank Smyth, Jr., Supt. of Virginia State Penitentiary*. Hustings Court of City of Richmond, Part II. Habeas Corpus. Pending.
53. *U-Drive-It Company of Virginia, Incorporated v. C. F. Joyner, Jr., Commissioner of the Division of Motor Vehicles of Virginia*. Circuit Court of the City of Richmond. Petition for declaratory judgment under section 2154(82a1) of the Code of Virginia. Judgment for Commonwealth. Appeal filed with Supreme Court of Appeals.

54. \* *Unemployment Compensation Commission of Virginia v. John Robert Alabough*. Circuit Court for the City of Richmond. Proceedings to collect unemployment taxes.
- \* 58 other similar actions were instituted in the Circuit Court of Richmond.
55. *Virginia Home for Incurables, Medical College of Virginia, et als. v. Fitch Ingalls' Estate*. Circuit Court of Henrico County. Construction of will. Interest of Medical College in the estate of Fitch Ingalls established.
56. *Washington, William v. W. Frank Smyth, Jr., Supt. of Virginia State Penitentiary*. Corporation Court of City of Newport News. Habeas Corpus. Pending.
57. *White, Edward Raleigh v. Commonwealth*. Circuit Court for Elizabeth City County. Suspension of license to drive automobiles. Relief denied.
58. *Williams, Landon v. Commonwealth*. Circuit Court of Alleghany County. Suspension of license to drive automobiles. Pending.
59. *Winston, Francis Allen v. Commonwealth*. Circuit Court of Mecklenburg County. Suspension of license to drive automobiles. Pending.
60. *Wyatt, Kaiser v. W. Frank Smyth, Jr., Supt. of Virginia State Penitentiary*. Circuit Court of Loudoun County. Habeas Corpus. Pending.
61. *Yaeger, C. F. v. W. Frank Smyth, Jr., Supt. of Virginia State Penitentiary*. Corporation Court of City of Norfolk, Part II. Habeas Corpus. Petitioner remanded. Writ dismissed.

# OPINIONS

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## AGRICULTURAL AND IMMIGRATION—Poultry; control of Importers. F-5

March 10, 1949.

DR. W. L. BENDIX,  
Division of Animal Industry,  
Department of Agriculture and Immigration,  
Richmond 19, Virginia.

My dear Dr. Bendix:

This is in reply to your letter of February 28, relative to the shipping into the State of exposed and diseased poultry by unlicensed persons.

You state that the Department of Agriculture has promulgated a regulation under the authority of Section 911 of the Code which requires out-of-state shippers to furnish the Division of Animal Industry with certain information concerning the poultry so shipped and, in turn, receive an approval number which must appear on each label on each package containing poultry or hatching eggs shipped into the State.

My opinion is desired as to the Department's authority to control this interstate movement with respect to the following:

- "1. Out of state shippers (hatcheries dealers or the agents) who have not and will not qualify under our regulation.
- "2. Carriers including trucks, express and parcel post who transport poultry into the State in violation of our regulation.
- "3. Persons, firms or corporations within Virginia acting as agents for out of state shippers who receive orders for transmittal.
- "4. Bonafide purchasers in Virginia who receive poultry in violation of our regulations."

The pertinent part of Section 911 of the Code provides that when the Department of Agriculture or the State Veterinarian shall have good reason to believe that the importation of poultry from localities outside of the State shall be a menace to the health of the poultry of the State a regulation may be promulgated to prohibit the importation of such poultry.

Section 912 provides, among other things, that one "who imports an animal or poultry in violation of any legally adopted quarantine or other rule or regulation" of the Department shall be guilty of a misdemeanor.

Therefore, it is my opinion that the only authority the Department of Agriculture has, under the above sections, to control the shipment of poultry into Virginia is to proceed against the importer of such poultry, who, as a practical matter, would usually be the bonafide purchaser or buyer.

Of course, if an agent of the out-of-state shipper not only receives orders from the prospective buyer, but also receives the shipments, directly from the out-of-state shipper, he would be an importer within the meaning of Section 912 of the Code and, consequently, be subject to prosecution in violation of any legally adopted regulation of the Department.

Very sincerely yours,

J. LINDSAY ALMOND, JR.,  
*Attorney General.*

**ALCOHOLIC BEVERAGE CONTROL ACT—Cities, Town and Counties cannot tax Alcoholic Beverages. F-210**

January 6th, 1949.

HONORABLE JOHN M. HART,  
Commissioner of Revenue,  
Roanoke, Virginia.

Dear Judge Hart:

I am in receipt of your inquiry of Jan. 5th, 1949, enclosing copy of an ordinance under consideration by the Council of the City of Roanoke. You request my opinion as the validity of this ordinance. The City Solicitor joins you in this request.

The ordinance under consideration, if enacted and valid, would levy an excise tax "on each and every purchaser of beer and wine within the City of Roanoke" to be collected by the retailer from the purchaser at the time of sale and remitted as provided therein.

By virtue of section 27 of the Alcoholic Beverage Control Act, a State excise tax is levied on all beer manufactured, and all beer bottled and sold in Virginia. The Legislature has not seen fit to confer this privilege upon the political subdivisions of the Commonwealth.

While it is true that this section contains no express inhibition against a municipality levying such a tax, yet authority to do so would have to be found in relevant legislative enactment or charter provision. A municipality possesses no such inherent power.

Section 4675(65) of the Alcoholic Beverage Control Act, is as follows:

"No county, city or town shall, except as otherwise provided in section twenty-six of this act providing for the issuance of local licenses, pass or adopt ordinance or resolution regulating or prohibiting the manufacture, bottling, possession, sale, distribution, handling, transportation, drinking, use, advertising or dispensing of alcoholic beverages in Virginia."

Section 26 of this Act authorizes the governing body of each city and town in the State to provide for the issuance of city and town licenses and to collect license taxes from persons licensed by the Alcoholic Beverage Control Board. The Legislature was careful, however, to classify such licensees and to prescribe a maximum limitation upon the amount of license tax which might be charged and collected.

This is a clear manifestation of legislative policy, that in assuming complete governmental control of alcoholic beverages the State has pre-empted the entire domain and has yielded to the political subdivisions only specific grants of authority relative to any phase of taxation.

The language of section 65 clearly indicates a legislative intent to limit the political subdivisions of the State in the field of Alcoholic Beverage Taxation to the imposition of a license tax circumscribed by the restriction established by section 26.

This specific grant of authority designating and meticulously controlling a particular tax is in effect a denial of the right of a county, city, or town to levy an excise tax such as embraced by the proposed ordinance. Section 26 delegates the only subject and provides the only method whereby the locality can legally impose a tax on alcoholic beverages.

I can find no legislative enactment or charter provision, upon which to sustain the tax in question.

I am of the opinion that the proposed ordinance, if enacted, would be invalid.

Sincerely yours,

J. LINDSAY ALMOND, JR.  
*Attorney General.*



**ALCOHOLIC BEVERAGE CONTROL ACT—What constitutes illegal transportation—Forfeiture of vehicle mandatory. F-210a**

May 10, 1949.

HONORABLE W. CARRINGTON THOMPSON,  
Commonwealth's Attorney for Pittsylvania County,  
Chatham, Virginia.

My dear Mr. Thompson:

This is in reply to your letter of April 22, in which you request my opinion upon the proper interpretation of that portion of Section 38-a of the Alcoholic Beverage Control Act, which reads as follows:

" \* \* \* if such illegally acquired alcoholic beverages or alcoholic beverages being illegally transported in amounts in excess of one quart be found therein, he shall seize the same, and shall also seize and take possession of such conveyance or vehicle \* \* \* ."

I agree with you that a literal reading of this language would subject to forfeiture a vehicle in which illegally acquired alcoholic beverages are found, whether the vehicle was being used for the transportation of the beverages or not. However, the title to this section reads as follows:

"Search of Vehicles in Which Illegally Acquired Alcoholic Beverages Are Being Transported; or in Which Alcoholic Beverages Are Being Illegally Transported; Vehicles to be Seized and Forfeited; Proceedings; Disposition of Alcoholic Beverages; Arrests.-" (See Acts of Assembly 1936, p. 429. Italics supplied).

The purpose of this section was to combat the evil of "bootlegging" by requiring the forfeiture of vehicles used in the illegal transportation of whiskey. In view of this purpose and the language used in the title of the section, it is my opinion that the element of transportation, either of alcoholic beverages illegally acquired or of alcoholic beverages being illegally transported, must be involved before the vehicle is subject to forfeiture. In this connection see *Patterson v. Commonwealth*, 87 Va. 913. As to what constitutes transportation, see, in addition to the above case, *One Chrysler Roadster v. Commonwealth*, 152, Va. 508, and *Seay v. Commonwealth*, 152 Va 982.

In my opinion the language "in amounts in excess of one quart" refers to illegally acquired alcoholic beverages as well as to alcoholic beverages being illegally transported. I am informed that the provision regarding one quart was placed in the legislation so as not to require a forfeiture when a very small quantity of "moonshine" is found, as there would be little likelihood of "bootlegging" activities being present in such a case. This construction is in accord with that placed upon the statute by officers of the Alcoholic Beverage Control Board.

With respect to the transportation of legally acquired alcoholic beverages, it is my opinion that the vehicle is subject to forfeiture whenever more than one gallon is being transported without a permit. You suggest that it is necessary to transport over ten pints of such beverages before the vehicle is subject to forfeiture on the ground that, since the transportation is not illegal unless in excess of a gallon, the illegal transportation does not involve amounts in excess of one quart until at least ten pints are involved. However, Section 49-a does not declare the first gallon to be legal, but declares that transportation in quantities in excess of one gallon is illegal. Therefore, when the amount exceeds one gallon the whole transportation is illegal and under Section 38-a the entire lot of whiskey would be subject to forfeiture. Since the vehicle is subject to forfeiture when alcoholic beverages in amounts in excess of one quart are being transported, transportation of any amount in excess of one gallon (which by

Section 49-a is made illegal) would subject the vehicle to forfeiture. I call your attention to Section 49-c, where under certain circumstances transportation of any amounts in taxicabs is rendered illegal. Transportation in excess of one quart would render such a vehicle liable to forfeiture. This is a further indication that the amount referred to in Section 38-a is a total amount of only one quart and not a quart in excess of the gallon mentioned in Section 49-a (though under this last section it must be one gallon before being illegal). If the Legislature had intended to allow the transportation of one quart in addition to the one gallon mentioned in Section 49-a before requiring the forfeiture of the vehicle, the language used in Section 38-a would have been "in excess of ten pints." The fact that the language "in excess of one quart" was used is but an indication that this language also refers to illegally acquired beverages.

You also ask whether the court is vested with any discretion in requiring the vehicle to be forfeited where the violation is admitted, but the defendant pleads ignorance of the law and shows that he is not a bootlegger, but, on the contrary, has an excellent reputation as a law-abiding citizen and in general is a person of good character.

As you point out, paragraph (j) of this section provides that, if it shall be determined that the owner of the vehicle was himself using the same at the time of seizure, and that the illegal use was with his knowledge and consent, the property *shall* be completely forfeited to the Commonwealth. I agree with you that this provision is mandatory and that under the circumstances specified the statute does not provide for the exercise of judicial discretion.

Very sincerely yours,

J. LINDSAY ALMOND, JR.,  
*Attorney General.*

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**AUDITOR OF PUBLIC ACCOUNTS—Has Responsibility to Audit Funds in Hands of Local Welfare Department, placed there by Juvenile and Domestic Relations Courts for Distribution. F-383**

**JUVENILE AND DOMESTIC RELATIONS COURTS—Local Welfare Department may act as Agent of Court To Distribute Funds. F-383**

August 20, 1948

HONORABLE J. GORDON BENNETT,  
Auditor of Public Accounts,  
Richmond 10, Virginia.

My dear Mr. Bennett:

This is in reply to your letter of August 18, in which you state that in some of the larger counties trial justice courts, acting in their capacity as juvenile and domestic relations courts, have appointed the local department of welfare to receive monies ordered to be paid by defendants in non-support cases and to pay these funds over to persons whom the courts designate to receive them. You ask whether, when these funds are handled by the local department of welfare as agent for the courts, the same should be audited in the course of your regular audits of the trial justice courts, just as is done when the funds are received by the courts themselves or one of their regular probation officers.

Section 1902-n of the Code (§§63-72 of the reorganization provisions of the Code of 1948) provides that it shall be the duty of local boards of public welfare to co-operate with the juvenile and domestic relations courts. Section 1939 of the Code, contained in Chapter 80 which deals with desertion and non-support, provides that in non-support cases the court may direct the defendant to pay

support money to the wife or guardian of the children either directly or through the court itself or a probation officer thereof.

In view of the provisions of section 1902-n requiring local boards to co-operate with the juvenile courts, it is my opinion that they act in the nature of a probation officer of the court when designated by it to receive payments of support money. Since the funds are received by public officials in accordance with statutory provisions imposing such duties upon them, it is my opinion that the accounts should be audited by you as a part of your regular audit of the trial justice courts, just as is done when the money is paid directly to the court and administered by it.

Very sincerely yours,

J. LINDSAY ALMOND, JR.,  
*Attorney General.*

**BAIL AND RECOGNIZANCES—Cash Bail May Be Used To Pay Fine.**  
**F-27**

June 6, 1949.

HONORABLE E. E. FRIEND, Clerk  
Circuit Court of Pittsylvania County,  
Chatham, Virginia.

My dear Mr. Friend:

This is in reply to your letter of May 28, from which I quote as follows:

"A is arrested for petty larceny and is unable to give a recognizance with surety for bail. However he procures B to deposit the sum of \$250.00 in cash for him, this being exclusively the property of B. A is convicted by the Trial Justice and appeals to the Circuit and the cash bond is delivered by the Trial Justice Clerk to the Clerk of the Circuit Court. On appeal A is convicted in the Circuit Court and ordered to pay a fine of \$100.00. Can the Clerk of the Circuit Court take the fine and costs out of the cash bond which has been deposited or can B demand that the cash bond be returned to him since it was his property in toto and A appeared in court at the proper time as he was supposed to."

As pointed out by you, §4973a of Michie's Code of 1942 is the applicable section. That section provides that a person charged with a criminal offense may " \* \* \* instead of entering into a recognizance with surety, give his person recognizance and deposit, or cause to be deposited for him, in cash, the amount of bail he is required to furnish \* \* \*."

Clearly under the above, the cash bail can be furnished either by the defendant or some other person. As to the disposition of this bail money, §4973a continues as follows:

"If there be no default in the observance of the conditions of the recognizance, or if there be default and it be a case which may be tried in the absence of the defendant and he is so tried, and if, upon the trial of the case, the defendant be found not guilty, the money so deposited shall be refunded to him, or upon his order, *but if he be found guilty, the court or justice trying the case shall apply the said money, or so much thereof as may be necessary, to the payment of such fines and costs, or costs, as may be adjudged against the said defendant, and the residue thereof, if any shall be paid over to the defendant, or upon his order; \* \* \**" (Emphasis added)

The "said money" mentioned above has clear reference to the cash bail which may be supplied by the defendant or some other person for him. The statute does not make any distinction in the disposition of this cash bail based upon whether it be furnished by the defendant or some other person.

It is my opinion that once this cash bail is supplied, regardless of by whom it may be advanced, it may be used for the payment of fine and costs if the defendant be found guilty.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, JR.,  
*Attorney General.*

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**BAIL AND RECOGNIZANCE—Forfeited Recognizance; Time to Docket.  
F-171**

November 23, 1948.

HONORABLE JENNINGS L. LOONEY, Clerk,  
Circuit Court of Buchanan County,  
Grundy, Virginia.

My dear Mr. Looney:

This is in reply to your letter of November 10, in which you request my opinion as to whether you should docket a forfeited recognizance in the judgment lien docket at the time the recognizance is forfeited or whether you should wait until after the scire facias has been served on the parties summoning them to appear in court to show cause why an execution should not be issued and the court passes on the scire facias.

Section 4978 of the Code provides in part as follows:

"When a person, under recognizance in a criminal case, either as party or witness, fails to perform the condition thereof, if it be to appear before a court of record, his default shall be recorded therein, and if it be to appear before a trial justice, his default shall be entered by such trial justice on the page of his docket, whereon the case is docketed, and he shall notify the attorney for the Commonwealth of the same. The process on any such forfeited recognizance shall be issued from the court before which the appearance was to be, and wherein such forfeiture was recorded or entered. Any such process issued by a trial justice, where the penalty of the recognizance so forfeited is in excess of one thousand dollars, shall be made returnable to the circuit court of his county, and where not in excess of one thousand dollars, it shall be made returnable before, and tried by, the said trial justice, who shall promptly transmit to the clerk of the circuit court of his county, an abstract of such judgment as he may render thereon, which shall be forthwith docketed by said clerk."

It is clear from the last clause of the above provision that, where the forfeited recognizance is for appearance before a trial justice and the process on the same is tried by that officer, the recognizance is not to be docketed in the judgment lien docket until judgment has been rendered on the scire facias. In my opinion the same thing is true of recognizance to appear before a court of record. The reference in the statute to the recording of the default at the time the party fails to perform the condition of the recognizance is to the entry of this fact of record in the order book and not the judgment lien docket.

Section 4980 provides that when, in an action or scire facias on a recognizance, the penalty is adjudged to be forfeited the court may remit the penalty or any part of it and *render judgment* on such terms and conditions as it deems

reasonable. Section 4981-a provides that "Whenever a *judgment* is entered \* \* \* upon a forfeited recognizance or bond, it shall be the duty of the clerk of the court in which said judgment is rendered to certify an abstract of the same to the clerk of the court wherein deeds are recorded", who shall thereupon enter the abstract of judgment upon his judgment lien docket.

Since the parties may have a legitimate excuse for the default upon the recognizance and the court, under Section 4980, may enter judgment on the scire facias for an amount less than the full penalty, it would seem that the matter should not be docketed upon the judgment lien docket until the court has passed upon the scire facias.

Very sincerely yours,

J. LINDSAY ALMOND, JR.  
*Attorney General.*

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**BOARD OF SUPERVISORS—Appropriations to private organizations prohibited.—F-13**

April 12, 1949.

HONORABLE J. GORDON BENNETT,  
State Auditor of Public Accounts,  
Richmond 10, Virginia.

Mr. dear Mr. Bennett:

This is in reply to your letter of April 7, in which you request my opinion upon two questions raised by the Honorable P. W. Ackiss, Commonwealth's Attorney of Princess Anne County, I quote in full the letter written you by Mr. Ackiss:

"The Board of Supervisors of Princess Anne County recently made two appropriations, one in the sum of \$500.00 for the benefit of the 4-H Clubs in Princess Anne County and another in the sum of \$600.00 for the Princess Anne Ruritan Softball League, pending an opinion from me as to whether the appropriations could be legally made. The appropriation for the 4-H Club is to be used in and about the construction of an additional building for the 4-H Club Camp. The 4-H Camp consists of fifteen acres leased from the Virginia Conservation Association and located in the Virginia Seashore State Park. The amount already spent on the camp is approximately \$15,000.00 and they have twenty-eight cottages equipped with beds and mattresses for sleeping purposes and one building 20 x 100' used for a kitchen and dining room, two bath houses and other utilities consisting of water and electric lights. This camp is used by all residents of Princess Anne County and particularly for 4-H Club work. At the present time there are more than three hundred 4-H Club members and these boys and girls are all given an opportunity to attend camp one week during the summer at which they are taught thrift, leadership, handicraft and sportsmanship making the camp practically an educational affair. The camp is also available to any groups in Princess Anne County for group meetings, picnics, etc. This camp is operated by gifts and donations by the various citizens. My question is whether or not this money can be expended by the Board of Supervisors under Section 2743 of the Code of Virginia, as being for the general welfare of the citizens of this county and if, in your opinion, it can be appropriated under the general welfare clause and is not prohibited by Article 185 of the Constitution of Virginia.

"The Princess Anne Ruritan Softball League is a soft ball league sponsored by the Princess Anne Ruritan Club. This league at the present time

is limited to sixteen teams, said teams coming from all sections of Princess Anne County. The contests between teams are being held at Creeds High School and on School Board property. They desire this appropriation for the purpose of building bleachers and supplying lighting equipment. They advise me that this expenditure would also come under the general welfare clause above referred to in that it would be for the purpose of promoting the health, safety and general welfare of the habitants of this county.

"Both of the above appropriations have sympathetic appeal, but I do not want to give an opinion that this money might be appropriated out of the general fund as promoting the health, safety and general welfare of the habitants of this county, and then have the Auditor of Public Accounts question its validity and legality of its expenditure and I do not know what the custom is in the other counties of the State with reference to these expenditures."

While Section 185 of the Constitution provides that neither the credit of the State, nor of any county, city or town, shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association or corporation, this does not, in my opinion, prohibit the respective governmental units from appropriating money to private organizations if specifically authorized to do so for the purpose of carrying out proper governmental functions. This provision was directed against the extending of credit by the government to private individuals and organizations or the pledging of the government's credit in support of their obligations. That direct appropriations made to promote the general welfare were not intended to be prohibited is illustrated by the fact that under Section 67 of the Constitution counties, cities and towns may be authorized to make appropriations to charitable institutions or associations.

The question of the authority to make direct appropriations to private organizations has arisen a number of times with varying results. The answer in each case depends upon whether the appropriation is made to carry out a function which the governing body is authorized to perform and, if so, whether it is authorized to make an outright appropriation or else retains control over the actual expenditure of the funds.

Under Section 2743 of the Code, Boards of Supervisors have authority to adopt such measures as they may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of their respective counties, not inconsistent with general law. This power is broad and I think it could be held that the functions being carried out by the 4-H Club and the Princess Anne Ruritan Club will tend to promote the general welfare of the county.

However, even though this be true, I do not think an outright appropriation may be made to the 4-H Club or the Ruritan Club. I call your attention to the following from 1 Quillen, Municipal Corporations, 2d Edition, at page 1046:

"Unless expressly authorized by charter or statute, a municipal corporation cannot, appropriate or give away the public moneys as pure donations to any person, corporation or private institution, not under the control of the city and having no connection with it. Appropriations for national guards, vote of money to purchase uniforms for an artillery company, or for sports and games, or a donation fund for the erection of a building for the use of the G. A. R. are examples."

While the above deals with municipal corporations, the principle is equally applicable to counties. That the welfare clause of Section 2743 does not, in itself, authorize an outright appropriation to a private organization not subject to the control of the county is indicated by the fact that specific legislative enactment has been deemed necessary and has been adopted to authorize such appropriations in particular instances, such as appropriations to charitable hos-

pitals, voluntary fire-fighting organizations, organizations building war memorials, and the like. See Sections 2743-g, 2743-h, 2742, 2743-l of Michie's 1948 Cumulative Supplement to the Code of Virginia.

It may be that the Board of Supervisors of Princess Anne County can accomplish the desired results by means other than a direct appropriation to the 4-H Club or the Ruritan Club. For instances, in the second question presented by Mr. Ackiss, the baseball games are played on county school property. There is, of course, no reason why the Board of Supervisors could not expend funds for the improvement of this county property so long as the title to the equipment is retained by the county. In the case of the first problem too, it may be that the county could work out an arrangement with the State Conservation Commission, the Owner of Seashore State Park, whereby money expended for equipment or otherwise could be used on that part of the park which is made available to citizens of the county. These, of course, would be matters to be worked out in detail by the local authorities.

Very sincerely yours,

J. LINDSAY ALMOND, JR.

*Attorney General.*

**BOARD OF SUPERVISORS—Authority to Adopt Ordinance Requiring Compliance with National Electric Code. F-33**

August 18, 1948.

HONORABLE F. L. WYCHE,  
Commonwealth's Attorney for Prince George County,  
Prince George, Virginia.

My dear Mr. Wyche:

This is in reply to your letter of August 14, from which I quote as follows:

"Will you please advise me whether or not, in your opinion, the Board of Supervisors has the authority to adopt an ordinance requiring any person, firm or corporation to comply with the National Electric Code in the installation of electric wiring in the construction of a new building and in the construction of any addition to an existing building; to require a permit before any electric wiring is installed; and to appoint an electric wiring inspector and to pay such inspector a salary or fees for his services out of the general fund of the County."

While I have been unable to find a statute dealing specifically with the questions presented above, it is my opinion that Section 2743 of the Code, dealing with the general powers of boards of supervisors, is broad enough to permit the adoption of the ordinance in question.

The pertinent part of the above mentioned section reads as follows:

"In addition to the powers conferred by other statutes, the board of supervisors of every county shall have power:

\* \* \* \* \*

"To adopt such measures as they may deem expedient to secure and promote the health, safety, and general welfare of the inhabitants of their respective counties, not inconsistent with the general laws of this State."

I call your attention to the fact that the provisions of the National Electric Code, if adopted, should, of course, be set forth fully in the ordinance.

Very sincerely yours,

J. LINDSAY ALMOND, JR.,

*Attorney General.*

**BOARD OF SUPERVISORS—Authority to purchase building for library purposes. F-217**

September 21, 1948.

HONORABLE L. C. HARRELL, JR.,  
Commonwealth's Attorney For Greensville County,  
Emporia, Virginia.

My dear Mr. Harrell:

This is in reply to your letter of September 20, regarding the purchase of a building in the county by the Board of Supervisors for a county free library.

Section 365 of the Code authorizes the Board of Supervisors of any county to establish a free library system for use of the residents of such county. Since the establishment of a library system is clearly made a county purpose by the terms of this section, it is my opinion that the Board of Supervisors has authority to purchase a building to be used for this purpose. Section 2854 of the Code authorizes the Board of Supervisors to acquire real estate up to 20 acres to be used for county purposes.

It is my opinion that the county free library system should be established under the terms of Section 365 of the Code and managed and controlled by a Board of Trustees in accordance with the following provision of that section:

"The management and control of a county free library system or a regional free library system shall be vested in a board of five trustees. In a county free library system they shall be appointed by the judge, chosen from the citizens at large with reference to their fitness for such office, one of whom shall be the superintendent of public schools of said county.  
\* \* \*

Very sincerely yours,

J. LINDSAY ALMOND, JR.  
*Attorney General.*

**BOARD OF SUPERVISORS—Authority to revoke ordinance creating board of real estate assessments. F-33**

April 5, 1949.

HONORABLE HUGH B. MARSH  
Attorney for the Commonwealth,  
Fairfax, Virginia.

My dear Mr. Marsh:

This is in reply to your letter of March 28, in which you state that Chapter 189 of the Acts of Assembly of 1946 provides that certain counties "may have a board" of real estate assessments in accordance with the conditions prescribed therein. The Board of Supervisors for Fairfax County, acting under the authority of this Act, passed an ordinance creating such a board and fixing the terms of its members at four years and the salary of the full-time member at \$3,600 per year.

You desire my opinion as to whether or not the Board of Supervisors for Fairfax County has the right to revoke the ordinance in question.

This office has heretofore expressed the opinion that where the Board of Supervisors has authority to adopt an ordinance it also has the inherent authority to repeal it. In my opinion, the fact that an office is abolished by the revoking of an ordinance does not affect the applicability of this rule, since it can be readily seen that a certain office or board might be desirable in one year and no longer necessary the next because of changed conditions.



I also might point out that, since the Act authorizing the passage of the ordinance in question provides that certain counties *may have a board*, it may be distinguished from the type of statute which provides that its provisions shall not become effective in any county until it has been adopted by the Board of Supervisors. In this latter case the Board adopts the statute and it becomes State law in the county and not an enactment by the Board of Supervisors. See Report of the Attorney General, 1939-1940, page 16.

Very sincerely yours,

J. LINDSAY ALMOND, JR.  
*Attorney General.*

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**BOARD OF SUPERVISORS—Authority To Sell Poor Farm; Meetings of Board; When Valid. F-33**

June 1, 1949.

HONORABLE RAYNER V. SNEAD,  
Commonwealth's Attorney for Rappahannock County,  
Washington, Virginia.

My dear Mr. Snead:

This is in reply to your letter of May 31, in which you request my opinion as to the legality of the sale of six acres of land, a part of the Rappahannock County Poor Farm, made by the Rappahannock County Board of Supervisors to the Rappahannock Labor Camp Cooperative for the purpose of bringing labor to the farmers to help harvest their apples and other crops. You state that the sale was made at a special meeting of the Board of Supervisors at the time and place specified in the notice of the meeting to each member by the Clerk of the Board, at which meeting all members were present and voted 6 to 0 for the sale. The meeting was requested orally by the Chairman and the notices of the meeting were not sent by registered mail. The sale, which was for the sum of \$120.00 was made without advertisement and no other bids were requested or received. The sale has, however, been duly confirmed by the Circuit Court of Rappahannock County. You state that, since some parties contend that the land is worth more than \$120.00, they are questioning the legality of the sale under Sections 2715 and 2723 of the Virginia Code.

Section 2723 expressly authorizes the Board of Supervisors of any county having a Poor Farm, in its discretion, to sell at public or private sale the land and other property constituting such Poor Farm on the best terms obtainable. It is noted that the sale was made to the Cooperative Association for the purpose of bringing labor to the county to help the farmers harvest their crops. It may be that for this purpose the price obtained was the best that could be secured. However, the sum for which the land is to be sold is a matter for the judgement and discretion of the Board of Supervisors, subject to confirmation by the Circuit Court.

Section 2715 provides that a special meeting of the Board of Supervisors shall be held when requested by two or more members, which request shall be in writing and shall specify the time and place of the meeting and the matters to be considered. The Clerk is required to notify each member of the Board by written notice sent by registered mail or served on the members by the sheriff. The section further provides that "no matter not specified in said notice shall be considered at such meeting, unless all the members of the Board are present." that the action taken was invalid simply because the request for the meeting made in writing is to notify the members of the purpose of the meeting, and

that the reason for having the notice served or sent by registered mail is simply to insure the member's receiving actual notice. Since all of the members were present at the meeting at which the said sale in question was made, I do not think that the action taken was invalid simply because the request for the meeting was not in writing and the notice was not sent by registered mail. For the above reasons I see no grounds upon which to question the legality of the sale.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, JR.  
*Attorney General.*

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**BOARD OF SUPERVISORS—Circumstances under which an easement may be granted across Court House lot. F-33**

February 10, 1949.

HONORABLE R. H. L. CHICHESTER,  
Commonwealth's Attorney,  
Stafford County,  
Stafford, Virginia.

My dear Mr. Chichester:

This is in reply to your letter of February 7, in which you ask if the Board of Supervisors of Stafford County has authority to convey an easement across the Court House lot to an individual.

Section 2854 of the Code provides that the board of supervisors may acquire so much land as will make two acres, and such land shall be occupied by the court house, clerk's office and jail, " \* \* \* and the residue planted with trees and kept as a place for the people of the county or city to meet and confer together. \* \* \*"

It is my opinion that whether the Board of Supervisors may grant an easement over the lot will depend upon the nature of the easement. If the easement is of such a nature that it does not interfere with the use of the court house lot as a meeting place for the people of the county, then I do not think that §2854 would prevent the Board from granting it. As an example, I should think that the Board could grant an easement for the laying of water pipes under the court house green. However, if the easement is of such a nature that it interferes with the use of the court house lot as a meeting place, then I do not think that the Board of Supervisors is authorized to make such a grant.

It is also my opinion that if the easement is of such a nature that the Board could grant it, such easement must be approved by the Court and should be subject to termination if it at any time in the future be found to interfere with the use of the Court House lot as a meeting place.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, JR.  
*Attorney General.*

**BOARD OF SUPERVISORS—Does Not Pass Ordinance When it Adopts the Terms of a Statute by Resolution. F-220**

July 30, 1948.

HONORABLE GEORGE W. DEAN,  
State Forester,  
Box 1368,  
Charlottesville, Virginia.

Dear Mr. Dean:

This is in reply to your letter of July 26, concerning §549-a1, relating to pine seed trees, and §545, regulating the burning of wood, brush, etc.

It appears that the above sections do not apply in any county, with certain exceptions not pertinent here, until the board of supervisors of such county had adopted them by a majority vote.

The question to be determined is whether or not such proposed adoption must be advertised for a period of two weeks pursuant to §2743-a of the Code before legal action could be taken by a board of supervisors.

Section 2743-a provides that *no ordinance* or by-law be passed by a county until after notice of such intention is published once a week for two successive weeks.

It is my opinion that the board of supervisors of a county is not passing an ordinance or a by-law when it adopts, by resolution, a statute previously enacted into law by the General Assembly. Therefore, the provisions of the above section of the Code, relating to publication of ordinances, would not be applicable.

Very sincerely yours,

J. LINDSAY ALMOND, JR.

*Attorney General.*

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**BOARD OF SUPERVISORS—Establishment Of Retirement System For Employees In Certain Counties. F-83**

October 8, 1948.

HONORABLE HUGH B. MARSH,  
Commonwealth's Attorney for Fairfax County,  
Fairfax, Virginia.

My dear Mr. Marsh:

This is in reply to your letter of September 24, in which you ask what employees and officers are included within the provisions of Chapter 4 of the Acts of Assembly, Extra Session, 1947, and Chapter 45 of the Acts of Assembly of 1948, which authorize certain counties to establish a retirement system for their employees.

Chapter 4 of the Acts of 1947 authorizes the governing body of any county adjoining a county having a population of more than one thousand per square mile according to the last preceding U. S. census to establish a system or systems of pensions and retirement allowances for "the officers and employees of any such county, including policemen and paid firemen and such other officers and employees whose compensation is paid in whole or in part by any such county, but not to include officials elected by the people or the General Assembly, and may, in their discretion, include therein the employees in the offices of the county treasurer, commissioner of revenue, sheriff, clerk's office, welfare de-

partment, health department, the office of superintendent of schools but not including teachers and any other office, agency or department of the county, \* \* \*"

Chapter 45 of the Acts of 1948 makes no reference to the 1947 Act, but, by its own terms, is applicable to the same counties, and authorizes the governing bodies of such counties to establish, by resolution, a retirement and pension plan "for the employees of such county". This Act states that such resolution may provide that membership in the plan shall be compulsory for "such officers and employees of such county as shall be so designated in the resolution."

The 1948 Act is a complete Act in itself, but it does not specifically repeal the 1947 Act. It provides merely that "All laws or parts of laws in conflict with this Act are repealed to the extent of such conflict." Since it does not contain the restriction against including elective officers in the retirement plan, it is my opinion that the county may include in the system not only the officers and employees specifically mentioned in the 1947 Act, but any officers and employees of the county, whether elected or not, which the governing body of the county may designate in the resolution establishing the system.

The 1948 Act states that each employee who is a member of the retirement system shall contribute to the retirement fund by payroll deduction a percentage of the compensation "paid by such county" for services rendered, the amount of such percentage deduction to be stated in the resolution. In the case of officers and employees paid partly by the county and partly by the State, I think that the county can make participation in the plan compulsory only as to that portion of the compensation paid by it. In such cases participation as to the full compensation, including that paid by the State, could be effected on a voluntary basis.

Very sincerely yours,

J. LINDSAY ALMOND, JR.

*Attorney General.*

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**BOARD OF SUPERVISORS—May Adopt Ordinance Regulating the Operation of Motor Boats without Mufflers. F-33**

July 9, 1948.

HONORABLE GILBERT L. DIGGS,  
Commonwealth's Attorney,  
Mathews County,  
Mathews, Virginia.

My dear Mr. Diggs:

This is in reply to your letter of July 7, in which you ask if the Board of Supervisors of Mathews County has the power to enact an ordinance controlling the practice of operating high powered outboard motor boats upon the small rivers and creeks of Mathews County without a muffler.

Section 2743 of the Code, conferring powers of a local nature on boards of supervisors, grants to these boards the following authority:

"To adopt such measures as they may deem expedient to secure and promote the health, safety, and general welfare of the inhabitants of their respective counties, not inconsistent with the general laws of the State."

It is my opinion that, under the above-quoted power, the board of supervisors of any county has the authority to define a public nuisance and to provide for its suppression. If, in fact, the operation of high powered outboard motor

boats without mufflers amounts to a public nuisance in Mathews County, the Board of Supervisors of Mathews County may enact an ordinance to control this practice.

I know of no state law which would prevent the enactment of such an ordinance by the Board of Supervisors nor do I think that such an ordinance would in any way conflict with or infringe upon the federal right to control navigation upon navigable waters of the State.

With best wishes, I am

Sincerely yours,

J. LINDSAY ALMOND, JR.  
*Attorney General.*

**BOARD OF SUPERVISORS—May appropriate money for a private library.**  
F-33

February 4, 1949.

HONORABLE E. O. RUSSELL, Clerk,  
Circuit Court for Loudoun County,  
Leesburg, Virginia.

My dear Mr. Russell:

I have your letter of February 3, 1949, which I quote in full as follows:

"For several years the Board of Supervisors of this County, have been contributing from three to five thousand dollars to the Purcellville library.

"This Library was not organized under Code Section 365. The Trustees are appointed by the management of the Library, and no accounting is made to the County for the expenditures of the contribution.

"Is a contribution to a Library of this type legal?

"It is my understanding that this Library is supported by private contributions, by contributions from the County and by state participation as provided in Section 365 (1/2).

"Our Board is meeting on February 8th, and I would appreciate a ruling on this before that date."

Section 365 of the 1942 Code provides in the next to the last paragraph as follows:

"The board of supervisors or other governing body of any county in which no such free library system as provided herein shall have been established, may, in its discretion, appropriate such sums of money as to it seems proper for the support and maintenance of any free library or library service operated and conducted in such county by a company, society, or association organized under the provisions of chapter one hundred and fifty-one of the Code of Virginia."

Assuming that the Library at Purcellville complies with the provisions of Chapter 151 of the 1942 Code of Virginia, and assuming that you have no such free library in Loudoun County as provided in §365, then I think that your Board has authority to appropriate such sums of money as it deems proper to the Library.

With kind regards, I am

Sincerely yours,

J. LINDSAY ALMOND, JR.  
*Attorney General.*

**BOARD OF SUPERVISORS—May Employ Counsel to appear before I. C. C. to oppose Abandonment of Railroad. F-33**

September 30, 1948.

HONORABLE L. C. HARRELL, JR.,  
Commonwealth's Attorney for Greensville County,  
Emporia, Virginia.

My dear Mr. Harrell:

This is in further reference to the authority of the Board of Supervisors to make an appropriation for the employment of counsel in connection with the application to the Interstate Commerce Commission by the Southern Railway Company to abandon its operation of the railroad from Norfolk to Danville and the application of the Atlantic and Danville Railway Company for reorganization of its debt structure with the expectation of this company's operation of the line if the I. C. C. allows the Southern to abandon its operation thereof.

When I wrote to you on September 24, I was under the impression that the purpose of the appropriation was simply to aid the Southside Virginia Shippers Committee, which I understood from your letter of September 18 to be a private organization for the general advancement of the business interests of the shippers of Southside Virginia. You have now advised that this committee is not such an organization, but is a special committee formed at the instance of representatives of the governing bodies of the localities concerned for the specific purpose of coordinating their efforts with those of private interests in opposing the applications made to the I. C. C. in these pending cases.

It appears that notice of these proceedings before the I. C. C. has been filed with the Governor, as required by paragraph 19 of Section 1 of the Interstate Commerce Act. I have been informed by Mr. W. C. Seibert, Commerce Counsel of the State Corporation Commission, that that agency, in accordance with its usual practice after being advised of the proceedings, notified the localities concerned in order that the full interests of the State can be protected at the hearing before the I. C. C., that is, the interests of the localities by them directly and the interests of the State at large by the State Corporation Commission.

Since such notice is given in order that the State and its political subdivisions can appear and be heard through their governmental agencies, I think that the proceedings can properly be regarded as affecting the interests of the County within the meaning of Section 2728 of the Code. That section reads as follows:

"The board shall have power to represent the county and have the care of the county property and the management of the business and concerns of the county, in all cases where no other provisions shall be made, and, when necessary, to employ counsel to assist the attorney for the Commonwealth in any suit against the county, or in any matter affecting county property where the board is of opinion that such counsel is needed."

Therefore, upon further consideration of the matter, it is my opinion that the Board of Supervisors may expend funds for the employment of special counsel to represent it in the proceedings before the I. C. C. if it deems such action necessary. While the County may join with other localities in employing the same counsel, I think that the appropriation should be made directly for that purpose rather than to the informal committee in which private parties are also interested.

Very sincerely yours,

J. LINDSAY ALMOND, JR.  
*Attorney General.*

**BOARD OF SUPERVISORS—May prescribe working hours for employees.  
F-33**

June 6, 1949.

HONORABLE HUGH B. MARSH,  
Commonwealth's Attorney for Fairfax County,  
Fairfax, Virginia.

My dear Mr. Marsh:

This is in reply to your request for my opinion as to the authority of the Board of Supervisors to establish and maintain a five-day week for the employees of the County, including the elective officials and their personnel.

Though I find no specific statutory provision dealing with the subject, it is my opinion that the Board of Supervisors would have such authority as to offices the heads of which and the employees of which are employed by and entirely under the jurisdiction and control of the said Board. This would apply to such offices as the Executive Secretary of the Board, the Zoning Administrator, and their employees. Since such officers are under the control of the Board, it would be proper for the Board to fix the hours that they are to be engaged in the performance of their duties.

However, it is my opinion that the Board has no such authority in the case of officers whose election or appointment are, by the Constitution or statute, vested in the people or some agency other than the Board of Supervisors, and over whom the Board has no direct control.

The working hours of the employees of such officers are the direct responsibility of the officers themselves, subject to any controlling statute dealing directly with the matter or any authority which may be vested in the appointing authority. So in the case of such offices as the Clerk's Office, Sheriff's Office, Commonwealth's Attorney, Local Board of Public Welfare, Office of the Commissioner of the Revenue, and the like, the Board of Supervisors has no power to control the hours and days of work.

Very sincerely yours,

J. LINDSAY ALMOND, JR.  
*Attorney General.*

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**BOARD OF SUPERVISORS—Members can be reimbursed for cost of telephone calls incurred in County business. F-33**

March 2, 1949.

HONORABLE HUGH B. MARSH,  
Commonwealth's Attorney for Fairfax County,  
Fairfax, Virginia.

My dear Mr. Marsh:

This is in reply to your letter of February 24, in which you state that the Board of Supervisors of Fairfax County has considerable telephone calls to make regarding the county's business, and the question has arisen as to whether or not each board member can keep a record of the telephone toll charges which are charged to his personal telephone and present the total of the same for payment by the county, provided such toll charges are made by the said board member on county business.

As you point out, there is no statute dealing with this particular matter. Section 2769(a) of the Code (Michie's Supp., 1948), which provides for compensation for members of a board of supervisors, allows a mileage expense for attending meetings of the board, but does not cover the situation presented here.

However, in my opinion, where, by direction of the board, a member incurs telephone expenses in connection with performing a legitimate function of the board pertaining to county business, it is within the inherent power of the board to reimburse the member for such expense out of any county funds available for the general purpose of conducting the affairs of a board of supervisors.

Very sincerely yours,

J. LINDSAY ALMOND, JR.  
*Attorney General*

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**BOARD OF SUPERVISORS—Money in "County and/or School Building Fund" May be Used for Maintenance and Repairs of Jail. F-77**

August 23rd, 1948.

HONORABLE S. PAGE HIGGINBOTHAM,  
Commonwealth's Attorney,  
Orange, Virginia.

Dear Mr. Higginbotham :-

I am in receipt of your letter of August 20th, from which I quote as follows :

"An addition is now being built to the Orange County jail, and certain repairs are also being made thereto. I would like an opinion from your office as to whether the money in said building fund can be used for repairs to the jail, as well as for the new part of the building."

I am informed that the Board of Supervisors of Orange County, pursuant to Chapter 293, Acts of Assembly 1944 (Section 3078d Code of Virginia) established a building fund under the title of "County and/or School Building Fund."

Upon examination of the title of this Act, and the verbiage of the Act itself, I am of the opinion that the fund created thereunder is not limited to application to new construction. An addition to the jail is new construction, but repairs to the already existing structure, if the Board deems such repairs necessary, would certainly be embraced by the purpose of the reserve fund which "is to provide for the payment of all or part of the cost of local public improvement and betterments."

Indeed, the terms of the Act itself, with the liberal construction which it enjoins, would seem to clearly embrace the situation covered by your inquiry.

The necessary repairs, some of which may be rendered necessary by the addition, would constitute a local public improvement and betterment, or replacement, reconstruction or deferred maintenance.

Sincerely yours,

J. LINDSAY ALMOND, JR.  
*Attorney General*



**BOARD OF SUPERVISORS—No Authority to Amend Ordinance to Exclude Portion of County within Criminal Jurisdiction of Incorporated Town. F-33**

July 7, 1948.

HONORABLE FERDINAND F. CHANDLER,  
Attorney for the Commonwealth  
Westmoreland County  
Montross, Virginia.

Dear Mr. Chandler:

I regret the delay in acknowledging your letter of June 16 in which you desire my opinion as to whether or not the Board of Supervisors of Westmoreland County may amend an ordinance prohibiting the sale of wine and beer on Sunday in that portion of the County not embraced within the corporate limits of any town so as to provide that wine and beer may be sold on Sunday within the criminal jurisdiction of any town in Westmoreland County.

The pertinent part of Chapter 129 of the Acts of Assembly of 1934 empowering counties to adopt ordinances prohibiting the sale of wine and beer on Sundays is as follows:

"1. Be it enacted by the General Assembly of Virginia, That the board of supervisors or other governing body of each county shall have authority to adopt ordinances, effective in that portion of such county *not embraced within the corporate limits of any city or incorporated town, \* \* \*.*" (Italics supplied)

Therefore, it is my opinion that the Board of Supervisors of Westmoreland County has no authority to amend the ordinance in question so as to exclude from its provisions that portion of the County which is included in the criminal jurisdiction of any incorporated town by section 3006, as amended, of the Code.

With kindest regards,

Sincerely yours,

J. LINDSAY ALMOND, JR.  
*Attorney General.*

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**BOARD OF SUPERVISORS—No authority to appropriate money to an Agricultural Fair Association. F-33**

February, 18, 1949.

HONORABLE LEWIS JONES,  
Commonwealth's Attorney,  
Middlesex County,  
Urbanna, Virginia.

My dear Mr. Jones:

This is in reply to your letter of February 16, from which I quote as follows:

"During 1947-48 a group of citizens of Middlesex, Mathews, Gloucester, New Kent, Charles City, King & Queen and King William Counties organized a non-profit agricultural fair, known as Tidewater Fair Asso. The Fair is governed by a Board of Directors chosen from each county.

"The purpose for which it was organized is to promote agriculture in the various counties. Last year the first fair was held in King & Queen County. It was well managed, the exhibits were very credible and the fair ran for one week and was well attended. Due to the fact that it was the first year and a great deal of equipment had to be purchased, the Association has a deficit. They have asked the Boards of Supervisors of the various counties to make an appropriation to help take care of the deficit. The following counties and towns have definitely responded, King William, New Kent, Charles City, King & Queen and the towns of Urbanna and West Point. I am advised that the other counties named will make an appropriation. Middlesex has made an appropriation of \$500.00 with the condition that should the Fair make a profit in the next two years they will pay Middlesex back on a pro rata basis."

You request my opinion as the legality of an appropriation to this Tidewater Fair Association.

The only authority which I can find which might support this appropriation is §2734 of the Code. That section provides that the board of supervisors may " \* \* \* apply and expend annually a sum not exceeding one thousand dollars for the purpose of promoting agriculture in said county." You will note that this section uses the words "apply and expend" in connection with this appropriation. It is my opinion that the use of these words indicates that the board of supervisors must retain control over expenditures of the funds appropriated. While the board may appoint some association or organization as its agent in expending the money, I think that the board, in its resolution authorizing the appropriation, should expressly provide how and for what specific purposes it shall be expended, and should require an accounting to be made.

From the facts presented in your letter, it appears that this appropriation would be to aid in taking care of a deficit incurred in a preceding year by the Tidewater Fair Association. It is my opinion that §2734 does not contemplate such an appropriation. While the purpose of the Association may be to promote agriculture in the county, and an expenditure by the county in line with the thoughts expressed above might be proper, I do not think that the board is applying and expending county funds in making an appropriation to take care of a deficit suffered by this Association.

I am enclosing a copy of an opinion by this office of June 21, 1946, to the Honorable Junius W. Pulley, in reference to the authority granted by §2734.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, JR.

*Attorney General.*

**BOARD OF SUPERVISORS—Not authorized to supplement compensation for viewers. F-33**

**EMINENT DOMAIN—Compensation of viewers can not be supplemented by Board of Supervisors. F-33**

February 16, 1949.

HONORABLE SAMUEL H. ALLEN,  
Attorney for the Commonwealth  
Kenbridge, Virginia.

My dear Mr. Allen:

This will acknowledge receipt of your letter dated February 14, 1949, in which you make the following inquiry:

"The Board of Supervisors of Lunenburg County has asked me to secure your opinion as to whether or not they may supplement the compensation for viewers as provided in Section 2039 (VIII) of the Code of Virginia. The Board would like, if possible, to pay each viewer \$10.00 per day."

The pertinent portion of §2039(8) of Michie's 1942 Code of Virginia, to which you refer, is as follows:

"\* \* \* and the said board may allow to each a reasonable compensation not exceeding two dollars per day to each viewer or commissioner  
\* \* \*"

In view of the plain language used in this section, I am of the opinion that the Board of Supervisors of Lunenburg County cannot supplement the compensation for viewers and commissioners appointed under Chapter 85-a of the Code of Virginia.

Compensation for commissioners appointed in condemnation proceedings is fixed pursuant to section 4366 of Michie's 1942 Code of Virginia, as amended by the 1948 Acts of the General Assembly, Chapter 108.

With kind regards,

Sincerely yours,

J. LINDSAY ALMOND, JR.

*Attorney General.*

**BOARD OF SUPERVISORS—Ordinances need not be approved by circuit judge to be valid. F-60a**

February 8, 1949.

DR. L. J. ROPER,  
State Health Commissioner,  
Department of Health,  
Richmond 19, Virginia.

My dear Dr. Roper:

I quote your letter of February 1, 1949, in full:

"It has been customary in the past for the county Boards of Supervisors to pass local ordinances setting forth minimum requirements in sanitation, particularly excreta disposal. It is my understanding that in some instances the validity of these ordinances has been questioned because the ordinances have not been approved by the judge of the Circuit Court following their passage by the Board of Supervisors.

I should appreciate your advising me the correct procedure to be followed in the passage of a local ordinance by a Board of Supervisors."

The procedure and authority for counties passing ordinances is contained in §2743 of the 1942 Code, and authorizes the boards of supervisors to pass certain ordinances after having advertised the same for two weeks prior to their passage, and for two weeks subsequent to their passing.

Prior to 1942 there was a provision in the law affecting counties adjoining cities of one hundred twenty-five thousand population or more, whereby it was necessary that the circuit judge approve the ordinance passed by the board of supervisors for these counties. However, this provision was stricken from the law in 1942, and the approval of the circuit judge is not necessary at this time.

Very truly yours,

J. LINDSAY ALMOND, JR.

*Attorney General.*

**BOARD OF SUPERVISORS—Under Zoning Appeals Act Board is not Bound to Hear Evidence from all Persons Aggrieved. F-33**

August 23, 1948.

HONORABLE ANDREW W. CLARKE,  
State Senator,  
108 N. Fairfax Street,  
Alexandria, Virginia.

My dear Senator Clarke:

This is in reply to your letter of August 17, concerning the interpretation of section 7 of Chapter 501 of the Acts of Assembly of 1948 (§2880ss of Michie's 1948 Cumulative Supplement), which deals with County Boards of Zoning Appeals.

The section in question provides that the governing body of a county shall refer to the County Planning Commission for review all appeals from decisions of the Board of Zoning Appeals. The Commission then must present its recommendations to the governing body of the county, at which time the governing body "shall hear the report of the Planning Commission, the appellant or his attorney, and the chairman or vice-chairman of the Board of Zoning Appeals, \* \* \*"

Your specific question is whether the Board of Supervisors "shall hear evidence of persons aggrieved and persons favoring such deals."

As was pointed out above, section 7 of the 1948 Act provides that the governing body of a county must hear only "the report of the Planning Commission, the appellant or his attorney, and the chairman or vice-chairman of the Board of Zoning Appeals." Therefore, I am in accord with your view that *it is not mandatory* under the Act that the Board of Supervisors hear "evidence" from all persons aggrieved or otherwise.

Very sincerely yours,

J. LINDSAY ALMOND, JR.  
*Attorney General.*

**BOARD OF WELFARE AND INSTITUTIONS—Regulations regarding the Reimbursement of Local Boards, Use of Personal Vehicles. F-231**

January 25, 1949.

HONORABLE STANLEY A. OWENS,  
Attorney for the Commonwealth,  
Manassas, Virginia.

My dear Mr. Owens:

This is in reply to your letter of January 17, in which you ask if the local Boards of Public Welfare are subject to Section 34 of the 1948 Appropriation Act. That section reads in part as follows:

"Allowances out of any of the appropriations made in this act by any and all State institutions, departments, bureaus and agencies to any of their officers and employees for expenses on account of the use by such officers and employees of their personal automobiles in the discharge of their official duties shall not exceed five cents per mile of actual travel."

Section 64 of the Virginia Public Assistance Act (§63-105 of the Reorganization Provisions of the Code of Virginia) provides that the Board of Supervisors shall appropriate such sums of money as shall be sufficient to provide for the payment of public assistance including the cost of administration. Sec-

tion 65 of the Act provides for the reimbursement of the localities by the State out of State and Federal funds in an amount not less than fifty nor more than sixty-two and one-half per centum of such administrative costs. The State appropriation is, therefore, a reimbursement of amounts expended by the localities and is not an appropriation out of which a direct allowance is made by a "State institution, department, bureau or agency" to "any of their officers and employees" on account of the use by such officers or employees of their personal automobiles. For these reasons it is my opinion that Section 34 of the 1948 Appropriation Act does not apply to the mileage allowances paid the employees of the local Boards of Public Welfare.

However, the Board of Welfare and Institutions has the authority to make such rules and regulations as may be necessary or desirable to carry out the purposes of the Virginia Public Assistance Act. The local Boards are required to administer the Act locally in accordance with, and subject to, such rules and regulations. The budget prepared by the local Board for submission to the Board of Supervisors is required to be approved by the Commissioner of Welfare and Institutions. (See §§63-25, 63-67, 63-68 and 63-69 of the Reorganization provisions of the Code; §§1904(4) and 1904(7) of Michie's Code of 1942.) I am informed that the State Board has adopted regulations regarding the reimbursement of local Boards for amounts expended by them as allowances to their employees for use of their private vehicles. In my opinion, this is a proper subject for regulation by the State Board in exercising its control of the administration of the Public Assistance Act.

Very sincerely yours,

J. LINDSAY ALMOND, JR.  
*Attorney General.*

**CHIROPODY—Board of, Additional Examinations for Applicants who Failed Former Examination. F-80**

December 16, 1948.

DR. FRANK L. APPERLY, CHAIRMAN,  
Basic Science Board of Examiners,  
Medical College of Virginia,  
Richmond, Virginia.

My dear Dr. Apperly:

I have your letter of December 13, 1948, advising that some 28 out of 70 applicants to take the basic science examination in order to continue the practice of *Chiropractic* in Virginia after January 1, 1950, have failed to make the required passing mark as provided by the Act. You advise that some who failed to pass this examination have requested the privilege of retaking this examination, which request has the endorsement of the Virginia Chiropractors Association. You also advise that the Board will go out of existence on June 30, 1949.

You ask an interpretation of the following paragraphs of §1613(a) of the Code:

Paragraph (d).- "The Board shall conduct an examination in November of each year in the City of Richmond on the following basic subjects:"

Paragraph (e).- "Any applicant who fails on an examination may take other examinations upon paying the fee required therefore."

The Act is very clear in setting November of each year as the time the Board shall conduct an examination. However, there is nothing in the Act which prevents the Board from giving an examination at some other time. There-

fore, in view of the fact that no examination had been given prior to November of this year, and paragraph (e) authorizes the Board to permit applicants who fail in an examination to take other examinations, I am of the opinion that the Board can grant this request that an additional examination be given.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, JR.  
*Attorney General.*

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**CHIROPODY—Chiropodists prohibited from advertising while lessee of commercial or mercantile establishment. F-80**

March 8, 1949.

DR. K. D. GRAVES, Secretary-Treasurer,  
State Board of Medical Examiners,  
Roanoke, Virginia.

My dear Dr. Graves:

This is in reply to your letter of February 28, from which I quote as follows:

"At the last session of the Legislature an Act was passed (H.B.354) making it unlawful for any physician, dentist, or optometrist to practice or to advertise that he practices his profession as a lessee of any commercial or mercantile establishment. An exception is made as to certain establishments employing full time registered optometrists when an Act of 1938 became effective.

"The question has been raised whether chiropodists are included in this law. Will you kindly send us an opinion as to the correct interpretation of this law?"

The Act to which you refer is found as Chapter 205 of the Acts of Assembly of 1948 (Section 1639a of the Code) and is entitled an Act to regulate the practice of medicine, dentistry and optometry in connection with commercial and mercantile establishments.

In the case of *Whitlock v Commonwealth*, 89 Va., 337, 15 S. E. 893, the Supreme Court of Appeals defined a physician according to general acceptance as one who professes or practices medicine.

It is also noted that there are three separate and distinct acts that regulate the practice of medicine, dentistry and optometry, and Chapter 195 of the Acts of Assembly of 1944, which regulates the practice of the healing arts (medicine when used in its comprehensive sense) includes therein the regulation of the practice of chiropody.

Therefore, it is my opinion that the term "physician" as used in Section 1639a of the Code includes a chiropodist as well as all other persons practicing the healing arts regulated by Chapter 195 of the Acts of Assembly of 1944.

Very sincerely yours,

J. LINDSAY ALMOND, JR.,  
*Attorney General.*

**CITIES AND TOWNS—Appointment of Police Justices. F-60**

June 17, 1949.

Mr. S. GAIL LANDON, JR.,  
Member of Town Council,  
Fairfax, Virginia.

My dear Mr. Landon:

This is in reply to your letter of June 8, from which I quote as follows:

"I am writing this letter with the request that you give us a ruling as Attorney General of the Commonwealth in connection with the powers of the Town Council under Section 2988 of the Code and under our charter. The Honorable Paul E. Brown, Judge of the Circuit Court of Fairfax County approves of this procedure.

"The Town Council proposes to set up a traffic police court to enforce the Town ordinances as enacted by the Town Council. Section 2988 of the 1942 Code of Virginia states in part.

"The Council of every city or town of this Commonwealth, having in their several charters the power to appoint certain municipal officers, shall, in addition to such powers, have power to appoint such other officers and employees as the Council may deem proper \* \* \* .

"The charter of the Town of Fairfax, approved March 24, 1920, Chapter 476, Acts of 1920, Section 2(d), states:

"The Council shall appoint a Clerk and a Town Sergeant, and if they deem it advisable a Deputy Town Sergeant and also a Town Treasurer, and such other officers as the Council may deem necessary and proper, all of whom shall hold office at and during the pleasure of the Council, and the officers shall qualify and execute bond in the manner prescribed by resolution of the Council. \* \* \*

"I would appreciate a ruling from you as to whether or not this gives the Council power to appoint a *police justice* for the Town of Fairfax at a regular salary and to require a bond from him for the purpose of taking cash collateral similar to the statutory requirements for justices of the peace."

The pertinent part of Section 4987-f-6 of the Code is as follows:

"\* \* \* any city or any incorporated town within the jurisdiction of any trial justice appointed as now or hereafter provided by law, may, by a resolution adopted by a majority of the members of the council thereof, confer upon and invest in the mayor or other trial officer of such city or town, the right and authority to issue warrants, summon witnesses and try cases involving violations of city or town ordinances, or the collection of city or town taxes or assessments, or any other debts due and owing to such city or town. \* \* \*"

First, upon considering Section 2988 of the Code and the provision of the charter of the Town of Fairfax to which you refer, it is my opinion that the authority contained therein with reference to the appointment of "other officers" does not refer to judicial officers.

At the time of the enactment of these provisions Section 3011 of the Code vested the duties of trying cases involving town ordinances in the office of the mayor. The charter does not provide for the establishment of a court, nor does it vest authority in any officer to try alleged violations of town ordinances. Of course, Section 4987-f-6 of the Trial Justice Act, the pertinent part of which is set forth above, does provide that "the mayor or other trial officer" by resolution of the council may be vested with the authority to try cases involving town ordinances. However, I am of the opinion that this section does not authorize the town council to create the position of a trial officer that was not in existence and could not legally exist under the town charter at the time of the pas-

sage of the Trial Justice Act. It merely authorizes the vesting of the prescribed jurisdiction in a special trial officer in those cases where the town charter provides for the appointment of a trial justice or special trial officer to perform the trial functions usually performed by the mayor.

Therefore, it is my conclusion that, while the town council may authorize the mayor to try cases involving town ordinances under Section 4987-f-6 of the Code, the charter for the Town of Fairfax must be amended before a special traffic court could be created.

Very sincerely yours,

J. LINDSAY ALMOND, JR.  
*Attorney General.*

**CITIES AND TOWNS—Municipal Corporations not Regulated by State Corporation Commission; May fix Price for Water. F-6C**

January 11, 1949.

HONORABLE WILLIAM T. GRAYBEAL,  
Attorney for the Commonwealth,  
Buena Vista, Virginia.

My dear Mr. Graybeal:

This is in reply to your letter of January 6, in which you state that the City of Buena Vista owns its own water system. You ask whether the City is required to get the permission of the State Corporation Commission before it can raise the price of water to those using it. You also ask whether the City is bound by the statutes which apply to public utilities.

Section 153 of the Constitution, in defining the word "corporation" as used in Article XII, which relates to the regulation of corporations by the State Corporation Commission, expressly excludes all municipal corporations. Likewise, Section 3881 of the Code, which defines the words "Public Service Corporation" as used in Title 36 of the Code, the Title concerning Public Service Corporations, also excludes all municipal corporations from such definition. It is my opinion, therefore, that the general statutes concerning the regulation of public utilities do not apply to the City of Buena Vista in the operation of its water works.

Paragraph (G) of Section 9 of the Charter of the City of Buena Vista, Chapter 195, Acts of Assembly of 1930, which authorizes the City to acquire, maintain and operate water works, provides that the City shall impose and enforce water rates, subject to regulations of the State Corporation Commission. However, since the constitutional and statutory provisions under which the State Corporation Commission regulates corporations in general and public service corporations in particular, and which prescribe the methods of fixing the rates of the latter type of corporation, do not apply to municipal corporations, the State Corporation Commission does not attempt to regulate the rates charged by municipal corporations in the operation of water works owned by them. In view of this fact, it is my opinion that the City of Buena Vista would not have to secure the permission of the Commission before raising the price of water to consumers.

Very sincerely yours,

J. LINDSAY ALMOND, JR.  
*Attorney General.*



**CITIES AND TOWNS—Municipality can Convey Real Estate to Commonwealth for National Guard Armory Sites. F-225a**

October 1, 1948.

MAJOR GENERAL S. GARDNER WALLER,  
The Adjutant General of Virginia,  
Richmond 19, Virginia.

My dear General Waller:

This is in reply to your letter of September 24, in which you enclosed a letter from Major General William H. Sands concerning the plan of the Virginia National Guard to acquire real estate from the City of Norfolk for an automotive maintenance project. His question is whether or not the City of Norfolk is authorized to make such a conveyance.

While there may be some doubt as to the applicability of Section 2673(113) of Michie's Code (Section 44-130 of the Reorganization Provisions of the Code of Virginia), which provides that a municipality is authorized to convey real estate to the State of Virginia "for use as a site for an armory for the Virginia National Guard", I call your attention to Section 2673(119) of Michie's Code (Section 44-137 of the Reorganization Provisions of the Code of Virginia) from which I quote as follows:

"Every city and county in the State having an active national guard or naval militia organization or organizations within its boundaries is authorized to render such financial assistance as it may deem wise and patriotic to such organization or organizations, either by donating land or buildings, or donating the use of land or buildings, or by contributing to their equipment and maintenance."

Since the above sections must be liberally construed in favor of its purposes (Section 2673(123) of Michie's Code; Section 44-140 of the Reorganization Provisions of the Code of Virginia), it is my opinion that Section 2673(119), quoted above, would authorize the City of Norfolk to convey the real estate in question.

Very sincerely yours,

J. LINDSAY ALMOND, JR.,  
*Attorney General.*

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**CITIES AND TOWNS—Municipality can invest its accumulated surplus funds in U. S. securities during time of War. F-60**

October 1, 1948.

HONORABLE CHARLES C. LOUDERBACK,  
Member of House of Delegates,  
Stanley, Virginia.

My dear Mr. Louderback:

This is in reply to your letter of September 30, in which you ask whether the Town of Stanley has the authority to invest accumulated surplus funds in securities issued by the United States Government. You state that these funds have been accumulated in part from the operation of the water system of the town and that it is desired to invest the funds pending the maturity dates of the bonds issued for such system, which bonds were issued without a provision that they could be called prior to maturity.

I call your attention to Chapter 15 of the Acts of Assembly of the Extra Session of 1942 (Section 2741a2 of Michie's Code of Virginia). This Act provides that so long as a state of war exists between the United States and any foreign power the Board of Supervisors of any county or the Council of any city or town may authorize the purchase, out of any monies available in the general fund or in any sinking fund or in any special fund of such county, city or town, of bonds or other evidences of debt of the United States. This office has previously ruled that, since treaties of peace have not been signed with all of the countries involved in the recent conflict and since there had been no official proclamation terminating hostilities, a technical state of war still exists. It is, therefore, my opinion that, acting under the authority of the above Act, the Town of Stanley has the authority to take the action mentioned in your letter.

Very sincerely yours,

J. LINDSAY ALMOND, JR.,  
*Attorney General.*

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**CITIES AND TOWNS—Number of Councilmen may be Increased by Act of Legislature, Need not be approved by people of Locality. F-30**

November 3, 1948.

HONORABLE EARL A. FITZPATRICK,  
Roanoke, Virginia.

Dear Mr. Fitzpatrick:-

I am in receipt of your letter of September 27th, from which I quote as follows:

"I have \*\* had numerous requests regarding the increasing of the number of councilmen now provided for in the Charter. I would \*\* appreciate very much an opinion from your office as to whether this can be accomplished by a simple Charter Amendment or whether the matter would have to be submitted to the people before such an increase could be made."

The Charter of the City of Roanoke, (Chapt. 473 Acts Assembly 1924) established the City Manager plan of government. Under Section 4 of the Charter the Council consists of five members elected at large to serve for a term of four years from the first day of September next following the date of their election.

Section 2942 of the Code, relating to the City Manager plan, provides that in cities and towns with more than ten thousand inhabitants the legislative powers shall vest in a council of from five to eleven members. This section is a part of the general law enacted pursuant to Section 117 of the Constitution for the organization and government of cities and towns. An increase in the number of members of the council of the City of Roanoke is clearly authorized by section 2942 if the increase is within the statutory limitation.

Such an increase would in no wise alter or disturb the substance of the charter or the form of government provided therein for the City of Roanoke. Since it would not change the form of the government, the procedure set up in section 2925 of the Code, requiring submission to the people, has no application.

I am of the opinion that there is neither constitutional nor statutory limitation upon the power of the legislature to increase the membership of the council

of the City of Roanoke, without reference to a vote of the people, within the limitation defined in section 2942 of the Code of Virginia.

Sincerely yours,

J. LINDSAY ALMOND, JR.,  
*Attorney General.*

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**CITIES AND TOWNS—Officers continue in office until successors qualify, notwithstanding provisions in new charter prescribing terms for same.**  
F-60

March 16, 1949.

HONORABLE STANLEY A. OWENS,  
Commonwealth's Attorney,  
Prince William County,  
Manassas, Virginia.

My dear Mr. Owens:

I have your letter of August 5, which I am quoting in its entirety.

"The General Assembly of 1948, see Acts of Assembly, Virginia, 1948, Page 732, amended and re-enacted in its entirety the Charter of the Town of Haymarket. The description in the old charter of 1908 was so vague that we had doubts as to the validity of the old charter.

"You will notice that the charter as re-enacted in 1948 designated certain individuals therein to serve as Mayor and Councilman until an election in June of 1948. It so happens that the regular town election will be this June of 1949, and I didn't know until recently that the officials did not do what was necessary to have a special election last June. You see therefore that the Haymarket Town affairs are in quite a predicament.

"Will you advise me whether in your opinion the individuals designated in the charter of 1948 are now the legal officials of the Town of Haymarket and are clothed with the usual powers incident to such offices. Their affairs are at a complete standstill at the present time and if we can have your opinion on this at an early date, it will be deeply appreciated."

Section 33 of the Constitution of Virginia provides that all officers elected or appointed shall continue to discharge the duties of their office after their terms of service have expired until their successors have qualified. I am, therefore, of the opinion that the individuals designated in the charter of 1948 are now the legal officials of the town of Haymarket, and are clothed with the usual powers incident to such offices.

Your letter raises the question as to whether or not a vacancy had occurred due to the fact of an election not being held in June 1948 as provided in the new charter. In the case of *Chadduck v Burke*, 103 Va. 694, the question of a vacancy was raised and the Court said that no vacancy existed since the incumbent for the previous term was still in office by virtue of a constitutional provision under which he was to hold office for a specified term and thereafter until his successor had been appointed and had qualified. The Court held that the period between the expiration of an incumbent's term and the qualification of his successor is a part of the term itself.

In view of this case it is my opinion that no vacancies exist in the office of mayor and councilman of the town of Haymarket. The present incumbents will continue to hold office until the next election. Under the new charter this should be held in June 1950, rather than in June 1949, as mentioned in your letter,

since the time the first election under the new charter was fixed as June 1948, and the general law requires such elections to be held every two years.

With every good wish, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**CITIES AND TOWNS—Ordinances enacted under former charter remain in force unless in conflict with new charter. F-60a**

February 17, 1949.

HONORABLE BERNARD MAHON,  
Commonwealth's Attorney,  
Caroline County,  
Bowling Green, Virginia.

My dear Mr. Mahon:

I have your letter of February 15, 1949, advising that the General Assembly of 1948 enacted a new charter for the town of Bowling Green, and requesting that I advise you whether the ordinances passed under the provisions of the old charter are still in effect.

In my opinion all such ordinances remain in force and effect unless they conflict and are inconsistent with the charter provisions as changed by the new charter.

With kind regards, I am

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**CITIES AND TOWNS—TOWN OF STANLEY—Members of Council May Vote Compensation for themselves; May Elect Mayor and fill Vacancies in Council. F-60**

January 7, 1949.

HONORABLE CHARLES C. LOUDERBACK,  
Stanley, Virginia.

Dear Mr. Louderback:-

I am in receipt of your letter of January 4, 1949, from which I quote in part as follows:

1. "Do the members of the town council of Stanley have the authority to vote themselves compensation?"
2. "Do they have the right at present to vote their Mayor a salary?"
3. In filling a vacancy on council "do they have to choose some one from the list of defeated candidates at the last election. or can they select some eligible voter from amongst the citizens of the town whose name did not appear on the last ticket?"

The answers to the foregoing inquiries are based on the assumption that the Charter of the town of Stanley, insofar as here pertinent, is at present in the form in which it is found as Chapt. 395 Acts of Assembly 1926, approved March 24, 1926.

1. Chapter 2, Section 4 of the charter provides:

"The municipal officers of said town shall consist of five councilmen, one of whom shall be elected by said council from among their own number, as mayor, treasurer, and a sergeant both of which latter are also to be appointed by the said council."

Section 7 of Chapt. 2 provides that:

"The duties and compensation of all municipal officers, except as herein defined or provided for, shall be defined and prescribed by the town council."

I find no other provision relating to the compensation of members of the town council. Inasmuch as the members of the town council are designated as "municipal officers" and the charter empowers the council to provide for the compensation of such officers, I am of the opinion that this question must be answered in the affirmative.

2. Chapter 5, sections 12 and 13 provide that the mayor shall be appointed by the council for a term of two years and that his salary shall be fixed by it, not to be diminished during his term of office without his consent.

This question must be answered in the affirmative.

3. A member of council is an elective officer. Section 6, of Chapt. 2, provides that "no person shall be eligible to hold an elective office unless he is a duly qualified voter of the said town". This is the only qualification prescribed. It is my opinion therefore that in filling a vacancy on council for an unexpired term there is no requirement that the choice be made from a list of defeated candidates at any election.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**CITIES, TOWNS AND COUNTIES**—Unless Ordinance Confers Jurisdiction on Mayor, then Trial Justice of County has Jurisdiction in Town. F-136a

**TRIAL JUSTICES**—Jurisdiction to try Offenses Committed in Towns unless Towns Ordinances Vest Mayor with that Jurisdiction. F-136a

August 23, 1948.

HONORABLE PORTER R. GRAVES,  
Trial Justice for Rockingham County,  
First National Bank Building,  
Harrisonburg, Virginia.

My dear Mr. Graves:

This is in reply to your letter of August 21, in which you ask whether you can be vested with authority to try violations of the ordinances of the town of Elkton, Cumberland County, which you state are being tried at the present time by the Mayor of the town.

Under section 4987-f-1 of the Code, trial justices have jurisdiction over all offenses against the ordinances of the towns located in the county for which he is appointed unless a town acting under section 4987-f-6 has conferred that jurisdiction upon the mayor or other trial officer of the town. It follows, therefore,

that, if the town repeals the ordinance by which jurisdiction to try violations of town ordinances is vested in the mayor, the jurisdiction to try these offenses will be vested in you in your capacity as Trial Justice for Rockingham County.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**CITIES, TOWNS, AND COUNTIES—When Daylight Saving Time May Be Adopted. F-301**

**TIME—Daylight Saving Time; When Counties May Adopt. F-301**

August 3, 1948.

HONORABLE A. O. LYNCH,  
Commonwealth's Attorney for Norfolk County,  
Norfolk, Virginia.

My dear Mr. Lynch:

This is in reply to your letter of July 31, requesting the opinion of this office as to whether the Board of Supervisors of Norfolk County may hold a referendum to determine whether the people of the county prefer daylight saving time, and to adopt such time in 1949 if the vote of the people is favorable.

Chapter 82 of the Acts of Assembly of 1946 provides that United States standard eastern time shall be in effect in all parts of the State of Virginia. While Chapter 115 of the Acts of Assembly of 1948 authorizes the governing body of any county having a population of more than 1,000 per square mile according to the last preceding U. S. census, or any county or city adjacent to such county to adopt daylight saving time, this latter Act is not applicable to Norfolk County.

In view of the provisions of Chapter 82 of the Acts of 1946, it is my opinion that the Board of Supervisors of Norfolk County is without authority to take the action you mention.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**CIVIL AND POLICE JUSTICES—Qualification for Office. F-136c**

June 8th, 1949.

HONORABLE JAMES N. COLASANTO,  
Secretary Electoral Board,  
109 N. Fairfax Street,  
Alexandria, Virginia.

My dear Mr. Colasanto:-

This is in reply to your letter of June 7th, from which I quote in part as follows:

“Would the mere admission by reciprocity of a person to practice law in Virginia, without actually having practiced law in Virginia for a period

of at least five years at the time of the General Election on November 8, 1949, satisfy the requirements of Section 3098; and could such a person qualify for the office of Civil and Police Justice if he were elected?

Would a person who was in the military service on October 4, 1944, and who, on that date, was admitted by reciprocity, to practice law in the State of Virginia, but who did not obtain a revenue license pursuant to Sections 127 and 159 of the Tax Code until January 29, 1946 for the year 1946, at which time his active military status had terminated, and who, for the first time, was admitted to practice law in the Corporation Court of the City of Alexandria on February 21, 1946; who did not obtain a revenue license to practice law for the year 1947; who had no revenue license to practice law for the year 1948 until June 9, 1948, at which time he paid for the period June 1, 1948 to December 31, 1948; and who obtained a revenue license for the year 1949 on January 31, 1949, satisfy the requirements of Section 3098 of the Code and Sections 127 and 159 of the Tax Code, as having actually practiced law for at least five years in the State of Virginia at the time of the General election on November 8, 1949?"

Section 3098, Virginia Code 1942, insofar as here pertinent provides:

"Such Civil & Police Justice at the time of his election shall have practiced law in this state for at least five years. \* \* \*

It is immaterial whether the subject of your inquiry was admitted to the Bar by reciprocity or through the regular channels of examination prescribed by law. In either event he must have practiced law in this state for at least five years antedating his election. If he has not practiced law in Virginia for the time prescribed he is not legally qualified to hold the office of Civil and Police Justice and his name should not be printed on the official ballot at the primary to be held on August 2nd (Sec. 229 Va. Election Laws).

Admission to the Bar is not the only pre-requisite which must be met in order to entitle one to engage in the practice of the profession of law. It is indispensable to the creation of the legal status as a practicing attorney-at-law that the revenue license prescribed by Section 159 of the Tax Code be obtained. It is a criminal offense to engage in the practice of law without obtaining the license required.

Inasmuch as the candidate in question did not qualify to practice law in this State prior to January 29, 1946, and had no revenue license for the year 1947, nor for the first half of 1948, he falls far short of meeting the requirements of Sec. 3098 (supra).

For the foregoing reasons, I am of the opinion that admission to practice must be followed by actual practice in Virginia for at least five years at the time of the general election on November 8, 1949, and without which, the candidate, if elected, could not qualify to hold the office of Civil & Police Justice.

I am also of the opinion that for the time subsequent to admission, viz; October 4, 1944 to date, during which the candidate had no revenue license, he could not be deemed to have practiced law and thus not being legally qualified to hold the office for which he is a candidate his name should not be printed on the ballot.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**CLERKS OF COURTS—Compensation of Clerk of the Hustings Court, Part II, City of Richmond. F-116**

August 23, 1948.

HONORABLE CHAS. R. PURDY, CLERK,  
Hustings Court, Part II,  
Richmond, Virginia.

My dear Mr. Purdy:

This is in reply to your letter of August 19, in which you request my opinion as to the total compensation you are authorized to retain as Clerk of the Hustings Court, Part II, of the City of Richmond.

You state that prior to the enactment of section 3516-3 of the Code at the last session of the General Assembly, the Clerk of your Court was authorized to retain from fees and commissions a total of \$7,500 and in addition received \$2,500 from the City.

Section 3516-3 reads as follows:

"Notwithstanding the provisions of sections thirty-five hundred sixteen, as amended, and thirty-five hundred sixteen-one of the Code of Virginia and chapter three hundred eighty-four of the Acts of Assembly of nineteen hundred forty, approved April one, nineteen hundred forty the maximum compensation thereby authorized for the clerks of courts of record is increased by twenty per centum for those clerks authorized by law to retain, from fees and commissions, a maximum of fifty-five hundred dollars or less; and by ten per centum *and* not exceeding five hundred dollars for those clerks authorized by law to retain, from fees and commissions, a maximum in excess of fifty-five hundred dollars, provided, however, that no increase authorized hereunder shall exceed the sum of one thousand dollars, and provided further that no clerk shall receive a total net compensation exceeding ten thousand dollars, excepting such clerk who is the clerk of two or more courts."

It is true that under section 3516 compensation allowed to the Clerk of your Court by the City Council for certain services is disregarded to the extent of \$2,500, and the new section 3516-3 increases the maximum you are entitled to retain from fees and commissions to the sum of \$8,000. If it were not for the last proviso of the new section, this would have the effect of increasing your total compensation to \$10,500. However, it is my opinion that, in providing that "no clerk shall receive a total net compensation exceeding ten thousand dollars," the new section has the effect of limiting your total compensation to the sum of \$10,000.

The \$10,000 limitation could not have been intended as limiting only the amounts listed in section 3516, in computing which the first \$2,500 received from the City is disregarded, for there are no maximum amounts so computed listed in that section which would be raised above the sum of \$10,000 by the increases authorized by section 3516-3. The \$10,000 limitation must, therefore, have been intended to limit the "total net compensation" received by clerks for their services as such from all sources, including their locality. The Legislature apparently did not intend the increases authorized to bring the total salaries of clerks above this figure except in the case of clerks of two or more courts.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*



**CLERKS OF COURTS—Duty to Maintain Crop Lien Docket Book as well as Agricultural Chattel Trust Book. F-221**

January 6, 1949.

HONORABLE E. E. FRIEND, CLERK  
Circuit Court of Pittsylvania County,  
Chatham, Virginia.

My dear Mr. Friend:

This is in reply to your letter of January 4, in which you ask if the clerk is required to maintain the Crop Lien Docket book as well as the Agricultural Chattel Deed of Trust book demanded by §6454a of the Code, Chapter 178 of the Acts of 1946.

The Crop Lien Docket is set up under §6452 of the Code. This section gives a lien to any person other than a landlord, who makes advances to a person engaged in cultivating the soil. The lien attaches upon crops or fruit seeded or maturing on the land for which the advance is made, when " \* \* \* there is an agreement, in writing, signed by both parties, in which there is specified the amount advanced, or a limit to be fixed beyond which any advances, made from time to time during the year, shall not go, and the said agreement be docketed in the office of the clerk \* \* \*".

Section 6454a declares that any person may give as security a chattel deed of trust on livestock, poultry, farm machinery and annual and perennial crops and plant products. All sums secured by such deed of trust must be evidenced by a written obligation, signed by the party to be charged. The chattel deed of trust must be signed and acknowledged by the grantor, and becomes a lien on the property when filed for docketing.

Sub-section (h) of this section requires the clerk to maintain an "Agricultural Chattel Deed of Trust" in which " \* \* \* he shall docket each instrument filed pursuant to this act \* \* \*".

These two sections contemplate two different types of instruments, though both may concern crops. The agreement to be filed in the Crop Lien Docket is an agreement signed by both parties setting forth its terms, which agreement need not be acknowledged or witnessed as a prerequisite to docketing. The instrument to be filed in the Agricultural Chattel Deed of Trust book is a deed of trust, signed and acknowledged by the grantor.

It is my opinion that both the Crop Lien Docket and the Agricultural Chattel Deed of Trust must be maintained. In the Crop Lien Docket will be docketed those agreements signed by both parties under §6252. In the Deed Trust book will be docketed deeds of trust prepared under §6454a, whether they be upon machinery, equipment or crops, or a combination.

You also ask if it is necessary that a notation be made in the Crop Lien Docket referring to the Agricultural Chattel Deed of Trust book when a deed of trust is filed covering crops. The statute does not require such notation, and I do not think it is necessary, though it would be of some assistance and convenience to the persons interested.

With kind regards, I am

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**CLERKS OF COURTS—Fees are chargeable to defendant. F-116**

March 1, 1949.

HONORABLE H. BRUCE GREEN,  
County Clerk,  
Arlington, Virginia.

My dear Mr. Green:

This is in reply to your letter of February 26, in which you ask if clerks should collect fees for services rendered to the defendant in an action at law. You refer to subparagraph 58 of Section 3484 of the Code of Virginia as amended by Chapter 379 of the Acts of Assembly of 1948, which reads as follows:

"In all actions at law the clerk's fee chargeable to the plaintiff shall be eight dollars and fifty cents to be paid by the plaintiff at the time of instituting the action; this fee to be in lieu of any other fee allowed by this section, except in actions involving nor more than five hundred (\$500.00) dollars the fee shall be five (\$5.00) dollars in lieu of any other fee."

The flat fee provided by this paragraph is clearly stated to be in lieu of all services rendered on behalf of the plaintiff. It is my opinion that when witnesses are summoned or other services are rendered on behalf of the defendant the regular fees should be charged by the clerk and assessed as costs chargeable to the defendant. The defendant may, of course, recover from the plaintiff such sums expended by the defendant as his costs should he secure judgment against the plaintiff for the same. The flat fee which is required to be paid by the plaintiff at the time of the institution of the action is designed to cover only those costs which would be initially assessed against him for services rendered on his behalf.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**CLERKS OF COURTS—Fees, In Felony Cases. F-85****FEES—Clerks of Courts, Fees In Felony Cases F-85**

January 4, 1949.

HONORABLE ROBERT H. OLDHAM, CLERK,  
Circuit Court of Accomack County,  
Accomack, Virginia.

My dear Mr. Oldham:

This is in reply to your letter of December 28, in which you ask what fee the clerk is entitled to receive out of the State treasury for a felony case tried in his court when the State is unable to recover the costs from the defendant.

The statutes dealing with the fees to which officers are entitled from the treasury of Virginia in criminal cases are Section 3504 et seq. of the Code. Section 3506 provides that the clerk shall receive for each felony case tried in his court the sum of \$2.50. In my opinion, this is the only fee to which the clerk is entitled.

Section 3484 of the Code, to which you refer, formerly provided fees for particular services rendered by the clerk, which were assessable against the defendant as a part of the costs and to which the clerk was entitled if the costs were collected from the defendant. The law has never been construed as authorizing the clerk to receive from the State treasury the fees mentioned in Section 3484 in cases where the defendant did not pay the costs. I am enclosing copies of two former opinions of this office on this question.

Section 3484 of the Code was amended at the last session of the General Assembly to provide that in lieu of the fees otherwise allowed by that section the clerk shall charge the accused \$10 upon conviction in a felony case. This amendment is simply for the purpose of providing a flat fee to be charged against the defendant as costs in lieu of the individual fees, and does not have the effect of changing the previously existing law as to the fee which the clerk was entitled to be paid from the State treasury when the defendant failed to pay the costs. This last question is governed by Section 3506, which provides only for a fee of \$2.50 from the State treasury.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**CLERKS OF COURT—Fees, Preparing Annual Budget. F-116**

June 9, 1949.

HONORABLE A. B. CORRELL, CLERK,  
Circuit Court of Montgomery County,  
Christiansburg, Virginia.

My dear Mr. Correll:

This is in reply to your letter of May 19, in which you state that in the past you have been employed by the Board of Supervisors of Montgomery County to prepare the annual county budget, for which service you have received an annual compensation of \$50. You ask whether or not the sum received for this service should be considered as fee allowance, commission, salary, or other emolument of office within the meaning of Section 3516 of the Code dealing with the report of excess fees of clerks.

I agree with you that, since the preparation of the county budget is not made a part of the duties of the clerk as ex-officio clerk of the Board of Supervisors by Section 2770-a which prescribes such duties, the clerk would, in the absence of any other controlling provision, be entitled to perform this service for compensation and not report the amount received in computing his excess fees. However, I call your attention to the fact that Section 2707 of the Code, which makes it unlawful for any paid officer of a county to be interested in any contract with the Board of Supervisors, was amended at the 1948 session of the General Assembly. The clerk of the court by this amendment was specifically named as one of the officers who could not deal with the Board, and the language of the section now reads in such a way as to apply to contracts for personal service. For this reason it is my opinion that the clerk can no longer agree to prepare the county budget for compensation in addition to his regular salary.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.  
*Attorney General.*

**CLERKS OF COURT—Increase in Compensation Limited to \$500.00 in Cases where Clerk is Receiving in Excess of \$5,500.00. F-116**

July 1, 1948.

HONORABLE THOS. R. MILLER  
Clerk, Hustings Court  
Richmond, Virginia

Dear Mr. Miller:

This is in reply to your request for my opinion as to the amount of increase allowed by Section 3516-3 of the Code, as enacted by Chapter 378 of the Acts of Assembly of 1948, for clerks authorized by law to retain from fees and commissions a maximum in excess of fifty-five hundred dollars per annum. The section referred to reads as follows:

"Section 3516-3. Compensation of clerks.- Notwithstanding the provisions of sections thirty-five hundred sixteen, as amended, and thirty-five hundred sixteen-one of the Code of Virginia and chapter three hundred eighty-four of the Acts of Assembly of nineteen hundred forty, approved April one, nineteen hundred forty the maximum compensation thereby authorized for the clerks of courts of record is increased by twenty per centum for those clerks authorized by law to retain, from fees and commissions, a maximum of fifty-five hundred dollars or less; and by ten per centum and not exceeding five hundred dollars for those clerks, authorized by law to retain, from fees and commissions a maximum in excess of fifty-five hundred dollars, provided, however, that no increase authorized hereunder shall exceed the sum of one thousand dollars, and provided further that no clerk shall receive a total net compensation exceeding ten thousand dollars, excepting such clerk who is the clerk of two or more courts.

This section of the Code was added by Chapter 387 of the 1948 Acts which originated as Senate Bill 87. The bill in its original form as introduced provided that the new section should read as follows:

"Section 3516-3. Compensation of clerks.- Notwithstanding the provisions of section thirty-five hundred sixteen, as amended, and thirty-five hundred sixteen-one of the Code of Virginia and chapter three hundred eighty-four of the Acts of Assembly of nineteen hundred forty, approved April one, nineteen hundred forty the maximum compensation thereby authorized for clerks of courts of record is increased by twenty per centum provided, however, that in no case shall the maximum increase allowable hereunder exceed the sum of one thousand dollars."

The bill was thus amended during its passage so as to provide that the twenty per cent increase should apply only to those clerks authorized to retain a maximum of \$5,500 or less and to provide that the maximum of those clerks authorized to retain a maximum in excess of \$5,500 should be increased by "ten per centum and not exceeding five hundred dollars."

While the language used by the amendment to the bill is far from being clear, it seems evident that it was intended to provide not only a different percentage increase but also a different limitation upon the increase allowed clerks whose maximum was in excess of \$5,500 than that provided for clerks whose maximum was \$5,500 or less. It has been suggested that the act provides for an increase of ten per centum plus an amount not exceeding \$500 which would bring the total increase up to but not exceeding the limitation of \$1,000 contained in the next to last proviso of the section. While the word "and", taken alone, in some instances does mean "plus" it is my opinion that the whole phrase "and not exceeding five hundred dollars" should be read as a whole as a limitation upon

the ten per centum increase theretofore specified. To say otherwise would be to say that the amendment to the bill was simply the use of different language not intended to effect any change in the bill, for the absolute limitation of \$1,000 was already in the bill.

It is true that to construe the allowable increase is limited to \$500 would mean that none of the clerks in the specified bracket would receive a full increase of ten per centum since the lowest bracket to which it is applicable is \$6,000. However, it is also true that to construe the phrase "and not exceeding five hundred dollars" as an addition to the ten per centum, would mean that full effect could not be given to the words "five hundred dollars", as none of the brackets to which it applies could receive the full ten per cent and the full \$500 because of the \$1000 limitation.

While the language used is not the clearest possible, it is my opinion that by amending the bill, the intention was to limit the increase to clerk's whose maximum was in excess of \$5,500, to the sum of \$500. Since the intention of the Legislature, if ascertainable, should govern in the construction of ambiguous statutes, it is my opinion that the statute should be construed as allowing an increase of only \$500 in the cases specified.

Very truly yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**CLERKS OF COURTS—Must Pay Cost of Premium of Surety Bond Covering Deputies. F-83**

**BOARDS OF SUPERVISORS—No Authority to Pay Cost of Premium of Surety Bond Covering Deputies of Clerk of Court. F-83**

July 8, 1948.

HONORABLE ROBERT BOLLING LAMBETH,  
Attorney for the Commonwealth  
Bedford, Virginia

Dear Mr. Lambeth:

This is to acknowledge receipt of your letter of June 29 from which I quote as follows:

"At our Supervisors' Meeting yesterday a bill was offered for payment by the County Clerk, which bill covered the expenses of the premium on surety bonds covering several deputies in the office of the Clerk. Heretofore the County Clerk has not had his deputies bonded and this matter has not been presented to the Board of Supervisors before.

"It appears to me that the County Clerk should pay this item of expense as he pays others, in view of the fact that the County Clerk is compensated on a fee basis and bears the expense of his office himself.

"I would appreciate your advising at your earliest convenience whether, in your opinion, you consider the payment by the Board of Supervisors of the premium on the surety bonds of deputies of the County Clerk a proper expense allowable under the statutes permitting the Supervisors to disburse the public money."

It has been the long established policy of the State to pay the premiums on bonds of public officers from funds appropriated for the expenses of the office, but since the County Clerk is compensated on a fee basis and bears the expense of his own office, I agree with your conclusion that he should pay this item of expense as he pays others.

I also call your attention to the fact that there is no statutory requirement that a deputy clerk give bond, therefore, when he does so it is simply for the County Clerk's own protection.

I can find no authority allowing the Board of Supervisors of counties having a population of twenty-five thousand or more, according to the latest United States census (see Chapter 123 of the Acts of Assembly of 1948 which deals with compensation of deputy clerks in certain counties) to pay the expenses in question. Therefore, in view of the reasons stated above, it is my opinion that the premium on the surety bond for deputies is not a proper expense to be paid by Bedford County.

With kindest regards,

Sincerely yours,

J. LINDSAY ALMOND, JR.,  
*Attorney General.*

**CLERKS OF COURTS—No duty to record a "Cattle Brand". F-116**

November 24, 1948.

HONORABLE E. O. RUSSELL, CLERK,  
Circuit Court for Loudoun County,  
Leesburg, Virginia.

My dear Mr. Russell:

This is in reply to your letter of November 17, in which you state that a person recently requested your office to record a 'brand' used by him in branding his cattle on his farm in Loudoun County. You desire to know if there is any statute authorizing a clerk to record such cattle brands.

I know of no statute in this State that authorizes the clerk of a court to record the type of 'brand' described above, and it is my opinion that you are under no duty to do so.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**COMMISSIONERS OF REVENUE—As owner of newspaper, such officer cannot Publish Notices of County Treasurer for Compensation. F-58**

**PUBLIC OFFICERS—County officers, in their Personal Capacity, cannot contract with the County and receive Compensation. F-58**

November 24, 1948.

MR. PRESTON MOSES,  
Commissioner of the Revenue,  
Chatham, Virginia.

My dear Mr. Moses:

This is in reply to your letter of November 13. You state that, in addition to being Commissioner of the Revenue of Pittsylvania County, you are the owner of a weekly newspaper having a general circulation in Pittsylvania County. You ask whether or not you may accept and be compensated for advertisements or

notices of delinquent land lists which are required to be published by the County Treasurer.

You refer to previous opinions this office on related questions. Since those opinions were rendered, Section 2707 of the Code has been amended by Chapter 286 of the Acts of 1948. It now provides that:

"No \* \* \* commissioner of the revenue \* \* \* shall become interested, directly or indirectly, in any contract made by or with any officer, agent, commissioner or person acting on behalf of the supervisors \* \* \* or in any contract, fee, commission, premium or profit therefrom, *paid in whole or in part*, by the county. \* \* \*"

The underscored language as well as other provisions of the statute are new. While the expenses of the County Treasurer for advertisements and the like are approved by the Compensation Board, they are paid in part by the County. In view of the amendment to the language of Section 2707, it is my opinion that the Commissioner of the Revenue cannot be interested in a contract made with the Treasurer for the publication of delinquent land lists.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**COMMONWEALTH'S ATTORNEY—Not Entitled to Fee in Representing  
County for the Collection of Taxes. F-69**

December 29, 1948.

HONORABLE R. A. ROBERTSON,  
Treasurer of Norfolk County,  
Portsmouth, Virginia.

My dear Mr. Robertson:

This is in reply to your letter of December 18, in which you state that the Norfolk County Board of Supervisors authorized the Commonwealth's Attorney for Norfolk County to enter suit against a corporation in Norfolk County for personal property taxes and that it was understood that a reasonable fee would be paid.

You desire to know whether you would be within the limits of the law to issue a check for the amount the Board and the Commonwealth's Attorney might agree upon.

This office has previously ruled that the Board of Supervisors of Isle of Wight County might pay the Commonwealth's Attorney of that county for services rendered in the collection of certain personal property taxes. However, the opinion was rendered before the recent amendment to Section 2707 of the Code and was based on the authority of the governing body of a county, under Section 403 of the Tax Code, to employ counsel of its own choosing for the collection of any county tax.

Section 2707 of the Code, which forbids certain paid officers of the county to have an interest in contracts with or claims against their counties, was amended and reenacted by Chapter 286 of the Acts of Assembly of 1948. The amendment expressly included Commonwealth's Attorneys in the list of paid officers of the county and provided that they should not be interested "in any contract, fee, commission, premium or profit there from, paid, in whole or in part by the county of any board, commission or agency thereof." The following exceptions was also added by the amendment:

" \* \* \* Provided, however, this section shall not apply to attorneys for the Commonwealth employed by the governing bodies of counties under the provisions of sections two hundred fifty-one and four hundred three of the Tax Code or section twenty-five hundred three of the Code of Virginia to collect taxes which are a lien on real estate." (Italics supplied).

Therefore, it is my opinion that Section 2707, as amended, prohibits a Commonwealth's Attorney from receiving any fee in connection with a contract for the collection of any taxes except those "which are a lien on real estate."

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
Attorney General.

**COMMONWEALTH ATTORNEYS—Serve in Non-support or Desertion cases; no extra Compensation Allowed. F-69**

September 22, 1948.

HONORABLE ROBERT T. HUBARD,  
Commonwealth's Attorney,  
Buckingham County,  
Buckingham, Virginia.

My dear Mr. Hubard:

This is in reply to your letter of September 16, in which you ask if you, as Commonwealth's Attorney, are expected to conduct cases involving desertion and nonsupport charges without compensation except so far as may be provided by your regular salary.

Section 1937c of the 1948 Supplement to the Virginia Code provides that proceedings for desertion and nonsupport shall be in the circuit courts, except that in counties having juvenile and domestic relations courts, such courts shall have exclusive jurisdiction. Section 49871 of the Code provides that the trial justice of each county shall also be judge of the juvenile and domestic relations court in his county.

Sections 1953h of the 1942 Code pertains to the duties of the Commonwealth's Attorney in matters before the juvenile court. That section provides that "the special justice may \* \* \* call upon the Commonwealth's Attorney \* \* \* to assist him in any proceeding under this Act and it shall be the duty of such Commonwealth's Attorney to render such assistance when so requested \* \* \*." It is further provided that the Commonwealth's Attorney shall represent the State in all cases appealed from the juvenile court.

It is my opinion that the Commonwealth's Attorney is not entitled to compensation beyond his regular salary when his services in nonsupport and desertion cases are requested by the judge of the juvenile court, or when he represents the state in any appeal from that court. In such cases it is his duty to appear, and in so appearing he appears in the official capacity of Commonwealth's Attorney. For such services he is not entitled to compensation beyond his regular salary.

With best wishes, I am

Very truly yours,

J. LINDSAY ALMOND, Jr.,  
Attorney General.



**CONTRACTS—Elizabeth River Tunnel District as political subdivision not required to advertize for bids before letting contracts. F-34**

April 11, 1949.

HONORABLE J. A. ANDERSON, COMMISSIONER,  
Chairman, Elizabeth River Tunnel Commission,  
State Department of Highways,  
Richmond, Virginia.

My dear General Anderson:

This is in reply to your letter of March 28, in which you desire my opinion as to whether or not the Elizabeth River Tunnel Commission, created by Chapter 130 of the Acts of Assembly of 1942, may enter into a negotiated contract for the construction by the Elizabeth River Tunnel District of the proposed tunnel under the South Branch of the Elizabeth River, rather than enter into a contract based on competitive bids.

Chapter 242 of the Acts of Assembly of 1932 (Section 5779(1) of Michie's Code of 1942) provides, with certain exceptions not pertinent here, that whenever *the State of Virginia or any department, institution or agency thereof* shall be a party to a contract for construction work in excess of \$2,500, except in the case of an emergency, such contract shall be let only after advertising for bids for such work.

The Act creating the District is known as the Elizabeth River Tunnel Revenue Bond Act and provides that the District *shall be a political subdivision of the State*. It further provides that its governing body, consisting of five members, shall be known as the Elizabeth River Tunnel Commission and have the power to make and enter into all contracts necessary in the performance of its duties.

Since the District is a political subdivision of the State, it can be seen that the terms of Chapter 242 of the Acts of Assembly of 1932 are not applicable. Therefore, it is my opinion that the Commission may negotiate a contract for the construction of the proposed tunnel pursuant to its authority "to make and enter into all contracts" necessary to the performance of its duties.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**CORONERS—Act authorizing Commission on Post Mortem Examinations to appoint Coroners is Constitutional. F-78**

February 23, 1949.

MR. JAMES P. REARDON,  
City Solicitor,  
Winchester, Virginia.

My dear Mr. Reardon:

This is in reply to your letter regarding the statutes relating to coroners, in which you raised a question as to the constitutionality of Chapter 355 of the Acts of Assembly of 1946 insofar as it relates to the office of coroner, and also the question of whether this law or Section 4806 of the Code as amended by Chapter 171 of the Acts of the same session of the Legislature governs the duties of coroners.

I quote in part from your letter:

"As City Solicitor for the City of Winchester, I objected to the City being taxed for certain fees for persons who were brought into Winchester for a radius of 100 miles or more, and in some instances dying here and over whose remains an inquest is held.

"If you will look at the Acts of 1946, page 251, you will note that this is virtually what the law has been for many years and which I think is still the law. The Act under which the Health Department seems to be proceeding is another Act passed in 1946, which will be found at the bottom of page 595, Chapter 355. This seems to be a very drastic departure from the old coroner's laws, and creates many offices and bureaus, and yet it does not refer to coroners except to repeal certain sections of the Code of Virginia. It does not repeal the section I have referred to above, which section, read by a normal person, would not indicate that in every death a coroner should be called.

"In my opinion, Chapter 355, page 595, of the Acts of Virginia, 1946, is unconstitutional insofar as it relates to the office of coroner, as it does not disclose in the Act any suggestion as to the appointment of a coroner or his duties."

While Section 4806 of the Code was amended in 1946, this section as amended remained in effect only until October 1, 1946, as the same along with a number of other provisions of the Code was repealed by Chapter 355 of the Acts of 1946, the repeal to take effect as of October 1, 1946. See Section 3 of said Chapter 355. I note that you state this Section 4806 of the Code was not repealed by Chapter 355. I call your attention, however, to the fact that Section 4806 was a part of Chapter 190 of the Code. While the title to Chapter 355 does not mention Section 4806 by number, it expressly states that one of the purposes of Chapter 355 is to repeal "Chapter 190 of the Code of Virginia relating to coroners and coroners' inquests." The body of the Act, in Section 3, provides: "That Sections 2815, 2818 \* \* \* of the Code of Virginia, Chapter one hundred and ninety of the said Code as amended (including sections forty-eight hundred and six to forty-eight hundred and eighteen, both inclusive) \* \* \* are hereby repealed, this repeal to be effective on and after the first day of October, nineteen hundred and forty-six. \* \* \*"

It is clear, therefore, that Section 4806 of the Code, as amended in 1946, was repealed as of October 1, 1946.

In stating your objections on constitutional grounds to Chapter 355 of the Acts of 1946, you state that the "Act" does not disclose any suggestion as to the appointment of coroners or their duties. I assume you have reference to the fact that the *Title* of the Act does not specifically mention the appointment of coroners and that you contend the Act is broader than its title.

The title to the Act, however, states that the Act is one "to revise the laws of Virginia with respect to *post mortem examinations*, and to that end to amend the Code of Virginia by adding thereto a new Chapter numbered 190-A and fifteen new sections creating a Commission on Post Mortem Examinations and prescribing its powers, duties and functions; to provide for the appointment of a Chief Medical Examiner, and to prescribe his powers and duties with respect to post mortem examinations and investigations \* \* \*" and to repeal the existing provisions relating to coroners.

The title to the Act clearly shows that the Act deals comprehensively with the subject of post mortem examinations, that is the examinations of dead bodies chiefly for the purpose of determining the cause of death, a function normally performed by coroners.

In my opinion the title of the Act is sufficiently broad to support the provisions authorizing the Commission on Post Mortem Examinations to appoint coroners to actually perform the examinations as well as the other provisions relating to the duties of coroners including the making of the necessary reports to the Chief Medical Examiner and others concerned. The fact that all of the particulars dealt with in the statute are not set forth in the title does not render

the provisions invalid, since the general purview and scope of the statute are clearly set forth in the title. In this connection see *Commonwealth v. Dodson*, 176 Va. 281. It is my opinion, therefore, that Chapter 355 of the Acts of 1946 is constitutional.

In our previous correspondence on this matter I have set forth my views on the questions of when a coroner should investigate a death and by whom he should be paid. As pointed out therein, the wisdom of the legislation is a matter for determination by the General Assembly.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, JR.,  
*Attorney General.*

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**CORONERS—Fees to be paid by the City or County wherein the death occurs. F-78**

February 24, 1949

HONORABLE A. O. LYNCH,  
Commonwealth's Attorney for Norfolk County,  
Norfolk, Virginia.

My dear Mr. Lynch:

This is in reply to your letter of February 18, in which you state that the Coroner for the City of South Norfolk is also Coroner for Norfolk County. My opinion is desired on whether or not the "fees for investigations of persons in the City of South Norfolk dying suddenly when in apparent health, or when unattended by a physician, are payable by the City of South Norfolk or Norfolk County."

As you point out, Section 19-23 of Chapter 2 of the Reorganization Provisions of the Code of Virginia (Michie's Supp. 1948, §4818(10)) provides that the coroner's fee shall be paid by the county or city for which he is appointed.

Under Section 19-22 of the above Chapter of the Reorganization Provisions of the Code (Michie's Supp. 1948, §4818 (10)) a coroner can, in effect, only make an investigation when the death occurs in the city or county for which he is appointed. Therefore, it is my opinion that the place of death determines the source of fees, which, in the instant case, would be the City of South Norfolk.

Very sincerely yours,

J. LINDSAY ALMOND, JR.,  
*Attorney General.*

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**CORONERS—Reports by, When Required. F-78**

October 7, 1948

DR. L. J. ROPER,  
State Health Commissioner,  
Richmond 19, Virginia.

My dear Dr. Roper:

With your letter of October 5 you enclosed a copy of a letter written to Dr. Breyfogle, Chief Medical Examiner, by Mr. James P. Reardon, City Solicitor for Winchester, Virginia, in which Mr. Reardon objects to the City's having to pay the Coroner's fees in the cases of Thomas Leroy Cooper and Ronny Ernest Ashwood, whose deaths occurred on September 7, 1948. Mr. Reardon takes the position that the opinion of a coroner was not necessary to determine whether or

not the deaths were accidental, and he requests that your Department clear up the question of having a coroner at all times when there is no evidence of foul play.

This office has previously ruled, both under the old coroner law and the law adopted in 1946, that the duty of the coroner is not limited to investigations of cases where death occurs under suspicious circumstances, but includes cases of any death arising from violence or occurring suddenly when the party is in apparent health. Section 4806-i of the Code as enacted by Chapter 355 of the Acts of Assembly of 1946 (codified by Michie in his 1948 Supplement as Section 4818(9) ) reads as follows:

"Upon the death of any person on or after October first, nineteen hundred forty-six, from violence, or suddenly when in apparent health, or when unattended by a physician, or in prison, or in any suspicious, unusual or unnatural manner, the coroner of the county or city in which such death occurs shall be notified by the physician in attendance, by any law enforcement officer having knowledge of such death, by the undertaker, or by any other person present. If the death occur in the penitentiary the notice shall be given to the coroner of the City of Richmond."

The following section requires the coroner, upon receiving such notice, to make an examination as to the cause and manner of death. It will be seen, therefore, that his duty attaches when he is notified of any violent or sudden death, whether or not the same occurred under suspicious circumstances. For instance, the law contemplates that the coroner shall investigate deaths arising from automobile accidents, many of which involve no element of criminal responsibility. See Sections 43 and 46 of the Motor Vehicle Safety Responsibility Act (Michie's Code, § 2154(a43) and § 2154(a46) ) which require coroners to report to the Division of Motor Vehicles upon learning of the death of a person as a result of a motor vehicle accident.

It may be pointed out that a death apparently resulting from an accident may be found, upon investigation, to have resulted from direct foul play and not from the supposed "accident". In other cases it may often be important to have established the fact that the death was caused by the accident and not natural causes if it is later discovered that the accident resulted from criminal negligence. The coroner is entitled to his fee for investigating the cause of death even though it originally appeared and is later established in fact that death was purely accidental.

Mr. Reardon refers to the fact that death in the case he mentions occurred en route to the hospital at Winchester. There could, of course, be a question as to whether death occurred in Winchester or before the injured party reached that locality. While the statute requires the notice of death to be given to the coroner of the county or city in which death occurs, this office has previously ruled that, in those cases where it is impossible to determine exactly where death occurred, a reasonable assumption upon which to act is that death occurred where it was first discovered.

Very sincerely yours,

J. LINDSAY ALMOND, JR.,

*Attorney General.*

**COSTS—Probation Officers, Traveling Expenses. F-84**

September 9, 1948

HONORABLE HUGH REID,  
Trial Justice for Arlington County,  
Arlington, Virginia.

My dear Judge Reid:

This is in reply to your letter of September 2, in which you ask if the traveling expenses of the probation officer of your court are payable out of the State criminal accounts fund and, if so, whether expenses for travel within the county should be included.

As you point out, the County Court of Arlington County is organized under section 5904a et seq. of the Code. Section 5904b provides that the county court shall be the juvenile and domestic relations court of the county and shall have all the powers and duties imposed by law on juvenile and domestic relations courts, one of which is the power to appoint probation officers. See sections 1915 and 1922a.

The statutes originally creating juvenile and domestic relations courts were sections 1945—1953 of the Code, which authorized the creation of such courts in cities of over twenty-five thousand inhabitants, and chapter 483 of the Acts of Assembly of 1922 (Michie's Code, §§1953a—1953m), which authorized the creation of such courts in cities of less than twenty-five thousand inhabitants and in counties. Both of these statutes contain provisions for the payment of the traveling expenses of probation officers from the State criminal accounts fund, the one dealing with juvenile courts in counties reading as follows:

"The traveling expenses of such special justice incurred in the discharge of his duties and the traveling expenses incurred by a probation officer of said city or county, when traveling under the order of said special justice, shall, after being approved by the judge of the circuit court of such city or county, be paid by State auditor of public accounts out of the criminal accounts fund provided for such purpose." (Michie's Code, §1953i).

Subsequent to the enactment of chapter 483 of the Acts of 1922, the trial justice Act designated trial justices as the juvenile and domestic relations judges of counties, and in Arlington County the county court has been designated as the juvenile and domestic relations courts. While these courts are not organized under the 1922 Act, it is my opinion that, since they are vested with all the powers and duties of juvenile and domestic relations courts, all of the general provisions of the Act should be held to apply to them. For this reason it is my opinion that the provision concerning traveling expenses applies to the probation-officer of your court.

In connection with your second question as to whether expenses for travel within the county should be included, I am informed by the Comptroller's Office that the sections directing the payment of traveling expenses out of the State criminal accounts have been uniformly construed by that office since their enactment in 1922 as applying only to travel beyond the limits of the probation officer's city or county in those exceptional cases where such travel is necessary and is specifically ordered by the court. This administrative construction of the statutory provisions relating to "traveling expenses" is supported by the language of the statute which directs such payment only where the expenses are incurred "when traveling under order of said special justice." This language indicates that the statute was intended to apply to those special cases where the justice finds it necessary to direct the officer to travel some distance to perform some specific duty.

In view of the long administrative construction of the statute by the Comptroller's Office, acquiesced in by the localities and unchanged by action of the

Legislature, it is my opinion that the statutes should not be held to apply to ordinary expenses incurred by the probation officer in his routine work in his county.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**COSTS**—Witness fees and court costs incurred by the Commonwealth—Virginia Operator's and Chauffeur's License Act Payable out of funds appropriated therefor. F-353

**MOTOR VEHICLE LAWS**—Court costs and witness fees chargeable to appropriation for administration of Virginia Operator's and Chauffeur's License Act.

February 3, 1949

HONORABLE GLEN M. WILLIAMS,  
Commonwealth's Attorney for Lee County,  
Jonesville, Virginia.

Dear Mr. Williams:

This is to acknowledge receipt of your letter of January 27 in which you state:

"Recently I defended a suit for the Division of Motor Vehicles in which the petitioner asked for his driver's permit to be restored to him. The petitioner won the suit and the question has arisen as to who is supposed to pay for the witnesses summoned in behalf of the Division of Motor Vehicles. I would like to know whether or not the Clerk of the Circuit Court can pay this out of the Commonwealth Fund or whether the Division of Motor Vehicles shall pay this amount. \* \* \*"

The licensing of operators is provided for in Chapter 385, Acts of 1932, as amended. The proceeding to which you refer is not a criminal one and, therefore, the funds appropriated under Item 51 of the Appropriation Bill, Chapter 552, Acts of 1948, should not be used for the payment of witnesses summoned in such a procedure. In Item 59 of the Appropriation Bill, there is a fund appropriated for licensing operators of motor vehicles.

It is, therefore, the opinion of this office that witness fees and court costs incurred in connection with the appeals to the courts of those persons denied licenses under the provisions of Chapter 385, Acts of 1932 as amended, commonly known as the Virginia Operators' and Chauffeurs' License Act, are payable out of the funds appropriated to the Motor Vehicle Commissioner for the administration of that Act. You should, therefore, have the Clerk bill the Motor Vehicle Commissioner for the witness fees and court costs properly chargeable to the Commonwealth in this case.

Yours very truly

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**COSTS AND FEES—Defendants Prosecuted Jointly Must Pay Fees Due Clerks and Commonwealth Attorneys. F-116**

July 28, 1948

HONORABLE JENNINGS L. LOONEY, *Clerk*,  
Circuit Court of Buchanan County,  
Grundy, Virginia.

My dear Mr. Looney:

This is to acknowledge your letter of July 26, in which you ask three questions with regard to fees to be charged when one hundred (100) defendants are prosecuted jointly under a single indictment and enter pleas of guilty to a felony charge.

As you pointed out, §3484 of the Code, dealing with fees of clerks, was amended by Chapter 379 of the Acts of Assembly of 1948, and subsection 56 provides that the clerks shall charge the accused ten dollars (\$10.00) upon conviction in a felony case. Therefore, under such language, I am of the opinion that it is proper for you to tax ten dollars (\$10.00) for each defendant.

In regard to your second question, I agree with your conclusion that under §3505 of the Code the fee of the Commonwealth's Attorney should be ten dollars (\$10.00) for each defendant.

Your third question is whether or not you should include an arrest fee of one dollar and fifty cents (\$1.50) for each defendant when taxing the costs in this case. You point out the fact that most of the arrests were made by the State Police.

This office has previously ruled that no arrest fee should be taxed in any criminal case where the arrest is made by a State police officer, therefore, it is my opinion that you should not include an arrest fee in the instant case as to those defendants who were arrested by the State Police.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General*

**COSTS AND FEES—Divorce Cases—not Dependent upon quantity of services rendered. F-116**

August 17, 1948

HONORABLE EMBRY E. FRIEND, *Clerk*,  
Circuit Court of Pittsylvania County,  
Chatham, Virginia.

My dear Mr. Friend:

This is to acknowledge your letter of August 13, in which you ask whether or not the clerk's fees in divorce cases, which are set forth in section 3485 of the Code, as amended by Chapter 380, Acts of Assembly of 1948, are chargeable against the plaintiff regardless of services rendered.

The pertinent part of section 3485, as amended, is as follows:

"In lieu of the fees hereinabove set forth: For all services rendered in divorce cases including furnishing a duly certified copy of the decree of separation from bed and board or of divorce ..... \$8.50  
\* \* \* \*"

It is my opinion, therefore, that the amount of actual service rendered is immaterial and that a fee of \$8.50 should be charged for all or *any service* rendered in a divorce case.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**COSTS AND FEES—Fees in Civil Cases Collected for Sheriff by Clerk Payable into the Treasury of County.—F-136**

August 19, 1948

HONORABLE J. GORDON BENNETT,  
Auditor of Public Account,  
State Finance Building,  
Richmond, Virginia.

My dear Mr. Bennett:

This is in reply to your letter of August 18, in which you ask whether a clerk should pay to the sheriff fees collected for him in civil matters.

Subsection (b) of section 1 of Chapter 386 of the Acts of Assembly of 1942 reads in part as follows:

“ \* \* \* All fees collected by *or for* every sheriff, sergeant, and deputy of either, shall be paid into the treasury of the county or city for which he is elected or appointed, on or before the tenth day of the month next succeeding that in which the same are collected. \* \* \* ” (Italics supplied)

In my opinion, the language of the statute quoted above requires the clerk to pay all fees collected by him for the sheriff into the treasury of the county or city for which the sheriff is elected or appointed, and that such fees should not be paid to the sheriff.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**COST AND FEES—Fees paid upon Qualification of Estate what based on.**  
F-17

July 30, 1948

MR. ROBT. H. OLDHAM, *Clerk*,  
Circuit Court of Accomack County,  
Accomac, Virginia.

Dear Mr. Oldham:

I am in receipt of your letter of July 29th, 1948, through which you propound an inquiry based upon the following situation:

You state, in substance, that there are numerous qualifications of personal representatives for the purpose of instituting suit through motion for judgment for recoveries on behalf of estates of decedents; that it is represented that the decedent's estate is of value of one hundred dollars, or less, and there is no tax or court costs upon qualification. You further state, in substance, that actions are brought in the name of the personal representative and often compromised for



appreciable sums, or proceed to judgment in substantial amounts.

You desire to know whether the personal representative should be required to estimate the estate for the purpose of tax and court costs upon qualification.

Section 5371a of the Code, as amended by Acts of 1946, Chapter 292, vests discretion in the Courts and Clerks relative to requiring surety of personal representatives, guardians or committees, when the amount coming into their hands does not exceed five hundred dollars. In the matter of estates of decedents, however, where the value is one hundred dollars, or less, the provision is mandatory that "there shall be no tax or court costs upon such qualification."

The purpose and spirit of the Statute is to enable a personal representative to assert, prosecute or defend any legitimate claim, right, suit or action belonging to or assertable against the estate. The value of the estate should be determined from the assets coming into the hands of the personal representative upon qualification without reference to the value of an unliquidated claim for damages contingent upon recovery through the process of litigation.

It is my opinion, therefore, in estimating the value of the estate of the decedent under this section the clerk or court could not properly require the personal representative to estimate the value of an unliquidated and contingent claim or liability.

It is my opinion that Section 3517 of the Code is pertinent to your inquiry. Inasmuch as qualification of the personal representative is a pre-requisite to institution of suit on behalf of the decedent's estate the court possesses inherent power in allowing a party litigant to avail himself of the provisions of this section in order that all proper costs be paid from any recovery by compromise, and could refuse to enter an order of dismissal until the order had been compiled with.

Where compromise is effected without resort to litigation the tax and cost of qualification is a proper charge of administration and the Clerk should see that it is called to the attention of the Commissioner of Accounts, and/or the court.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**COUNTIES—Ordinances—Counties Adjoining or Abutting Cities of 125,000 or more have same Authority of Cities to Adopt. F-83**

January 5, 1949

HONORABLE HUGH B. MARSH,  
Commonwealth's Attorney for Fairfax County,  
Fairfax, Virginia.

My dear Mr. Marsh:

This is in reply to your letter of December 30, in which you desire my opinion as to whether or not a county, and specifically Fairfax County has the right to adopt an ordinance under the provisions of Section 4533a of Michie's Supplement of 1948.

The section to which you refer provides for the punishment of persons guilty of riotous or disorderly conduct in certain public places and declares that "cities and towns are hereby authorized and empowered to adopt ordinances or resolutions prohibiting and punishing the above acts, or any of them, when committed in such cities or towns, and such ordinances or resolutions shall provide the same punishment for a violation thereof as is provided by this act, anything in the charter of such cities or towns to the contrary notwithstanding."

I concur with your conclusion "that because of the fact that the Code sec-

tion is silent as to counties, that therefore a county is not given the right to adopt an ordinance or resolution, and that all of the fines derived from violations of said Code section in a county must be paid to the State."

However, I call your attention to Section 2743b of Michie's Supplement of 1948, which provides, among other things, as follows:

"The boards of supervisors of counties adjoining and abutting any city, within or without this State, having a population of one hundred and twenty-five thousand or more, as shown by the last preceding United States census \* \* \* are hereby vested with the same powers and authority as are now vested or which may hereafter be vested in the councils of cities and towns by virtue of the Constitution of the State of Virginia or the Acts of the General Assembly passed or which may hereafter be passed, in pursuance thereof; \* \* \*."

This office has previously ruled that, if Fairfax County in fact adjoins the District of Columbia, it comes within the scope of the above quoted section. (Report of the Attorney General, 1938-1939, at page 174). Therefore, assuming that Fairfax County touches the District of Columbia, it is my opinion that its Board of Supervisors, by virtue of Section 2743b, may adopt an ordinance under the provisions of Section 4533a, to which you have referred.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**COUNTY ZONING ORDINANCE—Large Billboard is exempted from  
Operation of Ordinance under Certain Conditions. F-60a**

July 26, 1948.

HONORABLE W. H. CARTER,  
Commonwealth's Attorney,  
Amherst County,  
Amherst, Virginia.

My dear Mr. Carter:

This is in reply to your letter of July 19, in which you state that section X of the zoning ordinance of Amherst County provides that no signs shall be erected and that no existing signs shall be painted, rehung, replaced or maintained in highway residential districts with certain exceptions not pertinent to the question to be considered here. You point out that the zoning ordinance in question was enacted under the provisions of Chapter 415, Acts of Assembly of 1938, and that section 5 of the Act is as follows:

"Such ordinance or ordinances shall not prohibit the continuance of the use of any land, building or structure for the purposes for which such land, building or structure are used at the time such ordinance or ordinances take effect, but the alteration of, or addition to, any existing building or structure for the purpose of carrying on any prohibited use within the district may be prohibited."

You desire my opinion as to whether or not a sign on a large size billboard comes within the provisions of section 5 of the above-mentioned Act.

The question revolves around the definition of the word "structure" and whether or not a "sign" is considered to be a "structure" within the meaning of the word as used in section 5.

In its broadest sense "structure" means any production of work artificially built up and joined together in some definite manner. See 40 Words and Phrases (Perm.) page 323 et seq. For example, a sky sign erected on the roof of a building for the purpose of advertising has been held to be a "structure" as has a sign five feet long by three feet eight inches wide, hung in front of a dental office in a residence district been so held.

Therefore, it is my opinion that a sign on a large size billboard comes within the provisions of the Act in question.

I might point out, however, that I am also of the opinion that the word "structure" as used in section 5, above, does not necessarily include *all* signs, and that it is my belief that whether or not a "sign" is a "structure" within the meaning of section 5 would depend upon the circumstances of each case.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**CRIMINAL LAW—Abandoned Wells; Liability Of Owner. F-226a**

June 29, 1949.

HONORABLE J. C. KNIBB,  
Commonwealth's Attorney for Goochland County,  
Goochland, Virginia.

My dear Mr. Knibb:

This is in reply to your letter of June 28, in which you state that Goochland County has within its borders numerous abandoned coal and gold mining pits as well as abandoned wells, which constitute a hazard to the safety of the people and animals in your county. You further state that most of these pits and wells were dug many years ago by a business concern which has long since gone out of business or by individuals who have been dead many years. You ask whether the present owners of the land on which these wells and pits are located can be compelled to fill in or fence them under Section 4722(3) of Michie's Code of Virginia.

This statute makes it the duty of all owners, operators, proprietors, superintendents or conductors of any sawmill or other manufacturing plant, or any other person, who has caused to be dug on his own land or land of another any well or pit, to fill such well or pit with earth so that the same shall not be dangerous to human beings, animals, or fowls at the time the well or pit is abandoned, unless the owner of the land requests in writing that the well or pit shall remain open. In the case of mining operations it provides for fencing instead of filling the pit.

As originally enacted in 1922, this statute also made it the duty of the owner of any land whereon such abandoned well is located to see that this duty is properly performed, provided the well was dug after the passage of the Act. The statute was amended in 1938 and this paragraph now reads as follows:

"And it shall be the duty of the owner or owners of any such sawmill to see that the duty aforesaid, hereby imposed upon the persons aforesaid is properly performed. And any person violating any provision of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding five hundred dollars."

Since the statute has been amended so as to refer only to the owner of the sawmill and no longer refers to the owner of the land, as such, I do not think that the landowner can be held criminally liable under this statute unless he himself caused the well or pit to be dug. As you know, criminal statutes are to be strictly construed and cannot be extended by implication.

The above views are limited to the question of the landowner's liability to criminal prosecution under this statute and are not intended to imply that he would be under no civil liability if injury is caused by reason of an abandoned well being left on his land not properly safeguarded. This last question is one which would depend upon all the facts and circumstances of the case and is a matter up on which I express no opinion.

I agree with you that these abandoned wells constitute a serious hazard and it may well be that corrective legislation should be adopted in order to hold the landowner criminally responsible.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**CRIMINAL LAW—Accused entitled to copy of warrant when arrested.**  
F-381

September 13, 1948.

HONORABLE M. A. COGBILL,  
Commonwealth's Attorney for Chesterfield County,  
Chesterfield Court House, Virginia.

My dear Mr. Cogbill:

This is in reply to your letter of September 8, concerning section 4824-a of the Code as enacted by chapter 504 of the Acts of Assembly of 1948. This section reads as follows:

"Copy of process to be left with accused; exception.—Except as provided for violations of chapter three of the Motor Vehicle Code of Virginia, 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."

It is my opinion that in every case a warrant or other process charging a person with a criminal offense is issued, except in violations of the Motor Vehicle Code, this section requires that it be issued in duplicate and a copy delivered to the person charged. This would apply both where a warrant is issued on the complaint of a private citizen or officer prior to the accused's arrest and where the accused is arrested for an offense committed in the presence of the officer and brought before the justice for the issuance of the warrant and determination of whether he shall be let to bail or committed pending further proceedings. The purpose of the statute appears to be to give the accused notice in writing of the charge against him.

When a warrant or other process is issued by a duly authorized issuing officer, I think that a copy of that process should be given accused. When such process has been issued, I do not think that it will suffice to give the accused an informal summons made out by the police officer, even though the same purports to state the nature of the charge, for there may be a variance between this informal summons and the official charge stated in the warrant.

Of course, you will note that section 4824-a excepts from its provisions violations of chapter 3 of the Motor Vehicle Code. Section 120 of that Code (Michie's, §2154 (167), provides for the issuance of summons by police officers in the

case of such violations. I find no authority for similar procedure in the cases of violations of other State laws or of county ordinances. There may be cases of minor infractions committed in the presence of officers where it is not considered necessary to take the offender into custody until a warrant can be secured and, in such case, it may be desirable for the officer to issue an unofficial summons. It is my opinion, however that, if this is done, it will be necessary, when the warrant is subsequently issued, that the same be issued in duplicate and a copy given the accused.

I do not think that section 4824-a requires Grand Juries to return their indictments and presentments in duplicate, as such papers are not, in my opinion processes within the meaning of the statute, which you will note is in that chapter of the Code dealing with arrests, commitments and bail. I do think, however, that where the accused is not in custody when the indictment or presentment is returned, the *capias* for his arrest in felony cases and the summons for his appearance in misdemeanor cases should be issued in duplicate and a copy given the accused, as required by section 4824-a.

You also ask whether the process would be fatally defective and dismissable on motion if a copy is not delivered to the person charged. In my opinion, if a copy of the process is not delivered to the person charged with crime, he may ignore the same if it be a summons and may demand his release if it be a warrant under which he is taken into custody. If he raises no question as to the service until his trial, the matter can be corrected by the issuance of a bench warrant in duplicate. In such case it may appropriate to grant a continuance because no written copy of the warrant stating the charge against him had been furnished him.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**CRIMINAL LAW—Breaking into a house of another with no felonious intent is a misdemeanor. F-85**

April 15, 1949.

HONORABLE CHARLES H. FUNK,  
Commonwealth's Attorney For Smyth County,  
Graybeal Building, Church Street,  
Marion, Virginia.

My dear Mr. Funk:

This is in reply to your letter of April 13, in which you ask my opinion as to what law covers housebreaking where there is no intent to commit any felony.

As pointed out by you, §§4437, 4438 and 4439 of the Code of Virginia, prescribe punishment for the breaking and entering of buildings where there is an intent to commit some felony therein. While I am unable to find any statute which makes housebreaking without any felonious intent a crime, I do refer you to §§4479 and 4480 dealing with injuring property and remaining upon another's property after being forbidden to do so.

In *Miller v. Harless*, 153 Va. 228, the Supreme Court of Appeals had occasion to discuss the effect of a mere trespass upon real property. In that case the Court made the following observation:

"It is true that a mere trespass upon real or personal property, which is also the subject of a civil action, is not always a crime at common law; but

it is a crime at common law if it amounts to a breach of the peace, or if it tends to or threatens a breach of the peace." (153 Va. 244).

It would appear from this statement of the Court of Appeals that the breaking into a dwelling or home of another would be a common law offense, if such breaking and entry amounted to or threatened a breach of the peace. While the statement may not apply to all factual situations, it would seem to me that any breaking into another's dwelling house would threaten a breach of the peace.

I also call your attention to the following statement in Volume 2, *Cyclopedia of Criminal Law*, by Brill, at page 1536. After discussing trespass to real property, the author devotes a section to forcible entry and detainer. He points out that:

"A forcible entry or detainer consists in violently taking or keeping possession of lands or tenements by means of threats, force, or arms and without authority of law. Forcible entry is an indictable offense at common law."

In addition, I call your attention to 36 *Corpus Juris*, at page 1240, under the subject title of Forcible Entry and Detainer, where it is stated that:

"It has been held that breaking into a dwelling house is a forcible entry, although there is at the time no person in the house or on the premises. On the contrary, however, it has been held that such an entry, if accompanied with no more violence than is incident to effecting the entry is a mere trespass, and that, in the absence of circumstances amounting to a public breach of the peace, it is not a forcible entry to break an unoccupied dwelling or into vacant premises."

Upon a consideration of the above authorities, it is my opinion that the breaking into the house of another with no felonious intent can be an offense under Virginia law, properly punishable as a misdemeanor.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**CRIMINAL LAW—Costs; Cost of travel to and from chargeable to person convicted. F-114**

March 23, 1949.

MR. HENRY S. MYERS,  
Sheriff of Amherst County,  
Amherst, Virginia.

My dear Mr. Myers:

This is in reply to your letter of March 18, in which you ask what is the proper rate for mileage of a sheriff in carrying a prisoner to jail that should be taxed as costs in a criminal case.

While Section 34 of the 1948 Appropriation Act, to which you refer, provides that the Compensation Board, in allowing expenses for sheriffs, may make

an allowance of six cents per mile for actual travel by personal automobile, I do not think that this provision governs the amount to be taxed as costs in a criminal case. The ninth paragraph of Section 3487 of the Code reads as follows:

"For carrying a prisoner to or from jail, and every mile of necessary travel an amount equivalent to the necessary toll and ferry charges incurred by the officer, if any, and five cents per mile, which shall be charged and taxed as a part of the court costs."

It is my opinion that this section controls the amount to be taxed as costs for carrying a prisoner to and from jail.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**CRIMINAL LAW—Duty of Arresting Officer is to take Person to Judicial Officer Without Unnecessary Delay. F-129**

October 13, 1948.

MR. JAMES T. CLARK  
Sheriff of Prince Edward County,  
Farmville, Virginia.

My dear Sheriff Clark:

This is in reply to your letter of September 28 in which you ask my opinion as to the proper procedure to be followed by an arresting officer in certain specific instances. I quote from your letter the following paragraph:

"Would you say that should a police officer arrest a man who is dead drunk (passed out and has to be carried in) or one who is disorderly and resists arrest (requiring probably several officers to subdue him) that the officer would have to bring the defendant before a Trial Justice or other Justice to have a warrant issued and a copy of the warrant served on the defendant before the defendant could be committed to jail? This would, of course, work a hardship on the officer, especially if the arrest is made late at night when a Justice is hard to get. I have been of the opinion that under the old law a man was not supposed to be bonded anyway until he had ceased to be drunk, and therefore, a man charged with being drunk did not have to be carried before a Justice before he could be committed to jail. Mainly for this reason I thought that under the new section an officer still would not have to take a drunk man before a Justice before he could be committed to jail."

It seems well established that, where there is an arrest without a warrant, it is the duty of an arresting officer to take the accused before a trial justice or other justice within a reasonable time, in order that such justice might inquire into the matter and determine whether a warrant should be issued for the detention of the accused, or whether he should be released. The question of whether the accused shall be admitted to bail at this time may also be determined by the justice.

What is the reasonable time within which the accused must be taken before

a justice will vary with the particular circumstances of a specific case. The officer need not forsake all his other duties and immediately take the accused before a justice, but he must do so with such reasonable promptness and dispatch as the circumstances will permit. The time of the arrest and availability of a justice are among the factors which will influence the determination of what is a reasonable time. It would also seem that if a person is disorderly and resists arrests, or is dead drunk, that the officer may take whatever means are reasonably necessary to prevent his escape until he can be taken before a justice, but the appearance before the justice must not be unnecessarily delayed. At the time of such appearance, if a warrant is issued, a copy must be given to the accused pursuant to §4824a of the 1948 Supplement to the Virginia Code.

On October 11, the Supreme Court of Appeals delivered a decision in a case which involves the point raised by you, and this reply to your letter has been delayed pending that decision. In that case, *Winston v. Commonwealth*, a state trooper made an arrest without a warrant on a drunk driving charge at 3:30 P. M., on a Sunday afternoon. The accused protested his innocence, as did his companion, but the trooper considered them very drunk and drove them to the Charlotte County Courthouse, twenty-two miles away, where he turned them over to the jailor with instructions that they not be bailed until 9:00 P. M. No warrant had been issued, nor had the accused been taken before a justice prior to being put in jail.

After being jailed, the accused requested that he be taken before a proper official in order that he be bailed, but this request was refused, both the state trooper and the jailor considering him too drunk to be bailed. At 9:00 P. M., the accused was taken before the assistant trial justice where a warrant was issued and he was admitted to bail.

The Supreme Court, in reviewing the conviction for drunk driving which followed, held that the arresting officer "usurped the functions of a judicial officer" in deciding that the accused was not in such condition as to be admitted to bail. It was pointed out that had the accused been taken before the proper judicial officer for the purpose of securing a warrant, then he could have applied for bail, and the judicial officer could determine whether he was in proper condition to be bailed. The Court stated that, under the circumstances of this case, the accused was entitled to a judicial opinion and judgment upon the question of his eligibility for bail. The Court then concluded that the failure of the state trooper and the jailor to perform their respective duties resulted in denying the accused the right to call for evidence in his favor, with the result that the conviction was held to be void, and the prosecution dismissed.

It appears from this case that the arresting officer must take the accused before a judicial officer without any unnecessary delay. Certainly where there is any protestation of innocence in a case involving a charge of drunkenness, the arresting officer and the jailor must not take it upon themselves to determine whether the accused should be admitted to bail. Such action on their part may, as it did in the Winston Case, result in preventing the Commonwealth from securing a conviction. The better practice would seem to be to take all persons charged with drunkenness before a justice for a determination as to their eligibility for bail as promptly as possible in order to prevent the accused from later raising the objection that he was denied a judicial opinion as to his condition.

You also ask whether an arresting officer who fails to take a person before a judicial officer is subject to a civil suit for such action. The general rule seems to be that an action for false imprisonment may be predicated upon an unreasonable delay in taking the person arrested before a magistrate or upon a denial of an opportunity to give bond. Whether any civil liability would attach in any specific case would depend upon the reasonableness of the officer's actions.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
Attorney General.



**CRIMINAL LAW—Fee of counsel appointed by Court not chargeable as cost against defendant upon conviction. F-85b**

April 20, 1949

HONORABLE JOHN H. POWELL, *Clerk*,  
Circuit Court of Nansemond County,  
Suffolk, Virginia.

My dear Mr. Powell:

This is in reply to your letter of April 13, 1949, from which I quote as follows:

"Under the re-organization provision of the Code of Virginia, Section 53.278.1, which provides that 'In any case in which any person is charged with a felony and is not represented by a counsel, etc., the court shall appoint an attorney at law to represent him', should the allowance made by the court for the attorney representing the defendant under this section be included in the judgment docketed against the defendant for costs in the event that he is convicted?"

The purpose of this provision of the Code is to afford to a person charged with a felony and financially unable to obtain an attorney a right that the court appoint an attorney to represent him. It appears to me that this section contemplates that the attorney to be appointed by the Court shall represent the defendant at no cost to him. It is, therefore, my opinion that the allowance made by the Court for the attorney appointed under this section should not be included in the judgment docketed against the defendant for costs if he is convicted.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**CRIMINAL LAW—Insanity of accused; when the trial can be suspended. F-85**

March 10, 1949

HONORABLE BOLLING LAMBETH,  
Commonwealth's Attorney,  
Bedford County,  
Bedford, Virginia.

My dear Mr. Lambeth:

This has reference to your letter of March 4, in which you present for my opinion two questions based upon the following set of facts.

On March 3, 1949, a defendant was placed on trial in the Circuit Court of Bedford County on indictments charging malicious shooting and dynamiting. During the presentation of evidence on behalf of the defendant, and after all the Commonwealth's evidence had been heard, it appeared that there were reasonable grounds to believe that this defendant was insane at the time of his trial. The testimony of two psychiatrists on behalf of the defendant was that the defendant was a serious and dangerous paranoid type, and that he was insane not only at the time of the commission of the crime, but also at the time of the trial.

Upon receipt of this testimony, the Court concluded that the defendant was not in a proper state of mind for the trial and that there were reasonable grounds to doubt his sanity. The Court thereupon suspended the trial, and committed the defendant to the Southwestern State Hospital.

You present the following two questions for my consideration: (1) Should the Court, acting under § 4909, Code of Virginia, suspend the trial, terminate the trial, or declare a mistrial? (2) Has the defendant been placed in jeopardy to such an extent that a continuation of the trial or a new trial is barred?

Section 4909 of the Code prescribes the procedure to be followed when the sanity of the accused at the time of trial is in doubt. This section provides, in part, that "If a court, in which a person is held for trial, see reasonable ground to doubt his sanity or mentality at the time at which, but for such a doubt, he would be tried, it shall susupend the trial \* \* \*" and proceed to commit the accused to a mental hospital pending the determination of his mental condition, or impanel a jury to inquire into his sanity.

If the accused be committed to a hospital this section provides that he shall be returned to the custody from which he was removed, if or when he be found to be sane. Upon such return, " \* \* \* he shall be held in accordance with the terms of the process by which he was originally committed or confined". If, instead of committing the accused to a mental hospital, the court impanel a jury to determine his mental condition, upon their verdict that he is sane " \* \* \* the trial in chief shall proceed."

It is my opinion that this section applies to the case presented by you. I believe that the Court properly suspended the trial under this section. Upon the report from the hospital, if it be found that the defendant is sane at this time, the trial may continue. See §4912. I do not feel that this method of handling the case would allow a plea of former jeopardy to be successfully made at the time the trial may be resumed. I do not believe that the Court should, at this time and in the absence of the accused, declare a mistrial.

It may develop that, if and when it is found that the accused is sane, it will be impractical to continue the suspended trial with the same jury. If that be so, I feel that the Court could, at that time, discharge the jury, declare a mistrial and proceed to try the defendant. I do not believe that this action would enable the defendant to successfully make a plea of former jeopardy. On this point of the effect of discharging the jury and a plea of former jeopardy based upon such action, see *Mack v. Commonwealth*, 177 Va. 921, at 926.

If this accused were being tried by the judge and not by a jury, on which point your letter is silent, I see no objection to the action of the Court in suspending the trial. Upon a finding that the accused is sane, and upon his return from the hospital, the trial may proceed as if no delay had occurred.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
Attorney General.

**CRIMINAL LAW**—Lottery, Where Element of Skill is Present, there is no Lottery. F-123

**LOTTERY**—Where Element of Skill is present, There is no Lottery. F-123

November 10, 1948

HONORABLE HUGH B. MARSH,  
Commonwealth's Attorney for Fairfax County,  
Fairfax, Virginia.

My dear Mr. Marsh:

This is in reply to your letter of November 3, in which you ask whether or

not a bridge tournament where an entrance fee is charged and prizes or trophies are given to those persons winning the tournament is in violation of the gaming statutes of this State.

It is my opinion that the element of skill is present in a bridge tournament and, therefore, it is not a lottery prohibited by the Constitution or laws of this State.

Sections 4686 and 4687 of the Code prohibit gambling and the conducting of any game played for money or other thing of value.

However, since the prize offered in the bridge tournament is only a mere trophy and the contestants evidently are not gambling for the total amount, or even a large share, of the entrance fees, it is my opinion that such a tournament does not violate the provisions of the above mentioned sections.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**CRIMINAL LAW—Misdemeanor cases triable without warrant, no Necessity to Reduce Charges to Writing, unless Accused Requests it. F-381**

**WARRANTS—Must Be Issued In Duplicate. F-381**

October 22, 1948

HONORABLE JOHN W. B. DEEDS,  
Trial Justice,  
County of Pulaski,  
Pulaski, Virginia.

My dear Mr. Deeds:

This is in reply to your letter of October 18, in which you ask my opinion as to the effect upon §4992 of the 1942 Code of §4824a of the Code as enacted by Chapter 504 of the Acts of Assembly of 1948.

Section 4992 provides that where a person has been arrested for a misdemeanor by a police officer of any city or town it shall not be necessary for any justice of the peace to issue a warrant for such person, but the justice shall proceed to try the case without a warrant, unless the person arrested shall demand that the charges be reduced to writing in the form of a warrant.

Section 4824a requires that in every case in which a warrant or other process charging the person with a criminal offense is issued, such process must be issued a duplicate and a copy delivered to the person charged. By its terms this section does not apply to violations of the Motor Vehicle Code.

It is my opinion that § 4824a of the 1948 Code makes no change in procedure under §4992. Section 4824a does not require that a warrant be issued in every case, but it does require that if a warrant be issued, then it must be issued in duplicate, and a copy delivered to the person charged. As §4992 does not require that a warrant be issued where the arrest has been made for a misdemeanor by a police officer of any city or town, it follows that §4824a has no application. However, if the person arrested under §4992 does demand that the charges against him be reduced to writing then, of course, he must receive a copy of the warrant.

In your letter you express the view that police officers still have the right to make an arrest without a warrant in any case where they previously had such right, and that §4824a of the 1948 Code only means that where the arrest is made on the warrant, the accused should be given a copy. I concur with you in this view.

With best wishes, I am

Very truly yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**CRIMINAL LAW—Person Convicted Liable for all Costs, Incidental to Extradition. F-85b**

November 10, 1948.

HONORABLE ROBERT C. GOAD,  
Commonwealth's Attorney,  
County of Nelson,  
Lovingston, Virginia.

My dear Mr. Goad:

This is in reply to your letter of November 4, in which you ask the following question:

"Are the costs of the Sheriff of Nelson County incurred on a trip from this County to Great Lakes, Illinois, and back, pursuant to extradition proceedings, chargeable against the Defendant along with the other regular costs of the trial, when the Defendant, who was extradited and brought back to Virginia from Illinois on a charge of seduction was found guilty of fornication, upon a plea of not guilty, under the doctrine of included offenses?"

Section 4964 of the Virginia Code provides that in criminal cases, where the accused is convicted, the clerk shall make up a statement "of all the expenses incident to the prosecution \* \* \*", which expenses shall be charged against the accused as costs. It is my opinion that the expenses incurred by the Sheriff of Nelson County in traveling to Illinois and back, pursuant to the extradition proceedings, are expenses incident to the prosecution.

This office has previously ruled that where a defendant is charged with a felony and is convicted of a misdemeanor only under the doctrine of included offenses, the costs of the prosecution may be assessed against him. It is, therefore, my opinion that the costs to be assessed against the defendant in the case stated by you may include the expenses of the sheriff incurred upon his trip to Illinois pursuant to the extradition proceedings.

With every good wish, I am

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**CRIMINAL LAW—Prosecution for reckless driving is not bar to prosecution for involuntary manslaughter. F-85****STATUTES—Prosecution under statute does not preclude prosecution for common law offense. F-85**

February 10, 1949.

HONORABLE W. CARRINGTON THOMPSON,  
Commonwealth's Attorney,  
Pittsylvania County,  
Chatham, Virginia.

My dear Mr. Thompson:

This is in reply to your letter of January 27, 1949, from which I quote as follows:

"A, a motorist, is operating his vehicle on a public highway with B and C as his passengers. A is under the influence of alcoholic beverages. He also operates the motor vehicle recklessly, losing control of it as a result of which the vehicle is wrecked, B is killed and C is seriously injured but survives. Two criminal warrants are issued against A, one charging involuntary manslaughter because of the death of B, and the other charging reckless driving causing serious bodily injury to C, as set out in Section 61 of the Motor Vehicle Code, as amended by Chapter 431 of the Acts of Assembly of 1948. A is convicted by the Trial Justice for the reckless driving charge and is later indicted for involuntary manslaughter because of the death of B. To the indictment he interposes a plea in bar to the effect that having been convicted on the reckless driving charge, under Section 4775 of the Code he cannot be prosecuted further."

You ask if the involuntary manslaughter prosecution can be maintained. Section 4775 of the Code provides as follows:

"If the same act be a violation of two or more statutes, or of two or more municipal ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others."

It is my opinion that this section will not be a bar to the prosecution of the involuntary manslaughter charge. I agree with the thought expressed in your letter that §4775 applies only to statutes or municipal ordinances, and that the crime of involuntary manslaughter is not a statutory offense. Involuntary manslaughter is a common law crime and is nowhere defined in the Code of Virginia. Section 4397 merely provides for the punishment of involuntary manslaughter, but does not, as pointed out in your letter, define the crime.

It is, therefore, my opinion that A has not violated two or more statutes under the set of facts presented by you, and the prosecution for reckless driving cannot be interposed as a bar under §4775 to the involuntary manslaughter charge.

It also appears to me that a strong argument can be presented to the effect that A has committed two acts. In other words, when A, by his reckless driving, caused B's death, he committed one act, and when he, by his reckless driving, injured C, he committed another act. While some of the elements may be identical in each of the acts, it would seem to me that the fact that two separate and distinct results are caused would enable an argument to be made that A has committed two acts, based upon the theory that the act includes not only the setting in motion the forces which caused the injury, but also includes the result of those forces.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**CRIMINAL LAW—Service of process in criminal cases—Trial on appeal in Circuit Court is de novo. F-381**

October 14, 1948.

HONORABLE J. ALDEN OAST,  
Commonwealth's Attorney,  
City of Portsmouth,  
316 New Kirm Building,  
Portsmouth, Virginia.

My dear Mr. Oast:

This is in reply to your letter of October 9, in which you raise several questions relative to the issuing and serving of duplicate copies of process on defendants in criminal cases.

You first refer to my letter of September 13 to the Honorable M. A. Cogbill, Commonwealth's Attorney for Chesterfield County, on this subject, and quote from that letter the statement that "If the defendant raises no question as to service until his trial, the matter can be corrected by the issuance of a bench warrant in duplicate." In response to your question on this statement, it is my opinion that in such case the original warrant should not be dismissed, but should be retained as supplemental to the bench warrant.

You also ask, in misdemeanor appeal cases and appeals involving violations of the A.B.C. Act, when the Court of Record issues a bench warrant in duplicate because a copy of the original warrant was not served on the defendant, whether the Court of Record should try the case or remand it to the Police Court for trial on the bench warrant.

The Court of Record, in such cases, does not sit as an appellate court reviewing the action of the Police Court. The trial of the case is a trial de novo, and it is my opinion that once the bench warrant has been issued by the Court of Record, it may proceed to hear the case. The purpose of the bench warrant is, of course, to give notice to the defendant, and in such case it may be appropriate to grant a continuance because no written copy stating the charge against the defendant had been previously given.

Your last question pertains to the procedure to be adopted by the Court of Record in trying a misdemeanor appeal where the conviction in the Police Court was obtained prior to the effective date of §4824a, and no copy of the original warrant was served on the defendant. In such a case, it appears to me that, while the Court of Record may issue a bench warrant in duplicate and then try the case on that warrant, it is not necessary as §4824a would not be applicable.

With best wishes, I am

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**CRIMINAL LAW—Summons may be Given Accused by Officer When no arrest is made. F-381**

September 27, 1948

HONORABLE J. MELVIN LOVELACE,  
Commonwealth's Attorney for City of Suffolk,  
Suffolk, Virginia.

My dear Mr. Lovelace:

This is in reply to your letter of September 23, in which you ask if a written summons given by a police officer at the time he investigates an automobile accident or other traffic violation or other misdemeanor not committed in his presence, and a copy of said summons given to the person charged with the criminal offense, would be legal, or whether the officer would first have to secure a warrant for the arrest of the person and serve a copy of the warrant on the offender.

Section 4824-a of the Code as enacted by Chapter 504 of the Acts of Assembly of 1948 reads as follows:

"Copy of process to be left with accused; exception.-- Except as provided for violations of chapter three of the Motor Vehicle Code of Virginia, 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."

You will note that the exception contained in this statute applies only to violations of Chapter 3 of the Motor Vehicle Code and not to other offenses, whether felonies or misdemeanors. The exception was, in my opinion, designed to preserve the procedure provided by Section 120 of the Motor Vehicle Code (Section 2154(167) of Michie's Code) which provides that, when a person is arrested for a violation of Chapter 3 of that Code, the arresting officer shall issue a written summons instead of carrying the person arrested before a magistrate.

Section 120 of the Motor Vehicle Code, moreover does not, itself authorize the officer to make an arrest without a warrant for an offense not committed in his presence. While this authority is conferred under certain conditions upon members of the State Police by Section 4827-a of the Code, similar authority is not possessed by other police officers. It is my opinion, therefore, that before a local police officer can make an arrest for a traffic violation or other misdemeanor not committed in his presence, a warrant for the arrest of the offender must be secured and that a mere summons issued by the officer would not be legally binding.

While a summons issued by the officer in those cases where the offense is not committed in his presence would not be legally binding, it may be a practical action to take where no warrant can be secured beforehand. There may also be cases of minor infractions, other than violations of the Motor Vehicle Code, committed in the presence of the officer, where it is not considered necessary or even desirable to take the offender into custody or require him to give bail. In such case a summons or notice given by the officer may be preferable. If the offender fails to answer the summons, a warrant can then be issued and served upon him or, if he appears, he can be given a copy of the warrant at that time.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**DEPARTMENT OF PUBLIC WELFARE AND INSTITUTIONS—**  
**Duty thereof to Inspect Mental Institutions. F-231**

January 17, 1949.

HONORABLE RICHARD W. COPELAND, DIRECTOR,  
Department of Welfare and Institutions,  
429 South Belvidere Street,  
Richmond, Virginia.

My dear Colonel Copeland:

This is in reply to your letter of January 13, in which you ask whether or not the State Board of Welfare and Institutions is required to inspect mental institutions as a part of its duties, and whether or not it has to make reports of such inspections.

This matter is covered by Sections 63-28 and 63-29 of the reorganization provisions of the Code of Virginia, which read as follows:

"§63-28. Board to visit institutions.-- It shall be the duty of the State Board, as a whole, or by a committee of its members, or by its agents, to visit, inspect and examine, once a year or oftener, all State, county, municipal, and private institutions which are of an eleemosynary, a charitable, correctional, or reformatory character, or which are for the care, confinement, custody, or training of the defective, dependent, neglected, delinquent,

or criminal classes, except that the hospitals for the insane, the penitentiary, the industrial schools, and the reformatories shall be visited as often as once in every six months and by at least two members of the State Board. The State Board shall also inspect and report on the workings and results of the chartered institutions and associations engaged in the care and protection of the homeless, mentally defective, dependent, neglected or delinquent children or adults.

"§63-29. Reports of Board as to institutions.-- The State Board shall make reports regarding the condition of the institutions or associations mentioned in the preceding section, the care of their inmates, the efficiency of their administration and such other matters as it may deem proper. All reports shall be duly signed and filed in the office of the Board and such extracts and recommendations thereof as the Director deems advisable shall be transmitted to the chairman of the boards of supervisors of the counties, the presidents of the councils of the cities and the officials who are in charge of the respective institutions."

It will be seen from the above that the State Board of Welfare and Institutions is required to make inspections of hospitals for the insane and to make reports regarding the conditions found at such institutions. This is a duty which prior to the reorganization of the State government was already imposed upon the former State Board of Public Welfare. See Section 1902j of Michie's Code of Virginia, 1942. In transferring the duties of that Board to the new Board of Welfare and Institutions this duty was simply carried forward from that previously existing statute.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**ELECTIONS**—Applications for registration may be made in any language.  
F-100d

May 27, 1949.

MR. RUSSELL A. COLLINS, CHAIRMAN,  
Electoral Board City of Newport News,  
Newport News, Virginia.

My dear Mr. Collins:

This is in reply to your letter of May 23, which I quote in full:

"Several naturalized citizens from Greece and Italy, who are unable to write in English, desire to register to vote in the next election, but because of their inability to adequately write English they are not able to register; however, the people can readily write in Greek and Italian. May these people be properly registered?"

Section 20 of the Constitution of Virginia provides that every citizen of the United States having the required qualification of age and residence shall be entitled to register provided he had paid his poll taxes, and that he answer on oath any and all questions affecting his qualifications as an elector submitted to him by the registration officer and provided that, "unless physically unable, he make application to register in his own handwriting, without aid, suggestion, or memorandum, in the presence of the registration officer, stating therein his name, age, date and place of birth, residence and occupation at



the time and for the one year next preceding, and whether he has previously voted, and, if the State, county, and precinct in which he voted last; \* \* \*

As you will see, this only requires that he make application to register in his own handwriting and does not specify that the application be made in the English language. It is my opinion that, if he is able to write in any language and submits an application containing the required information, he is entitled to register. Of course, it is incumbent upon him to satisfy the registrar that his application contains all the required information, and, if the registrar is not satisfied of this fact, he will be justified in rejecting the application. In this connection I think he would be justified in having the applicant bear the expense incident to having the application translated, but, if it appears that the application does contain all of the essentials and is in the handwriting of the applicant, it is my opinion that he should be registered even though the application be written in a foreign language.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**ELECTIONS—Ballots; Form Of For Bond Issues. F-100a**

December 14, 1948.

HONORABLE RIPLEY S. WALKER,  
Commonwealth's Attorney,  
Woodstock, Virginia.

My dear Mr. Walker:

I have your inquiry of December 8 in regard to the form of ballot to be used in an election to be held on January 4, 1949, for the issuance of \$200,000 of bonds on the credit of Shenandoah County for additions to the elementary school buildings at Strasburg, Davis District, Shenandoah County, Virginia. You advise that the bond issue is applied for under §673 of the Code, as amended, and make reference to the election procedure in accordance with §2739 of the Code, which states that the qualified voters shall deposit a ticket or ballot on which shall be written or printed the words "For Bond Issue and Against Bond Issue." You also request an opinion as to whether or not anything should appear other than "For Bond Issue and Against Bond Issue" as provided under §2739.

Since the enactment of §2739 a procedure for special elections, such as this, has been set up, the last amendment being in 1942, under §197a of the 1942 Code. This section provides that in special elections, such as this, the question should be briefly stated and then the square [ ] For, [ ] Against, be placed on the ballot. In my opinion this procedure should be followed in preparing the ballot in this case, rather than the procedure as set forth in §2739.

I appreciate your enclosing certified copy of the order, which I am returning herewith.

Very truly yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**ELECTIONS—Ballots; Secretary Of Election Board Legal Custodian Of.  
F-100a**

October 7, 1948.

MR. H. W. BROWNING, CHAIRMAN,  
Electoral Board of Washington County,  
Route 3,  
Abingdon, Virginia.

Dear Mr. Browning:-

I am in receipt of your letter of October 5th, 1948, from which I quote as follows:

"As Chairman of the Electoral Board \* \* \* I have been asked in order to expedite the handling of the mail ballots \* \* \* to hold a certain number of blank ballots to be delivered to a qualified voter, on legal application. As I interpreted the law, it provides only for the Secretary of the Electoral Board to handle these ballots.

"Will you please inform me whether I can, as Chairman, legally handle the mail ballots in this way?"

You are eminently correct in your interpretation of the law.

The Virginia election laws are strict and specific in the safeguards thrown around the sanctity and security of the ballot.

Section 158, relating to the affixing of the seal, the division for voting precincts, arrangement in securely sealed packages so as to make them invisible and not readily opened without detection provides:

"The packages designed for the various precincts shall be delivered to the secretary of the board and *remain in his* exclusive possession until delivered *by him* to the judges \* \* \* or until he shall have delivered the same to one of the other members of the board to be delivered to the judge or judges."

Section 156 designates and empowers the secretary as the responsible officer to administer the oath to the printer with whom the board contracts for the printing of the ballots.

Section 159 makes it the duty of the secretary to deliver the packages containing the official ballots to the judges of election unless through inability of sickness or other incapacity he is unable to do so, in which event the secretary may delegate that duty to another member of the board.

When a registrar receives an application for a mail ballot, duly made by a person qualified to make same, the registrar must forward same to the secretary or deliver or return the application to the applicant for delivery to the secretary.

It seems clear, from these provisions when read together, that the secretary of the electoral board is the legal custodian of the ballots.

I am mindful of the provisions of section 205 relative to the duty of the electoral board with regard to the sending by registered mail or the delivery in person of the ballot and other material to the applicant, however, I do not believe that the chairman, as such, or any member of the electoral board, would have the right to hold a number of blank ballots for delivery to qualified voters upon legal application for same. The board and not the individual member must act as a board or by the secretary through direction of the board.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**ELECTIONS—Bond Issue for Sanitary District—Judges of election must determine whether voters reside in said district. F-213a**

May 23, 1949.

HONORABLE HUGH B. MARSH,  
Commonwealth's Attorney,  
Fairfax County,  
Fairfax, Virginia.

My dear Mr. Marsh:

This will reply to your letter of May 18 from which I quote in part:

"What is known in this County as Sanitary District No. 1, was created by an order of the Circuit Court of this County some several months ago. The said Sanitary District No. 1 was created under the provisions of Section 1560m to Section 1560s2, of the 1942 Michie's Code of the State of Virginia, and amendments thereto. This Sanitary District No. 1 covers parts of Mount Vernon, Falls Church and Providence Magisterial Districts, of this County.

"Most probably there will be a special election in Sanitary District No. 1, on the question of whether or not the district is to be bonded for the purpose of acquiring a trunk line sewer system now located in the same, and now owned by the Federal Government, and to build a treatment plant and construct lateral sewer lines. Such election, of course, will be conducted under the provisions of Section 1560q, of the aforesaid Code sections.

"The question has been propounded to me as to who is to judge and determine the qualifications of the persons offering to vote in said election, particularly who is to determine and how whether or not those persons offering to vote are actual residents of the district. \* \* \*"

I am of the opinion that the judges of the election would be the proper persons to determine whether the prospective voters reside in the said Sanitary District. The method by which the judges should reach their determination is, of course, up to them; however, I think the suggestion contained in the unquoted part of your letter is a very good one.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**ELECTIONS—Candidates, Amount He May Spend. F-100b**

March 11, 1949

HONORABLE J. HAMILTON HENING, *Clerk*,  
Circuit Court City of Hopewell,  
Hopewell, Virginia.

My dear Mr. Hening:

On July 30, 1948, you requested my opinion as to whether the language "last preceding gubernatorial election" used in Section 234 of the Virginia Election Laws means the general election or the primary election. You stated that you desired this information so that the proper amount of money a candidate may spend in the August, 1949, primary election could be determined.

In my reply of August 2d I expressed the view that the language mentioned referred to the primary and not the general election. A question has been raised as to the correctness of this view and upon reconsideration of the matter I have come to the conclusion that the better view is that this language should be held to mean the general and not the primary election. The pertinent part of Section 234 reads as follows:

"No candidate for any office at any primary shall spend for any purpose whatever, a larger sum than an amount equal to fifteen cents for every vote cast for the candidate of his party receiving the largest vote at the last preceding gubernatorial election, within the territory, the qualified voters of which have the right to vote for the office for whose nomination such person is a candidate at such primary; \* \* \*"

While the words "candidate of his party receiving the largest vote" seem to imply an election in which more than one member of the same party are running as candidates, and it is only in primary elections that this is the case, since each party has but one candidate at a general election, it is also true that the individuals seeking the nomination at a primary are not the "candidates of their party" and do not become such until they are nominated at such primary. It is only at the general election that the parties have candidates.

Since each party has only one candidate at the general election, the words "receiving the largest vote" make this statute ambiguous unless treated as mere surplusage. However, upon reconsideration, it is my opinion that the words "last gubernatorial election" refer to the last general election and not the last primary election. Strictly speaking, a primary is not an election, but only a nomination and, giving the words "gubernatorial elections" their true meaning, they refer to the general election.

I am writing this letter to correct the view previously expressed to you.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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#### **ELECTIONS—Candidates: Party Committeemen; Time For Filing. F-100b**

June 8, 1949

HONORABLE CHARLES R. FENWICK,  
State Senator,  
6733 Lee Highway,  
Arlington, Virginia.

My dear Senator Fenwick:

This is in reply to your letter of June 6, from which I quote:

"The Democratic Committee of Arlington County, by appropriate resolution voted to hold a primary for the office of the County Board and House of Delegates and, in addition, decided to hold an election for the selection of members of the Democratic Committee, said election to be held on the same day as the August primary.

"Notice of holding such a primary and primary election was duly published in a newspaper in the County more than ninety days prior to August 2nd. The resolution adopted by the Committee provided that a written declaration of candidacy for the County Board, House of Delegates and the Democratic Committee had to be filed at least sixty days prior to the primary. In computing this time we reached the conclusion that the deadline

for the filing was midnight on June 2nd. In the form provided by the Committee for filing declaration of candidacy for the Democratic Committee we stated that the declaration had to be filed with the County Chairman on or before midnight of June 2nd. Since the statute, section 229 provided that the declaration of candidacy must be filed at least sixty days before the primary the chairman ignored the day of the primary, August 2nd, and arrived at the date of June 2nd since this gave sixty full days between filing and the primary.

"All of the candidates for the House of Delegates and the County Board filed by midnight June 2nd and most of the candidates for election to the Democratic Committee did likewise. A number of candidates for the Democratic Committee, however, filed after midnight, June 2nd and before midnight June 3rd."

You ask whether the candidates for the Democratic Committee who filed on June 3 have properly qualified.

Section 229 of the Code provides that the name of no candidate shall be printed upon any official ballot used at any primary unless, in the case of a candidate for an office filled by election by the qualified voters of the State at large, or of a congressional district, he file his declaration of candidacy at least ninety days before the primary, and in all other cases he file his declaration at least sixty days before the primary.

While, as the Democratic Committee of Arlington County has computed it, June 2 would leave sixty full days between the filing and the primary and this would be one interpretation of Section 229, the sixtieth day before August 2 is actually June 3.

I call your attention to Clause 8 of Section 5 of the Code, which provides that:

"Where a statute requires a notice to be given, or any other act to be done, a certain time before any motion or preceding, there must be that time, exclusive of the day for such motion or preceeding, *but the day on which such notice is given, or such act is done, may be counted as a part of the time; \* \* \**" (Italics supplied)

In view of this provision it is my opinion that June 3 may be counted as a part of the sixty days specified by Section 229 and that this date was the last day for filing notices of candidacy for candidates for the General Assembly and local offices. June 3 was an official State Holiday (See Section 5758 of the Code), and in view of this fact we have expressed the view that it would be advisable for notices to be filed not later than June 2 in order to avoid any question on this ground. However, since notices of candidacy for the primary are to be filed with the party chairmen and not State or local officials, it is my opinion that a notice filed and accepted on June 3 by a candidate for the General Assembly or a local office would be properly filed.

Your question, however, concerns candidates for the County Democratic Committee and not public officers. The State primary laws deal with the nominations of candidates for public office, not the election of party officials. There is no provisions contained in the election laws which either authorizes or forbids the use of facilities and personnel employed in a party primary for the election of party officials. This is a common practice, however, and has been approved. The regulations governing the qualification of candidates for party office and the manner in which they become candidates is purely a party matter. The Democratic Party Plan provides that when the election of party committeemen is ordered to be made by primary election, such elections shall be held in conformity with the provisions of State primary law.

Though this would seem to require the filing of notices of candidacy within the time prescribed by Section 229 for candidates for public office, this is a matter to be determined by the party authorities themselves and not by this office. The law relating to candidates for public office provides only that the notice

must be filed *at least* sixty days before the primary. A party regulation requiring that the notices of candidates for the position of party committeeman be filed a longer period before the primary would only be an added requirement and would not necessarily be in conflict with the provision of Section 229. This question, as well as the question of whether the notice on the form prepared by the Committee that candidates for the party office should file on or before midnight of June 2, was a binding requirement, is a matter to be decided by the party officials in Arlington County.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**ELECTIONS—Candidates—Payment Of Primary Fees; Declaration of Candidacy. F-100b**

May 27, 1949

HONORABLE HUGH B. MARSH,  
Commonwealth's Attorney for Fairfax County,  
Fairfax, Virginia.

My dear Mr. Marsh:

This is in reply to your letter of May 26 in which you state that one member of the House of Delegates will represent both the City of Falls Church and the County of Fairfax, and that certain confusion has resulted because the City of Falls Church, while it has an Electoral Board duly appointed and qualified, does not have a City Democratic Committee. You ask whether or not candidates for this office would be required to pay one-half of the filing fee to the City Treasurer and one-half to the County Treasurer.

Section 24-a of the Act relating to the holding of primaries, as amended by Chapter 40 of the Acts of Assembly of 1918, which statute is found at page 89 of the printed pamphlet of the Virginia Election Laws, and is codified by Michie in his Code as Section 249-a, provides that candidates for the Senate or the House of Delegates of Virginia shall pay the primary fee to the Treasurer of the candidate's county or city, and where the candidate's district is composed of more than one county or city the fee must be equally divided among the counties and cities in the district and paid to the respective Treasurers. In view of this fact, it is my opinion that candidates for the House of Delegates from the legislative district composed of the City of Falls Church and the County of Fairfax should pay one-half of the fee to the City Treasurer and one-half to the County Treasurer.

The candidates' declarations of candidacy should be filed with the Chairman of the Democratic Legislative District Committee, who would be the party to certify the candidates to the several Electoral Boards.

Under the Democratic Party Plan, the Chairmen of the respective county and city committees for the several counties and cities composing any legislative district where it consists of more than one county or city constitute the Democratic Legislative District Committee. Since Falls Church has not yet organized a City Democratic Committee, the Chairman of the County Committee is the only member of the District Committee and as such would serve as Chairman until the City Committee has been created and the other member of the District Committee is named. He, therefore, in his capacity as Chairman of the District Committee, not as Chairman of the County Committee, would be the party to receive the notices of candidacy and the one to certify the candidates. He should also as Chairman of the District Committee take the proper steps under Section 248 to notify the State Board of Elections that the district officers will be elected by direct primary.

It would also appear that he would be the proper party to organize the City Committee. See paragraph 3 of the section of the Democratic Party Plan relating to Democratic Legislative and Senatorial District Committees.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**ELECTIONS—Capitation Tax—What Persons are Qualified to Vote in Special Election. F-100d**

December 17, 1948

MR. WAILES HANK, *Secretary*,  
Electoral Board, City of Norfolk,  
Norfolk, Virginia.

Dear Mr. Hank:—

This is in reply to your letter of December 13th, in which you request my opinion as to what was the last day a person could pay his capitation tax in order to vote in the special election to be held in Norfolk on December 28th, 1948.

Section 83 of the Code provides that:

"The qualification of voters at any special election shall be such as are hereinbefore prescribed for voters at general elections, but \* \* \* at any such special election, held on or after the second Tuesday in June or any year, any person shall be qualified to vote who is or was qualified to vote at the regular election held on the Tuesday after the first Monday in November of that year. \* \* \*"

Under the above provision, not only those who were qualified to vote in the November 2 election will be qualified to vote in the special election, but also those will be entitled to vote who are otherwise qualified and have paid their capitation taxes six months prior to December 28, the date of the special election.

You will note that the first clause of the language quoted above provides that the qualification of voters at a special election shall be such as is prescribed for general election, one of which is that capitation taxes be paid six months prior to the date of the election in which he wishes to vote. Since the date of a special election is not generally known six months in advance; section 83 goes on to provide an additional ground of eligibility based upon qualification to vote at the regular November election.

It is my opinion, therefore, that those who have paid their capitation taxes on or before June 28th, 1948, and are otherwise qualified, may vote in the election to be held December 28th, 1948.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**ELECTIONS—Commissioners of elections—only one set required in Dual Primary. F-100**

May 20, 1949

MR. CHAS. T. GARTH,  
Secretary Electoral Board,  
Greene County,  
Geer, Virginia.

Dear Mr. Garth:-

I am in receipt of your letter of May 18th, 1949, which I quote as follows:

"Will it be necessary to have two sets of commissioners for the primary election to be held in August 1949, that is one set for the Democratic Primary Election, and one set for the Republican Primary Election, or use one set of commissioners for canvassing the returns from both parties."

The primary elections to be held in Virginia on August 2nd, are two separate and distinct primaries. One is a state-wide Democratic primary, and the other is a state-wide Republican primary, and must be conducted, as far as the actual holding of the primary is concerned, by representatives of the two parties involved.

The law requires that the electoral board appoint the judges and clerks of election. Section 239 of the Virginia Election Laws provides that at the time the judges and clerks of the election are appointed the electoral board of the County or City shall "designate five of the judges so appointed to act as commissioners," and prescribes their duties. The law provides for representation of both major parties on the electoral board.

The commissioners of election so appointed by the electoral board constitutes a Board for the canvassing of the returns of the primary elections. The law does not require that there be two separate and distinct boards, or set of commissioners. The law does contemplate, however, that both parties be represented on the board of commissioners.

Section 224 specifically provides that the electoral board appoint three judges from each party participating in a primary from members of that party. Since section 239 does not require two sets of commissioners, I am of the opinion that the appointment of one set of commissioners, composed of representatives of both parties, would be in conformity with the statute applying to this situation.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**ELECTIONS—Electoral Board of Cities and Counties; Control over Elections: Where voters eligible to vote. F-100**

June 6, 1949

HONORABLE HUGH B. MARSH,  
Commonwealth's Attorney for Fairfax County,  
Fairfax, Virginia.

My dear Mr. Marsh:

I have given careful consideration to the questions presented in your letter of May 21, regarding the conduct of the coming elections in Fairfax County and the City of Falls Church.

I am still of the opinion expressed in my letter of March 11, 1949, to Mr.



LaRue Van Meter, that the actual holding of the election of a delegate to the General Assembly representing Fairfax County and the City of Falls Church, as well as the election of Governor, Lieutenant Governor, and Attorney General should in the County of Fairfax and the City of Falls Church, respectively, be under the control and responsibility of the electoral boards of the county and city respectively. The same views expressed in my letter of March 11 as to the November elections are equally applicable to the primary election. See Section 224 of the Code.

The fact that the City of Falls Church has no City Democratic Committee does not affect this matter. The City Democratic Committee does not have any official duties, in connection with the actual holding of the election, nor in fact with the decision as to holding a primary for the nomination of a delegate to represent the City of Falls Church and the County of Fairfax. The Democratic Party Plan, Section 2 of the Heading of State Senatorial and Legislative Primaries, provides that legislative primary elections shall be held under the direction of the Democratic *Legislative District Committees*, except where a single county or city shall comprise the district. Since the district in question is composed of a city and a county, the exception does not apply and the matter is under the direction of the *district committee*.

As pointed out in my letter to you of May 27, the district committee is composed of the chairmen of the respective county and city committees where the district is composed of more than one county or city. Since Falls Church has not yet formed a city committee, the only member of the district committee is the chairman of the Fairfax County Committee, who will act as the district committee, and as such will receive the notices of candidacy and certify the candidates to the respective electoral boards of the City of Falls Church and the County of Fairfax, which electoral boards will then supervise the holding of the election in their respective jurisdictions.

It is my opinion, therefore, not only that there was no need for the agreement that the election would be supervised in both localities by the electoral board of the County, but that such arrangement would not be in accordance with law. The views expressed herein in no way prevent the people of Falls Church from participating in the primary election of a candidate for the General Assembly or the other officers mentioned in your letter. It is noted that the County Committee has already certified the names to the County Electoral Board. He should also certify the names to the Electoral Board of the City.

You also ask whether the residents of the County living in Falls Church Precinct No. 1 and Falls Church Precinct No. 2 may vote at a precinct established by the Electoral Board of Fairfax County in the City of Falls Church, under the provisions of Chapter 308 of the Acts of Assembly of 1930. That Act is applicable only when a city lies wholly within the bounds of a magisterial district. Since a part of the City of Falls Church is in what was Providence Magisterial District, and a part in what was Falls Church Magisterial District the voting place for Falls Church Magisterial District of Fairfax County cannot be placed in the City of Falls Church under the authority of this Act.

It would seem proper for the Electoral Board of Fairfax County to locate the polling place for the residents of the two precincts in question who still live in the County at some place in the precinct not within the boundaries of the City. I am enclosing a previous opinion of this office rendered to Mr. W. I. Green on October 28, 1940, in which it was held proper for the electoral board to relocate the polling place, this not being considered a change in an election district or voting place under Section 144 of the Code.

Very sincerely yours.

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**ELECTIONS—Judges of Election: Can Require Proof of Registration. Registration within Thirty Days of Primary is Valid. Judge to be Selected from Bystanders. Vote of Absentee Voter Who Dies before or on Election Day Should not be Counted. F-100**

August 9, 1948.

MR. WAYNE MITCHELL,  
Judge of Election,  
R. F. D. 2, Box 14,  
Fries, Virginia.

My dear Mr. Mitchell:

This is in reply to your letter of August 2, in which you ask certain questions concerning the election laws.

You first ask how the judges of election should determine the correct person to be permitted to vote when, in the same magisterial district, two or more voters with identical names and initials have been properly registered, but the State poll taxes are shown on the treasurer's list as paid for but one of them.

Sections 174 and 175 of the Code provide for the challenge of voters suspected of not being qualified to vote. Since in the case you put there would be a question as to which person is qualified, I think that it would be proper to require them to take the oath prescribed by section 175 for voters who are challenged. This section provides that, if the voter takes the oath, his vote shall be received unless the judge be satisfied from record or other legal evidence or from his own knowledge that he is not a qualified voter. If one of the named individuals has already taken the oath or produced his tax receipts, I think the judges could reject the vote of the other unless he also produces his tax receipts, for then there would be evidence justifying the conclusion that the second voter is not qualified.

You next ask, if a voter was registered during the thirty days just prior to the primary, is he properly registered and entitled to vote at the general election.

While, under the provisions of section 98 of the Code, the registration books should have been closed during the thirty-day period before the primary, if in fact a person was registered during that period and is otherwise qualified to vote at the general election, it is my opinion that he should be entitled to vote.

Your third question relates to how a third judge of election should be selected when one of the regularly appointed judges is unable to serve and the two remaining judges are unable to agree upon who should be named to serve in his place.

Section 148 provides that, when a judge of election fails to attend, the judges in attendance may select a bystander having the qualification of judge to act in place of the absent judge. While provision is made for other methods of selecting judges when all appointed judges fail to attend, none is provided in the case of the absence of only one and the failure of the remaining two to agree on a third. In my opinion it is incumbent upon those two to select by some method a person satisfactory to both or else proceed to serve without the appointment of a third judge. The latter course would only lead to inconvenience and to possible confusion over matters to be decided by the judges. This factor would probably induce the two judges to come to a satisfactory agreement over a third judge.

You ask further, if an absentee voter has returned his marked ballot, but dies before or on the day of election, should the ballot be rejected.

Section 214 of the Code provides that the box containing absentee ballots shall be opened by the judges of election at the close of the regular balloting and the name of the voter "called and checked as if the voter were voting in person. If found entitled to cast his vote, the envelope is then, *but not until then*, opened, and the ballot deposited in the regular box \* \* \*." It will be seen from the quoted language that, while an absentee ballot may be returned prior to elec-

tion day, it is not actually cast until the close of the regular voting, at which time the voter must be found entitled to cast the vote. If the judges have definite information at that time that the voter is dead, his vote should not be cast.

In answer to your last question, it is my opinion that the use of a fountain pen or a colored pencil by a voter in marking his ballot would not be considered as the use of an "identifying mark or symbol," as that alone would not destroy the secrecy of the ballot.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**ELECTIONS—Judges of Elections; Election Of In Dual Primary. F-100g**

June 1st, 1949.

HONORABLE JOHN T. DUVAL,  
Commonwealth's Attorney,  
Gloucester County,  
Gloucester, Virginia.

My dear Mr. DuVal:-

I am in receipt of your letter of May 31st, requesting an opinion as to how the county electoral board should proceed for the selection of election judges in those precincts in which there are no qualified Republican voters, and no qualified Democrats who are willing to serve as Republican judges in the August primary.

In connection with the dual primary which was held in the 8th Congressional District in August 1948, this office expressed the view in a similar instance as that propounded by you, as follows:

It is the duty of the electoral board to select, as prescribed by law, the judges of election to serve in the various precincts of the county. If it should occur that there are no Republicans in a particular precinct, I would suggest that the electoral board notify the chairman of the local Republican committee, and request that he furnish a list of qualified Republicans for that particular district. If he fails to do so, then it would be the duty of the electoral board to select competent citizens to serve as the judges to handle the Republican vote in that precinct, irrespective of political affiliations. By reason of such selection and service those judges could vote in either the Democratic or Republican primary. They would simply be serving as appointees of the electoral board to perform a service required by law. If such appointees, upon proper notification, decline to serve I suggest that you should call the matter to the attention of the judge of your circuit court, as section 224 requires that the judges so appointed shall conduct the primary for the party for which they are appointed. The judge of this circuit court is empowered by virtue of section 224 to require this service to be performed.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**ELECTIONS—Judges Of Election; Failure To Serve, Validity of Vote Cast. F-100d**

August 27th, 1948.

HONORABLE LEVIN NOCK DAVIS, SECRETARY,  
State Board of Elections,  
Richmond, Virginia.

Dear Mr. Davis:-

I am in receipt of your letter of August 26th, transmitting an inquiry propounded by Honorable Charles O. Stone, Commonwealth's Attorney of Fauquier County. I quote from Mr. Stone's letter to you as follows:

"In the recent primary in this County there were some four or five precincts which were manned by only one or two judges. The full slate was appointed but did not show up, and the Judges who did show up failed to complete the panel as provided by law."

The inquiry based upon the above statement is: .

"Do you know of any official ruling or decision to the effect that the returns from a precinct are valid or invalid if a less number than three presided at that precinct?"

I have been unable to discover any official ruling or decision in Virginia on this point.

Section 224, of the Virginia Election Laws, relating to primaries, provides that they shall be held by three Judges, whose appointment and qualifications shall be as prescribed, and that one of which Judges shall act as Clerk. If the Electoral Board deems it necessary in order to have the vote cast, at any voting place, it may appoint three Judges and two Clerks. In the event any of the Judges so appointed are absent from the voting place for one hour after the official time prescribed for the opening of the polls, the Judge, or Judges, present shall appoint a substitute Judge, or Judges, from duly qualified voters present who are members of the party holding the Primary. Violation of the statute in this respect constitutes a misdemeanor.

While the language of the statute, as it relates to the duties of the appointed election officials, is couched in mandatory terms, yet insofar as the failure to appoint substitutes relates to the validity of the vote cast in that precinct, the statute is directory.

It will be noted that the law itself does not declare much an irregularity to be fatal, and unless it be shown that the deviation so operated as to prevent a free and full expression of the popular will, the returns would not be vitiated. It is well settled that where irregularities are not shown to have affected the result of an election, the courts are disposed to give effect to the results as ascertained and certified.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**ELECTIONS—Members of the Armed Services in Time of War do not have to pay Poll Taxes; a Person becoming of Age cannot register when Registrar's Books are closed. F-100d**

September 21, 1948.

MR. C. W. NEWTON, *Registrar*  
Graham Precinct,  
Bluefield, Virginia.

My dear Mr. Newton:

This is in reply to your letter of September 18, 1948, from which I quote as follows:

"Please let me know if a man in the armed services is eligible to vote without paying poll taxes, and if he is eligible, how does he apply for a ballot?"

"Also please let me know if a new voter comes of age of 21 between the period of closing of registrar's books (30 days prior to election) and actual date of election, if he would be eligible to register and vote in an election."

Section 220(57) of the 1948 Supplement to the Code of Virginia provides for the voting in person and by absentee ballot by members of the armed services. This section provides that a person in active service, as a member of the armed services of the United States in time of war, may vote without being required to register or to pay any poll tax. For the purposes of this act, this office has previously ruled that a person in active service in the armed forces today is in active service in time of war.

Section 220(57) further provides that such member of the armed forces may request an absentee ballot in person from the registrar of his precinct, pursuant to the provisions of the Virginia Code pertaining to absentee voting. However, since the expiration of the War Voters Act, there is no provision whereby a member of the armed forces who has not registered may request an absentee ballot by mail. He may of course, vote by being physically present on election day, or he may secure an absentee ballot by making request in person.

In response to your question as to whether a person who becomes of age during the period when the registrar's books are closed can register, this office has previously answered this question in the negative. Any person who becomes 21 years of age during 1948, prior to the date of election, could have registered at any time during 1948 when the registration books were open. Since the registration books are closed for the purpose of new registration for 30 days prior to the election, there may be no new registrations during that period.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**ELECTIONS—Name of candidate cannot appear on ballot unless he is eligible under the particular statute. F-100b**

February 14, 1949.

HONORABLE JAMES N. COLASANTO,  
Member of Electoral Board,  
Alexandria, Virginia.

My dear Mr. Colasanto:

This is in reply to your letter of February 7, in which you state:

"We will have a primary in April, of this year, for the office of City Attorney of Alexandria, Virginia, under our city charter, which provides as follows:

"No person shall be eligible for election to the office of City Attorney unless he shall be a duly licensed attorney at law and shall have practiced in the State of Virginia for at least five years and in the City of Alexandria for at least three years."

"I am informed that one of the candidates filing was admitted to practice law in the State of Virginia on October 4, 1944. On September 1, 1949, the effective date of assuming office, if elected, he will not have practiced law for five years in the State of Virginia, as I figure time.

"Section 229 of the Code of Virginia provides: 'The name of no candidate shall be printed on an official ballot used at any primary unless such person is legally qualified to hold the office for which he is a candidate \* \* \*'

"Under the circumstances, is the Electoral Board right in assuming that it should refuse to print his name on the official ballot?"

In view of the provisions of Section 229 of the Code and the provision of the city charter quoted by you, it is my opinion that the name of the candidate to whom you refer should not be printed upon the ballot. The charter provision states that, to be eligible for election to the office of City Attorney, a person "shall have practiced in the State of Virginia for *at least* five years." Under the facts as stated by you the person does not meet this requirement.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**ELECTION—Person becoming of Age after January of any Year may Register Without Paying Capitation Tax. F-100d**

October 5, 1948.

HONORABLE A. D. JONES, *Treasurer*,  
Williamsburg, Virginia.

My dear Mr. Jones:

This is in reply to your letter of September 25, which Mr. Morrissett, the State Tax Commissioner, referred to this office.

Since 1944, when the question arose in a suit in the U. S. District Court for the Western District of Virginia, this office has ruled that a person becoming of age after January first of any year, but prior to the general election, may register and vote in the general election without the payment of any capitation tax, provided the other requirements of the election laws are met. This is be-

cause he is not assessable with a capitation tax unless he was twenty-one years of age on Januray first and, if he should die or remove from the State, he would never become subject to the tax.

It is not necessary that the person become twenty-one any specific length of time prior to election day, it being required only that he be twenty-one on that day. However, such person must have registered before the registration books were closed, which was thirty days prior to the election.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**ELECTIONS—Persons Convicted of Felony Cannot Vote Although Placed on Probation. F-100d**

October 20, 1948.

HONORABLE LEVIN NOCK DAVIS, *Secretary*,  
State Board of Elections,  
Room 3 - State Capitol,  
Richmond 12, Virginia.

Dear Mr. Davis:

I am in receipt of your letter of October 19th, requesting the opinion of this office on a question submitted to the State Board of Elections by Mr. Elijah Stacy, a registrar in Buchanan County.

I quote from Mr. Stacey's letter as follows:

"In July, at Grundy, Va., there were one hundred \* \* (persons) convicted and put on parole for five years. \*\*\*

"Please get an opinion from the Attorney General about this law and let me know."

For the purpose of this opinion it will be assumed that the persons referred to were convicted of felony. The fact that sentence was suspended and they were placed on probation by the court has no bearing on the question.

Section 93 of the Virginia election law provides, insofar as material here, that:

"The following persons shall be excluded from registering: \* \* \* persons convicted after the adoption of the Constitution, within or without the State, of \* \* any felony, \* \* unless the disabilities incurred thereby have been removed."

Section 82 relating to the qualifications and disqualifications of voters, provides that:

"The following persons shall be excluded from registering and voting: \* \* \* persons convicted after the adoption of the Constitution, either within or without the State, \* \* of any felony. \* \* \*"

It is clear, therefore, under the plain terms of the statutes quoted, that any person who is under a conviction of felony is not entitled to register. If such person has already registered, he or she is not entitled to vote.

These statutes find their constitutional support in section 23 of the Virginia Constitution.

Section 99 of the election law makes it the duty of the County Clerk, at each registration to:

"Deliver to each registrar in his county or city a list of all voters, who have been convicted of any of the offenses enumerated in section twenty-three of the Constitution since the last registration. It shall be the duty of the registrar to correct his list in accordance with the list thus furnished, and he shall strike from the list of voters the name of any person so convicted upon the production before him of a certificate of the clerk of a court of competent jurisdiction that such person has been so convicted since December first, eighteen hundred and seventy-six, in such court, or has been so convicted by a mayor, police justice, or justice of the peace in the county, city or town wherein is held the court to which the said clerk belongs, unless such person shall produce a pardon from the Governor or a certificate from the Governor that his disabilities have been removed by him, or a certificate from the Keeper of the Rolls that his disabilities have been removed by the General Assembly."

The registrar cannot assume that a person has been so convicted nor can he rely upon evidence from any source to justify the striking from the list of voters the name of any person so convicted, except upon production before him of the certificate of the clerk, as provided in section 99. When the list and certificate is so produced by the clerk it then becomes the duty of the registrar to correct his voting list accordingly and to strike therefrom the name of such person so identified, unless such person shall produce the pardon or certificate, required by this section, that his disabilities have been removed.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**ELECTIONS—Persons in the Armed Services during Time of War are Relieved of Paying Capitation Tax. F-100h**

**TAXES—No Penalty Imposed by Law except 6% Interest can be Collected from Persons in the Armed Services. F-100h**

October 7, 1948

HONORABLE C. R. KENNETT,  
City Treasurer,  
Roanoke, Virginia.

My dear Mr. Kennett:

This is in reply to your letter of September 29, in which you ask if members of the armed services are still entitled to vote without the payment of the capitation tax.

Sections 1 and 2 of Article XVII of the Constitution of Virginia provide that no member of the armed forces, while in active service in time of war, shall be required to pay a poll tax as a pre-requisite to the right to vote, and also that such persons are exempt from the assessment of poll taxes for all years they were engaged in such services. Since there has been no termination of the state of war by treaty of peace or otherwise, members of the armed forces on active duty are still entitled to vote without the payment of the capitation tax.

Chapter 286 of the Acts of Assembly of 1944, to which you refer, also dealt with this matter. While that Act, by virtue of Section 13 thereof, expired on July 1, 1946, the constitutional provisions mentioned above are still controlling.

You also ask if penalties and interest on taxes owed by soldiers should be



abated. Chapter 207 of the Acts of Assembly of 1946, which so directed, expired by limitation on June 30, 1948. However, sub-paragraph 4 of Section 500 of the Soldiers and Sailors Relief Act of 1940 (U. S. C. A., Tit. 50, App. §560), which is still in effect, reads as follows:

"Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of 6 per centum per annum, and no other penalty or interest shall be incurred by reason of such non-payment. Any lien for such unpaid taxes or assessment shall also include such interest thereon."

The taxes and assessments referred to are defined by sub-paragraph 1 of this Section, which reads as follows:

"The provisions of this section shall apply when any taxes or assessments, whether general or special (other than taxes on income), whether falling due prior to or during the period of military service, in respect of personal property, money or credits, or real property owned and occupied for dwelling, professional, business, or agricultural purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid."

The quoted language means that no penalty imposed by State or local law other than six per cent interest may be collected from persons in the armed services for failure to pay the taxes mentioned thereby.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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#### **ELECTIONS—Petitions For Candidacy, Who May Sign. F-100b**

May 6, 1949

HONORABLE ROBERT J. McCANDLISH, JR.,  
Member of House of Delegates,  
Fairfax, Virginia.

My dear Mr. McCandlish:

This is reply to your letter of May 2 in which you request my opinion with reference to the election to be held in Falls Church on June 14, 1949. I quote from your letter as follows:

"Mr. Larue Van Meter, the Attorney for said City, has now advised those interested that the election of members of the Town Council must be by wards, i. e., the petition qualifying each candidate may be signed only by the qualified voters of the ward which he desires to represent, and only the voters in such mard may vote for such candidate.

"It is my opinion that he is in error in this matter, since in the past the elections have always been at large and the qualifying signatures have been by the qualified voters at large, although the members of the Council, when elected, represent specific wards."

I am enclosing a copy of an earlier letter from this office to Mr. Van Meter. This letter points out that the petitions for candidacy may be signed by the

voters of the city at large, and agrees with Mr. Van Meter's thought that, as the Falls Church charter makes no reference to territorial representation on the council, §2979 of the Code is applicable. That section provides that the council members " \* \* \* shall be residents of their respective wards and qualified voters therein and shall be elected by the qualified voters of such wards."

As the election of councilmen is by wards a question is raised as to whether the petitions of candidacy in general elections should be signed only by the qualified voters of the candidate's ward. In primary elections, §229 of the Code eliminates the question by stating that the petitions of candidates for city or county office shall be signed by voters of the " \* \* \* city or county \* \* \*." However, §154, applicable to general elections, differs in that it provides that the petitions be signed by voters of the " \* \* \* city, county or district \* \* \*."

This language of section 154 does lend support to the thought that the petitions must be signed by voters of the candidate's ward. However, it is my opinion that the better view is that the petitions of candidates for local offices may be signed by qualified voters of the city, as is the case in primary elections. There is some doubt on the question, however, and it would seem to be a wise, though not necessary, practice to have the petitions signed by the qualified voters of the candidate's ward.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**ELECTIONS—Poll taxes, Assessable against Voter during Three Years  
next proceeding that in Which he Offers to Vote, Prerequisite to Vote.  
F-100c**

October 21, 1948

MR. R. M. BEAZLEY, *Registrar*,  
City of Colonial Heights,  
P. O. Petersburg, Virginia.

Dear Mr. Beazley:

This is in reply to your letter of October 20, from which I quote:

"I have an applicant for an absentee ballot, who paid her 1945 poll tax and her 1947 poll tax.

"The lady was not a resident of the State in the year 1946, and did not pay her 1946 poll tax.

"Kindly advise at once if the lady is eligible to vote in the coming election on November 2, 1948."

Under the election laws of Virginia a person is required to pay only the poll taxes which are actually assessable against him during the three years next proceeding that in which he offers to vote. If the lady to whom you refer removed from Virginia prior to January 1, 1946, and did not re-establish her residence in this State at any time during that year, she was not assessable with the 1946 tax and is not required to have paid the same to be eligible to vote. If, however, she re-established her residence in Virginia at any time during 1946, she became assessable with the capitation tax for that year even though she was not here on January 1. See Section 22 of the Tax Code, as amended. In the latter case she must have paid the 1946 tax as well as the tax for the years 1945 and 1947.

Verv sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**ELECTIONS—Poll Tax; Payment Of; Eligibility To Vote Of Persons Living On Government Reservations. F-100c**

June 1, 1949

HONORABLE W. R. DILLARD,  
Treasurer of Spotsylvania County,  
Spotsylvania, Virginia.

My dear Mr. Dillard:

This is in reply to your letter of May 23, in which you state that on May 20, 1949, a person submitted to you a certificate from the Treasurer of another county showing that her poll taxes for the years 1946, 1947 and 1948 were paid before May 6, 1949. You ask whether her name should be placed on the list to be prepared by you showing those who have properly paid their capitation taxes.

Section 38 of the Constitution and Section 109 of the Code of Virginia provide that the treasurer of each county shall, at least five months before the regular election in November, file with the clerk of the circuit court of his county a list of all persons in his county who have paid not later than six months prior to said election the State poll taxes required during the three years next preceding that in which the election is to be held. These provisions do not require that the poll taxes shall have been paid to the treasurer of the county in which the person then resides, but simply that the poll taxes shall have been "paid". It is true, as you point out, that the voter may present her certificates from the treasurer of the county in which she formerly resided to the judges of the election and be entitled to vote. See Section 115 of the Code. However, it is my opinion that she would also be entitled to have her name placed upon the treasurer's list if she has in fact paid the required poll taxes within the specified time. It would be sufficient if she presented to the treasurer at any time before his list is prepared her certificate showing that such payment had been made within the required time. The certificate could be presented after May 7 if the taxes had been paid prior to that time.

You also ask whether a person who is, or whose husband is, employed by the United States Government and who resides in a Government building on a Government reservation, and who owns no property, either real or personal, assessed in the county, is legally entitled to vote in the county where the reservation is located, such person having prior thereto voted in some other county in Virginia in which they had formerly claimed legal residence.

If the party had abandoned her legal residence in the other county and had established her legal residence on the Government reservation (which question is one of fact depending largely upon the intent of the party) her right to vote in Spotsylvania County would depend upon whether the Federal Government has *exclusive* jurisdiction over the Government reservation on which she resides. If exclusive jurisdiction has been ceded to the Federal Government, then civilians residing on the reservation would not be residents of Virginia so as to render them eligible to vote.

Generally speaking, such jurisdiction in the past has not been obtained over reservations not related to military or naval purposes and even then not in all cases. This depends largely upon the time the Federal Government acquired the land and whether at that time the statutes of Virginia conferred such jurisdiction.

Since the passage of Section 355 of the Revised Statutes of the United States, as amended by Act of Congress approved October 9, 1940 (54 Stat. 1083), the mere enactment of a statute conferring jurisdiction of any kind upon the United States over lands acquired by it is not effective unless and until the head of the governmental agency having charge of such property accepts such jurisdiction on behalf of the Federal Government. By Acts of 1940, page 761, the Governor and the Attorney General are authorized to convey exclusive juris-

diction in certain cases to the United States upon the request of the appropriate Federal department head, who, in turn, accepts the jurisdiction. There have been a number of these deeds recorded in Arlington County.

If persons residing on the Government reservation have been entitled to vote as citizens of Spotsylvania County in the past, that is, prior to October 9, 1940, those now living there are entitled to vote as residents of the county unless a deed has been executed by the Governor and the Attorney General of Virginia conveying exclusive jurisdiction to the United States over such lands. In a case of this kind, I suggest that you ascertain from the office of the Clerk of the Court whether or not any such deed has been executed and recorded.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**ELECTIONS—Poll Taxes, time for payment. Last day for registration.**  
F-100c.

February 8, 1949

HONORABLE ALEX H. BELL,  
City Treasurer,  
City of Norfolk,  
Norfolk, Virginia.

My dear Mr. Bell:

This is in reply to your letter of January 28, in which you ask that I advise you as to the last date for the payment of poll taxes in order to qualify for the August primary, and also the last day for registration prior to the August primary.

Section 21 of the Constitution provides that a person must pay his poll taxes at least six months prior to the election in which he offers to vote. In order to be able to vote in the August primary a person must be qualified to vote in the November election. The November general election will be held on November 8. The day, six months prior to November's general election will be May 8. As this date falls on a Sunday, it is my opinion that the last day for the payment of poll taxes in order to qualify to vote in the November general election and the August primary election will be Saturday, May 7.

Section 98 of the Code provides for registration thirty days before the day fixed for the primary election. Upon the completion of registration on that day, the registration books shall remain closed until after the election. The August primary will be held on August 2. The day thirty days before August 2 is July 3; which falls on Sunday. It is, therefore, my opinion that the last day for registration prior to the August primary will be Saturday, July 2.

Very truly yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**ELECTIONS—Poll Tax. When Midshipmen and Cadets Exempt From Payment Of. F-100c**

September 24, 1948.

HONORABLE LEVIN NOCK DAVIS, *Secretary*,  
State Board of Elections,  
State Capitol,  
Richmond 12, Virginia.

Dear Mr. Davis:

I am in receipt of your letter of September 17th, 1948, requesting the opinion of this office as to whether or not a person who had served in the armed forces in World War II, received an honorable discharge there from and later appointed as midshipman to the Naval Academy, or to a cadetship at West Point, is exempt from the payment of the poll tax, as a pre-requisite to voting, by reason of being a member of the armed forces. More specifically, is such person "in active service as a member of the armed forces of the United States in time of war?"

We have held that inasmuch as there has been neither proclamation from the President of the United States, nor concurrent action by both houses of Congress, officially declaring a cessation of hostilities, we are still, in legal contemplation, in a "time of war."

The status of a cadet or midshipman, relative to the armed forces of the United States, would be determined by federal law.

The army of the United States consists of the regular army, and other components specified by statute. The regular army of the United States consists of various components including "the professors and cadets of the United States Military Academy". (U.S.C.A., title 10, section 2 and 4). In *Weller v U. S.* (1906) 41 Ct. Cl., 324, it was held that there was no reason for any distinction, as to status, between midshipman and cadets. If one is in the active service, certainly the other would be. Midshipman are, therefore, a component of the naval establishment of the armed forces.

A cadet is subject to the legal orders of his superior officers and the rules and articles governing the armies of the United States. He must sign articles by which he engages to serve eight years unless sooner discharged and is subject at all times to duty in such places and on such service as the President may direct. (U. S. C. A., title 10, sections 1099, 1101, 1102).

It is my opinion, therefore, that a cadet of the United States Military Academy, as well as a midshipman of the United States Naval Academy "is in active service as a member of the armed forces of the United States." If he is otherwise qualified, presents himself in person, offers to vote and satisfies a majority of the judges of election that he is such cadet, or midshipman, he is entitled to vote without being required to register or to pay any poll tax.

If such cadet, or midshipman, desires to vote by absentee ballot, he must request same of the registrar in person, pursuant to the provisions of sections 202 to 218 of the Code of Virginia. If the registrar is satisfied that the applicant is such member of the armed forces, and is otherwise qualified to vote, he shall furnish the absentee ballot, even though such a person has not registered, or paid any poll taxes. The registrar shall require, however, execution in his presence of the "Oath of Voter", affidavit similar to that prescribed by chapter 2, section 7, Acts of Assembly, extra session 1945.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**ELECTIONS—Poll Tax, When Paid By Person Becoming Of Age. F-100c**

May 18, 1949.

HONORABLE EUGENE W. CHELF,  
Commonwealth's Attorney,  
Roanoke County,  
Salem, Virginia.

My dear Mr. Chelf:

This is in reply to your letter of May 12, from which I quote, in part, as follows:

" \* \* \* If a person becomes of age in 1948, but delays registering until 1949, in order to be eligible to register in 1949 he must first pay his 1949 capitation tax. The Chairman of the Roanoke County Electoral Board has asked me to request you to give your opinion as to just when this capitation tax must be paid. If a person becomes twenty-one years of age after January 1, 1948, of course he must pay the 1949 capitation tax, in order to vote in this year's elections. Must this 1949 tax be paid six months prior to the General Election, or can it be paid at any time before the Registration Books close before the Primary, or thereafter before the Registration Books close before the General Election?"

Section 20 of the Constitution, dealing with who may register, provides, in part, that a person having the qualifications of age and residence may register, provided that he

" \* \* \* if he came of age at such time that no poll tax shall have been assessable against him for the year preceding the year in which he offers to register, has paid one dollar and fifty cents, in satisfaction of the first year's poll tax assessable against him; \* \* \*."

I nowhere find any indication of when this sum must be paid, other than that it must obviously be paid prior to registration. Section 18 of the Constitution dealing with the qualifications of voters, declares that every citizen shall be entitled to vote if, in addition to other requirements, he " \* \* \* has paid his State poll taxes, as hereinafter required \* \* \*." Section 21 of the Constitution, pertaining to the conditions for voting, states that a person registered under §20 may vote if

" \* \* \* he shall, as a prerequisite to the right to vote, personally pay at least six months prior to the Election, all State poll taxes assessed or assessable against him, under the Constitution, during the three years next preceding that in which he offers to vote."

This requirement would not be applicable to the person mentioned in your letter, because he is not assessed for any poll taxes for the three years next preceding that in which he offers to vote.

It is my opinion, from a consideration of these sections, that the one dollar and fifty cents required to be paid under §20 of the Constitution as a prerequisite to registration, may be paid at any time prior to the registration. Thus, the person referred to in your letter could pay the required amount and then register at any time prior to the closing of the registration books before the primary or general elections.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**ELECTIONS—Poll Tax, When Reserve Officers Exempt From Payment Of. F-356a**

May 18, 1949.

HONORABLE CHARLES G. STONE,  
Commonwealth's Attorney,  
Fauquier County,  
Warrenton, Virginia.

My dear Mr. Stone:

This is in reply to your letter of May 7, from which I quote as follows:

"Article 17 of the Amendments to the Constitution provides certain exemptions from the poll tax to members of the armed forces. I am informed that very generally men who served as officers in the Army and Navy were not given honorable discharges from the service, but were released to inactive duty and retained indefinitely as members of the reserve corps. The officials of this County are now confronted with the problem involving service men who served honorably as officers in the Army and in the Navy and who in 1946 were released from service as above described, but who are still members of the reserve corps. Some were called back to active duty for two weeks in 1947 and some for the same period in 1948. Their contention is that such a recall from civil employment to active service for two weeks has released them from liability for the poll tax during that year."

Article 17 exempts members of the armed forces from poll taxes assessed or assessable " \* \* \* for every year during any part of which such person is a member of said forces in active service during said war or any future war \* \* \*." This office has previously ruled that, for the purposes of this Article, World War II has not been terminated.

Whether this exemption applies to the persons referred to in your letter depends upon the nature of their present service. I do not think that a man is " \* \* \* in active service during said war \* \* \* " if he merely subjects himself to a two-weeks tour of duty each year, limited as to assignment and location. It will be noted that this Article limits these exemptions to periods of war, and I think it clearly contemplates that to be exempt a person must be engaged in active war service.

It is my opinion that those reserve officers who claim this exemption must show that their active duty is in war service. I would suggest that in determining this question, the county officials should consider whether the officer is, under his orders, subject to the same controls as to assignment and the other duties of military life, as is the officer who is serving in the armed forces on a full-time basis. This, of course, is a factual question which may vary with the individual.

I am enclosing a copy of an opinion of March 27, 1947, to Colonel C. W. Woodson, Jr., which involves the same principle raised in the question presented by you.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**ELECTIONS—Polls Opened and Closed by Eastern Standard Time. F-100**

July 8th, 1948.

HONORABLE THOMAS P. CHAPMAN, JR.,  
Clerk, Circuit Court of Fairfax County,  
Fairfax, Virginia.

Dear Mr. Chapman:

I am in receipt of your letter of July 7th, enclosing a duly certified copy of an ordinance adopted by the Board of Supervisors of Fairfax County, Virginia, on June 16th, 1948.

Through the enactment of this ordinance the Board of Supervisors of Fairfax County adopted Daylight Saving Time as the official time in said County, as well as the incorporated towns, therein, for a period beginning on June 26th, 1948, at 11:01 o'clock A. M. and ending at 2:00 o'clock A. M. September 26th, 1948.

Your question is: Will this ordinance govern the time for the opening and the closing of the polls for the primary election to be held on August 3rd, 1948?

The pertinent provisions of Section 152 of the Code of Virginia, are as follows:

"\* \* \* All elections held between the 31st day of May and the 1st day of October in any year, the polls shall be opened at six-thirty o'clock A. M. eastern standard time, and close at seven-thirty o'clock P. M. eastern standard time of the same day."

There are no exceptions to the mandatory provisions of this Statute. Its application is state-wide and its language so clear and positive as not to require construction. The fact that a political sub-division has, in the wisdom of its legislative body, enacted legislation relative to the subject of Time to govern the conduct of all businesses within its jurisdiction, would have no bearing upon a Statute enacted by the Legislature of Virginia fixing the time for the opening and the closing of the polls at each voting place in the State.

It is my opinion, therefore, that the law requires that the polls shall be opened for the August 3rd Primary at 6:30 o'clock A. M. eastern standard time, and close at 7:30 o'clock P. M. eastern standard time of the same day.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**ELECTIONS—Procedure to be followed by Registrars upon application of citizen for registration. F-100d**

August 31st, 1948.

HONORABLE LEVIN NOCK DAVIS,  
State Board of Elections,  
Room 3, State Capitol,  
Richmond 12, Virginia.

Dear Mr. Davis:

I am in receipt of your letter of August 30th, enclosing letter under date of August 27th, 1948, from Mr. A. Hewson Michie, Secretary, Electoral Board of the City of Charlottesville.

In view of the recent opinion of this office with reference to the use of



printed forms in connection with registration, advice is desired as to the procedure which should be followed by registrars when a citizen applies for registration.

The mandatory provisions of Section 93 of the Virginia Election Laws are derived from Section 20 of the Virginia Constitution. Unless physically unable to do so every applicant must make application to the registrar in his own handwriting. The printed forms in use in many sections of the Commonwealth are in contravention of the letter, spirit and purpose of the statute. It is the duty of the registrar to furnish the necessary equipment and materials to be "used by persons desiring to register in writing their application". It will be seen, therefore, that the statute places double emphasis on the written application "in his own handwriting".

The language "without aid, suggestion, or memorandum, in the presence of the registrar", relates to the actual writing of the application. It is designed to prevent such assistance from the registrar, or any other person, in the presence of the registrar.

It is not only permissible, but it is the duty of the registrar to inform every applicant, desiring such information, as to the requirements of the law. These requirements are spelled out by the statute, viz; the full name of the applicant, his age, date of birth, place of birth, residence, occupation at the time application is made, occupation for two years next preceding date of application, whether he has previously voted; and if so, the State, County and precinct in which he last voted.

After the applicant has met the above requirements, the registrar is authorized, in the exercise of sound discretion, to submit written questions to the applicant pertinent to qualification for registration. The answers to such questions shall be under oath, reduced to writing, certified by the registrar and preserved as a part of the official records along with the application in the handwriting of the applicant.

Section 95 provides that if the registrar is satisfied that the applicant is qualified to register as a voter he shall then, prior to actual registration, require the applicant to take and subscribe the oath prescribed therein.

Information as to the requirements of the law is not that "aid or suggestion" against which the law inveighs.

In view of the lack of uniformity which apparently prevails in the administration of the law and the confusion which has arisen as a result of the use of printed forms, you desire to know whether or not the State Board of Elections should issue a bulletin to the registrars in an effort to secure uniform compliance with the law.

Section 24-25, reorganization portion of the New Code, effective July 1st, 1948, requires the Board to "so supervise and co-ordinate the work of the county, and city electoral boards and of the registrars as to obtain uniformity in their practices and proceedings, and legality and purity in all elections."

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**ELECTIONS—Publication of Notice of Election for Bond Issue Required.**  
**F-206**

December 17, 1948.

HONORABLE RIPLEY S. WALKER,  
Commonwealth's Attorney for Shenandoah County,  
Woodstock, Virginia.

My dear Mr. Walker:

This is in reply to your letter of December 16, in which you asked if it is

necessary to publish notice of the election to be held in connection with the contemplated school bond issue in Shenandoah County.

Section 131 of the Election Laws provides that all elections for public free school purposes shall be held after notice thereof given according to Section 146. Section 146 requires the sheriff of the county to publish the writ of election by posting a copy thereof at each voting place in his county or city at least ten days before the election.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**ELECTION—Question to be Decided at Special Election not Printed on Regular Ballot for Candidates. F-100a**

September 29, 1948.

HONORABLE LEVIN NOCK DAVIS, *Secretary*,  
State Board of Elections,  
Richmond, Virginia.

Dear Mr. Davis:

You request an opinion from this office based on the following situation:

The Judge of the Corporation Court of the City of Norfolk has ordered a special election to be held on November 2nd, 1948, submitting to the electorate of that City, for approval or disapproval, an ordinance prescribing Daylight Saving Time.

You desire to know whether it will be permissible to print the question to be so submitted on the same ballot which will be used on the same date for the general election.

Section 197-a of the Virginia Election Laws requires the use of a special ballot, whether the question be submitted at a regular or special election. While the election shall be "held and conducted in the manner prescribed by law for other elections" a specific proviso is added relating to the ballot to be printed for use in submitting the question.

I am of the opinion that the question should not be submitted on the official ballot to be used for the election of candidates to public office.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**ELECTIONS—Registrar Should be Compensated by Town if he Registers Voters Therein. F-100d**

December 20, 1948.

HONORABLE GEORGE D. CONRAD,  
Commonwealth's Attorney,  
Harrisonburg, Virginia.

My dear Mr. Conrad:

This is in reply to your letter of December 10, in which you request my opinion as to whether a registrar appointed under Section 2995 of the Code for the registration of voters in a town should be compensated by the town or by the

county for his services in purging the town registration books and in registering voters of the town.

It is my opinion that, since the registration books kept under Section 2995 of the Code are for use in connection with town elections only, the registrar appointed to keep such books should be paid by the town and not the county. I do not think that it makes any difference that the registrar for the county precinct in which the town or a portion thereof lies is the same person appointed as town registrar.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**ELECTIONS—Registration Books must be closed on Election Day and six days next prior thereto. F-100d**

January 28, 1949.

HONORABLE GEORGE D. CONRAD,  
Commonwealth's Attorney,  
Harrisonburg, Virginia.

Dear Mr. Conrad:

I am in receipt of your letter of January 27th, 1949, from which I quote as follows:

"The Town of Grottoes will hold a special election on March 1 in connection with a proposed bond issue.

"Section 94-b of the Virginia Election Laws provides that 'For the purpose of registering and transferring voters all registration books shall be closed for a period of six days next preceding and including the day of any special election or of any election upon a referendum.'"

You request my opinion as to the proper construction to be placed on this statute relating to the number of days it requires the registration books to be closed.

While the language employed is somewhat cumbersome and ambiguous, I am of the opinion that it requires the registration books to be closed for a period of seven days. That period embraces the six days next preceding the day of the special election, and also the day of the election. Neither grammatically nor arithmetically could six days next preceding the day of election include that day but the period for which they shall be closed does embrace both. The word "including" does not modify "six days." It relates to the period during which the books shall be closed. The language employed imports a legislative intention to close the books on election day and for the six days next prior thereto.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**ELECTIONS—Returns In Dual Primary; How Delivered. F-100a**

June 20, 1949.

HONORABLE LEVIN NOCK DAVIS, *Secretary*  
State Board of Elections,  
State Capitol,  
Richmond, Virginia.

My dear Mr. Davis:

This is in reply to your letter of June 1, enclosing a letter from the Honorable R. A. Edwards, Clerk of the Circuit Court of Isle of Wight County, from which I quote as follows:

" \* \* \* in returning the poll books, tickets, etc., to the Clerk's Office the day following the primary, will it be necessary for a representative of the Democratic party to bring in their returns and a representative of the Republican party to bring in their returns, or could one person be agreed upon by the two sets of judges to bring the entire lot? \* \* \* ."

You request my opinion on this question. Section 238 of the Code is applicable to this inquiry. That section reads, in part as follows:

"After canvassing the votes, the judges, before they adjourn, shall put under cover the poll books, seal the same, and direct one of them to the clerk of the circuit court of the county or the clerk of the corporation court of the city, as the case may be, in which the election is held, and the poll books thus sealed and directed, together with the ballots strung, enclosed and sealed, shall be conveyed by one of the judges, to be determined by lot if they cannot otherwise agree, to the clerk to whom it is directed, on the day following the election, \* \* \* . The judges of election shall be responsible for all the primary ballots delivered to them. If from any cause the judges of election shall fail to make returns, as provided by this section, within the time limited by this following section for the commissioners to meet and open the returns, it shall be the duty of the clerk to whose office such returns ought to have been made to dispatch a special messenger to obtain such returns, \* \* \* ."

Section 224 of the Code clearly indicates that each party participating in a primary shall have its own set of judges of election. Section 236 states that the primary ballots for the parties participating in the primary shall be delivered to the judges of election by the local electoral boards. I take this to mean that the Democratic ballots are to be delivered to the Democratic judges, and the Republican ballots to the Republican judges.

As seen above, section 238 makes the judges of election responsible for all the primary ballots delivered to them, and provides that one of them shall convey the returns to the clerk of the court.

It is my opinion that §238 requires that the returns of each party be delivered to the clerk of the court by one of the judges of election of that party.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**ELECTIONS—Time of opening and closing polls governed by general law unless local ordinance covers same. F-100**

September 7, 1948

HONORABLE ROBERT J. McCANDLISH, JR.,  
Fairfax, Virginia.

Dear Mr. McCandlish:

I am in receipt of your letter of September 3rd, relative to an opinion of this office under date of July 8th, 1948, in a letter to Mr. Thomas P. Chapman, Clerk of the Circuit Court of Fairfax County, concerning the time fixed by law for the opening and closing of the polls in elections.

Candor compels me to admit that Chapter 115, Acts of 1948, was inadvertently overlooked when the opinion to Mr. Chapman was expressed. However, since the Act confers permissive authority upon the governing bodies of the political subdivisions classified therein, and since the ordinance enacted by the Board of Supervisors on June 16th, 1948, expressly embraces "the conduct of all businesses", omitting any reference to elections in its prescription of coverage or application, I seriously doubt whether the authority conferred by the Act was specifically exercised so as to change the time explicitly fixed by Section 152 of the Code of Virginia.

I am in full accord with your suggestion that if the ordinance followed the language of Chapter 115 (*supra*), so as to expressly embrace elections, then it would supersede Section 152 of the Code.

I am also of the opinion that had the ordinance not mentioned either "the conduct of all businesses", or elections, but had simply prescribed the change of time, the time so prescribed would have, by the terms of the Act itself, governed the conduct of all businesses and elections.

The doubt engendered in my mind arises from the fact that the ordinance embraces one, and by omission excludes the other, thus manifesting a legislative intent that it apply to "the conduct of all businesses" only.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**ESCHEATS—Escheator Should Select Jury—Mandamus against Commissioner of Revenue proper under Certain Conditions. F-166**

December 16, 1948

WILLIAM H. BUNTIN, *Esq.*,  
Attorney at Law,  
Board of Trade Building,  
Norfolk, Virginia.

My dear Mr. Buntin:

This is to acknowledge your letter of December 7, in which you state that it is necessary for you, as Escheator for the City of Norfolk, to hold an inquest and summon a jury in accordance with Section 494 of the Code. You desire my opinion as to how such a jury should be selected and summoned.

Since Section 494 of the Code does not provide for the selection of the 16 qualified jurors required thereunder, and I find no other statute dealing specifically with the question, it is my opinion that you, as Escheator, should select the jurors from the list which is prepared by the jury commissioners and delivered

to the clerk of the court. The Sergeant for the City of Norfolk should, of course, summon the jury as required by Section 494.

As to the advisability of bringing mandamus proceedings against the Commissioner of the Revenue for failure to furnish "a list of all lands within his district of which any person shall have died seized of an estate of inheritance intestate, and without any known heir, or to which no person is known by him to be entitled," I am of the opinion that mandamus proceedings would lie only when the Commissioner had knowledge of such persons dying intestate without heirs and then failed to furnish the list as required by Section 492 of the Code.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**ESCHEATS—Payment of jurors in escheator's inquest. Unclaimed funds in estates can be recovered for the Commonwealth. F-109**

February 18, 1949

WILLIAM H. BUNTIN, *Esq.*,  
Attorney at Law,  
Board of Trade Building,  
Norfolk, Virginia.

My dear Mr. Buntin:

This is in reply to your letter of February 8, in which you desire to know how the jury who served in a recent escheator's inquest should be paid. You further desire to know whether you, as Escheator for the City of Norfolk, may recover by a bill in equity in the name of the Commonwealth certain funds, which are the residua of a few estates in which there were no distributees, that were deposited in a bank in the City of Norfolk by the Clerk of the Circuit Court.

Since I am unable to find a statute that deals specifically with the payment of jurors in an escheator's inquest, it is my opinion that Section 6007 of the Code as amended, (Michie's Supplement of 1948), which provides for the payment of jurors in civil cases, would be applicable in an escheator's inquest.

The answer to your second inquiry must be in the negative, since it is my opinion that the duties of an escheator relate only to the recovery of real property. Sections 489-517, inclusive, of the Code.

I suggest, however, that the personal property in question may be recovered pursuant to Section 6311 of the Code, as amended, et seq., which deal with the proceedings to be held when money has remained under the control of a court for five years without a known owner or claimant.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**EXAMINING BOARD OF CLINICAL PSYCHOLOGISTS—Not empowered to Adopt Rule Requiring Payment of Examination Fee to be Deposited in Local Bank to its Credit. F-80**

December 17, 1948.

MR. CHARLES J. DUKE, JR.,  
Governor's Office,  
Richmond, Virginia.

My dear Mr. Duke:

This is to acknowledge your letter of November 26, in which you state that the Virginia Examining Board for Clinical Psychologists requires, under its by-laws, a \$10 examination fee, the funds so received being deposited in a special account in a local bank in Charlottesville, and the payment of expenses of its members to the extent of its funds.

You desire my opinion as to whether Chapter 280 of the Acts of 1946, the Act establishing the Board, or any other statute, offers a suitable basis for the adoption of the by-laws set forth above.

Nowhere in the above Act is the Board given the authority to require an examination fee, to deposit its money in a local bank, or to pay its members for expenses incurred while serving on the Board. While the Board does have the authority, under Section 3 of the Act, to adopt certain "rules and regulations", such authority extends only to its internal proceedings and government and, in my opinion, does not confer on the Board the power to require an examination fee or pay the expenses of its members.

Furthermore, I find no statute that would permit the enactment of such by-laws, and it is pertinent to note that neither the Appropriation Act for 1946 nor the Appropriation Act for 1948 provided public revenue for the Board's use, though such Acts did provide revenue for the use of boards of similar nature.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**EXTRADITION—Sheriff has duty to return fugitive whose sentence was suspended and has violated his parole. F-84**

December 31, 1948.

HONORABLE J. WILTON HOPE, JR.,  
Attorney for the Commonwealth,  
Hampton, Virginia.

My dear Mr. Hope:

This is in reply to your letter of December 16, in which you state that the Circuit Court of Elizabeth City County in 1946 suspended the execution of a five-year penitentiary sentence of a party convicted of grand larceny and that thereafter the party violated the terms of his parole and fled to Pennsylvania. You ask whether it rests upon the Probation and Parole Officer of the County, the Sheriff, or the Penitentiary authorities to return the defendant to the jurisdiction of this State in the event the Court revokes the suspension of sentence and the defendant waives extradition.

Since the defendant has never been delivered to the custody of the Penitentiary authorities, I do not believe that they would have any responsibility in the matter. In my opinion, either the Sheriff, who has general duties with re-

spect to the enforcement of the laws, or the Probation Officer, who, under Section 4788g of the Code, is charged with certain duties with respect to persons on probation, would be proper persons to be sent for the defendant. Since both are officers of the Court, either of them, if so directed by the Court, should undertake the assignment.

I might add that the Director of Parole informs me that probation officers generally are not trained as police officers and normally do not carry sidearms. This may be a practical consideration in determining who should be directed as the agent to go after and return the defendant.

I also call your attention to the fact that, without formal extradition papers, no State officer would have enforceable legal authority in another State. Quite frequently persons who have indicated an intention to waive extradition change their minds before the agent named to return them arrives. While the expense of returning a prisoner is payable out of the criminal fund if the return is actually secured, if he is not returned, the expenses of the agent are not paid by the State unless the travel is authorized by the Governor under the extradition law. I am informed by the Governor's Office that, since in some cases the persons back down on their promise to waive extradition, travel authorizations are not issued, except where the person is in an adjoining State, unless formal extradition papers are secured. In those cases any person may be named by the Governor as the agent to receive the prisoner. I understand that he usually names the person suggested by the Commonwealth's Attorney in his request for the papers.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**EXTRADITION PROCEEDINGS—Conditions under which Commonwealth will pay expenses thereof. F.122**

Januray 3, 1949.

HONORABLE C. W. WOODSON, JR., *Superintendent*  
Department of State Police,  
Richmond 10, Virginia.

My dear Colonel Woodson :

This is in reply to your letter of December 20 in which you asked several questions pertaining to extradition proceedings. I quote below the questions presented in your letter.

"(1) When a criminal, who has committed a crime in Virginia, is apprehended in another state and the interested police department in Virginia is notified that the offender is being held and waives extradition, is it legal to dispatch an officer to facilitate the offenders return?

"(2) Under the conditions outlined under No. 1, will the Commonwealth pay for the expenses incurred?

"(3) Under the conditions as outlined under No. 1, will the Governor's Office telegraph the interested department to proceed with the return of the prisoner, and if so, will this indicate that the expenses will be defrayed by the state?"

There is no legal objection to dispatching an officer for the return of a fugitive, apprehended in another state, who has waived extradition. The Uniform Extradition Law specifically provides that persons who waive extradition may be returned without formality to the demanding state. The principal ob-



jection to the dispatch of an officer for such a purpose is a practical one, based upon the facts that the fugitive may, at any time, change his mind and decide not to waive extradition, and that the officer without formal extradition papers, has no legally enforceable authority outside of Virginia.

The question of who bears the expense of the return of the fugitive may depend upon whether the fugitive was, in fact, returned or whether proper authorization was obtained from the Governor's office for the trip. If the fugitive is actually returned, the expense of the return is payable out of the criminal fund of the Commonwealth. However, if the fugitive is not actually returned, then the Commonwealth will not pay the expenses, unless prior authorization for the trip was secured from the Governor's office.

As a matter of policy, the Governor's office will not issue a travel authorization for the return of a fugitive on a waiver of extradition, unless the person is in an adjoining state. This travel authorization must be obtained by communicating with the Governor's office prior to the dispatch of the officer. That office will then notify the Commonwealth's Attorney by telegram authorizing the trip, and proper forms will be mailed. The dispatch of the officer may precede the receipt of the forms, but upon his return, the forms must be properly filled out and sent to the Comptroller, along with the telegram of authorization.

If the fugitive is not in an adjoining state, the Governor's office will not issue a travel authorization, unless formal extradition papers are secured. While this does result in a delay in the dispatch of the officer, it does assure that the trip will not be unsuccessful merely because the fugitive changes his mind.

If there are any additional questions, or if any further clarification of those questions quoted above is desired, please do not hesitate to write me.

With best wishes, I am

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**FEES—Divorce Cases when Interlocutory Decree is merged into Final Decree.** Fee applicable to cases filed before effective date of Act F-116

September 30, 1948.

HONORABLE W. CARY CRISMOND, *Clerk*,  
Circuit Court of Spotsylvania County,  
Spotsylvania, Virginia.

My dear Mr. Crismond:

This is in reply to your letter of September 23, in which you refer to Section 3485 of the Code as amended by Chapter 380 of the Acts of 1948, and ask whether the last item of \$4 mentioned therein is applicable to divorce cases filed prior to June 29, 1948, and the interlocutory decree is merged into a final decree after that date, or whether the Clerk's costs are based on the law as it existed at the time the suit was filed.

Section 3485 is the section which provides for the fees of clerks in chancery cases. It provides certain fees for specific services, but in 1948 it was amended by adding a paragraph to provide a flat fee in divorce cases, which paragraph reads as follows:

"In lieu of the fees hereinabove set forth:

"For all services rendered in divorce cases including furnishing a dully certified copy of the decree of separation from bed and board or of divorce .....	\$8.50
"In cases where an interlocutory decree is merged into a final decree there shall be a charge of .....	4.00"

Since the statute provides for a flat fee of \$4.00 in cases where an interlocutory decree is merged into a final decree, it is my opinion that this is the fee that should be charged when such action is taken in a divorce case after June 29, 1948, the effective date of the Act, even though the original divorce suit had been instituted prior to that time.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**FINES AND COSTS—Trial Justices in filing Papers with Clerk of Circuit Courts must Indicate if Same has been paid: F-116**

October 27, 1948.

HONORABLE ROBERT D. HUFFMAN, *Clerk*,  
Circuit Court of Page County,  
Luray, Virginia.

My dear Mr. Huffman:

I am in receipt of your letter of October 23, from which I quote as follows:

"As we understand the law enacted by the last session of the Legislature, the trial justice is no longer required to furnish the clerk of court with a report of all cases disposed of by him during each month, but is required to deliver to the clerk all papers in each case, which the clerk is required to index and file.

\* \* \* \* \*

"Since he no longer makes this report, but merely delivers all papers to us, to be indexed and filed, it is a physical impossibility to ascertain in what cases the fine and costs have not been paid and therefore judgment cannot be docketed, thus depriving the State of potential revenue.

"Will you please advise us the correct procedure to follow?"

Section 2550 of the Code, as amended by Chapter 46 of the Acts of Assembly of 1948, is as follows:

"Between the first and tenth day of each month every justice in a county or town shall return to the clerk of the county, and every justice in a city shall return to the clerk of the corporation or hustings court, and if the city has no such court, then to the clerk of the circuit court of the city, the warrants in all criminal cases finally disposed of by him in the preceding month on which shall be itemized the fines and costs imposed in each case or other disposition thereof; also the justices shall at the time of making the return, pay to the clerk any fines and costs shown by the return to be due, for which the clerk shall issue a receipt on the official form. When he acquits the accused he shall certify the costs of the trial and to whom due; and if he rendered judgment against the prosecutor for costs he shall so state."

In order to comply with Section 2552 of the Code, which requires, among other things, that you, as clerk, issue execution if the fines and costs in question have not been paid, it is my opinion that you should require the justices at the time of making the return to designate the fines and costs that have not been paid.

As a practical solution to the problem, I suggest that the justices write the word "paid" on the back of these warrants that have been satisfied when he makes his return.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**FINES AND FORFEITURES—Forfeited Recognizance Bonds; Time limit on Enforcement. F-72**

June 6, 1949.

HONORABLE B. T. FITZPATRICK,  
Assistant Commonwealth's Attorney,  
City of Roanoke,  
Roanoke, Virginia.

My dear Mr. Fitzpatrick:

This is in reply to your letter of May 24, from which I quote as follows:

"Is a judgment docketed, and execution issued thereon on a forfeited recognizance bond in favor of the Commonwealth, barred of enforcement after twenty years without renewal of an execution thereon?"

Section 5829 of the Code provides that no statute of limitations which does not in express terms apply to the Commonwealth shall be deemed a bar to any proceedings on behalf of the Commonwealth. Section 6477 provides a limitation on proceedings to enforce a judgment unless execution is issued and periodically renewed. Section 6478 declares that no execution shall issue on any judgment after the period prescribed in Section 6477, except for the Commonwealth.

It appears then that the limitation on the enforcement of judgments without renewing executions does not apply to judgments for the Commonwealth. It only remains to consider whether Section 2543 would prevent the enforcement of this judgment.

Section 2543 provides, in part, as follows:

" \* \* \* No action, suit or proceeding of any nature, however, shall be brought or had for the recovery of a fine or costs due the Commonwealth or any political subdivision thereof, unless within twenty years from the date of the judgment imposing the fine."

This limitation applies only to the recovery of fines or costs due to the Commonwealth. I do not think that it is applicable to the enforcement of a judgment on a forfeited recognizance bond. It is my opinion, based upon consideration of the above noted sections, that a judgment for the Commonwealth on a forfeited recognizance bond may be enforced after twenty years without renewal of an execution.

With best wishes, I am

Very truly yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**FINES AND FORFEITURES—Interest On. F-171**

June 23, 1949.

HONORABLE T. BRYAN TATE, *Clerk*,  
Corporation Court City of Danville,  
Danville, Virginia.

My dear Mr. Tate:

This is in reply to your letter of June 1, in which you request my opinion as to whether or not a judgment of a forfeited recognizance carries interest.

It has generally been held that the State may recover interest from the date

of the judgment of a forfeited recognizance. See 6 Am. Jur., Bail and Recognizance, §197.

Therefore, if the judgment to which you refer is a final judgment on a *scire facias*, it is in fact a judgment for a debt and, in my opinion, carries interest in favor of the Commonwealth. See §6259 of the Code of Virginia.

The defendant's contention that §4979 of the Code should be construed to exempt interest is not a proper one of the instant case. This section which provides that a surety may, after default, pay into court the amount for which he is bound with such costs as the court may direct, refers only to the procedure which may be followed immediately after the default and before a judgment has been entered in favor of the Commonwealth.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**FISH AND FISHERIES—To what territorial limits statute prohibiting fishing applies. F-233**

April 5, 1949.

HONORABLE JOHN PAUL CAUSEY,  
Commonwealth's Attorney,  
King William County,  
West Point, Virginia.

My dear Mr. Causey:

I have your letter of March 30 requesting my opinion as to whether Chapter 327 of the 1948 Acts applies only to the territorial limits of King William County or is effective as to all waters of the Pamunkey and Mattaponi lying within the criminal jurisdiction of the Circuit Court of King William County.

Chapter 327, Acts of 1948, provides as follows:

"It shall be unlawful for any person to take, or attempt to take any fish by means of nets or seines, whether drift, set, haul or otherwise, between the hours of twelve mid-night of Saturday and twelve o'clock mid-night of Sunday in the waters of Pamunkey and Mattaponi Rivers in King William County. Any person violating any provision of this act shall be guilty of a misdemeanor."

Section 5958 of the Code provides for current jurisdiction, as mentioned in your letter. However, I feel that this Act is limited by its own wording and would, therefore, apply only to the territorial limits of King William County.

With kind regards, I am

Very truly yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**FORFEITURE—Remitting Penalty Against Principal does not Release Sureties—F-27**

August 17, 1948.

HONORABLE JENNINGS L. LOONEY, *Clerk*,  
Circuit Court of Buchanan County,  
Grundy, Virginia.

My dear Mr. Looney:

This is in reply to your letter of August 12, from which I quote as follows:

"I am herewith mailing to you an order from His Excellency, the Governor of Virginia, remitting the penalty of the bond against A. C. Stacy, together with the order in connection therewith entered in our court directing the Clerk to make certain notations on the judgment lien docket. Judgment on the forfeited bond in this case was against Onie Prater and other sureties other than A. C. Stacy, and I will appreciate an opinion from you as to whether or not I should mark the judgment of record in my office satisfied only as to A. C. Stacy, or satisfied as to all of the parties against whom judgment is docketed."

Since the Governor's order, to which you refer, states in effect that remission of the forfeited recognizance should be granted only to A. C. Stacy, I am of the opinion that the notation on the judgment lien docket should be marked as satisfied only as to A. C. Stacy.

If the other sureties desire relief, their remedy is to follow the same procedure taken by Mr. Stacy.

I am returning herein the papers in connection with this matter.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**GAME, INLAND FISHERIES—Regulation Adopted by Commission Prescribing Opening Dates for Hunting Season not Uniform Throughout the State is Invalid. F-233**

August 26, 1948.

HONORABLE T. MOORE BUTLER,  
Attorney for the Commonwealth,  
Alleghany County,  
Covington, Virginia.

My dear Mr. Butler:

This is in reply to your letter of August 19, 1948, in which you raise a question concerning the squirrel hunting season in Alleghany County. It appears that the Commission of Game and Inland Fisheries, on May 22, 1948, adopted a regulation fixing the open season for hunting squirrels. This regulation provided that the first season would be from September 15 through September 30, and the second season would commence on November 20 and close January 20. Certain exceptions, not pertinent to your inquiry, were made.

On June 25, the Game Commission adopted another regulation establishing the open season for hunting squirrels in Alleghany County. This regulation provided that it should be lawful to hunt squirrels in Alleghany County from November 20 through January 5 only. You ask if this last mentioned regula-

tion is contrary to the provisions of §33-A of Chapter 317 of the 1948 Acts of the Assembly of Virginia.

Section 33-A of Chapter 317 of the 1948 Acts reads as follows:

"Commissions authorized to prescribe seasons for taking fish and game.- Within the limits prescribed by law the Commission shall have power to prescribe the seasons for hunting, fishing, trapping, or otherwise taking fish and game; provided, however, that the opening date of any such season heretofore or hereafter fixed shall be uniform throughout the State and there shall be no variation therein as between areas located east and those west of the Blue Ridge. Nothing herein contained shall be construed as repealing any special act as to game fish and trapping."

It is my opinion that, under the above-quoted section, the Game Commission is not authorized to establish opening dates for hunting season which are not uniform throughout the State. It, therefore, follows that the Game Commission, having selected September 15 as the opening date for squirrel hunting in Virginia, cannot provide that the season in Alleghany County shall not open until November 20. It is my opinion that the regulation of June 25, 1948, referred to above, is in violation of §33-A of Chapter 317 of the Acts of 1948, and is, consequently, not valid.

With best wishes, I am

Very truly yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**GAME, INLAND FISH AND DOG CODE—County Resident Using Pole,  
Line, Cork, etc., Must Obtain Fishing License. F-233**

July 8, 1948.

HONORABLE L. R. SLAGLE,  
Trial Justice of Greensville County,  
Emporia, Virginia.

My dear Mr. Slagle:

This is in reply to your letter of July 3, in which you ask if county residents using only pole, line, cork, sinker, hook, worms and cut bait are required to obtain a license to fish under the provisions of Chapter 317 of the Acts of Assembly of 1948.

Chapter 317 of the 1948 Acts amended and re-enacted §§14, 19, and 23 of the Game Code of Virginia. Prior to the 1948 amendment, §19 of the Game Code provided five exemptions from obtaining a license to hunt, trap and fish in or on inland waters of this State. The fifth of these five exemptions provided that:

"License shall not be required of residents to fish in the county limits of the county of which they are resident \* \* \*, provided such person is not fishing with a rod and reel or other method whereby artificial lures or minnows are used as bait and provided, further, that such person is not fishing for bass or trout."

When §19 was amended and re-enacted by Chapter 317 of the 1948 Acts, the above-quoted exemption was omitted. The other four exemptions contained in §19 were repeated in the 1948 Act in substantially their same form.

It is my opinion that the failure to include the exemption as to county residents in the 1948 amendment to §19 clearly indicates the legislative intent that

county residents not be exempted from the requirement of obtaining a license.

You point out, by reference to §19(b) (1) of the 1948 amendment, the fact that the county resident season license to fish provided for applies only to fishing with rod and reel or fishing with artificial lures or fishing for bass and trout. It appears that under this subsection of §19, there is no provision for a county resident fishing merely with pole and line to obtain a license.

This subsection of §19 also appears in the old §19. Apparently when the fifth exemption as to county residents not requiring a license was removed, the corresponding change was not made in the section relating to the cost and purchase of a license. It appears to me that this failure does not override the obvious intent to remove county residents from the list of those exempted from the requirement of obtaining a license.

Upon a consideration of both the 1948 amendment, and §19 prior to the 1948 amendment, it is my opinion that a license must be obtained by county residents fishing in their county and using only pole, line, cork, sinker, hook, worms and cut bait. It is my further opinion that they can obtain the license provided by subsection (b) (1) of §19 of the 1948 amendment, or they can obtain the combination county resident season license to hunt and fish in the county of residence provided by subsection (a-2) of §23 of the 1948 amendment.

With best wishes, I am

Very truly yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**GAME, INLAND FISH AND DOG CODE—Gun not larger than ten gauge cannot be confiscated. F-233**

February 11, 1949.

HONORABLE HANSEL FLEMING,  
Commonwealth's Attorney,  
Dickenson County,  
Clintwood, Virginia.

My dear Mr. Fleming:

This will acknowledge receipt of your letter of February 9 requesting an opinion on the following question:

"A defendant is convicted of hunting and killing squirrels with a shotgun out of season. Should the gun be confiscated? Does 'any gun', mentioned as unlawful and subject to forfeiture in Sec. 3305 (52) of the Code of Virginia, mean literally any gun or only such types of guns as are made or rigged specially for taking wild birds, wild animals or fish?"

Answering your first question, I wish to advise that §3305 (37) (a) provides that a shotgun not larger than ten gauge may be used for killing game. Assuming that the shotgun in question is not larger than ten gauge, then the gun should not be confiscated.

Section 3305(52) the words "any gun" means only such types as are made or rigged specially for taking wild birds or wild animals.

With kind regards, I am

Very truly yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**GAME AND INLAND FISHERIES AND DOG CODE—License to trap must be Issued by Clerk of the County Wherein the Applicant Legally Resides. F-233**

January 25, 1949.

HONORABLE JAMES ASHBY, *Clerk*,  
Circuit Court of Stafford County,  
Stafford, Virginia.

Dear Mr. Ashby:

This is in reply to your letter of January 17, from which I quote as follows:

"I would like for you to please advise me if I have authority under the law to issue a county trapping license to a gentleman from Fredericksburg, who has a home in the City of Fredericksburg and votes there, but who also owns property in this county and has a fishing shack where he spends a good deal of his time in this county. He tells me that on the average he spends about four days out of each week in his fishing shack where he fishes and traps on Potomac Creek and River."

The pertinent part of Chapter 317 of the Acts of Assembly of 1948 (§3305 (19) of Michie's Supplement of 1948) is as follows:

"(d) License fees to trap only. -- The license fees to trap only shall be as follows:

- "(1) County resident season license three dollars.
- "(2) State resident season license twenty dollars."

In the construction of statutes the meaning of the word resident necessarily depends upon the context and purpose of the particular statute and it is clear, in my opinion, that "resident" as used in the above Act, is intended to mean "legal resident".

Therefore, it is my conclusion that you have no authority to issue a county resident license to a person whose legal residence is the City of Fredericksburg.

With best wishes, I am

Very truly yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**GAME, INLAND FISH AND DOG CODE—Owner where land extends on both sides of Non-navigable Stream can prevent fishing in said Stream; no ownership in Wild Game. F-233**

September 27, 1948

MR. T. H. LILLARD,  
Sheriff of Madison County,  
Madison, Virginia.

My dear Mr. Lillard:

This is in reply to your letter of September 21, in which you ask if a person who owns land on both sides of a non-navigable stream can prevent others from fishing in that part of the stream which runs through his property.

The beds of non-navigable streams or bodies of water belong to the owners of the adjoining property and where one person owns the land on both sides he



is the owner of the entire bed. While his rights in the stream itself may be subject to certain water rights of the upper and lower riparian owners, he may keep anyone from coming on his property to fish. See Section 3305 (50) of the Code, which makes it illegal for a person to go upon the lands or waters of another to hunt, fish or trap without the consent of the landowner or his agent.

You also ask who owns the quail and other wild game on a person's property. Except as the State is considered to own wild game for the benefit of all the people, there is no ownership in wild animals, birds or fish so long as they remain wild, unconfined and in a state of nature. However, they become the property of the person who reduces them to possession.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**GOVERNOR—Appointment of Forest Warden cannot be Delegated.**

September 22, 1948

MR. CHARLES J. DUKE, JR.,  
Governor's Office,  
Richmond, Virginia.

Dear Mr. Duke:

This is in reply to your letter of September 17, in which you request my opinion as to whether or not forest wardens can be appointed either by the State Forester or the Director of the Department of Conservation and Development acting for the Governor.

Section 10-55 of the reorganization provisions of the new Code of Virginia provides that:

"Whenever the Director considers it necessary, he may apply to the Governor to commission such persons as the Director may designate to act as forest wardens of this State, to enforce the forest laws, and, under his direction through the State Forester, to aid in carrying out the purposes of this chapter. \* \* \*"

The forest wardens so appointed are required to take an oath of office and while holding office possess the authority and power exercised by constables at common law and by arresting officers under the statutes of this State so far as the forestry laws are concerned. Since the section specifically states that the Governor makes the appointment of wardens, I do not think that this authority can be delegated either to the State Forester or the Director of the Department of Conservation and Development. Since these officers exercise certain police powers, a question could be raised as to the validity of their appointment if this procedure were followed.

I am returning Mr. Dean's letter herewith.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**GOVERNOR—Authority to expend appropriations for contingencies of an emergency nature for educational facilities in other states for Virginia citizens. F-386**

April 15, 1949

HONORABLE WILLIAM M. TUCK,  
Governor of Virginia,  
Richmond, Virginia.

My dear Governor Tuck:

This is in reply to your request for my opinion as to your right to authorize a contract to be entered into on behalf of the Commonwealth of Virginia with the Board of Control For Southern Regional Education pursuant to which educational facilities for veterinary medical training will be made available to Virginia citizens at the University of Georgia and Tuskegee Institute.

This proposal is the result of the efforts and studies of the Regional Council For Education, a Council of the several southern States, which was created for the purpose of finding means by which the participating States could better meet the problems of furnishing education facilities in the various fields of graduate study. The plan developed recognizes the difficulties which would be encountered if each of the States attempted to provide graduate schools in all of the fields of study. The plan provides that, instead of establishing separate schools in each State, those States which have a graduate school in a particular field of study will make its facilities available to a certain number of students from each of the participating States. In consideration for this the participating States will contribute a proportionate part of the cost of furnishing the educational facilities. The funds from each State will be paid to the Board of Control For Southern Regional Education, the joint agency created by the States which are members of the Regional Council, which Board of Control will make an appropriate contract with the institution furnishing the services. The State contracting with the Board will certify applicants from that State as eligible for consideration for training in the servicing institution.

The advantages of this plan to the Commonwealth of Virginia in the field of veterinary medicine training can be seen, since Virginia has no graduate school in this field. Under the plan Virginia, which has considerable interest in the livestock industry, will be able to provide veterinary training to its citizens without being put to the large expense of establishing a veterinary school at this time.

While Section 141 of the Constitution of Virginia provides that no appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof, this does not, in my opinion, prohibit an appropriate agency of this State from making a contract with the Board of Control of the Regional Council, pursuant to which educational facilities not available in Virginia are secured for Virginia citizens at some institution located elsewhere. While an appropriation, could not be made directly to the servicing institution, an appropriation made to some department or agency to be spent by it and under its control in carrying out a contract with the servicing institution through the Regional Board of Control would not be in violation of this constitutional provision.

Legislation of this nature has been upon the statute books for some time and has always been considered in harmony with the Constitution. See Chapter 352 of the Acts of Assembly as amended by Chapter 54 of the Acts of 1940 and also Section 969-a of the Code of Virginia. Under the first statute mentioned monies appropriated to the State Board of Education may be used to help finance the education of Virginia citizens at some institution not operated by the State when they are denied admission to a State operated institution. Under the second Act money appropriated to the State Board of Education may be contributed to the cost of education of qualified Negroes of Virginia as medical and dental students at Meharry Medical College. The funds to defray the cost of such expenses are

paid out of the appropriation to the State Board of Education for equalization of higher educational opportunities.

It is doubtful whether the appropriation for this last mentioned purpose is broad enough to be used for the purpose of paying the cost of educational facilities in the field of veterinary medicine, since that is a field of higher education not given at any State institution. Moreover, the whole program of regional education developed by the Regional Council for the southern States transcends the mere purpose of equalization and is designed to offer full educational opportunities to all citizens in the various branches of higher education in graduate fields, for some of which no provision or inadequate provision is made by some or all of the participating States.

However, while there is no appropriation made for the specific purpose of carrying out the proposed program of regional education, it is my opinion that this program could be financed out of the appropriation made to the Governor by Item 443½ of the Appropriation Act, which provides a reserve of \$150,000 for contingencies of an emergency nature. The program of the Regional Council For Education was not matured by the participating southern States until after the last session of the Legislature. Moreover, I am informed that, unless Virginia participates in the program at the present time, it is possible that it will be unable to secure a quota for Virginia students at the servicing institutions in the future. For this reason, I think the program presents a matter of an emergency nature. I also understand that funds for Virginia's share in the administrative costs incurred in organizing the Regional Council to study this matter were paid out of this appropriation. It is my opinion that it would be proper to use this emergency appropriation for the purpose of carrying out this program until the Legislature can make specific provisions therefor.

I understand that Virginia Polytechnic Institute will be the screening agent for White students applying for veterinary medical training and that Virginia State College will act in that capacity for Negro students. Since these are the Virginia institutions offering undergraduate training for students planning to enter this field, it would seem that they would be the most appropriate agencies to act for you in carrying out this program.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**GOVERNOR**—No authority to set aside unappropriated revenues for Literary Fund. F-199

**SCHOOL BOARDS**—County school board may borrow money from the Retirement Fund or Sinking Fund after voters approve bond issue. F-199

**SCHOOL BOARDS**—City School Board may borrow money from Retirement Fund through Literary Fund. Charter must provide that loans be made from Sinking Fund. F-199

May 9, 1949.

HONORABLE CHARLES R. FENWICK,  
State Senator,  
6733 Lee Highway,  
Arlington, Virginia.

My dear Senator Fenwick:

This is in reply to your request for my opinion upon the following three questions:

"1. In case there is any surplus occurring in the biennium beyond the conditional and unconditional appropriations as provided for in the budget, can the Governor, by way of deficient appropriation or otherwise, transfer such monies to the Literary Fund without prior authorization of the Legislature

"2. Can the school boards of municipalities and counties borrow funds from the Retirement Fund for the erection of school buildings or, putting it another way, can the State or those duly charged with investing the Retirement Fund invest such funds through loans to the municipal and county school boards? If the answer is in the affirmative, what would be the legal procedure for accomplishment? Is any act of the Legislature required to authorize such loans?

"3. Can municipal or county school boards borrow from the State funds which have been ear-marked for the retirement of bonded indebtedness or, conversely, can the State, through those authorized to invest such funds, make loans to the municipal or county school boards for erection of school buildings? If the answer is in the affirmative, what is the legal procedure for perfecting these objectives? Is any authority of the Legislature required in this connection?"

Section 134 of the Constitution provides that the General Assembly shall set apart as the Literary Fund the present Literary Fund; the proceeds of all public lands donated by Congress for public free school purposes; of all escheated property; of all waste and unappropriated lands; of all property accruing to the State by forfeiture, and all fines collected for offenses committed against the State, and such other sums as the General Assembly may appropriate. This mandate of the Constitution has been carried out by Section 632 of the Code of Virginia.

While both the Constitution and the statute declare that the Literary Fund shall consist of certain specified revenues and such other funds as the General Assembly may appropriate, there has been no appropriation made by the General Assembly from the general fund of the State treasury to the Literary Fund. In fact, the only item of the Appropriation Act of 1948 dealing with the Literary Fund (other than item 76 appropriating \$500,000 each year therefrom to the Retirement System) is item 123 which appropriates the interest on the Literary Fund for the maintenance of public free schools. This last item expressly provides that no part of that appropriation shall be paid out of the general fund of the State treasury.

The Governor's authority to authorize a deficit appropriation is contained in

Sections 39 and 40 of the Appropriation Act of 1948. Section 39 provides in part as follows:

"No State department, institution or other agency receiving appropriations under the provisions of this act shall *exceed the amount of its appropriations*, or incur obligations at a rate which would result in the creation of a deficit *in its appropriations*, except in an emergency, and then only with the consent and approval of the Governor in writing first obtained. \* \* \*

Section 40 reads:

"Any amount which a State department, institution or other State agency may expend *in excess of its appropriation*, under authority given by the Governor under this act to such department, institution or other State agency to exceed its appropriation or to incur a deficit, shall be first obtained by the said department, institution or agency by borrowing said amount on such terms and from such sources as may be approved by the Governor and State Treasurer."

As will be seen from the *italicized* portions of the above provisions, they contemplate that, before a deficit authorization is made, there must be some appropriation made by the General Assembly to the particular department, institution or agency concerned for the particular purpose or object for which the funds are to be spent, and that the amount which the General Assembly has made available by specific appropriations has, because of emergency conditions, proven inadequate.

The provisions of the Appropriation Act under which the Governor may authorize a deficit have never been construed to permit the expenditure or use of unappropriated funds for purposes for which no appropriation at all had been made by the General Assembly. To do so would be to transfer the appropriation power from the Legislature to the Chief Executive. If such authority existed, State funds could be expended for any purpose deemed desirable by the Chief Executive, whether or not the Legislature had authorized an expenditure for such purpose. Since the General Assembly has made no appropriation from general fund revenues to the Literary Fund, it is my opinion that the Governor may not transfer surplus money in the general fund to the Literary Fund by a deficit authorization or otherwise.

You next ask whether the school boards of municipalities and counties may borrow funds from the Retirement System. Section 18 of the Virginia Retirement Act, as amended by Chapter 519 of the Acts of Assembly of 1948, provides that the Board of Trustees of the Retirement System shall have power to invest retirement funds in securities which, at the time of making the investment, are, by statute, permitted for the investment of reserves of domestic life insurance companies. Chapter 343 of the Acts of Assembly of 1932, as amended (Section 4258a of Michie's Code of Virginia) provides that the reserves of domestic life insurance companies may be invested in the following securities:

"(a) In bonds, or other evidences of indebtedness, not in default as to principal or interest, which are valid and legally authorized obligations issued, assumed or guaranteed by the United States of America or by any state thereof or by any territory or possession of the United States, or by the District of Columbia, or by any county, city, town, village, municipality or district therein or by any political subdivision thereof or by any civil division or public instrumentality of one or more of the foregoing, if by statutory or other legal requirements applicable thereto, such obligations of such civil division or public instrumentality are payable, as to both principal and interest, from taxes levied or by such law required to be levied upon all taxable property or all taxable income within the jurisdiction of such governmental unit or from adequate special revenues pledged or otherwise appropriated or by such law required to be provided for the purpose of such

payment, but not including any obligations payable solely out of special assessments on properties benefited by local improvements,"

The above provision would authorize domestic life insurance companies to invest their funds in bonds issued by county and city school boards. Therefore, by virtue of Section 18 of the Virginia Retirement Act, the funds of the Retirement System can also be invested in such securities.

In the case of county school boards, bonds can be issued and sold to the Retirement System only after compliance with the provisions of Section 673 and Sections 2738-2741 of the Code, which among other things, require the approval of the voters at an election held to secure such approval.

In the case of city school boards, I find no specific provision of general law authorizing them to borrow money and issue bonds therefor except in the case of loans made through the Literary Fund. In the case of most cities loans for school purposes are made directly by the city itself and not by the school board. The funds are then used for the erection of school buildings by the city, which in most instances retains title thereto. In some instances specific charter provision may authorize direct borrowing by the school board itself.

I am enclosing a copy of a previous opinion of this office rendered on March 22, 1949, to Honorable Jesse W. Dillon, Treasurer of Virginia, in which I held that, under the authority of the case of *Almond v. Gilmer*, 188 Va. 1, bonds for loans to a city school board from the Literary Fund could be transferred to the Retirement System without the approval of the voters of the city at an election to determine whether the bonds should be issued.

Retirement funds may be used for financing loans to either county or city school boards without additional legislation, provided the procedure outlined above is followed by county and city school boards respectively.

Your third question concerns the use of State funds earmarked for the retirement of the bonded indebtedness of the State to make loans to municipal and county school boards.

The Act setting up the "Sinking Fund" for the retirement of the State debt is Chapter 1 of the Acts of the General Assembly, Extra Session 1942. (Section 2624a of Michie's 1948 Cumulative Supplement to the Code of Virginia). Section 4 of that Act provides that the moneys belonging to the "Sinking Fund" shall be invested in obligations of the United States Government or obligations fully guaranteed by the United States Government. However, Section 8 reads as follows:

"Notwithstanding the provisions of subsection four of this section, with respect to the investment of the 'Sinking Fund' moneys in obligations of the United States Government or obligations fully guaranteed by the United States Government, the 'Commissioners of the Sinking Fund' shall nevertheless have authority to invest same in bonds or obligations of the State, or any political subdivisions thereof, or of any State institution, whenever, in their judgment, the best interests of the State will be promoted by so doing."

Since, under Section 673 of the Code, county school boards are authorized to issue bonds "on the credit of the county", I believe such bonds would be obligations of political subdivisions of the State within the meaning of Section 8 of the Sinking Fund Act. The language there used, however, is not quite as broad as that used in Section 4258a, quoted above, and it might be desirable to have clarifying legislation.

The procedure for making such loans to county school boards would be the same as described above in connection with loans from the Retirement System and would necessitate compliance with Section 673 and Sections 2738-2741 of the Code. Approval by the voters of the county, as provided by these sections, is required by Section 115a of the Constitution, whether the loan be from the Retirement System or the "Sinking Fund". See *Almond v. Gilmer*, *supra*.

While approval by the voters would not be required in the case of city school boards, the question of whether they could borrow from the "Sinking Fund" would depend upon whether there is any charter provision of the particular city authorizing the school board, itself, to borrow money directly and issue bonds therefor.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**GOVERNOR—When He May Authorize Deficit.—F-253**

June 7th, 1949.

HONORABLE WILLIAM M. TUCK,  
Governor of Virginia,  
Richmond, Virginia.

Dear Governor Tuck:

You have requested my opinion as to the authority of the Governor, through the medium of deficit authorization powers, to make available additional funds to the Hospital Construction Fund in order to augment and match Federal funds to become available at the beginning of the ensuing fiscal year, under the terms of the Hill-Burton Act in conjunction with funds raised, or in process of being raised, by certain localities for community hospital construction projects.

The Appropriation Act, Biennium 1948-50, (Item 444½) made available the sum of \$1,500,000, for State aid for hospital construction and to match Federal and local funds under the terms of the Hill-Burton Act. This appropriation, in application to the purposes designated, has been exhausted.

It is manifest that Federal and local funds which now appear available for the fiscal year immediately ensuing, as well as the necessities which have arisen, were not comprehended by the Legislature of 1948. It is a reasonable supposition that these conditions could not, by the exercise of reasonable care and good judgment, have been foreseen when the General Assembly was in session. However, the expression of the intent and purpose and the manifestation of the policy of that body to derive the benefits obtainable under the Hill-Burton Act, are clear. The subject being one, therefore, embraced by the Appropriation Act without limitation, express or implied, upon the Governor's authority relative thereto, I am of the opinion that if the Governor finds the situation which has arisen to be one of emergency he is clothed with ample authority to authorize the deficit to the Hospital Construction Fund for the purposes and to be used in the manner specified in Item 444½.

Your Excellency will recall that the testimony adduced at the hearing, over which you presided on June 1st, established the projects under consideration as having high priorities under the State-Federal hospital aid survey. Proof, both competent and abundant, was also submitted that the communities represented were in dire and emergency need to expand deplorably inadequate hospital facilities. While the determination of the emergency phase of the matter is solely the prerogative of the Governor, I do not hesitate to express the opinion that the emergency has been clearly demonstrated.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**HIGHWAYS—No Obligation on County or Department of Highways to Maintain Streets on Plotted Subdivisions. F-192**

January 6, 1949.

HONORABLE ANDREW W. CLARKE  
104 North Fairfax Street  
Alexandria, Virginia.

My dear Senator Clarke:

This will acknowledge receipt of your letter dated January 3, 1949, which I quote as follows:

"A question has arisen in Fairfax County, Virginia, as to who owns the land duly dedicated as public streets in Subdivisions placed of record. It appears that by a deed of dedication dated April 14, 1947, the Tyler Corporation placed of record among the land records of Fairfax County, Virginia, the enclosed dedication deed, along with Section 4 of the Tyler Park Subdivision.

"At the time of placing the Subdivision of record and selling the lots contained therein, the residents of the area were advised and informed that certain improvements, such as hard surfacing, storm sewers and etc. were to be placed in the Subdivision and as usual, the developer after completing his project does not live up to his promises to improve the streets. The people of the Subdivision have been informed that no one is the owner of the land dedicated and designated as public streets, neither the State of Virginia, the County of Fairfax or the property owners in the Subdivision. The people in the Subdivision have requested me to furnish you with a copy of the enclosed and urge you to give me an opinion as to who is the rightful owner of the land shown on the plat as streets.

"I might likewise inform you, that prior to dedicating the Subdivision, Mr. Hugh B. Marsh, Commonwealth Attorney, prepared an agreement, a copy of which is enclosed herewith. This information was disclosed to the purchasers at the time they sold the lots and now that the developer has refused to pave and hard surface and place storm sewers, the people in the Subdivision have requested the Board of Supervisors to enforce the contract entered into on the 24th day of October, 1946. After Mr. Marsh prepared the contract, he now advises the Board that the contract is not an enforceable one, since there is a failure of consideration and has refused to institute suit on behalf of the Board of Supervisors to enforce the developer to comply with the terms of the same.

"The Tyler Park development is quite a large one, having three hundred to four hundred families living therein and I would like to assist them in solving the problem which I have submitted herein. I explained to them at the time they brought the matter to my attention, that I would be glad to take the same up with you and have you render an official opinion to me as to the title to the land lying in this Subdivision and dedicated for public use."

The exhibits which you enclosed with letter, namely, the deed of dedication and agreement between the Tyler Corporation and the Board of Supervisors of Fairfax County, Virginia, have been carefully examined.

The deed of dedication is dated April 14, 1947, and the agreement with the supervisors October 24, 1946. I am advised that this subdivision lies within one mile of the corporate limits of Falls Church and that this city became a city of the second class August 1946. Therefore, at the time of the dedication Falls Church was an incorporated town.

You first ask who owns the land dedicated as public streets in this subdivision. Your attention is called to section 5222y of Michie's 1942 Code of



Virginia which deals with subdivisions situated within the corporate limits of any incorporated town or within two miles of the corporate limits of such town. Code section 5222aa provides in part as follows:

"The recordation of such plat shall operate to transfer, in fee simple to the Commonwealth of Virginia, such portion of the premises platted as is on such plat set apart for streets or other public use and to create a public right of passage over the same; \* \* \*

I am, therefore, of the opinion that pursuant to the provisions of this section the title to the dedicated streets is vested in the Commonwealth of Virginia, and that the public is entitled to right of passage over them.

The photostatic copy of the agreement between the Tyler Corporation and the Board of Supervisors of Fairfax County, Virginia, which you furnished me does not disclose that the same was executed on behalf of the Board of Supervisors of Fairfax County. It is, therefore, a factual matter whether or not the County of Fairfax accepted the terms of the agreement. The County, being a party to the agreement and in the possession of such facts, is in a much better position to pass on the validity of the agreement than this office.

You, of course, are familiar with the provisions of the statute known as the Byrd Road Law enacted in 1932 vesting the control, supervision, management, and jurisdiction of the public roads maintained by the several counties in the State Highway Commission. New roads may be taken into the Secondary System of Highways upon appropriate proceedings by the board of supervisors and the concurrence of the State Highway Commissioner.

Since the statute above referred to vests title to such streets in the Commonwealth of Virginia and creates a public right of passage, I am of the opinion that the rights of the public have become vested by the opening and maintenance of these streets and those rights cannot be disturbed. For further discussion, you may refer to the case of *Glasgow v. Mathews*, 106 Va. 54. S. E. 991.

In the case of *Washington-Virginia R. R. Co. v. Fisher*, 121 Va. 229, 92 S. E. 809, the court held as follows:

"While streets, outside of an incorporatted city or town, dedicated under this section [5219] thereby become public highways, without any acceptance by the public, they do not become county roads until accepted or established as such by the county authorities."

I am of the opinion that since the jurisdiction of highways has been placed in the State Highway Commission that such dedication does not of itself make them a part of the State Highway System until they have been accepted or established by the Commission. This does not appear to have been done.

The maintenance of dedicated streets before they are accepted by public authority is discussed in the case of *Oney v. West Buena Vista Land Company*, 104 Va. 58, 52 S. E. 543.

In view of the foregoing, I am of the opinion that there is no duty upon the County of Fairfax or the Commonwealth of Virginia to maintain the streets in the subdivision you refer to until such time as they may be legally taken into the highway system.

Trusting that this fully answers your inquiry, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**INEBRIATES—Transferred from State Hospitals to State Farm Only if Misdemeanants. F-148**

July 12, 1948.

DR. JAMES B. PETTIS, *Superintendent*  
Department of Mental Hygiene and Hospitals,  
Western State Hospital,  
Staunton, Virginia.

My dear Doctor Pettis:

This is in reply to your letter of June 30 in which you state that the brother of a patient, who is confined at the Western State Hospital for inebriacy, desires to have the patient transferred to the State Farm in an attempt to rehabilitate him and assist him in overcoming his inebriacy. You desire my opinion as to whether this can be done under §5058(9) of the Code, and also desire to know whether or not there are any legal forms available for use in making such transfers.

Section 5058(9) of the Code is as follows:

"It shall be the duty of all superintendents of State hospitals for the insane and feeble-minded colonies to transmit to the superintendent of said State farm for defective misdemeanants or other farm or farms the names and record of all misdemeanor inmates whose mental condition is sufficiently good to enable them to be detained at said State farm for defective misdemeanants or other farm or farms, in order that their beds may be released for the more acute non-misdemeanant mental cases, and when so transferred a per diem of sixty cents a day shall be allowed out of the criminal fund."

It can be seen that the above section refers to misdemeanor inmates only. Therefore, unless the patient to which you refer was convicted of a misdemeanor by a court of competent jurisdiction and sent as a patient to the Western State Hospital, no transfer can be made.

I know of no legal forms required for transfer of a misdemeanor inmate, although, of course, the name and records of the patient should be forwarded pursuant to §5058(9) of the Code.

Very truly yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**JAIL AND PRISONERS—Jailor should not refuse to receive criminal without mittimus. F-381****ARREST—Warrant for should be obtained as soon as reasonably possible. F-381**

February 24, 1949.

MR. D. W. SHIELDS,  
Jailor for Bedford County,  
Bedford, Virginia.

My dear Mr. Shields:

This is in reply to your letter of February 18, from which I quote as follows:

"Please advise if it is necessary to have a mittimus signed by a trial justice or a justice of the peace before committing a prisoner to jail."

It is my opinion that a formal or common law mittimus is not necessary before committing a prisoner to jail. However, there must always be some lawful authority, whether it be a court order, a warrant or some other appropriate process.

On the other hand, as a practical matter, it frequently happens that, where a felony or a misdemeanor is committed in the presence of an officer, the criminal may be taken to jail before a warrant is sworn out. In such a case, I am of the opinion that the jailor should not refuse to receive the criminal merely because the officer has not had the opportunity at that time to have a warrant sworn out. Of course, a warrant should be secured as soon as is reasonably possible.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**JUDGMENTS—In executing a levy, officer has no right to padlock the store of a debtor. F-136**

September 10, 1948.

HONORABLE FRANK W. BURKS, *Clerk*,  
Trial Justice Court of Bedford County,  
Bedford, Virginia.

My dear Mr. Burks:

This is in reply to your letter of September 3, addressed to the Honorable Levin Nock Davis, Secretary of the State Board of Elections. I quote in part as follows:

"For your information, we tried a case here yesterday against a merchant and gave judgment in favor of a wholesale supply company for \$384.06, placed execution in the hands of our sheriff for the amount, and the sheriff padlocked the merchant's store; and the merchant broke the lock and repossessed the stock of goods. This defendant was tried yesterday and was fined \$25 for breaking the lock on the store with goods levied upon therein."

You desire my opinion as to whether or not the sheriff had the right to padlock the store.

A sheriff, of course, has the authority to levy on the merchandise within the store and to remove the same therefrom if he deems it necessary, but it is my opinion that a sheriff has no authority to padlock a merchant's store in execution of a levy on the goods therein.

However, if a merchant fraudulently sells or removes merchandise levied upon with intent to defeat the levy, he is guilty of larceny under section 4447 of the Code.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**JURISDICTION OF STATE—Extends to the Low-Water Mark in the Potomac River.—F-79**

July 13, 1948.

HONORABLE HORACE T. MORRISON,  
Attorney for the Commonwealth,  
King George, Virginia.

My dear Mr. Morrison:

This is to acknowledge receipt of your letter of July 8, from which I quote as follows:

"A question of jurisdiction has arisen here upon which I would like to have your counsel.

"As you know, Maryland has jurisdiction over the Potomac River to the Virginia low water mark. If a person builds a pier out from the Virginia shore which is clearly fastened to the Virginia shore, is that pier in Maryland or Virginia? What must be done to disconnect the pier from Virginia so as to put it in Maryland?

"The question arises from the fact that a man here is selling beer on Sundays out on a pier which has no break in it. He has a Maryland license. An ordinance in this county forbids the sale of beer on Sunday---but in Maryland it is legal. If he should make a break in the board walk, does that change the situation?"

The pertinent part of §14 of the Code which fixes the boundary between Maryland and Virginia provides:

"Third, The low-water mark on the Potomac, to which Virginia has a right in the soil, is to be measured by the same rule; that is to say, *from low-water mark at one headland to low-water at another*, without following indentations, bays, creeks, inlets, or affluent rivers; \* \* \*." (Italics supplied)

While the above section also provides that the citizens of Virginia shall have full property in the southern shores of the Potomac river and the privilege of building piers so long as navigation is not obstructed, it can be seen that the territorial jurisdiction of the Commonwealth ends at the low-water mark.

Therefore, it is my opinion that that portion of a pier which is beyond the low-water mark on the southern shores of the Potomac River is in the State of Maryland and is not subject to the laws of the Commonwealth.

With best wishes, I am

Very truly yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**JURY—Grand Jury may consist of five persons: No duty on Court to supply the deficiency. F-166**

March 22, 1949.

HONORABLE JOHN H. POWELL, *Clerk*,  
Circuit Court of Nansemond County,  
Suffolk, Virginia.

My dear Mr. Powell:

This is in reply to your letter of March 15, in which you point out that Section 4852 of the Code provides that before the commencement of the term of court at which a regular grand jury is required the clerk shall issue a venire facias commanding the sheriff to summon not less than five nor more than seven of the persons selected (the number to be designated by the judge of the court by an order entered of record) to be named in the writ to appear on the first day of court to serve as grand jurors. You further point out that Section 4853 of the Code provides that a regular grand jury shall consist of not less than five and not more than seven persons, and state that you desire my opinion on the following question:

"If seven persons should be designated by the Judge in an order entered of record prior to the commencement of the term and summoned to appear, and only five of the seven actually appearing, could the Judge order the five sworn in to constitute the grand jury although by order before that entered of record seven had been designated, or would it be his mandatory duty to supply the deficiency as provided by Section 4855 of the Code?"

It is my opinion that there is no mandatory duty on the part of the judge to supply the deficiency in the instant case, since five persons are present and only five are necessary to constitute a regular grand jury under the provisions of Section 4853.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**JUSTICES OF THE PEACE—May Issue Warrants for Violation of Town Ordinances when such Justice is of a Magisterial District Wherein the Town is located. F-136b**

**WARRANTS—Violation of Town Ordinance issued by Justice of the Peace in County Magisterial District in which the Town is Located. F-136b**

January 11, 1949.

HONORABLE W. H. OVERBEY,  
Trial Justice for Campbell County,  
Rustburg, Virginia.

My dear Mr. Overbey:

This is in reply to your request for my opinion as to whether or not a justice of the peace of Otter Magisterial District, in which is located the Town of Altavista, may issue warrants for violations of ordinances of the Town which are tried by you as Trial Justice of Campbell County.

We have received several inquiries of this nature, apparently prompted by the recent decision of the Supreme Court in the case of *Winston v. Common-*

*wealth*, 188 Va. 386. Since the practice seems to vary in different localities, we have given the matter considerable study. There appear to be no statutes specifically stating by whom process in cases involving the violation of town ordinances should be issued, either when they are tried by the Trial Justice or the Mayor of the Town. However, by Section 4789 every justice is made a conservator of the peace, and Section 4828 provides that any justice may issue a warrant for the arrest of a person charged with an offense.

While Section 4828, dealing with the arrest and bail of persons charged with offenses, is more clearly applicable to misdemeanor and felony cases constituting offenses against the State, it is my opinion that, since no specific procedure has been provided for violations of town ordinances, those sections in so far as they are adaptable to such cases should be held to apply thereto. It is to be noted that Section 3011, which conferred upon mayors the powers of a justice and the jurisdiction to try cases arising under the ordinances of the town, does not contain language which would preclude other justices from issuing warrants in such cases.

Under the Trial Justice Act Trial Justices were appointed for "every county, including all incorporated towns therein," and have exclusive original jurisdiction of all offenses against the ordinances of the towns for which they are appointed unless jurisdiction to try such offenses is conferred upon the Mayor. See Sections 4987a and 4987f1 of the Code. Under Section 4987f4 the Trial Justice has authority, within his general jurisdiction within the territory for which he is appointed, to issue warrants, summons and subpoenas in civil and criminal cases, and under Section 4987f5 Justices of the Peace, within their respective counties, "have the same power to issue attachments, warrants and subpoenas within the jurisdiction of the Trial Justice as is conferred upon the Trial Justice, and they shall also have power to grant bail in any case in which they are now authorized by general law to grant bail."

Upon consideration of all of these statutory provisions, it is my opinion that the Justices of the Peace of a magisterial district in which is situated a town may issue warrants charging a violation of ordinances of the town. I think this is true whether the violation be triable by the Trial Justice or by the Mayor acting under a resolution of the Town Council. Conferring jurisdiction upon the Mayor to try the offense would not, in my opinion, deprive the Justice of the Peace of authority to issue a warrant for such offense.

The views expressed herein are based upon the general statutes and, of course, may be rendered inapplicable in cases where the charter of the towns prescribe specific procedure for enforcement of town ordinances.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**JUSTICE OF THE PEACE—May Testify Concerning Condition of Accused F-136b**

December 31, 1948.

MR. LOUIS F. JORDAN,  
Civil and Police Justice,  
Waynesboro, Virginia.

Dear Mr. Jordan:

This is in reply to your letter of December 16, with regard to the interpretation of Section 4781 of the Code, which prohibits among other things, a

justice of the peace from testifying as to the statements made by an accused on a preliminary examination before him.

I agree with you that Section 4781 does not prohibit the introduction of evidence as to the condition of the accused and it is my opinion that a justice, who either issued a warrant or admitted the accused to bail under the charge of operating a motor vehicle while under the influence of intoxicants, could testify on behalf of either the Commonwealth or the accused as to whether the latter was intoxicated at the time he was brought before him.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**JUSTICE OF THE PEACE—May testify concerning the condition of accused brought before him for trial. F-136b**

May 26, 1949.

HONORABLE MEREDITH C. DORTCH,  
Commonwealth's Attorney,  
Mecklenburg County,  
South Hill, Virginia.

My dear Mr. Dortch:

This is in reply to your letter of May 24, in which you request my opinion as to whether a justice before whom one accused of drunken driving is taken for warrant and bail may later testify at the trial of the defendant on the issue of whether he was drunk or sober at the time he was before the justice.

Section 4781 of the Code of Virginia provides, in part, as follows:

"No justice of the peace \* \* \* or other trial justice shall be competent to testify against the accused in a court of record as to the statements made by the accused on his trial by such justice or on his preliminary examination before such justice."

It will be noted that this section prevents the justice of the peace from testifying as to the statements made by the accused at his preliminary examination. It is my opinion that this does not prevent the justice from testifying as to the condition of the accused when he was brought before him for warrant and bail. I do not think the use of the word "statements" in the above quoted section is broad enough to prevent the justice from testifying as to the condition of the accused at the time he was before him.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**JUSTICES OF THE PEACE—Not Permitted to Collect Claims. F-136b**  
August 12, 1948.

HONORABLE E. R. HUBBARD,  
Justice of the Peace,  
Wise, Virginia.

Dear Mr. Hubbard:

This is in reply to your letter of August 6, in which you ask if you can be bonded through a bonding company to collect debts such as store accounts. Section 6019 of the Code reads in part as follows:

" \* \* \* Nothing in this section shall be construed as permitting or authorizing justices of the peace to receive claims or evidences of debt for collection; and it shall be unlawful for any such justice to receive claims of any kind for collection, or to accept or receive money or any other thing of value by way of commission or compensation for or on account of any collection made by or through him on any such claim, either before or after judgment."

In view of this statutory provision forbidding justices of the peace to receive claims for collection, your question must be answered in the negative.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**JUSTICES OF THE PEACE—Of Cities May Collect Cash Deposits in lieu of Recognizances with Surety if Properly Bonded. F-136b**  
July 29, 1948.

HONORABLE J. GORDON BENNETT,  
Auditor of Public Accounts,  
Richmond 10, Virginia.

My dear Mr. Bennett:

My delay in answering your letter of July 13, 1948, has been due to my absence from the City.

You desire to know whether or not justices of the peace of cities may collect cash deposits in lieu of recognizances with surety under the provisions of §4973a of the Code and, if so, before whom they are required to give bond.

Chapter 412, Acts of Assembly of 1924 as amended by Chapter 335, Acts of Assembly of 1940 (found as section 4973-a of Michie's Code of 1942), which allows cash deposits in lieu of recognizances, provides in part as follows:

" \* \* \* no justice of the peace shall receive any such cash deposit until he shall have given bond before the clerk of the circuit court of his county in the penalty of five hundred dollars, \* \* \*."

Section 3092 of the Code provides that justices of the peace for cities shall possess the jurisdiction and exercise *all the powers* conferred upon justices of the peace under the laws of this Commonwealth, therefore, it is my opinion that the Act mentioned above applies to *all* justices of the peace, and that the justices of the peace for cities should be required to give bond to the clerk of the circuit court before which they qualify for office.



Since I am of the opinion that the Act in question is applicable to all justices of the peace, it follows that you, as Auditor of Public Accounts, have the same responsibility with respect to justices of the peace for cities as exist under the Act in regard to justices of the peace of the counties.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**JUSTICE OF THE PEACE—Resident of a Town incorporated as a City**  
Cannot serve as such. F-136b

**PUBLIC OFFICERS—Resident of a Town incorporated as a City cannot**  
Serve as such. F-136b

January 24, 1949.

MR. T. W. MURPHY,  
Justice of the Peace,  
Colonial Heights, Virginia.

Dear Mr. Murphy:

This is in reply to your letter of January 11, from which I quote:

"In November, 1947, I was elected a justice of the peace for the County of Chesterfield, Matoaca District, term of four years, beginning January 1, 1948. I qualified before the Circuit Court of Chesterfield County and at that time posted a bond for the faithful performance of my duty for the four years. Since that time the Town of Colonial Heights, in which I reside, has been made a city of the second class under the jurisdiction of the Circuit Court of Chesterfield County. I have since been appointed a justice of the peace for the city by the Circuit Court of Chesterfield County and qualified for that position. \* \* \*"

You ask whether you now have the right to perform the duties of a justice of the peace in the area of Chesterfield County for which you were elected.

Section 2703 of the Code requires every district officer to be a resident of the district at the time he is elected and Section 2704 provides that, if such officer remove therefrom, his office shall be deemed vacant. While residence within an incorporated town lying within a district is regarded as residence in the district, residence in a city is not considered as residence in the county and district within which the city is situated.

In the case of annexation of territory by a city, Section 2967 provides that, where territory is so annexed that any county or district officer shall reside in such annexed territory, such officer shall continue in office until the end of the term for which he was elected or appointed as if he were resident of the territory not annexed. However, no similar provision is contained in the statutes relating to the transition of a town to the status of city. The implication is clear from Section 2967 that, when territory becomes embraced within the corporate limits of a city, the residents of that territory, by operation of law, are no longer residents of the county; and that, in the absence of such a saving clause as is there contained, any county or district office they might hold would be vacated by virtue of Section 2704. If such a saving clause as is

contained in Section 2967 was necessary in the case of annexation; one would also be necessary in the case of the transition of a town to the status of a city. While, under Section 2894, certain county officers continue to exercise their functions in a town when it becomes a city, that section does not include justice of the peace. Since the transition statutes contain no general provision similar to Section 2967, it is my opinion that other county or district officers no longer continue in office if they remain residents of the town after it becomes a city. For this reason I do not think that you can continue to perform the duties of justice of the peace in Chesterfield County.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**JUSTICE OF THE PEACE OF COUNTY—No authority to commit to bail person confined in jail located in city. F-136b**

September 3, 1948.

HONORABLE CLAUD C. GRANDY,  
Justice of the Peace,  
R. F. D. 2 Box 215,  
Suffolk, Virginia.

My dear Mr. Grandy:

This is in reply to your letter of August 30, from which I quote as follows:

"The Nansemond County jail is located within the corporate limits of the city of Suffolk, and I would like to know if I, as Justice of the Peace for the Sleepy Hole Magisterial District, have authority to go to the county jail and admit to bail persons charged with misdemeanors before such persons have been arraigned or tried before the Trial Justice of Nansemond County. \* \* \*"

Section 4987f5 of the Code provides, among other things, that justices of the peace "within their respective counties" shall have the same power to grant bail in any case in which they are so authorized by general law.

Under §4828 of the Code justices of the peace are authorized to admit to bail persons charged with misdemeanors before such persons have been arraigned. Therefore, the question to be decided is whether or not the Nansemond County jail is located *in the county* within the meaning of the provisions found in §4987f5.

You state that the jail is located "within the corporate limits of the City of Suffolk." It is my opinion, therefore, that you, as a justice of the peace of Nansemond County, have no jurisdiction to admit to bail those persons confined therein, since the jail cannot be said to be "within the county".

However, I call your attention to the fact that the Henrico County jail is located within the corporate limits of the City of Richmond, if you consider that phrase to mean simply that the city completely surrounds the jail. Actually, the land on which the jail is located was not annexed by the City of Richmond and, in fact, was expressly excluded therefrom. Accordingly, the Henrico County jail is still in the county within the meanings of §4987f5.

Therefore, I am of the opinion that if it is found that a situation, similar to the one concerning the Henrico County jail, exists in the City of Suffolk, you,

as justice of the peace, would have the authority to admit to bail persons confined in the Nansemond County jail.

Wish best wishes, I am

Very truly yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**JUVENILE AND DOMESTIC RELATIONS COURT—Custody of Child.**  
F-239

January 17, 1949.

HONORABLE JAMES HOGE RICKS, *Judge*,  
Juvenile and Domestic Relations Court,  
1115 East Clay Street,  
Richmond, Virginia.

My dear Judge Ricks:

This is in reply to your letter of January 4 concerning a certain conflict of jurisdiction between juvenile courts and divorce courts of this State.

It appears that C, the four year old child of A and B, was brought before the Juvenile and Domestic Relations Court of the City of Richmond and, after due notice, a hearing was held and an order entered adjudging the child dependent and neglected and without proper parental care. A third party was awarded custody of the child. No appeal was taken, but several months thereafter the mother of C instituted divorce proceedings in a court of record, which court was not informed of the previous proceedings in the Juvenile Court. The divorce court entered an order awarding custody of C to the mother. Later the third party, who was awarded custody of C by the Juvenile Court, intervened in the divorce proceedings on behalf of C. At that time the divorce court continued legal custody with the mother, but ordered actual custody to remain with the third party for one year. The mother of C is now petitioning the divorce court for the actual custody of C.

You desire my opinion as to whether or not, under the above set of facts, the mother can regain custody of her child through divorce proceedings.

Section 1905 of the Code (Michie, 1942), among other things, provides that juvenile and domestic relations courts shall have exclusive original jurisdiction "to determine the question of dependency, neglect or delinquency of any child or children within their respective jurisdictions, and when so adjudicated to declare such child or children to be \* \* \* wards of the State, and to make and enter such judgments or orders for their custody, discipline, supervision, care, protection and guardianship, as in the judgment of the court will be for the welfare and best interest of such child or children."

Under Section 5111 of the Code, as amended, (Michie's Supplement, 1948) any court having jurisdiction to hear divorce proceedings may enter a decree concerning the care, custody and maintenance of the minor children involved and "may determine with which of the parents the children or any of them shall remain."

It is my opinion that the above statutes, properly interpreted, present no conflict in jurisdiction between the juvenile court and the divorce court. The divorce court does not determine whether the child is or is not dependent and neglected, but adjudicates that, as between the husband and the wife, the one or the other is the proper parent to have custody of the child. On the other hand, the juvenile court adjudicates whether the child is dependent and neg-

lected and, if it so finds, declares the child a ward of the State. On this latter question the juvenile court by virtue of Section 1905 has "exclusive original jurisdiction."

While there appear to be no Virginia decisions involving the question presented in your letter, the Supreme Court of Kansas has considered this question of jurisdiction in the light of statutes similar to Section 1905 and has said in the case of *Trent v. Bellamy*, (1948) 190 p. (2d) 400, 402:

"While the general rule seems to be that the jurisdiction of the district court in a divorce action is both continuing and exclusive, precluding any other court in the same state from thereafter acquiring or exercising jurisdiction over the same subject (146 A. L. R. 1155), this rule is quite generally held not to apply to jurisdiction of a juvenile court over children found to be dependent or neglected within the meaning of the state statute. In *Re Hosford*, 107 Kan. 115, 190 P. 765, 11 A. L. R. 142, 147 it is said, citing cases from a number of jurisdictions in support, that: 'The assumption of jurisdiction by a juvenile court over a child, in conformity to a statute expressly conferring on that court the power to determine the custody of a neglected or delinquent child, has been frequently held to end, or to prevent the assumption of, jurisdiction over such child by another court.'"

The above case is in accord with the weight of authority in this country. (See 11 A. L. R. 147; 78 A. L. R. 317). Therefore, it is my conclusion that a divorce court, while it may determine the rights of the parents in a divorce proceeding, cannot take action affecting an order of the juvenile court under which a child has become a ward of the State. Any modification of that order should, in my opinion, be secured from the juvenile court.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**JUVENILE AND DOMESTIC RELATIONS COURTS—Dismissal by,  
Does Not Preclude Indictment by Grand Jury. F-239**

January 28, 1949.

HONORABLE C. E. CUDDY,  
Commonwealth's Attorney,  
City of Roanoke,  
Roanoke, Virginia.

My dear Mr. Cuddy:

This is in reply to your letter of January 12 from which I quote as follows:  
"No doubt you have recently seen where a certain twelve-year old boy shot and killed his grand-mother in the City of Roanoke.

"Today a preliminary hearing was conducted before the Juvenile & Domestic Relations judge who desires, if possible, to have the matter handled in its entirety through the said court. In view of the case of *Mickens v. Commonwealth*, 178 Va. 273, I am of the opinion that there is no choice but to have this child bound over for action of the grand jury.

"Will you please advise me whether or not my opinion is correct, or if the Juvenile & Domestic Relations court has any authority in such a case to commit the said infant to the Department of Public Welfare."

In the Mickens Case, referred to in your letter, the Court of Appeals expressed itself on the authority of a juvenile court to deal with a minor charged with an aggravated felonious offense. I quote below from the opinion in that case:

"The juvenile and domestic relations court is given no power to acquit or convict a minor over twelve years of age charged with an aggravated felonious offense. In such a case, such court acts only as a court of investigation. If the evidence for the Commonwealth presents a prima facie case, the juvenile and domestic relations court should hold the accused for action by the grand jury. If the offense charged is not well-founded, it should dismiss the case, having, in this regard, the same jurisdiction that justices of the peace formerly had and trial justices now have. The judgment of the juvenile and domestic relations court in such a case is not conclusive, and the judgment of dismissal is not sufficient to bar action by the grand jury."

It is my opinion that, under this language, the juvenile court must investigate the charge placed against the minor, and determine whether or not the evidence of the Commonwealth presents a prima facie case of an aggravated offense. If it does, the court must send the case on to the grand jury.

However, if, upon investigation, it appears to the juvenile court that the evidence does not indicate that an aggravated offense has been committed, then the juvenile court must dismiss the charge. If the juvenile court does dismiss the charge for this reason, it may still make a determination that this child is delinquent, and may treat it as such. The judgment of dismissal is not conclusive, and will not bar subsequent grand jury action.

As applied to the case presented by you, I think that the juvenile court must first determine whether the homicide charged against this 12-year-old boy is of an aggravated nature. I do not think that all homicides are necessarily aggravated offenses. If he determines that the Commonwealth's evidence does not present a prima facie case of the commission of an aggravated felony, he should dismiss the charge. He may then proceed to find the child a delinquent, and deal with him according to the usual procedure.

With kind regards, I am

Sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**JUVENILE AND DOMESTIC RELATIONS COURT—Jurisdiction  
Thereof. F-239**

June 24, 1949.

HONORABLE S. PAGE HIGGINBOTHAM,  
Commonwealth's Attorney for Orange County,  
Orange, Virginia.

My dear Mr. Higginbotham:

This is in reply to your letter of June 17 addressed to Mr. Rogers, of this office regarding the jurisdiction of the Juvenile and Domestic Relations Court to try offenses arising under Section 1923 of the Code of Virginia.

As pointed out by Mr. Rogers in his telephone conversation with you, Sec-

tion 1923 is a part of Chapter 78 of the official Code of Virginia of 1919. When Section 1905 of the Code was amended in 1922 so as to confer upon Juvenile and Domestic Relations Courts jurisdiction of all matters and cases arising under "this chapter", it was amended as an official section of the Code. The word "Chapter" used therein embraced all provisions in Chapter 78 of the Code and not merely the sections amended by that particular Act of the General Assembly passed in 1922. *Humphreys v. Commonwealth*, 186 Va. 765.

I think that it could also be argued with great weight that, when the Trial Justice was declared to be the Judge of the Juvenile and Domestic Relations Court in each county, there was conferred upon him, as such Judge, all of the jurisdiction conferred by Chapter 483 of the Acts of 1922 (Sections 1953-a - 1953-m of Michie's Code) upon Juvenile Judges appointed under that Act. The purpose of this provision of the Trial Justice Act was merely to substitute the Trial Justice for the individuals appointed under the 1922 Act, and it would seem that he should have the same jurisdiction as they had, although his actual appointment was not made thereunder. This would mean that the Trial Justice, in his capacity as Juvenile Judge, would have jurisdiction of violations of Section 1923. See paragraph (3) of Section 1953-e. However, as indicated above, Section 1905 clearly gives all Juvenile and Domestic Relations Courts exclusive original jurisdiction of violations of Section 1923 since that is a part of the same chapter of the official Code referred to in Section 1905.

I do not think that Section 1905, in conferring jurisdiction upon Juvenile Courts to try the misdemeanor defined in Section 1923, is inconsistent with the Trial Justice Act. While Section 4987-f (1) provides that the Trial Justice shall have exclusive original jurisdiction of all misdemeanors; Section 4987-1 provides that the Trial Justice shall also be the Judge of the Juvenile and Domestic Relations Court in his county. Construing these provisions together, I do not consider that it is inconsistent with the Trial Justice Act to hold that the Trial Justice, in his capacity as Juvenile Judge, has jurisdiction of such misdemeanors which other statutes vest in Juvenile Judges. For this reason it is my opinion that Section 1905, in so far as it gives such jurisdiction to Juvenile Judges, was not repealed by Section 4987-p which repealed all inconsistent statutes.

Therefore, it is my opinion that Juvenile and Domestic Relations Courts have jurisdiction to try violations of Section 1923 and, if the defendant is over the age of eighteen years, may convict the defendant and impose the prescribed penalty of a fine not exceeding \$500 or confinement in jail for not more than one year, or both. While it is true that the Juvenile and Domestic Relations Courts cannot impose a jail sentence upon a child under eighteen years of age (Section 1910), this restriction is limited to cases involving children under that age and does not apply to those misdemeanor cases involving adults or children over eighteen years of age which are within the jurisdiction of the Juvenile and Domestic Relations Court.

In cases arising under Section 1923, which makes it a misdemeanor for any person over the age of eighteen years to commit certain offenses against a child under that age, it is my opinion that the proceeding should be instituted by the ordinary criminal warrant rather than by a petition under Section 1907. While Section 1907 provides that proceedings against a "child" shall be by petition, it is my opinion that this is the case when the purpose of the proceeding is to adjudge him delinquent, dependent or neglected child. By Section 1906 such proceedings apply only to a case where the child is under eighteen years of age. Section 1923 classifies a person over eighteen just as an adult, who would, of course, be proceeded against by ordinary warrant under this Section.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**JUVENILE AND DOMESTIC RELATIONS COURT—Such Courts have no Jurisdiction to try Murder or Manslaughter Cases. F-239**

August 25th, 1948.

HONORABLE W. W. MOORE, *Judge*,  
Juvenile & Domestic Relations Court,  
Municipal Building,  
Danville, Virginia.

Dear Judge Moore:

I am in receipt of your letter of August 23rd, requesting the opinion of this office as to the jurisdiction of the Juvenile & Domestic Relations Court of the City of Danville in a case of murder or manslaughter, committed by one member of a family against another member of said family.

You direct my attention to Section 1950 of the Virginia Code. An examination of this Section of the Code clearly discloses that the offenses of murder and manslaughter are expressly eliminated from operation of the jurisdiction conferred thereby, either original or concurrent. This is manifest from the language of paragraphs three (3) and four (4).

The jurisdiction of felonious offenses against children under the age of eighteen years is limited to that of an examining Magistrate. It will be observed that murder and manslaughter are excepted from such felonious offenses and excluded from the jurisdiction otherwise conferred. Paragraph four, conferring jurisdiction of offenses committed by one member of a family against another member of said family, expressly excepts murder and manslaughter. If the parties involved are not embraced by the statutory construction of "family", as recited, and the offense is murder or manslaughter, the Juvenile & Domestic Relations Court has no jurisdiction over the offense. Jurisdiction to try and dispose of such matters is vested in the courts of record having general criminal jurisdiction.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**LABOR—Terms of Check-Off Agreement binding on Commonwealth. F-143**

July 28, 1948.

HONORABLE WILLIAM M. TUCK,  
Governor of Virginia,  
State Capitol,  
Richmond, Virginia.

My dear Governor Tuck:

At your request I am writing in regard to the Citizens Rapid Transit Company which is being operated pursuant to authority vested in you by Chapter 9, Acts of Assembly, Extra Session, 1947.

It is my understanding that §3 of Article 3 of the existing agreement between the local union and the Citizens Rapid Transit Company provides that the Company shall deduct from the wages of their employees the dues owed by them to the union, and that the Commonwealth, on paying these wages, has not so deducted the dues nor paid them to the officers of the union in accordance with this agreement.

I also understand that the president of the union in question has claimed,

in a letter to the State Corporation Commission, dated July 20, 1948, that this check-off agreement was one of the subjects of dispute between the union and the company at the time the Commonwealth took possession and began operation of the transportation facilities of the Company.

The question to be decided is whether or not the Commonwealth, on paying the wages of the employees of the company, should deduct the dues owed the union and pay them to the officers of the union.

Section 11 of the above-mentioned Act provides, in part, as follows:

" \* \* \* No changes shall be made in any conditions of employment or in any matter which may have been the subject of any dispute out of which the lockout, strike or work stoppage arose, it being intended that all such questions shall be settled by collective bargaining between the parties to the dispute. \* \* \* " (Italics supplied)

Therefore, it can be seen that if the check-off agreement was in dispute at the time the Commonwealth took possession of the company the deductions must be made in accordance with the existing agreement.

Section 11 also provides that "The status of no person as an employee of the utility shall be affected." Therefore, it is my opinion, since the manifest purpose of this section is to prevent the Commonwealth from changing the status quo existing between the union and the company at the time of the Commonwealth's possession, that it would be a violation of the Act to refuse to recognize the existing contract and fail to make the necessary deductions from the wages of the employees and pay them to the officers of the union.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**LABOR LAW—Provisions of Virginia Right-to-Work Statute apply notwithstanding the Existence of a Contract between Labor Union and Employer. F-143a**

HONORABLE WILLIAM M. TUCK,  
Governor of Virginia,  
Richmond, Virginia.

October 13, 1948.

My dear Governor Tuck:

This is in reply to your letter of October 8, regarding the negotiations between Virginia Division No. 33, Communication Workers of America, and the Chesapeake and Potomac Telephone Company of Virginia, which negotiations are being held pursuant to Article II, Section 3 of an agreement dated May 19, 1948, entered into between these parties. You have been advised of the "First Conference" and the matter has been docketed in your office under Chapter 9 of the Acts of the General Assembly for the Extra Session of 1947.

You ask if, in the event the 30-day period of negotiations provided for in the existing contract between the parties terminates without an agreement and either of the parties files notice of a request for a "Second Conference", should such request be recognized by your office as conforming to the requirements of the Act and be considered as bringing the dispute under all the procedural provisions of the Act.

The existing contract provides that, subject to reopening on the question of basic weekly wages, it shall remain in effect for an initial period running



through May 18, 1951. It further provides that, if the question of basic weekly wages is reopened by either party's exercise of its first reopening privilege and no change in wage rates is agreed upon, either party may terminate the entire agreement not earlier than May 18, 1949.

Therefore, it would appear and may be assumed that, if no agreement is reached as to wages during the present 30-day negotiation period, the existing contract should continue in effect until May 18, 1949. I wish to point out, however, that the interpretation of a contract between an employer and the representatives of his employees and the determination of their respective rights thereunder is not a matter for this office to determine. These are questions for the parties themselves to determine or for the courts to decide if the matter is brought before them for judicial determination.

Nor do I think that it is incumbent upon your office to determine whether there is a contract in force between a utility and its employees when the question of the applicability of Chapter 9 of the Acts of Assembly of the Extra Session of 1947 arises. When, in fact, a dispute arises, either because the parties are unable to agree upon a contract concerning wage rates or conditions of employment or because the parties threaten a walkout or a strike in violation of a contract which has been entered into, it is my opinion that the law applies.

The law is designed to protect the welfare, health and safety of the people of Virginia by insuring the continuous operation of public utilities. It makes it unlawful for either party to a labor dispute to engage in a walkout, strike or work stoppage in connection with the operation of a public utility until certain procedure has been followed and provides the means by which the State can secure the continued operation of the utility if a suspension of its operation is threatened by a proposed walkout, strike or work stoppage after such procedure has been followed.

The purpose of the law is to secure the continued operation of the utility, not simply to secure the execution of a written contract. A walkout, work stoppage or strike cannot be called without complying with the prescribed procedure, even though a contract may already be in existence. Moreover, the State cannot be denied the right to take action authorized by the statute to secure the continued operation of the utility when a strike or walkout is threatened, even though such strike or walkout is in violation of an existing contract. The parties cannot, by contract, exempt themselves from the provisions of the statute.

In the present case, therefore, it is immaterial whether the parties have a contract which is supposed to continue in effect until May 18, 1949. If a dispute exists as to whether the employees will continue to work under the terms of the existing contract, it is my opinion that the provisions of Chapter 9 of the Acts of the Extra Session of 1947, both those relating to procedure and to other matters, apply as fully as in any other case.

Nothing said herein is intended to imply that either party to the existing contract may violate the terms of their agreement without incurring liability to the other party. The contract is still a contract and any rights or remedies either party may have thereunder are not affected by any action taken under Chapter 9 of the Acts of 1947.

Your file is returned herewith.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**LAND GRANT—Land is not Waste or Unappropriated Land if it has been previously patented.—F-177**

January 28, 1949.

HONORABLE RANDOLPH W. CHURCH,  
State Librarian,  
Richmond 19, Virginia.

My dear Mr. Church:

This is in reply to your letter of January 21, in which you desire my opinion as to whether an application for a land grant should be made under the following circumstances:

"There is a lot of small value now in the City of Roanoke which has never been listed for taxation. It was part of a considerable boundary owned by a land company which went out of existence forty or more years ago and this lot was overlooked in winding up its affairs. The deed books of the County of Roanoke do not show that the lot was ever sold. The adjoining land owner wishes to acquire a land grant for it if possible."

It is my opinion that the land in question is not waste and unappropriated land within the meaning of the land grant statutes. The facts show that the Commonwealth has no title to convey since the land has been previously patented.

In order to get the property on the land book in the City of Roanoke, I am of the opinion that the lot should be considered as abandoned and sold as escheated land (see §§489-521, inclusive, of the Code).

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**LAND GRANTS—Recordation fees and tax. F-116****TAXES—Recordation of Land Grants. F-116****CLERKS FEES—Recordation of Land Grants. F-116**

May 26, 1949.

HONORABLE T. W. CARPER, *Clerk*,  
Circuit Court of Franklin County,  
Rocky Mount, Virginia.

My dear Mr. Carper:

This is in reply to your letter of May 21, in which you ask whether or not the fee of the clerk for recording a land grant from the Commonwealth would be the same as the fee for recording a deed between private individuals. The land grant from the Commonwealth is in substance a conveyance of property to the individual by the State and, in my opinion, the clerk's fee would be the same as that for recording an ordinary deed.

You also ask whether there would be any State recordation tax for recording such an instrument. In such a case the person offering a deed for recordation is the grantee, who desires to have it recorded for his own benefit, and this is the person upon whom the tax is imposed. While Section 122 exempts

a deed conveying property to the State, no exemption is provided on deeds by which the Commonwealth conveys land to private individuals. In my opinion the fact that the grantor in the deed is the Commonwealth does not relieve the grantee from paying the recordation tax imposed by Section 121 of the Tax Code of Virginia.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**LITERARY FUND LOANS—Continuance of levy after loan repaid. F-199**

**BOARD OF SUPERVISORS—Power to continue levy after loan from Literary Fund is repaid. F-199**

February 8, 1949.

HONORABLE JULIUS GOODMAN,  
Attorney for the Commonwealth,  
Christiansburg, Virginia.

My dear Mr. Goodman:

This is in reply to your letter of January 17, regarding certain literary fund loans to Montgomery County and the district levies made to repay the same.

You ask whether, after a specific literary fund loan made for the construction of a school building in a particular district has been repaid from a levy in such district, the levy may be continued and the proceeds used to repay other literary fund loans for the district.

Under Section 698 of the Code the Board of Supervisors may levy a special district tax for the payment of indebtedness. This levy is made annually for the purpose of repaying such loans as may have been incurred for the district and is fixed at such sum as the Board of Supervisors may deem necessary. If one of several loans made for the district has been repaid, I see no reason why the Board of Supervisors could not continue the levy at the same rate and apply all of the proceeds to the repayment of any other loans for the district which are still outstanding. Such special district levy should, of course, be made only for loans incurred for the particular district concerned.

You also ask whether the Board may continue a previous district levy made to take care of a literary loan for a particular district after such loan has been repaid and apply the proceeds to a reserve building fund for the construction of a new school building to be built in that district. Section 698 also permits Board of Supervisors to levy a special district tax for capital expenditures, but limits such levy to one dollar and fifty cents per hundred dollars of the assessed value. After a literary fund loan has been repaid, it is my opinion that a special district tax for the same amount could be continued for the purpose of accumulating a reserve for capital expenditures in the district; provided, however, that such amount, together with the amount of any other levy for that purpose, does not exceed the statutory limit prescribed for special district levies for capital expenditures.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**LOTTERY—Automobiles used in the Illegal Transportation of Liquor and in Lotteries are subject to Confiscation. Search Warrant not necessary. F-210a**

**SEARCH WARRANT—When not Necessary. F-210a**

December 27, 1948.

HONORABLE B. D. PEACHY,  
Commonwealth's Attorney,  
Williamsburg, Virginia.

My dear Mr. Peachy:

This is in reply to your letter of December 13, in which you state that two automobiles were seized in your jurisdiction for the respective offenses of transporting illegal liquor and lottery tickets, both of which vehicles were seized without the issuance of a search warrant. You ask whether the vehicles may be confiscated in view of the fact that they were not seized under or by virtue of a search warrant.

You do not state the circumstances of the seizure and I assume that they were made in the course of lawful arrests at the time of which it was discovered that one of the vehicles was being used for the transportation of illegal whiskey and the other was being used in connection with the promotion, operation or conduct of a lottery.

A search warrant is not necessary in all cases. For instance, no such warrant is necessary where there is no need for a search, as when the contraband subject matter is fully disclosed and open to the eye. Also certain searches are permitted without a search warrant where made in connection with a lawful arrest. It is my opinion that contraband articles seized under such circumstances are clearly subject to confiscation under the procedure prescribed by law, even though no search warrant was issued.

Even assuming that the automobiles were seized as a result of an illegal search, it would seem that they should not be returned to the parties from whom they were taken, but, instead, should be forfeited to the Commonwealth. See 56 C. J., Searches and Seizures, p. 1251; *Hall v. Commonwealth*, 138 Va. 727. This last principle appears based, in part at least, upon the thought that the individual should not be caused to further violate the law by returning to him articles which cannot be legally possessed. While the possession of an automobile is not itself illegal and the basis of forfeiture depends upon the use of the vehicle, it would seem that, since the statutes provide that vehicles used for the illegal transportation of liquor or the conduct of a lottery are subject to forfeiture, they should be confiscated even though they were seized without a search warrant. It was their use that made them subject to forfeiture, not the issuance of a search warrant, since the latter is only for the purpose of discovering the illegal use.

I think, therefore, that you would be justified in taking the position that the automobiles in question are legally subject to confiscation and in bringing proceedings to effect the same. If any question is raised as to the necessity of a search warrant, this matter can be submitted to the court for decision.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**LOTTERY—Consists of three elements—chance, prize and consideration.**  
F-123

May 5, 1949.

HONORABLE ARCHER L. JONES,  
Attorney for the Commonwealth,  
Hopewell, Virginia.

My dear Mr. Jones:

This is in reply to your letter of April 28 concerning whether or not the following advertisement scheme is in violation of the lottery laws of the State of Virginia:

"Is it a violation of the lottery laws for a Syndicate to come to the City of Hopewell and operate the following advertising scheme? Each participating merchant is to pay \$44.80 to join the advertising plan; out of this amount \$11.00 goes to the Syndicate. \$2.00 each week for a period of thirteen weeks goes toward cash prizes; 60c each week goes for the purchase of tickets. These tickets are furnished to the participating merchants. Citizens of the City of Hopewell and surrounding territories are permitted to come into the store and sign a numbered ticket, regardless of whether they make a purchase or not. Each week all the tickets of the participating merchants are collected and a drawing is made. The winning ticketholder is permitted to draw from another box which contains numbers from 5 to 100. They win from the amount put up by the merchants each week the percentage of the total corresponding to the number which they draw; that is to say, if a person draws number 40, he wins 40% of the total amount put up by the merchants; the remaining portion put up by the merchants goes over to the next week, and in that manner the total fund increases, and at the final drawing on the thirteenth week the winner takes all."

As you know, a lottery consists of three elements, namely, chance, prize and consideration. As there can be no dispute concerning the elements of chance and prize in the scheme described above, the question to be decided is whether or not the essential element of consideration is present.

Even though the participants do not have to make a purchase, it is my opinion that the element of consideration is present since the merchants will derive benefits from the increase of sales which undoubtedly follows such advertising schemes. See *Maughs v. Porter*, 157 Va. 415, 161 S. E. 242. It follows, then, that the advertising scheme to which you refer is a lottery and violates the laws of this State.

With kind regards,

Sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**LOTTERY—Dog Racing; Betting thereon.** F-123

June 30, 1949.

HONORABLE CASSIUS M. CHICHESTER, *Director*,  
Division of Statutory Research and Drafting,  
State Capitol  
Richmond 19, Virginia.

My dear Mr. Chichester:

This is in reply to your letter in which you state that you have been re-

quested to prepare a measure permitting dog racing in certain localities. The question you present for my consideration is whether or not such a measure can be drawn on a constitutional basis in the light of the provisions of Section 60 of the Constitution.

Section 60 prohibits lotteries and the sale of lottery tickets and as you know, a lottery consists of three elements, namely, chance, consideration and prize. The running of a dog race as such contains none of these essential elements and, therefore, would not in my opinion violate the provisions of Section 60 of the Constitution.

Moreover, unless it is the desire of the party who contemplates introducing the measure in question to legalize betting, which is now prohibited by Sections 4682 and 4683 of the Code, I am of the opinion that no legislation is necessary in order to permit the mere running of dogs in this State.

While certain forms of betting could properly be legalized by the General Assembly, the sale of lottery tickets, as already pointed out, is prohibited by the Constitution. Therefore, if the measure to which you refer provides for betting on dog races, the question to be decided is whether or not such betting constitutes a sale of lottery tickets in violation of Section 60 of the Constitution.

It is my opinion that straight betting, i. e., where no pooling scheme is involved, would not violate the Constitution. See 54 C. J. S., Lotteries, Section 10, p. 858. However, the form of wagering commonly called "pari-mutuel" has been declared a lottery in some jurisdictions. See 34 Am. Jur., Section 18, page 660. While this type of betting does involve a certain amount of chance, the great majority of foreign jurisdictions that have considered the point hold that such betting does not violate the constitutional provisions prohibiting lotteries.

Therefore, since the element of chance is present in pari-mutuel betting and our Supreme Court of Appeals has not passed on the question, I can only state that the constitutionality of a statute legalizing pari-mutuel betting in this State would be questionable.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**LOTTERY—Facts in Each Particular Case Determine Whether There is a Lottery. F-123**

August 12, 1948.

HONORABLE W. O. FIFE,  
Commonwealth's Attorney for Albermarle County,  
Charlottesville, Virginia.

My dear Mr. Fife:

This is in reply to your letter of August 6, from which I quote:

"The Farmington Country Club holds an annual horse show in this county. In order to attract a larger crowd this year, it is proposed to advertise the show through the sale to the general public of tickets, at \$1.00 each, upon which is to be printed the following incomplete statement:

"I desire to win the jeep because \_\_\_\_\_."

"The purchaser of each ticket will be permitted to insert any reason deemed sufficient by such purchaser. The tickets are to be deposited with

three judges whose duty it will be to select the best answer in accordance with the opinion of the judges. The ticket will contain a statement to the effect that the decision of the judges shall be final, and the jeep is to be awarded to the holder of the ticket whose answer is decided by the judges to be the best answer."

You ask whether such a contest violates the anti-gambling laws of the State. Section 4693 of the Code makes lotteries illegal. This office has frequently ruled that whether any particular scheme is a lottery depends upon whether the three elements of prize, consideration and chance are involved. In the contest described by you it appears that the first two elements are present. Whether the element of chance exists is a question of fact depending upon how the winning ticket is selected. If it is drawn by chance or lot, the scheme would be a lottery. If it is actually chosen by the judges giving real consideration to the answers given and selecting the winner on the basis of the best worded answer, it could be a game of skill.

If no standard is used by the judges and the winning ticket is actually chosen by lot, I do not think the device of having the participants complete the statement on the ticket would take the plan out of the lottery statute. These questions are ones of fact which would depend upon how the plan is actually operated.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**LOTTERY—Operation of Pyramid Clubs—unlawful. F-123**

April 7th, 1949.

HONORABLE T. GRAY HADDON,  
Commonwealth's Attorney,  
Room 216 City Hall,  
Richmond, Virginia.

Dear Judge Haddon:

I am in receipt of your letter of April 5th, 1949, requesting my opinion relative to the so-called Pyramid Clubs. The Honorable Harold M. Ratcliffe, Commonwealth's Attorney for Henrico County, and the Honorable Robert R. Gwathmey, III, Commonwealth's Attorney for Hanover County, join with you in this request. I quote from your letter as follows:

"There have been organized in Richmond and vicinity what are commonly called Pyramid Clubs.

"As near as I can determine the Clubs operate as follows:

"On the first day, a person joins a pyramid club. That person attends a pyramid party and pays the host one dollar for joining the club. That person is then placed in a space on the bottom row of the pyramid.

"On the second day, that person attends another pyramid party at the address noted on the top space of the pyramid, bringing two new members, who in turn pay the host one dollar each.

"On the third day, that person does nothing but help anyone below him or her on the pyramid to get his or her new members, if he or she cannot obtain them.

"On the fourth day, that person is then host at a pyramid party, and en-

tertains the four persons on the third row of the pyramid and their new members. That person should have his or her charts ready for filling out with the names of the new members, explain the workings of the club and impress upon them that the amount they receive is in direct proportion to the effort they expend in getting new members and in helping those below them in getting their new recruits. That person serves refreshments at his or her party, his or her guests staying just long enough to have the club explained to them and to receive their charts. That person then phones the top name on the ladder the amount that he or she has to deliver and then sees that this money is delivered to the address of the top name listed on the ladder that night.

"From the fifth to the twelfth days, that person does nothing, and moves up one position on the ladder each day, until on the twelfth day, that person reaches the number one spot on the ladder.

"When that person reaches the number one spot, or top of the ladder, he or she then stays at his or her home and receives the money that is paid in by the other members of the club at the various pyramid parties.

"If there has been no break in the pyramid and every member had obtained the number of recruits required, that person would receive \$2048.00.

"However, as far as I have been able to learn, no one has received the full amount. The highest amount I have heard of being paid is about \$1400.00, and the lowest is about \$190.00.

"Of course, only a very small number of the members will get anything as there will not be enough recruits to keep the clubs going.

"When a person reaches the top of the ladder and is paid off, his or her name is eliminated from further consideration in the club, and the next in line comes up and is ready for the pay-off. The amount of the pay-off depending on the number of new recruits who have joined to keep the club going.

"Some of these clubs have a fee of \$1.00, some have a fee of \$2.00, and I understand that some have a fee that runs as high as \$5.00 to \$10.00. Frankly, my view is that the operation of these clubs comes within the definition of a lottery or a game of chance as defined by the courts.

"However, I am certain that these clubs will become state-wide, and I will appreciate it if you will give me an opinion as to whether or not you think they constitute a lottery or game of chance."

The question for determination is whether or not the scheme, device, plan or enterprise, designated as a Pyramid Club, constitutes a lottery or other game of chance for money or other thing of value in violation of section 60 of the Constitution and section 4693 of the Code of Virginia.

Neither the Constitution nor the statute define a lottery. The reason is apparent. The boundless genius of those who devise such schemes would be employed to circumvent a precise definition. There is no end to the variety of schemes which may constitute a lottery. In this connection our Supreme Court of Appeals in *Abdella v. Commonwealth*, 174 Va., 450, said:

"Manifestly all forms of lottery cannot be defined by statutes. New devices are daily adopted, and it is to meet this situation that they must deal with gambling in general terms. But they are remedial and are to be liberally construed."

Any device, scheme, plan, enterprise or project, by whatever name designated, set up or promoted which embraces, as constituent elements thereof, prize, consideration and chance is a lottery and is expressly condemned by the gaming statutes of Virginia. Under the sanction of their remedial purpose the courts have uniformly been alert to apply the inhibitory provisions of the law.

That the elements of prize and consideration are present in the instant



scheme or plan is so clearly manifest as to render discussion of these phases unnecessary.

There remains only to be considered the essential element of chance. If chance be present as to any expected prize or return, or merely as to the amount or value of a certain or uncertain prize or return, the scheme is a lottery or other game of chance within the scope of the statute.

In *Public Clearing House v. Coyne*, 194 U.S. 497, the plan of operation, in its essential aspects similar to the scheme here presented, was described as:

"A plan for securing money from a constantly increasing large number for the benefit of a constantly increasing smaller number, with an absolute certainty that when the enterprise reaches an end for any reason the large number will lose every dollar they have put into it, and in the meantime the smaller number will have realized such amounts as may have resulted from the growth of the larger number; but no one can predict what the growth will be."

This general analysis is so strikingly applicable to the so-called Pyramid Club scheme as to make one the synonym or carbon copy of the other.

In dealing with the element of chance the United States Supreme Court in the *Coyne* case (*supra*) said:

"It is true, \*\*\* that in investing money in any enterprise the investor takes the chance of small profits, or even of failure, as well as the hope of large profits; but such enterprises contemplate the personal exertions of the investor, or of his partners, agents, or employees, while in the present case *his profits depend principally upon the exertions of others, over whom he has no control*, and with whom he has no connection. It is in this sense the amount realized is determinable by chance." (Italics supplied). See also *Kent v. City of Chicago* 22 N.E. (2d) 799.

It is clearly manifest that the success of the plan, and the value of the prize depend upon constant and increasing number of subscribers produced by solicitation of participants. Growth cannot be perpetual. The limits are circumscribed by time, distance, willing or unwilling prospects and population. Co-participants may or may not function. Over these no participant has supervision or control by any norm which he can evolve. When and if his name reaches the apex of the Pyramid as well as the value of the prize for which he has paid consideration reeks with the element of chance for every participant. There is no necessity to resort to the rule of liberal construction to reach this conclusion.

For the foregoing reasons I am of the opinion that the facts submitted clearly constitute a lottery in violation of section 4693 of the Code of Virginia.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,

Attorney General.

**LOTTERY—When Essential Element of Chance is Present with other Elements, There is a Lottery. F-123**

December 20, 1948.

HONORABLE ARCHER L. JONES,  
Commonwealth's Attorney, City of Hopewell,  
Hopewell, Virginia.

My dear Mr. Jones:

This is in reply to your letter of December 13, from which I quote as follows:

"Is it a violation of the laws of the State of Virginia for an organization to sell tickets for value to the public generally, which tickets will, on a given night be placed in a box and five of said tickets will thereafter be drawn from said box by lot, the holder of the first ticket will have an opportunity to answer three or more questioned propounded to him by a member of said organization, the answers to said questions will be based on the contestant's skill or knowledge; in the event the said contestant answers said questions correctly, he will be awarded a cash prize. If he fails to answer said question correctly, another ticket will be drawn from the box and the holder of this ticket will be given like chance to answer three different questions involving skill or knowledge, and should he answer the questions correctly he will be awarded a cash prize, but in the event of his failure so to do, this procedure will be continued until some contestant answers the three questions correctly involving skill or knowledge. Questions propounded to each contestant will, of course, be different and no one will have any information as to the questions propounded nor the answers thereto. After the first prize has been awarded, the same procedure will be duplicated as to the awarding of the second, third, fourth, or fifth prize, as the case may be."

As you know, a lottery consists of three elements, namely, prize, consideration and chance. As there appears to be no dispute concerning the elements of prize and consideration in the scheme described above, the question to be decided is whether or not the essential element of chance is present.

In my opinion the element of chance is present by reason of the fact that a person is not given the opportunity of answering a question unless his name happens to be drawn from a receptacle.

Therefore, notwithstanding the fact that a certain amount of skill is necessary before a contestant can win a prize, since all three of the elements of a lottery are present, the program would violate the gaming laws of the State.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**MILITARY LEAVE—Employees of Local School Board not Entitled to Such Leave. F-225a**

December 15, 1948.

HONORABLE S. GARDNER WALLER,  
The Adjutant General,  
Adjutant General's Office,  
Richmond, Virginia.

My dear General Waller:

This is in reply to your letter of December 2, enclosing a letter from a National Guard officer inquiring as to his rights to leave of absence, without loss of pay from his position as an employee of the Montgomery County School Board. It appears that the Captain is employed by the Montgomery County School Board as a teacher and athletic coach and had fifteen days' pay deducted from his salary, apparently for his absence on National Guard duty. He has written to you requesting that some action be taken in order the he may be compensated.

Article VIII, §1 of the Military Code of Virginia provides as follows:

"All officers and employees of the State who shall be members of the National Guard or Naval Militia shall be entitled to leaves of absence from their respective duties, without loss of pay, time or efficiency rating, on all days during which they shall be engaged in field or coast defense training, ordered or authorized under the provisions of this act."

It is my opinion that the party making this inquiry to you does not come within the provisions of the above-quoted section of the Military Code, inasmuch as he is not a State officer or employee. He is an employee of the Montgomery County School Board, which is a body corporate and distinct from the Commonwealth of Virginia. I do not think the language in this section includes employees of local school boards.

I call your attention to the Retirement Act for State employees and teachers. That Act indicates, by making specific provision for State employees and then making specific provision for teachers employed by county or other local school boards, that an employee of a county school board is not a State employee.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**MINORS—Upon Conviction of Minor Offenses, Juvenile Should be placed on Probation and not Confined. F-239a**

August 12, 1948.

HONORABLE L. BROOKS SMITH, *Judge*,  
Juvenile and Domestic Relations Court,  
Accomac, Virginia.

My dear Judge Smith:

This is in reply to your letter of August 10, in which you ask what recourse is open to the Juvenile Court when a juvenile is unable to pay a fine and cost assessed against him as punishment for a minor offense such as a traffic violation.

As you point out, a juvenile delinquent is not to be committed to a jail where adult criminals are confined unless the offense is aggravated or the child is of an extremely vicious disposition. Code §1910. In some localities detention homes have been established for the detention of juvenile offenders. Arrangements could be made under section 1914, with the courts maintaining such homes for the detention of juveniles coming before you.

In cases where it is not desirable to commit the child to the Department of Public Welfare or to have him confined in a detention home, he may be placed under probation subject to supervision by the court and its probation officers. Such supervision could be required until the fine, which can be paid in weekly or monthly installments, has been fully paid or longer if the court deems it necessary. If, after a trial of the various disciplinary measures provided by Chapter 78, it is found that the child cannot be made to lead a correct life, he may be proceeded against as if an adult. Code §1918.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**MOTOR VEHICLE CODE—Applicability of Section 35 to interstate carriers. F-119**

April 11, 1949.

HONORABLE C. F. JOYNER, JR.  
Commissioner of Motor Vehicles,  
2220 West Broad Street,  
Richmond, Virginia.

My dear Mr. Joyner:

This is to acknowledge receipt of your letter of April 7th in which you state in part:

"At your earliest opportunity kindly furnish me with your opinion in the following matter, relative to section 35 of the Motor Vehicle Code.

"Can that provision of the above section, which requires all for-hire passenger vehicles to pay five dollars (\$5.00) per passenger seat, be validly applied to an interstate common carrier of passengers?

"If this portion of the Statute should be declared unconstitutional as an unreasonable burden on interstate commerce, what would be the effect, if any, on the remaining portion of this Statute?"

Your attention is invited to section 35(b) of the Motor Vehicle Code, which reads as follows:

"(b) For the operation of each motor vehicle, trailer or semi-trailer kept or used for rent or hire for transportation of passengers, or operated, or which should operate, *under a permit issued by the State Corporation Commission* as provided by law, or operated, or which should operate, under a permit issued by the interstate Commerce Commission as provided by law, there shall be paid to the Commissioner in addition to the fees provided in subsection (a) of this section, the sum of five dollars (\$5.00) for each passenger seat, exclusive of the driver's seat; provided, however, that on passenger vehicles with a seating capacity of more than six adult passengers only used to transport persons to and from their place of employment a fee of thirty dollars (\$30.00) shall be charged.

*"The provisions of this section shall not apply to any carrier operating under a certificate of public convenience and necessity issued by the State Corporation Commission, which carrier has procured from the Commissioner for the number of busses operated in special or chartered party service appropriately designated tags for each set of which the Commissioner shall charge and such carrier shall pay the sum of five dollars." (Italics supplied).*

It would follow from the wording of this statute that interstate common carriers of passengers are not excepted from the provisions of this subsection, as this type of carrier cannot secure a certificate of public necessity from the State Corporation Commission. Although it may be contended that the purpose of this exception was to relieve those common carriers of passengers that are chargeable with the 2% gross receipts tax (Section 36 of the Motor Vehicle Code of Virginia, Chapter 550, Acts of 1948) from paying the \$5.00 per passenger seat fee in addition to the license fee figures according to weight, thereby equalizing the tax burden between them and the taxicabs and those vehicles engaged in U-Drive-It operations (which pay the \$5.00 per passenger seat fee), there is no need to consider this contention, as the statute in this respect is free from ambiguity and, therefore, the meaning of the same must be ascertained from the language contained therein. The courts have consistently held that they are powerless to write into the law that which is not, regardless of the intent of the legislation, manifested by the history of the same, and the circumstances under which it was enacted.

It seems to me that the real question here involved is whether or not the enforcement of that portion of the law requiring the payment of \$5.00 per passenger seat in addition to the license fee figured according to weight, if imposed on a common carrier engaged in interstate commerce, would place such a burden on interstate commerce as to render said law invalid as being repugnant to the commerce clause of the Federal Constitution. The other question involved is whether or not the application of this statute discriminates against the interstate common carriers in favor of intrastate common carriers of passengers, that are expressly exempted from the operation of this portion of the Act.

The mere fact that the tax falls upon one who uses the highway is not enough to give it presumptive validity. It is well settled that a State may impose licenses and similar fees upon vehicles using the highways in interstate commerce, provided such fees are reasonable, in order to defray the expense of administrative regulations and being a fair contributive share of the cost of constructing and maintaining the public highways furnished by the State. A leading case on this subject is that of *Interstate Transit vs. Lindsay*, 283 U. S. 183, 75 Law Ed. p. 953. In that case a tax was graduated according to the carrying capacity, i. e. the number of passenger seats in the vehicle. The revenue derived went into the General Fund of the State and not into the Road Fund, as in the Virginia Statute. Holding the tax invalid, the Court said:

*" \* \* \* In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage travelled, or even with the number of passengers actually carried on the highways of the state. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except insofar as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses. \* \* \* " (Italics supplied.)*

In the case of *Dixie Greyhound Lines, Inc., vs. McCarroll*, 101 Federal Reporter, 2d. 573, the United States Circuit Court of Appeals had before it for

consideration a statute taxing all gasoline in excess of 20 gallons in the fuel tank of a motor vehicle entering the State. The proceeds from this tax were paid into the Highway Fund and used for the maintenance of the State highways. The Court held this tax invalid as there was no reasonable relation between the amount of gasoline carried through the State for use in other States and the use which the bus makes of the highways of the State imposing the tax. Applying the same reasoning to the Virginia statute, I cannot perceive that there is any relationship between the number of passenger seats in a vehicle and the use made of such vehicle on the Virginia highways. Inasmuch as the intrastate common carriers of passengers are not required to pay this charge, it seems to me that there is discrimination, as the tax does not fall equally on all members of the class of carriers which it taxes.

Answering the second question: that is, whether if a portion of the section is held unconstitutional, would this nullify the entire section of the Motor Vehicle Code, I call your attention to section 123 of the Motor Vehicle Code, which reads as follows:

"Section 123. Constitutionality.--If any part or parts, section, subsection, sentence, clause or phrase of this act is for any reason declared unconstitutional, such decision shall not affect the validity of the remaining portion of this act which shall remain standing as if such act has been passed with the unconstitutional part or parts section, subsection, sentence, clause or phase thereof eliminated; and the General Assembly hereby declares that it would have passed this act if such unconstitutional part or parts, section, subsection, sentence, clause, or phase had not been included herein."

In this connection, Chapter 298 of the Acts of Assembly of 1948, which reenacted and amended section 35 of the Motor Vehicle Code, being a part of that Code, then it would follow that section 123 of that Code would be applicable to any part therein, irrespective of the time of its enactment.

I am, therefore, of the opinion that section 35(b) of the Motor Vehicle Code, which requires the payment of \$5.00 for each passenger seat, is not valid if applied to interstate common carriers of passengers; and, furthermore, that it is discriminatory. This does not render the other portions of the section invalid.

Very truly yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**MOTOR VEHICLE CODE—Contract carrier of passenger vehicle must be licensed. F-119**

September 2, 1948.

HONORABLE R. E. DYCHE,  
Trial Justice, Alleghany County  
P. O. Box 387  
Covington, Virginia.

Dear Judge Dyche:

This is to acknowledge receipt of your letter of August 31 in which you state:

"Will you please give me a ruling on the following:

"John Doe owns a truck and operates under CH license and hauls picni:

parties and ball players and makes a flat charge for these services. Can John Doe lawfully haul passengers on these tags and make a charge for the same?"

You are advised that CH tags are the tags designated by the Motor Vehicle Commissioner to be placed on property-carrying vehicles which are licensed pursuant to Section 35-aa(b) of the Motor Vehicle Code, (section 2154(82a1) Michie's Code, 1948 Supplement). The license issued for the contract carrier of passengers is done pursuant to Section 35(b) of the Motor Vehicle Code (section 2154(82) Michie's Code, 1948 Supplement). These tags are designated by prefixing the letter "P" before the number.

It is, therefore, my opinion that John Doe cannot lawfully haul passengers on CH tags and he cannot lawfully make a charge for the same until the vehicle is licensed pursuant to Section 35(b) of the Motor Vehicle Code and bears a "P" tag.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**MOTOR VEHICLE CODE—Dealer's License Plates; Use of. F-353**  
June 9, 1949.

HONORABLE THURMAN BRITTS,  
Commonwealth's Attorney for Craig County,  
New Castle, Virginia.

My dear Mr. Britts:

This is in reply to your letter requesting advice as to the proper interpretation of Section 22 of the Motor Vehicle Code (Section 2154(69) of Michie's Code) which deals with the use of automobile license plates issued to dealers. The pertinent part of this section reads as follows:

"Such dealer's license plates may be used on motor vehicles, trailers and semi-trailers owned by, or assigned to, duly licensed motor vehicle dealers, of this State when operated on the highways of this State by such dealers or their duly authorized representative; provided that dealers' tags shall not be used on motor vehicles for the use or operation of which dealers charge or receive compensation, such as wrecking cranes or other service motor vehicles.

"Provided, however, a dealer may permit such tags to be used in the operation of a motor vehicle, trailer or semi-trailer by a bona fide prospective purchaser thereof where such dealer issues to such prospective purchaser a certificate on forms provided by the division, a copy of which shall be retained by such dealer and open at all times to the inspection of the director or any of the officers or agents of the division. Such certificate shall show the date of issuance, the person to whom issued, the motor or serial number of the vehicle for the use of which it is issued and the dealer's license number, and shall be in the immediate possession of the person operating such vehicle at all times while so operating same. Such certificate shall entitle such person to operate with dealer's tags only on the day mentioned therein and not more than two such certificates may be issued by a dealer to the same person on successive days."

Under this section dealers, their authorized representatives and prospective purchasers are the only ones authorized to use dealer's license plates. When the vehicle is driven by a prospective purchaser and the dealer's license plate is used, the certificate provided by the second paragraph quoted above should be issued as there directed. Other persons who are acting as a duly authorized representative of the dealer may use the vehicle without having a written permit, but must in fact be authorized to represent the dealer.

Since you state that the dealers in your locality are not familiar with the permits required to be issued to prospective buyers, I suggest that you contact the Division of Motor Vehicles, which provides the forms for such purpose, and request that they send a supply to the dealers operating in your county.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**MOTOR VEHICLE CODE—Licenses for Contract and Common Carrier Vehicles cannot be prorated; Licensing statute does not have Retroactive Effect unless Legislation Expressly Provides. F-119**

October 22, 1948.

HONORABLE C. F. JOYNER, JR., *Commissioner*  
Division of Motor Vehicles  
2220 West Broad Street  
Richmond, Virginia

Dear Mr. Joyner:

This is to acknowledge receipt of your letter of October 15 in which you request my opinion on two questions concerning the collection of license fees pursuant to the Motor Vehicle Code. These questions will be considered *seriatim*:

"(1) Whether the Commissioner of the Division of Motor Vehicles has any authority to prorate the license fees described by Section 35-aa, of the Motor Vehicle Code. This section covers the registration of vehicles operated as common and contract carriers. I want to know whether the Commissioner has the authority to charge the applicant one-half of the fee when the application is made after September 30 and one-third of the fee when the application is made after January 15."

The only authority for the proration of license fees to be collected by the Motor Vehicle Commissioner under the provisions of the Motor Vehicle Code is found in Section 35-b of that Code, re-enacted by Chapter 550, Acts of 1948. This section reads as follows:

"Fees reduced after certain periods.--One-half of the annual fees prescribed by sections thirty-five and thirty-five-a shall be collected whenever any registration certificate and license plates are issued during the period beginning on the first day of October in any year, and ending on the fifteenth day of January in the same license year, and one-third of such fees shall be collected whenever any registration certificate and license plates are issued after the fifteenth day of January in any license year."



If we examine Chapter 550, Acts of 1948, we find that that Chapter reimposed the gross receipts tax on contract and common carriers, inserting again in the Motor Vehicle Code Section 36 which had been repealed in 1946. The only other part of that Act was the re-enactment of Section 35-b, supra, and the repeal of Section 35-aa. It is provided therein that Section 36 shall apply with the tax year beginning January 1, 1949. There is no provision in the Statute, however, concerning the effective date of Section 35-b. Therefore, it is patent that this section becomes effective at the same time that all general legislation becomes effective, that is, ninety days after adjournment of the Session of the General Assembly at which it was enacted. This is in accordance with Section 4 of the Code of Virginia, 1919. Hence, Section 35-b became effective on the 29th day of June, 1948.

Chapter 550, Acts of 1948, supra, repeals Section 35-aa of the Motor Vehicle Code (the section prescribing fees for common and contract carriers), effective the 15th of March, 1949. Section 35-b of the Motor Vehicle Code, as it existed prior to the 1948 amendment, read as follows:

"Fees reduced after certain periods.--One-half of the annual fees prescribed by sections thirty-five, thirty-five-a and *thirty-five-aa* shall be collected whenever any registration certificate and license plates are issued during the period beginning on the first day of October in any year, and ending on the fifteenth day of January in the same license year, and one-third of such fees shall be collected whenever any registration certificate and license plates are issued after the fifteenth day of January in any license year." (Chapter 377, Acts 1942; Chap. 196, Acts 1946) Section 2154 (82b) of Michie's Code, 1946 Supplement. (*Italics supplied*).

It will be noted that the only reason for amending and re-enacting the section in 1948 was to eliminate the portion thereof permitting the proration of fees to be collected under Section 35-aa. Regardless of what may have been in the minds of some of the members of the Legislature when it re-enacted this section, there is no doubt about the meaning of this enactment. In other words, there is no ambiguous language; there is no doubt about the time on which the amendment becomes effective. I am not unmindful of the fact that the general intent of the Legislature was to abolish the costly license fees for common and contract carriers and substitute therefor the gross receipts tax; and that the new plan would go into effect in 1949. The history of this legislation may be of interest, but it has no value because the Statute itself is clear and unambiguous. See the case of *Commonwealth vs. Rose*, 160 Va. 777. Had the Legislature intended that the proration of license fees on common and contract carrier vehicles should be permitted during 1948, it would have said so in the new legislation, or would have left Section 35-b as it stood. (Chap. 156, Acts of 1946). Inasmuch as the Statute says just the opposite, the conclusion is inescapable that the Legislature intended to prohibit the issuance of license tags to common and contract carriers on a prorata basis after June 29, 1948.

Therefore, it is the opinion of this office that there is no authority in the law for the Motor Vehicle Commissioner to issue license plates for common and contract carriers on a pro-rata fee basis, and that Section 35-b of the Motor Vehicle Code, supra, only permits such issuance to vehicles licensable under Sections 35 and 35-a of said Code (passenger carrying and privately operated trucks and trailers).

"(2) As the law prohibited the operations of motor vehicles with a gross weight in excess of 40,000 lbs. prior to June 29, 1948, I want to know whether the Commissioner has any authority to require the operator of a motor vehicle with a gross weight of 50,000 lbs., operating at such weight subsequent to June 29, and prior to October 1, to pay the full licenses fee for a 50,000-pound gross weight for that portion of the 1948 license year beginning April 1, 1948, and ending June 29, 1948."

Upon examination of the Motor Vehicle Code, I find that there was a legal prohibition against the operation of any motor vehicle which exceeds 40,000 lbs. prior to June 29, 1948. This prohibition is set forth in Section 113-a of the Motor Vehicle Code. This section was re-enacted and amended by Chapt. 510, Acts 1948, setting the maximum gross weight of any vehicle as 50,000 lbs. This Act became effective June 29, 1948. Therefore, it is apparent notwithstanding the language in Section 35-aa of Chapter 196, Acts 1946 (prescribing the fees for common and contract carriers with a gross weight from 40,000 lbs. to 50,000 lbs.) that it was unlawful for a vehicle to be operated on the highways of Virginia having a gross weight in excess of 40,000 lbs. prior to June 29, 1948. It would follow that there was no authority for the Commissioner to sell license plates for vehicles of those weights. This is substantiated by what you say has been the administrative practice of the Division since 1946 in not issuing license plates for vehicles in excess of 40,000 lbs.

Section 35-a of the said Code was re-enacted by Chapter 492, Acts of 1948, and license fees were prescribed for vehicles with weights up to 50,000 lbs. This section became effective June 29, 1948. There is nothing in the said Act to indicate that it is the legislative intent that the Act be retroactive. The general rule is that a statute will always be interpreted so as to operate prospectively and not retrospectively unless the language of the legislation is imperative. The recent case of *Gloucester Realty Corporation vs. Guthrie*, 182 Va. 869, recognized this doctrine and held that there is a presumption that statutes operate prospectively.

These sections of the Motor Vehicle Code, which require the payment of large fees as prerequisite to operating vehicles on the highways, are revenue-producing statutes as well as police regulations. It cannot be said that a person acquires a mere license thereunder, as the license fees prescribed do not bear any reasonable relation to the cost of regulation. In other words, these statutes impose a tax to operate a vehicle as well as a license. If it were solely a license proposition, designed primarily as a police regulation, it might be reasonably argued that the statute should have a retroactive effect, permitting no proration of fees. However, when we view these statutes as tax measures, we must look to the statutes themselves to determine whether the Legislature desired the statute to have a retroactive effect.

The Courts have held, in many cases where the terms of the statute provide for retroactive effect, that the same are constitutional. A discussion on this subject is found in Vol. 146 A. L. R., page 1011 et seq. The case of *Garrett Freight Lines, Inc. vs. State Tax Commission of Utah*, 135 P(2d) 523, is a leading case on this point. On the other hand, it has been held by the Supreme Court of North Carolina in the case of *Young vs. the Town of Henderson*, 76 N. C. 420, that a tax levied by a Town on May 24, 1876, on all merchandize purchased for twelve months prior to the first of May, 1876, is retroactive and, therefore, unconstitutional.

In the matter under discussion, as pointed out above, we have no language in the statutes indicating that it was the desire of the Legislature that the same have retroactive effect. The fees imposed and collected under these sections are annual fees, and the Legislature recognizes them to be, inasmuch as they have permitted the proration thereof in another section of the Motor Vehicle Code. I think the sound view would be to hold that if a tax statute becomes effective in the middle of a license tax period, where the same is, in fact, a revenue measure, that the taxing authorities would be precluded from collecting the license tax for that portion of the year before the statute became effective, unless there is plain language in the statute to indicate that the same should have a retroactive effect.

It is, therefore, the opinion of this office that the Motor Vehicle Commissioner is without authority to require the payment of the license tax imposed under Section 35-a and 35-aa of the Motor Vehicle Code for the period beginning April 1, 1948, to June 29, 1948, inasmuch as no language in the statutes imposing these license fees indicates the legislative intent that the acts

have retroactive effect. It is your duty as Motor Vehicle Commissioner to collect three-fourths of the fee under Section 35-aa on any application made for the licensing of a vehicle in excess of 40,000 lbs. after June 29, 1948; and to give a credit of one-fourth the annual registration fee to the applicant for license under Section 35-a to cover a vehicle having a gross weight in excess of 40,000 lbs.

Very truly yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**MOTOR VEHICLE LAWS—Commissioner can Refuse to Accept Statement of Limited Coverage of Insurance Carrier under Virginia Motor Vehicle Safety Responsibility Act. F-353**

October 6, 1948

HON. C. F. JOYNER, JR., *Commissioner*,  
Division of Motor Vehicles,  
Richmond 10, Virginia

My dear Mr. Joyner:

This is to acknowledge receipt of your letter of September 20, in which you say:

"Section 2154(a32) of Michie's Code carries certain requirements concerning the filing a proof of financial responsibility and the filing of cash or security for the purpose of compensating for damages resulting from a motor vehicle accident. Section 2154(a33) then qualifies the preceding section and reads, in part, as follows:

"The provisions of the preceding section shall not apply to (one) an owner, operator or chauffeur if the owner had *in effect*, at the time of the accident with respect to the vehicle involved, a standard provisions automobile liability policy in form approved by the State Corporation Commission and issued by an insurance carrier authorized to do business in this state \* \* \*,"

"Suppose a person is involved in a motor vehicle accident, and the insurance carrier contends the assured has violated some provision of the policy, as a result of which alleged violation the carrier agrees to defend a personal injury action under a non-waiver agreement, and has indicated that in the event the pending action results in a plaintiff's judgment it will refuse to make payment. In view of the policy violation alleged by the carrier, it filed the required form SR-21, but qualified it by typing in the following words: 'This form is filed subject to the effect on coverage of violations of the policy contract by the assured'.

"My question now is: what is the meaning of the words 'in effect' in section 2154(a33) set forth above? Does it mean that if a standard form policy was physically in existence at the time of the accident, the suspension provided for in section 2154(a32) may not be enforced regardless of whether the policy had been breached by the assured, and by reason of which breach the insurance company would be free from liability thereunder, or does it mean any policy in existence at the time of the accident must be effective as to any liability arising out of the accident and insured under the terms of the policy?"

Section 33 of Chapter 384, Acts of 1944, Section 2154(a33) of Michie's Code, which is quoted by you above, states that in order to be relieved of the requirements as outlined in Section 32 of said Act, 2154(a32) in Michie's Code, that the operator, owner or chauffeur must show to the Commissioner that he

had in effect at the time of the accident a standard insurance policy covering the car involved in the accident. Attention is invited to Section 34 of the said Act, which reads as follows:

"Upon receipt of notice of the accident, the insurance carrier or surety company which issued the policy or bond shall furnish, for filing with the commissioner, a written notice that the policy or bond was in effect at the time of the accident."

I understand from your letter that the written notice furnished by the insurance companies pursuant to this Section, indicating coverage, is known as SR-21, and the form of this certificate was adopted at the time the Act became effective. It would seem to me that the Commissioner would have the authority to require of the insurance carrier or the individual involved in an accident such reasonable information as may pertain to the coverage as he sees fit.

It is, therefore, the opinion of this office that unless the insurance carrier furnishes, on behalf of the individual involved in an accident, an unqualified certificate concerning the coverage of the vehicle by the policy, then the Commissioner would be authorized to refuse to accept the certificate as evidence of the insurance coverage.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**MOTOR VEHICLE LAWS—Dealer Licensing Act—Commonwealth can appeal in criminal case. F-85**

**TAXATION—Appeal permitted the Commonwealth in Motor Vehicle Dealer Licensing Act. F-85**

January 20, 1949

HONORABLE HORACE T. MORRISON,  
Attorney for the Commonwealth,  
King George, Virginia.

My dear Mr. Morrison:

This is in reply to your letter of January 14, in which you ask whether the Commonwealth has the right to appeal from a Trial Justice's decision in a criminal case in which a person is charged with a violation of Section 3 of Chapter 406 of the Acts of Assembly of 1944, the motor vehicle dealer licensing law.

Section 4989 of the Code provides as follows:

"In any case involving the violation of a law relating to the State revenue tried by a justice under the provisions of the aforesaid sections, the Commonwealth shall also have the right, at any time within ten days from final judgment, to appeal to the circuit court of the county or corporation or hustings court of the corporation as the case may be."

A law relating to the State revenue is generally understood to be a law by which funds for public governmental purposes are raised, that is to say, tax laws. The most conspicuous examples are the various sections of the Tax Code imposing license taxes on the conduct of certain businesses and professions and making violations thereof misdemeanors. Where a person is acquitted of the charge of failing to comply with one of these license statutes

the Commonwealth undoubtedly has the right of appeal. See *Commonwealth v. Bibee Grocery Company*, 153 Va. 935.

The question is not so clear when the primary purpose of the law is one of police regulation and certain fees and charges are required only as an incidental measure in connection therewith. However, while Chapter 406 of the Acts of 1944 has as its main purpose the regulation of the business of distributing and selling motor vehicles, the license fees imposed are not simply for the purpose of defraying the expense of issuing the license certificate.

Section 5 of the Act provides that dealers, distributors and wholesalers shall pay a yearly license fee of fifteen dollars for each principal place of business plus five dollars for each additional car lot; manufacturers, a fee of twenty dollars plus ten dollars for each branch factory; salesmen, factory representatives and distributor branch representatives, a fee of two dollars. Section 3 provides that a dealer acting as a salesman must also obtain a salesman's license. The Act thus provides a scale of fees based upon the type of activity involved, instead of a flat fee. Also, under Section 5, all license fees collected under the Act are appropriated to the Commissioner of the Division of Motor Vehicles for the purpose of administering, *enforcing and effectuating the purposes of the Act*. The fees are in addition to licenses, taxes and fees imposed by other provisions of law.

The license fees are, therefore, not simply for the purpose of defraying the expenses of issuing the license certificates, but are for the purpose of securing revenue to enforce all of the provisions of the Act. The fact that the funds are used for this specific purpose and not for the purpose of defraying the general expenses of government seems immaterial. See *Bailey v. Commonwealth*, 124 Va. 800, where an appeal was allowed at the instance of the Commonwealth in a case involving a violation of the hunting license laws, which were for the purpose of providing revenue for the support of the Department of Game and Inland Fisheries.

It is my opinion, therefore, that the Commonwealth may appeal in a case where a person is acquitted of the charge of violating Section 3 of the motor vehicle dealer licensing law, which makes it unlawful for a person to engage in the business regulated by that Act without obtaining the required license. The same thing applies even more strongly to a case where a person is charged with selling alcoholic beverages without a license, about which you also ask. In this latter case the charges for licenses are specifically referred to as taxes and are paid into the State treasury and used for general governmental purposes as well as for certain specified purposes set forth in the Alcoholic Beverage Control Act.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**MOTOR VEHICLE LAWS—Dealers tags; circumstances under which same may be used. F-149**

March 17, 1949

HONORABLE I. R. DOVEL,  
Commonwealth's Attorney,  
Luray, Virginia.

Dear Mr. Dovel:

This is to acknowledge receipt of your letter of March 11 in which you make certain inquiries concerning the interpretation of the section of the Motor Vehicle Code concerning what use is to be made of dealers' tags.

Your attention is invited to section 22 of the Motor Vehicle Code, subsection (a), which is section 2154(69) of Michie's Code, which reads in part as follows:

" \* \* \* Such dealer's license plates may be used on motor vehicles, trailers and semi-trailers owned by, or assigned to, duly licensed motor vehicle dealers of this State when operated on the highways of this State *by such dealers or their duly authorized representatives*; provided that dealers' tags shall not be used on motor vehicles for the use or operation of which dealers charge or receive compensation, such as wrecking cranes or other service motor vehicles. \* \* \*

Before the amendment in 1948, the pertinent part of the section read as follows:

" \* \* \* Such dealer's license plates shall be used only on motor vehicles, trailers and semi-trailers which when operated on the highways of this State *are operated in connection with their business*; provided that dealers' tags shall not be used on motor vehicles for the use or operation of which dealers charge or receive compensation, such as wrecking cranes or other service motor vehicles. \* \* \* (Italics supplied).

The italicized portions of these sections indicate the portions which were changed by the 1948 Act. I shall answer your questions seriatim:

1. What constitutes a duly authorized representative as used in the second paragraph of (a) in the above section?

It is my opinion that the term "authorized representative" means a person connected with the dealer or the dealer's business, or members of his immediate family.

2. Under section (a) as amended is the dealer permitted to use dealer's tags on an automobile in the conduct of his personal business, automobile or other business, and for personal pleasure?

It is my opinion that the automobile bearing dealers' license plates could be used by the dealer in the conduct of his personal business, or any business of the dealer so long as no compensation is received for the use of the vehicle on which the tags are placed.

3. Are members of the immediate family of an auto dealer permitted under the above section to operate an automobile with his dealer's tags on the same, or other persons not in the employ of the dealer and not prospective buyers, permitted to use an automobile with dealer's tags on the same?

I am of the opinion that members of the immediate family of the dealer are permitted under this section to operate his automobile with his dealer tags thereon. Other persons not in the employ of the dealer and not prospective buyers are not permitted to operate the car with the dealer tags thereon, although they may have the authorization of the dealer.

4. If an automobile is placed in a garage for repairs is the dealer allowed to furnish such car owner an automobile with dealer's tags on the same, to be used by him while the car is being repaired?

It is my opinion that the automobile dealer tags could not be used in this manner.

With high regards,

Sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**MOTOR VEHICLE LAWS—Driving License Lawfully Revoked after Person is Committed to an Institution as an Inebriate. F-353**

January 18, 1949.

HONORABLE C. F. JOYNER, JR., *Commissioner*,  
Division of Motor Vehicles,  
Richmond, Virginia.

My dear Mr. Joyner:

I am in receipt of your letter of January 17 in which you state:

"On August 29, 1948, an individual was committed to the \_\_\_\_\_ Hospital on the order of a Justice of the Peace for observation. Upon being advised of his commitment, the Motor Vehicle Commissioner, under the provisions of Section 17 of Chapter 384, Acts of 1944, known as the Virginia Motor Vehicle Safety Responsibility Act, issued an order of revocation of the driving privileges of this individual. This was done on September 20, 1948. On October 12, 1948, the Superintendent of \_\_\_\_\_ Hospital, \_\_\_\_\_, Virginia, discharged the person as recovered.

"The question has now arisen as to whether or not the Order issued by this Division revoking the driving privileges of this individual is valid. I am enclosing a letter from the Honorable Lewis Jones, Commonwealth's Attorney for Middlesex County, in which he takes the position that he does not believe the Order is valid. I should appreciate it if you would let me have your views on the same."

Your attention is invited to Section 17 of Chapter 384, Acts of Assembly of 1944, known as the Virginia Motor Vehicle Safety Responsibility Act, which reads in part as follows:

"(a) The commissioner, upon receipt of notice that any person has been (one) legally adjudged to be insane, or a congenital idiot, an imbecile, epileptic or feeble-minded, or (two) committed to an institution as an inebriate or an habitual user of drugs, shall forthwith revoke his license, but he shall not revoke the license if the person has been adjudged competent by judicial order or decree, or discharged as cured from an institution for the insane or feeble-minded, for the cure of inebriates, or for the treatment of habitual users of drugs, upon a certificate of the person in charge that the release is competent.

"(b) In any case in which the person's license has been revoked or suspended *prior to his release it shall not be returned to him unless the commissioner is satisfied that he is competent to operate a motor vehicle with safety to persons and property and only then if he gives and maintains proof of financial responsibility.* \* \* \*"  
(Italics supplied)

From what you state and an examination of the file, this individual was committed by competent authority, pursuant to Section 1022(b) of the Code, and a notice of the commitment proceedings was filed with the Commissioner.

It was then the Commissioner's duty to revoke the driving privileges of this person. You will notice that the statute says the Commissioner must do this "forthwith", which means as soon as possible after the receipt of the notice of commitment, notwithstanding the language "but he shall not revoke the license if the person has been adjudged competent \* \* \* or discharged as cured from an institution \* \* \*". I do not think this language means that the Commissioner should delay in issuing his order of revocation until after the institution makes a report to him concerning the individual. Once the revocation order is issued under these circumstances, the same is valid. Paragraph (b) contemplates that the license of an individual can be revoked prior to his release from the institution, and sets up prerequisites for returning his operating license to the individual: these prerequisites being (1) that the Commissioner must be satisfied that the person is competent to drive, and (2) that he gives and maintains proof of financial responsibility for the future. In order that Paragraph (b) have any meaning, a revocation order issued under the provisions of Paragraph (a) would continue in force until such time as the prerequisites for returning the license are met. A review of this file indicates that a revocation order was issued before the individual was released from the institution, and that the Commissioner advised him that he must furnish proof of financial responsibility as a prerequisite to having his license returned to him.

I am, therefore, of the opinion that where the Commissioner receives notice that a person has been legally committed to an institution, it is his duty to revoke the driving privileges of the individual so committed; provided, however, that if the Commissioner is notified by the institution that such individual is cured or has been adjudged sane *before* any revocation order is issued, then the Commissioner is without authority to revoke the driving privileges. In this particular case, it is my opinion that the order of revocation issued by the Commissioner is valid and remains in effect until such time as the individual has fulfilled the requirements of having his operating privileges restored, those requirements being (1) that he must satisfy the Commissioner that he is competent to drive, and (2) that he must furnish and maintain proof of financial responsibility.

Yours very truly,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**MOTOR VEHICLE LAW—Driving Privileges of Minor Under 18 can be Revoked upon Conviction in Juvenile Court or Trial Justice Court of Certain Convictions. F-353**

August 12, 1948.

HONORABLE C. F. JOYNER, JR.,  
Commissioner, Division of Motor Vehicles,  
Richmond 10, Virginia.

My dear Mr. Joyner:

This is in reply to your letter of July 28, in which you state that, after receiving an abstract of conviction from the Trial Justice Court of Pittsylvania County showing that one Archie Linford Robertson was convicted on a plea of guilty of operating a motor vehicle while intoxicated and given a \$100 fine and a thirty-day jail sentence, both of which were suspended, the Division of Motor Vehicles, acting under section 16(a) of the Motor Vehicle Safety Responsibility Law, suspended Robertson's operating privileges. This action has been questioned by the attorney representing Robertson on the ground that his client was only 17 years of age when the proceedings were had against him in the



Trial Justice Court and that he was tried on the regular petition for juveniles. You ask for advice on the matter.

From the correspondence submitted to me it would appear that Robertson was actually convicted of the offense and not simply adjudged a delinquent, for he was actually given a jail sentence, though execution of the sentence was suspended. It may be that Robertson had been before the juvenile court before and it had been found that the corrective measures provided by the law dealing with juveniles were not availing in his case. If so, the trial justice may have proceeded against him as if he had been over the age of 18 years, as is authorized by section 1918 of the Code. If this is the case, there can be no question that the same results would follow his conviction as in the case of an adult and that action by the Division of Motor Vehicles under section 16(a) of the Motor Vehicle Safety Responsibility Law would be proper.

However, it is my opinion that, even if this were not the case and Robertson was simply adjudged a delinquent on the basis of a finding that he was guilty of operating a motor vehicle while intoxicated, action by the Division of Motor Vehicles under the Motor Vehicle Safety Responsibility Law would still be proper. It is true that section 1905 provides that no adjudication upon the status of any child under the provisions of Chapter 78 of the Code "shall operate to impose any of the disabilities ordinarily imposed by a conviction, nor shall any such child be denominated a criminal by reason of any such adjudication, nor shall such adjudication be denominated a conviction."

It is my opinion that the purpose of the quoted provision was to prevent the stigma of conviction from being imposed upon children under 18 which would result if they were considered criminals. I do not think it was intended to prevent appropriate action from being taken when a child commits an offense which shows his conduct is likely to endanger the lives or safety of members of the public. While a minor who has committed a crime and is adjudged a delinquent under the juvenile law does not lose the rights of citizenship ordinarily lost upon conviction of certain offenses, I do not think that he would be immune from the provisions of the Motor Vehicle Safety Responsibility Law if his offense is such that requires action under the law.

The provisions of this last mentioned statute, enacted long after section 1905, bear out this conclusion. Section 99 of the Motor Vehicle Safety Responsibility Act provides that "It is the legislative intent that this act be liberally construed so as to effectuate as far as legally and practically possible and feasible its primary objective to promote and further greater safety in the operation of automotive vehicles in this State." Section 3 defines "conviction" as meaning "conviction upon a plea of guilty or the *determination of guilt by a jury or by a court though no sentence has been imposed or if imposed has been suspended.*"

The above definition of conviction is, in my opinion, broad enough to include an adjudication of delinquency based upon a determination that the person is guilty of the offense and, if the offense is such as is mentioned in section 16(a), the Commissioner should act under that section to revoke the operating privileges of the party involved.

Driving while intoxicated is dangerous to the safety of the public when done by an adult, and is even more so in the case of minors who are less likely to realize the seriousness of such conduct. Since the law is susceptible to that construction and should be liberally construed to effect its purpose, I think that it should be construed as applying to minors dealt with under the juvenile laws.

While the statutes dealing with juveniles forbid indiscriminate public inspection of records of juvenile courts, they do not forbid such reports as are required to be made to the Division of Motor Vehicles by the Safety Responsibility Act.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

Attorney General.

**MOTOR VEHICLE LAWS—Driving Privileges of Person Convicted in a Foreign State can be Revoked by Motor Vehicle Commissioner. F-353**

October 6, 1948.

HONORABLE C. F. JOYNER, JR.,  
Commissioner, Division of Motor Vehicles,  
Richmond, Virginia.

My dear Mr. Joyner:

This is to acknowledge receipt of your letter of September 21 in which you ask my advice on the following question:

"Our question now is: May the Division of Motor Vehicles, through the Commissioner, proceed under sections 16(a) and 16(b) against a driver who is convicted in some other state of drunk driving or driving under the influence of intoxicants or drugs? Even though a Virginia resident may be convicted in another state of drunk driving in violation of the laws of that state, he has not been convicted of violating 'Chapter 87 of the Acts of the Assembly of 1940'.

"The intent of the act is, of course, clear; but I should like to have a ruling from you as to whether I should proceed against a person whose conviction took place in another state."

Section 16 of the Virginia Motor Vehicle Safety Responsibility Act, Chapter 384 of the Acts of 1944, Section 2154(a16) Michie's Code, reads in part as follows:

"(a) The Commissioner shall forthwith revoke, and not thereafter re-issue during the period of one year, the license of any person, resident or non-resident, upon receiving a record of his conviction of any of the following crimes, committed in violation of either a State law or a valid town, city or county ordinance paralleling and substantially conforming to a like State law and to all changes and amendments of it; \* \* \* (two) violation of the provisions of chapter eighty-seven of the Acts of Assembly of nineteen hundred forty, approved February twenty-six, nineteen hundred forty, as now in force or as hereafter amended; or in violation of a valid town, city or county ordinance paralleling and substantially conforming to chapter eighty-seven of said Acts of Assembly of nineteen hundred forty; \* \* \*"

"(b) The commissioner shall forthwith revoke and not thereafter re-issue during the period of three years the license of any person, resident or non-resident, upon receiving a record of the second or other additional conviction, within a period of ten years, of a violation of the provisions of chapter eighty-seven of the Acts of Assembly of nineteen hundred forty, approved February twenty-six, nineteen hundred forty, as now in force or as hereafter amended, or in violation of a valid town, city or county ordinance paralleling and substantially conforming to chapter eighty-seven of said Acts of Assembly of nineteen hundred forty."

Chapter 87, Acts of Assembly of 1940, which is found in Michie's Code in section 4722(a), is the drunk driving statute. It is unnecessary for the purposes of this opinion to quote the provisions of this statute.

Section 61 of the aforesaid Virginia Motor Vehicle Safety Responsibility Act, which is found as Section 2154(a61) of Michie's Code, reads in part as follows:

"(a) The commissioner shall suspend or revoke the license and registration certificate and plates of any resident of this State upon receiving

notice of his conviction, in a court of competent jurisdiction of this State, any *other State* of the United States, the United States, any territory, district or possession of the United States and under its exclusive control, the District of Columbia, the Dominion of Canada, Newfoundland, or any province or territorial subdivision of either, of *an offense* therein, which if *committed in this State* would be *ground for the suspension or revocation of the license granted to him, or registration of any motor vehicle registered in his name.* (Italics supplied).

Section 99 of the aforesaid Virginia Motor Vehicle Safety Responsibility Act, which is Section 2154(a99) of Michie's Code, reads in part as follows:

" \* \* \* It is the legislative intent that this act be liberally construed so as to effectuate as far as legally and practically possible and feasible its primary objective to promote and further greater safety in the operation of automotive vehicles in this State."

The expressed intent of Section 61 is to vest the Commissioner with authority to revoke the driving privileges of a person convicted in a foreign state of an offense which, if convicted in this state, would result in the revocation. Upon reading sections 16 and 61 together, the conclusion is inescapable that the Commissioner has the authority to revoke a person's driving privileges if that person, be he resident of this state or non-resident, is convicted in a foreign state of driving while under the influence of intoxicants: i. e., drunk driving.

It is, therefore, the opinion of this office that the Commissioner of Motor Vehicles has the authority to revoke the driving privileges of a person who was convicted in a foreign state on a charge of driving while under the influence of intoxicants or a drug which would affect his driving.

Yours very sincerely,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**MOTOR VEHICLES LAWS—Governor may approve issuance of license plates for State cars for any period. F-353**

**GOVERNOR—Authority to approve issuance of license plates for State cars for any given period. F-353**

March 28, 1949.

HONORABLE J. H. BRADFORD,  
Director of the Budget,  
Governor's Office,  
Richmond, Virginia.

My dear Mr. Bradford:

This is to acknowledge your letter of March 22, in which you state that the provisions of Chapter 361 of the Acts of Assembly of 1934 (Section 2154(79)a of Michie's Code) require the Governor's approval for the issuance of any free license plate for use on a State-owned pleasure-type motor vehicle, and that it has been his practice heretofore to issue such approval permits annually and for a period corresponding to the year followed by the Division of Motor Vehicles in the licensing of automobiles.

In view of the fact that the Motor Vehicle Commission has adopted a permanent type of automobile license plate for State-owned motor vehicles, on which only the year inscribed on the plate is changed, and no longer requires

an annual renewal thereof, you desire my opinion as to whether or not a State agency may legally continue to use the permanent plates so issued, from year to year, without obtaining the Governor's approval at the expiration of each year after the first free issuance of the license plate.

Since it is the practice of the Governor to issue approval permits for one year only, I am of the opinion that the Director of the Division of Motor Vehicles cannot issue license plates to a State agency for the coming automobile license year without first obtaining his approval.

However, I am further of the opinion that the Governor, under the provisions of the Act in question, could, at his discretion, approve the issuance of license plates for use of State-owned pleasure-type motor vehicles for any period of time he desires, subject, of course, to revocation, thereby rendering it unnecessary for a State agency to apply for an approval permit every license year.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**MOTOR VEHICLE LAWS—In collecting penalty under Over-Weight Statute no Tolerance can be Allowed Person Convicted. F-H.F.**

October 27, 1948.

HONORABLE J. A. ANDERSON,  
State Highway Commissioner,  
Department of Highways,  
Richmond, Virginia.

My dear General Anderson:

Copy of your memorandum dated October 18, 1948, and Mr. Burton Marye's letter of same date addressed to Mr. C. Champion Bowles, of this office, have been handed to me for attention. You wish to be advised if the Director of the Division of Motor Vehicles in enforcing the provisions of paragraph 5 of section 113a of Chapter 510 of the Acts of the General Assembly of 1948 may exercise discretion and allow a tolerance for the first two thousand pounds of weight in excess of the maximum weight provided in this Act. The pertinent portion of this Act is as follows:

"Upon final conviction of any person, firm, or corporation for operating \* \* \* over the highways of this State a motor vehicle \* \* \* exceeding the maximum road limit \* \* \* such person, firm or corporation shall, in addition to penalties provided for such conviction, pay or cause to be paid to the Division of Motor Vehicles for the benefit of the literary fund the sum of two dollars per hundred pounds or fraction thereof *for each and every hundred pounds of weight in excess of the maximum weight* \* \* \*, said payment to be made without demand on the part of the Division of Motor Vehicles within thirty days of the entry of the final conviction."

Since this Act expressly provides that the two dollar penalty shall be paid for each and every hundred pounds of weight in excess of the maximum, I am of the opinion that no tolerance can be allowed and that the Director of Motor Vehicles has no discretion in its enforcement.

With kind regards,

Very truly yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**MOTOR VEHICLE LAWS—Insurance policy must Cover Owner to the Extent named in Statute to be Acceptable. F-353**

October 6, 1948

HONORABLE C. F. JOYNER, JR., *Commissioner*,  
Division of Motor Vehicles,  
Richmond 10, Virginia.

My dear Mr. Joyner:

We have your letter of September 21, in which you ask whether or not an insurance policy covering property damage to the extent of one thousand dollars, with a fifty-dollar deductible feature in the policy, would be in compliance with section 32 of the Virginia Motor Vehicle Safety Responsibility Act, when that type of policy is furnished to the Commissioner.

Section 6 of the said Act, which is section 2154(a6) of Michie's Code, reads as follows:

" \* \* \* (three) insure the insured or either person against loss from any liability imposed by law for damages, including damages for care and loss of services, because of bodily injury to or death of any person and injury to or destruction of property caused by accident and arising out of the ownership, use or operation of such motor vehicle or motor vehicles within this State, any other State of the United States, the United States, any territory, district or possession of the United States and under its exclusive control, the District of Columbia, the Dominion of Canada, Newfoundland, or any province or territorial subdivision of either, subject to a limit exclusive of interest and costs, with respect to each motor vehicle, of five thousand dollars because of bodily injury to or death of one person in any one accident and, subject to the limit for one person, to a limit of ten thousand dollars because of bodily injury to or death of two or more persons in any one accident, and to a limit of *one thousand dollars* because of injury to or destruction of property of others in any one accident." (Italics supplied).

It will follow that the standard form of policy must cover the owner to the extent of one thousand dollars because of the injury or destruction of the property of others in any one accident. Inserting in the policy a deductible feature limiting the coverage to damages over and above fifty dollars would have the effect of reducing the coverage to nine hundred fifty dollars and, therefore, is not in compliance with section 6, *supra*.

It is, therefore, the opinion of this office that a person who furnishes to the Commissioner information to the effect that his vehicle was covered by a policy of insurance covering damage to the extent of one thousand dollars, in which there is a clause to the effect that the policy does not cover the first fifty dollars of damage, has not complied with Section 33 of the said Act; and, therefore, the Commissioner must act under Section 32 thereof. That is to say, the Commissioner would be justified in not accepting the type of policy as proper insurance coverage so as to relieve the owner, operator or chauffeur of having his driving privilege revoked under Section 32 of the Act (for the reason of being involved in an accident.)

Sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**MOTOR VEHICLE LAWS—Licensed trucks must have the empty and gross weight painted on either side. F-353**

February 3, 1949.

HONORABLE T. H. LILLARD,  
Sheriff of Madison County,  
Madison, Virginia.

Dear Sheriff Lillard:

This is to acknowledge receipt of your letter of January 27 in which you state:

"Will you please let me know at once if you have to put your name and weight on pick-up truck to 10,000-pounds with TH and CH license. Let me hear from you at once."

Your attention is invited to subsection Sixth of Section 38 of the Motor Vehicle Code of Virginia, last amended by Chapter 492, Acts of 1948, which reads as follows:

"To operate or cause to be operated or to permit the operation of a 'for hire' vehicle over or on the highways of this State unless the name and address of the owner of such vehicle plainly appears on both sides of such vehicle in letters not less than three (3) inches in height."

Also, Section 35-a of the Motor Vehicle Code, which reads in part as follows:

" \* \* \* (c) The owner of every vehicle registered pursuant to this section, except those falling within the gross weight group of ten thousand pounds and less as shown in paragraph (a) hereof, shall cause to be painted on each side of such vehicle, in letters and figures of such color and in such position as shall be prescribed by the Commissioner, not less than three inches in height, the empty weight of the vehicle and the gross weight on the basis of which it is registered and licensed, and to have painted, or otherwise plainly and legibly shown on both sides of such vehicle, except in the case of private carriers, in letters not less than three inches in height, the name and address of the owner of such vehicle. \* \* \* "

Vehicles bearing TH license tags are those used as private haulers for compensation, and are not required to secure permits from the State Corporation Commission; those that bear CH license tags are used for the transportation of property for compensation, and must obtain permits from the State Corporation Commission. In other words, both types of vehicles are commonly known as "for hire vehicles."

At the present time there is no requirement that the weight of a vehicle licensed with a TH or CH tag (for hire) have the empty and gross weights painted thereon. All property-carrying vehicles, including those bearing TH and CH license tags, are now licensed under the provisions of Section 35-aa of the Motor Vehicle Code (Chapter 196, Acts of 1946). Although it is apparent that such vehicles should have the empty and gross weights shown thereon, the Legislature omitted that requirement, and hence, the failure of an owner to have his vehicle so marked with the empty weight and gross weight does not make him amenable at the present time to punishment.

Section 35-aa was repealed by the 1948 General Assembly effective on the 15th day of March, 1949; and all vehicles formerly licensed under the provisions of that section are to be licensed under the provisions of Section 35-a of the Code, beginning March 15, 1949. I have quoted above the provisions of that section, which requires the painting of the empty and gross weights thereon if the vehicle exceeds 10,000 pounds in weight.

It is, therefore, the opinion of this office that at the present time all vehicles licensed for hire, including trucks bearing TH and CH license plates, irrespective

of weight, must have the name and address of the owner appearing on both sides thereof; and that after March 15, 1949, all trucks, including those bearing TH and CH license plates, must (if their gross weights exceeds 10,000 pounds) have the empty and gross weights painted on either side.

Yours very truly,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**MOTOR VEHICLE LAWS—Load limit of vehicles; when it is exceeded.  
F-353**

March 17, 1949.

HONORABLE HANSEL FLEMING,  
Commonwealth's Attorney for Dickenson County,  
Clintwood, Virginia.

Dear Mr. Fleming:

This is to acknowledge receipt of your letter of March 9th in which you propound two inquiries as to the loading statutes. The questions raised will be answered seriatim:

Question 1. A loaded truck is weighed with the following results: weight on front axle, 6500 pounds; weight on rear axle, 21,000 pounds. The rear axle has dual wheels. Does the rear axle weight of this truck violate Section 2154(160) of Michie's Code of 1942?

The provisions of the statute to which you refer are found in section 113 of the Motor Vehicle Code of Virginia; and you will notice that the first sentence thereof states in part that the maximum weight to be permitted on the road surface through any axle of any vehicle shall not exceed sixteen thousand pounds. Obviously, therefore, the weight mentioned in your letter for the rear axle does violate the statute unless the fact that dual wheels are on the rear would make a difference in the definition of axle. We find, however, that the statute itself goes on to answer this question, as follows:

" \* \* \* In determining the number of wheels, dual wheels shall be counted as two wheels. *No two axles shall lie in the same vertical plane,* nor shall the axle spacing be less than forty inches from center to center. \* \* \* " (Italics supplied).

Section 113-a of the Motor Vehicle Code, which is section 2154(160a) of Michie's Code of 1942, further clarifies this definition, and we quote in part:

" \* \* \* (1) \* \* \* an axle load shall be defined as the total load on all wheels bearing upon the road surface whose axle centers are not more than forty-eight inches apart. \* \* \* "

I am, therefore, of the opinion that the operation of this vehicle with the axle load mentioned in your letter violates the statute.

Question 2. Does the Motor Vehicle Code of Virginia, as amended, contemplate that dual wheels should be counted as an additional axle in determining the axle weight of a load or any axle load on said axle as provided in section 2154(160) and section 2154(160a) of Michie's Code of 1942, as amended?

For the reasons set forth above, this question must be answered in the negative.

With high regards,

Sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**MOTOR VEHICLE LAWS—Name and Address of Owner of Vehicle Operated for hire must appear on both sides thereof. F-353**

January 20, 1949.

HONORABLE GEORGE W. TALIAFERRO,  
Member of House of Delegates,  
Harrisonburg, Virginia.

My dear Mr. Taliaferro:

This is in reply to your letter of January 13 addressed to Mr. Rogers, of this office, in which you request an interpretation of subsection 6 of Section 38 of the Motor Vehicle Code as amended by Chapter 492 of the Acts of Assembly of 1948. This subsection makes it unlawful—

“To operate or cause to be operated or to permit the operation of a ‘for hire’ vehicle over or on the highways of this State unless the name and address of the owner of such vehicle plainly appears on both sides of such vehicle in letters not less than three (3) inches in height.”

You ask whether it is mandatory that the sign be painted on the vehicle. The quoted language simply requires that the name and address of the owner plainly appear on both sides of the vehicle. It does not require that they be painted on the vehicle. While that may be the most practical method of complying with the law, it is my opinion that any method of showing the name and address of the owner, whether by painting on the sides of the vehicle itself or by signs affixed to the sides or the side windows would be a compliance with the statute. Of course, cards or signs, if used, should not be placed in a manner that obstructs the driver's vision or violates the law with respect to placing signs on windshields, side shields or rear windows of the vehicle. In this connection I call your attention to subsection (a) of Section 103 of the Motor Vehicle Code, which provides as follows:

“It shall be unlawful for any person to operate any motor vehicle, trailer or semi-trailer upon a highway with any sign, poster or other non-transparent material upon the front windshield, side-shields or rear windows of such motor vehicle other than a certificate or other paper required to be so placed by law or which may be permitted by the director.”

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*



**MOTOR VEHICLE LAWS—Persons must be licensed as Dealer to Sell Automobiles for Profit. F-353**

November 4, 1948.

HONORABLE J. MELVIN LOVELACE,  
Commonwealth's Attorney for the City of Suffolk,  
Suffolk, Virginia.

Dear Mr. Lovelace:

This is to acknowledge receipt of your letter of October 15th in which you state, in part:

"There is a man here in \_\_\_\_\_ who recently purchased a \_\_\_\_\_ automobile from a local dealer on November 17, 1947, and paid \$3273.41 for it, and sold it to the \_\_\_\_\_ Motor Company of \_\_\_\_\_ on the 18th day of November, 1947, for the sum of \$3850.00; and then he purchased a \_\_\_\_\_ automobile from a local dealer on July 17, 1947, and paid \$2,334.13 for it and sold it on July 23, 1947 to \_\_\_\_\_ Used Cars for the sum of \$2834.00. We can show that he has on two or three occasions bought and sold cars at a used car sales place in \_\_\_\_\_. This man runs a small grocery store here in \_\_\_\_\_ and the statement that he made to the inspector from the Motor Vehicle Division was to the fact that he was speculating somewhat in cars.

"What I would like to know: is the man, in your opinion, a used motor car dealer as specified in the aforementioned Section 3 of the Virginia Motor Vehicle Dealers' Licensing Act?"

Under Chapter 406, Acts of 1944, commonly known as the Virginia Motor Vehicle Dealers' Licensing Act, the term "dealer" is defined in Section two as follows:

"Definitions.—

\* \* \* \* \*

"(b) 'Motor vehicle dealer' and 'dealer' mean any person who:

"(1) For commission, money or other thing of value, buys, sells or exchanges, either outright or on conditional sale, bailment lease, chattal mortgage or otherwise howsoever, or offers or attempts to negotiate a sale or exchange of an interest in, new motor vehicles or new and used motor vehicles, or used motor vehicles alone.

"(2) Is engaged, wholly or in part, in the business of selling new motor vehicles, or new and used motor vehicles, or used motor vehicles only, whether or not such motor vehicles are owned by such person, co-partnership, association or corporation.

"The term 'motor vehicle dealer' or 'dealer' does not include:

"(1) Receivers, trustees, administrators, executors, guardians or other persons appointed by or acting under judgment or order of any court, or their employees when engaged in the specific performance of their duties as such employees.

"(2) Public officers, their deputies, assistants or employees, while performing their official duties.

"(3) *Persons disposing of motor vehicles acquired for their own use and actually so used, when the same shall have been so acquired and used in good faith and not for the purpose of avoiding the provisions of this act.*

"(4) Persons dealing solely in the sale and distribution of firefighting equipment including motor vehicles adapted therefore; provided that the exemption granted under this paragraph shall not extend to exempt any such person from the provisions of section five of this act." (Italics supplied).

It seems to me that this language is pretty broad, and includes any person who sells automobiles for a profit. There are exceptions, as you will notice, which include persons disposing of motor vehicles acquired for their own use and actually so used, etc. I understand that there have been a good many convictions in the trial courts of persons who have bought and sold cars without being licensed under this act.

It is my opinion that the facts that you narrate above certainly make a prima facie case of guilt against the person who has so trafficked in cars of violating Section 3 of the aforesaid act.

With high regards,

Yours very truly,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**MOTOR VEHICLE LAWS—Persons Violating Speeding Limit fixed by Authorities on Federal Reservations Cannot be Convicted in Trial Justice Court. F-79**

November 17, 1948.

HONORABLE CHARLES H. WILSON,  
Commonwealth's Attorney for Nottoway County,  
Nottoway, Virginia.

My dear Mr. Wilson:

This is in reply to your recent letter in which you asked my opinion on the following set of facts:

"The Camp Pickett authorities have placed a 30 mile per hour speed limit on certain roads in the Camp Area. The question has arisen relative to the conviction in the Trial Justice Court of Nottoway County, Virginia, of a civilian driving in such a restricted zone at 40 miles per hour."

Chapter 490 of the Acts of Assembly of 1948 amended a re-enacted Section 62, as amended, of Chapter 342 of the Acts of Assembly of 1932 (found as Section 2154(109) of Michie's Supplement of 1948) and provides, among other things, that the State Highway Commission, within certain limits and under certain conditions not material here, may determine the speed of motor vehicles on all highways maintained by the State.

Section 19 of the Code cedes to the United States concurrent power to regulate traffic on the highways over the lands acquired by or leased or conveyed to it.

It is my understanding that the State Highway Commission has not fixed the speed of motor vehicles within Camp Pickett. Therefore, since the 30 mile per hour speed limit to which you refer is not a State regulation, but solely a Federal one, I am of the opinion that the civilian driving in such restricted zone at 40 miles per hour has violated no State law and could not be convicted in the Trial Justice Court of Nottoway County.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**MOTOR VEHICLE LAWS—Reckless Driving is not Included in Driving While Intoxicated nor Involuntary Manslaughter. F-85**

**CRIMES—Reckless Driving not Included in Charge of Driving While Intoxicated nor Involuntary Manslaughter. F-85.**

January 26, 1949.

HONORABLE I. R. DOVEL,  
Commonwealth's Attorney,  
Luray, Virginia.

My dear Mr. Dovel:

This is in reply to your letter of January 19, in which you desire my opinion on the following questions:

"1. In the trial of an accused on a warrant for operating an automobile under the influence of intoxicants, am I permitted to instruct the jury that if they believe the accused was not intoxicated at the time in question, but that the automobile was being operated in a reckless manner that they may bring in such a verdict.

"2. In the trial of an accused indicted for involuntary manslaughter, can the jury be instructed to the effect that they may return a verdict of reckless driving if they believe there was no gross negligence in the operation of the car, but that there was negligence sufficient for reckless driving."

Under the doctrine of included offenses reckless driving is not incident to or included in the offense of driving while intoxicated, but is a separate and distinct offense. *Spickard v. City of Lynchburg*, 174 Va. 502. Therefore, it is my opinion that your first question must be answered in the negative, since the warrant under consideration charges only the offense of operating an automobile while under the influence of intoxicants.

The answer to your second question must necessarily depend upon the form of the indictment. For example, an indictment charging involuntary manslaughter in terms of the statute includes only *that* offense or a lesser one which is incident to and constitutes an element of the major offense, such as assault and battery. And it is my opinion that the offense of reckless driving is not included in the crime of involuntary manslaughter.

On the other hand, felony and misdemeanor counts may be joined in the same indictment when they arise out of the same criminal transaction. *McDaniel v. Commonwealth*, 165 Va. 709. Therefore, if the indictment to which you refer includes a count charging reckless driving, I am of the opinion that it would be proper to instruct the jury that they may, if the evidence so warrants, return a verdict of guilty of reckless driving.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**MOTOR VEHICLE LAWS—Town can Regulate Taxicabs Operating Within its Limits. F-60**

November 16, 1948.

HONORABLE R. M. GRIMMER, *Mayor*  
Cape Charles, Virginia.

Dear Mr. Grimmer:

This is to acknowledge receipt of your letter of November 3rd in which you ask whether or not a taxicab owner and operator who picks up passengers at a point without the city and discharges them at a point within the city, and also picks up passengers within the city and discharges them at a point without the city can be regulated by an ordinance passed by the Town of Cape Charles.

Pursuant to Section 32 of Chapter 367, the Town of Cape Charles can regulate taxicabs operating upon its streets. I can find nothing in the general law that would prohibit the town from so doing. The State Corporation Commission has the authority to regulate the operation of taxicabs on public highways outside the corporate limits of cities and towns. See Section 7(f) of Chapter 129, Acts of 1936, as amended by Chapter 489, Acts of 1948. Chapter 35-e of the Motor Vehicle Code, as amended by Chapter 413, Acts of 1948, Section 2154(82-e) of Michie's Code, provides that cities and towns having a population in excess of two thousand inhabitants per square mile, according to the last preceding United States Census, may levy and assess taxes, and charge license fees and taxes upon motor vehicles.

I do not think that in regulating taxicabs the Town of Cape Charles could tax or regulate the licensing of taxicabs which discharge passengers within the corporate limits of the town who have been picked up at a point without the corporate limits. To permit such a licensing and control would result in nullifying benefits accruing to a licensed taxicab owner or operator holding a license to operate lawfully outside the corporate limits. In other words, it is my thought that the term "to operate a taxicab" does not consist solely of the act of discharging passengers, but does include the solicitation of taxicab business and the picking up of passengers.

It is, therefore, the opinion of this office that a town such as Cape Charles has the authority to regulate taxicab business within its corporate limits, that such business would embrace the solicitation of the taxicab business and the picking up of passengers within the corporate limits, but would not include the discharging of passengers within the corporate limits where such passengers had entered the taxicab outside the corporate limits.

Very truly yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**MOTOR VEHICLE LICENSE—Neither Commonwealth nor Municipal Corporation Can Exact an Automobile License Fee from Person in the Armed Service under certain circumstances. F-356a**

July 29, 1948.

HONORABLE C. F. JOYNER, JR.,  
Commissioner of Motor Vehicles,  
Richmond, Virginia.

Dear Mr. Joyner:

This office has been in communication with Staff Sergeant Howard E. Melson, Langley Air Force Base, Hampton, Virginia, and with Captain R. W.

Dech of that Command, concerning the right of the Town of Phoebus, or any other municipality, to exact a city license fee from a serviceman whose car is lawfully registered in his domiciliary state who is stationed in Virginia, he not being required under the State law to purchase State tags for his car. Recently Mr. Melson was fined in the Police Court of Phoebus, Virginia, for not having an automobile license issued by that town, and furthermore, he was directed to procure one.

The provisions of the Soldiers' and Sailors' Relief Act (50 U. S. C. A., App. 574) cover cases of this character. Your attention is invited to said section of the Soldiers' and Sailors' Relief Act, which reads as follows:

"(1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district: Provided, That nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942.

(2) When used in this section (a) the term "personal property" shall include tangible and intangible property (including motor vehicles), and (b) the term "taxation" shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: Provided, That the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid."

The State of Virginia is not authorized to exact an automobile license fee from the serviceman whose car is properly registered in his domiciliary state.

Many sections of the said Soldiers' and Sailors' Relief Act have been declared valid by the courts, and I have no reason to believe that this particular section would not be held valid. Until it is declared invalid, the states must recognize the same. Municipal corporations in Virginia are creatures of statute and they procure all their authority from either the Constitution, the general statutes and the specific statutes enacted by the Legislature. Generally speaking, they are simply arms of the State Government and, of course, are amenable to all the provisions of Federal and State statutes that are pertinent and, of course, do not enjoy any greater rights or privileges than the State itself.

I am therefore of the opinion that a municipal corporation in this State does not have authority to require a serviceman to purchase an automobile license plate as a prerequisite to the right to drive upon the highways of the

municipality where the serviceman's car is lawfully licensed by his domiciliary state and not properly licensable by the State of Virginia.

I am enclosing herewith a copy of a communication from Sergeant Melson and Captain Dech.

Very truly yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

## OSTEOPATHS—When Qualified To Practice Surgery. F-182

June 29, 1949.

DR. K. D. GRAVES, *Secretary-Treasurer*,  
State Board of Medical Examiners,  
Roanoke, Virginia.

My dear Mr. Graves:

This is in reply to your letter of June 21 regarding an osteopathic physician who, having been licensed in another State, was, by reciprocity, licensed to practice in Virginia in 1942.

You state that he has recently applied to have his license made more extensive so as to cover surgery in addition to osteopathy. The Board examined the applicant on materia medica and surgery, upon which subjects the applicant made grades of 94 and 70 respectively. You further state that, since this was a special examination on only two subjects and the applicant did not make a passing grade of 75 on the subject of surgery, the Board feels that the applicant has not satisfied it as to his fitness to practice surgery. You ask whether the Board is justified in this position or whether the applicant is entitled to have the two grades averaged together as is provided by Section 1612 when the complete Part I or Part II examination is given to applicants desiring to practice osteopathy.

Paragraph (e) of Section 1609 defines the "practice of osteopathy" as the treatment of human ailments, diseases, or infirmities by any means or methods other than surgery or drugs. However, this section provides that, if a duly licensed osteopath "has satisfied the Board by an examination" that he is qualified to administer drugs or to practice surgery, then the term "practice of osteopathy" as applied to such person shall include the use of surgery or of drugs as the case may be.

It is my opinion that the provision in Section 1612 for averaging the grades when a comprehensive examination is given does not apply to the special examination given under paragraph (e) of Section 1609, and that, if the person taking the special examination for surgery does not make a passing grade on that subject, the Board may decline to extend his license to that field even though his grade on surgery, when coupled with his grade on related subjects, would give him an average of 75 per cent.

I note that Mr. Vivian L. Page has written you on June 23 and enclosed a copy of his letter of June 20, 1949, to Mr. Williams, of this office, with reference to the application of Dr. Stanley Channing, about whom I understand you are writing. Mr. Page's letter of June 20 indicates that Dr. Channing's application was to extend his license to the use of drugs rather than surgery.

There seems to be some misunderstanding as to the type of license Dr. Channing desires. If he wishes to practice surgery, it is my opinion that he must satisfy the Board of his ability in that field independent of his ability to practice with drugs. (Of course, if the use of drugs is considered necessary to the proper practice of surgery, and this may well be the case, he should also

satisfy the Board as to his ability in this respect). On the other hand, if he does not desire to practice surgery, but only desires to be entitled to administer drugs, it is my opinion that, if he satisfied the Board of his ability to use drugs, the Board may extend his license to this field even though he may not have satisfied the Board as to his ability with respect to surgery.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**PRISONERS—Contract with Another County for the Care of Prisoners—  
Sheriff cannot retain fees Collected Therefor. F-136**

November 5, 1948.

HONORABLE J. GORDON BENNETT,  
Auditor of Public Accounts,  
Richmond 10, Virginia.

My dear Mr. Bennett:

This is in reply to your letter of October 25, from which I quote:

"During the course of our audit of the accounts and records of Shenandoah County, we determined that the Board of Supervisors of Shenandoah County, on May 7, 1945, entered into an agreement with the County of Warren and the Town of Front Royal for the care of their prisoners in the jail of Shenandoah County, as provided for in Chapter 386 of the Acts of Assembly of 1942. At or about the same time, the County of Warren and the Town of Front Royal agreed to pay Sheriff O. L. Sheetz of Shenandoah County, *as personal compensation*, a fixed per diem rate for caring for their prisoners, in addition to the amounts to be paid to the County of Shenandoah. Up until June 30, 1948, Sheriff Sheetz had received from the Town of Front Royal \$658.45 and from the County of Warren \$939.90, or an aggregate of \$1,598.35 for this service, which he claims as his own personal funds. \* \* \*"

You ask the following questions:

"1. Did the County of Warren and the Town of Front Royal, in the light of Chapter 386 of the Acts of Assembly of 1942, have the authority to enter into a contract with the sheriff of Shenandoah County to pay him a stipulated fee personally benefitting him for each prisoner received by him and confined in the jail of Shenandoah County for the two aforementioned political subdivisions?

"2. If the sheriff and the county and the town had the right to enter into such a contract, should the fees which the sheriff received as personal compensation have been paid into the county treasury for apportionment between the State and the County of Shenandoah, as required by the Acts of Assembly of 1942?"

Chapter 386 of the Acts of Assembly of 1942 abolished the fee system as a method of compensating sheriffs and provides for the payment of salaries to these officers. In fixing the salaries of sheriffs the number of prisoners and the number of days spent by them in the jail of his county are taken into consideration.

While, prior to the enactment of this statute, a sheriff was entitled to charge other localities the fees prescribed by Section 3510 for keeping their prisoners in the jail of his county and under the Act continues to collect all fees provided by law except those he was entitled to receive from the Common-

wealth or the county or city for which he was elected or appointed, it is my opinion that the charging of fees for the care of prisoners of other localities has been superceded by Section 9 of the Act. Paragraph (c) of this Section as amended provides that each sheriff—

" \* \* \* shall also collect from the counties, cities and towns of the Commonwealth, other than the county or city for which he is elected or appointed, and from any other state or country for which any prisoner is held in such jail, the reasonable costs, to be determined by agreement with the governmental unit involved, or, in the absence of such agreement, as shall be determined by the governing body of his county or city, of feeding, clothing, caring for, and furnishing medicine and medical attention for, prisoners held for such county, city, town, state or country. *All moneys so collected from the United States or from any such county, city, town, state or country shall be promptly paid into the treasury of his county or city, and the total amount so collected shall be retained by such county or city.*"

It is clear from the italicized portion of the language quoted above that a sheriff is not entitled to retain as personal compensation funds received from towns and other counties for the care of their prisoners in the jail of his county. All of such funds are to be paid into the treasury of his county to be retained by that locality.

Were the sheriff still entitled to charge a fee to other localities for the care of their prisoners, such funds would not be kept by him for his personal benefit, but, under Section 1 of the Act, would have to be paid into the county treasury to be apportioned between the county and the State. However, as indicated above, such fee should no longer be charged as Section 9 of the Act provides only that other localities shall pay the reasonable costs of feeding, clothing, caring for and furnishing medical attention to their prisoners, which costs are determined by agreement between the Board of Supervisors of his county and the governing body of the other locality and, when collected, are paid into the treasury of his county to be retained by it.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**PRISONERS—Traveling expenses are chargeable to accused. F-114**

May 20, 1949

HONORABLE R. N. EARLY,  
Commonwealth's Attorney,  
Greene Count,  
Standardsville, Virginia.

My dear Mr. Early:

This will acknowledge receipt of your letter of May 14, from which I quote in part:

"I am writing you in regard to payment of mileage for Sheriff for transporting prisoners to jail as I cannot find any law applicable to the situation which has arisen in my county.

"Greene County has abandoned its jail for the detention of prisoners and is now using the Albemarle County jail in Charlottesville, Virginia for that purpose.



"The Trial Justice of our County has recently decided that transportation costs to the Albemarle County jail is not a legitimate part of the costs and should not be taxed as a part of the costs since it is the duty of the county to maintain a jail within its borders, and should the Board of Supervisors see fit to use a jail in another county, then it is the duty of the county to bear the cost of transportation and not the prisoner."

"The Sheriff of Greene County has to make a trip of forty-four miles per round trip in order to lock up a prisoner and has to make the same trip again to bring him back for trial, and if convicted and given a jail sentence, has to make the same trip again which you can readily see causes considerable cost on the prisoner for mileage."

"The question we would like you to render an opinion on is whether or not, where a county has adopted a jail in another county as a place of detention for its prisoners, should the prisoner or the county bear the mileage costs of the Sheriff for his transportation to and from the said jail for trial?"

Section 4964 of the Code provides that in every criminal case where there is a conviction all the expenses incident to the prosecution will be borne by the accused. The travel in question, regardless of the distance, is incident to the prosecution and, therefore, in my opinion, should be paid by the accused, if he is convicted.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**PROBATION, PARDON AND PAROLE—Parole Officer May be Cross-Examined on his Pre-Sentence Report. F-84**

July 21, 1948.

HONORABLE RICHARD W. COPELAND,  
Director of Parole,  
Parole Board,  
Richmond, Virginia.

Dear Colonel Copeland:

Mr. Charles J. Duke, Jr., has forwarded to this office your letter of July 13, 1948, in regard to the interpretation of section 53-278.1 of The Reorganization Provisions of the Code of Virginia.

Specifically, you desire to know to what extent a Probation and Parole Officer may be cross-examined as to his pre-sentence report which is required in certain cases by the above section and whether or not this officer is required to divulge the sources of his information. You also state that several judges have expressed themselves as believing that the spirit of this new section is such as to indicate that in all felony cases a pre-sentence investigation should be made.

The section to which you refer gives the accused the right to cross-examine the investigating officer as to any matter contained in his report, therefore, I am of the opinion that the cross-examination is limited to the contents of the report made by the investigating officer.

Also it is my opinion that this right of cross-examination would necessarily include the right to require the investigating officer to divulge the sources of his information if asked to do so by the accused. To hold otherwise would, in

effect, give little force to the provision concerning the accused's right to cross-examine the investigating officer.

As to the applicability of section 53-278.1 in all felony cases a court, of course, may ask for an investigation before imposing a sentence in any case before it, but it is clear that a pre-sentence investigation is required only when a person is tried upon a felony charge for which a sentence of death or confinement for a period of over ten years may be imposed.

If you desire to be advised further concerning this section, I shall be glad to be of assistance.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**PUBLIC BUILDINGS—Confectionery in Capitol Building and State Office Building. F-189**

March 9th, 1949.

HONORABLE EDWARD T. HAYNES,  
Mutual Building,  
Richmond, Virginia.

Dear Mr. Haynes:

I am in receipt of your letter of March 4th, 1949, from which I quote as follows:

"Will you kindly give me your opinion as to who would be entitled to operate the confectionery and eating stand located in the basement of the Capitol and also the one operated in the State Office Building since the death of Mr. W. D. Crenshaw? Particularly in view of the Acts of Assembly of 1948, page 433, Chapter 198, and more especially on page 435, Section 9, which reads as follows:

"When any vending stand and other business enterprise now operated in a public building becomes vacant for any reason whatsoever such vacancy shall be filled by employment of the blind."

The applicability of the quoted provision from Chapter 198, Acts of 1948, depends upon whether or not the vending stand or other business enterprise has become vacant.

It is my information that the pertinent facts relative thereto are substantially as follows:

For some time prior to January 1946 the stand or enterprise located in the State Office Building was operated by Mr. W. D. Crenshaw, now deceased. On or about the 1st day of January 1946 this stand was taken over and has been since operated by Mr. W. D. Crenshaw, Jr., as sole proprietor. The business has been and is now under his direct supervision, ownership and control. It is license in his name and he has assumed and discharges full responsibility to the State for the monthly rental and orderly conduct of the business.

House Joint Resolution No. 3, agreed to Jan. 10, 1940 (Acts 40, Page 930) directed the Clerk of the House of Delegates to procure, from time to time, someone to operate a lunch counter in the Capitol to vend the usual lunch counter commodities during sessions of the General Assembly. Pursuant to this resolution the Clerk procured Mr. Winthrop D. Crenshaw. At the conclusion of the 1940 session because of the investment involved and the demand from State employees, Mr. Crenshaw sought and obtained permission from the Clerk, with the approval of the Governor, to continue the operation between sessions.

No formal lease was ever executed, it being considered that responsible authority would have better control over the character of services rendered. This status has had the acquiescence of the Governor and subsequent Legislatures. Mr. Crenshaw employed the present occupant, Mrs. Louise Clayton, as an assistant. As early as 1946, when Mr. Crenshaw was unable for reasons of health, to manage the enterprise the Clerk of the House in order to insure continuous operation had a verbal understanding with him and Mrs. Clayton from which time and understanding the Clerk has recognized and treated both as associates engaged in a joint enterprise. Pursuant to this and prior to the session of 1948, Mrs. Clayton has ostensibly had full charge or the operation of the enterprise.

Under this factual situation I am of the opinion that the vending stands or business enterprises, referred to in your letter, have been in continuous operation and occupancy and that the death of Mr. W. D. Crenshaw did not create a vacancy in either. Under these circumstances the quoted provisions of Chapt. 198, Acts of Assembly 1948, have no application.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**PUBLIC OFFICIALS: COMPATIBILITY—Chairman of Local Milk Board Cannot Serve as School Trustee. F-249**

July 9, 1948.

MR. LYLE C. WELLER,  
Attorney at Law,  
Staunton, Virginia.

Dear Mr. Weller:

This is to acknowledge receipt of your letter of June 29 from which I quote as follows:

"I have been serving for a number of years as Chairman of the local milk board under the provisions of the Milk and Cream Act of 1934. Recently I was appointed by the City Council as a member of the Board of Trustees (School Board) for the City of Staunton. Before qualifying, I request an opinion as to whether or not I would be considered a state officer as contemplated by Section 786 of the Code of Virginia."

Section 786 of the Code provides, among other things, that no State officer shall be chosen or allowed to act as a school trustee, therefore, the question to be decided is whether a chairman of a local milk board is considered to be a State officer.

After carefully considering Chapter 357 of the Acts of Assembly of 1934, which created the Milk Commission, and the local milk boards and makes reference to "all officers and employees of the milk board" (subsection (b) of section 11), and after reading the rules and regulations promulgated by the Milk Commission, it appears to me that the Chairman of a local milk board is vested with a delegated portion of the State's sovereign power, exercised for the benefit of the public.

Therefore, it is my opinion that you, as Chairman of a local milk board, are a State officer and cannot serve as school trustee by virtue of the prohibition set forth in section 786.

With kindest regards,

Sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**PUBLIC OFFICIALS—Compatibility—Jailer cannot Serve as Justice of the Peace. F-249**

December 28, 1948.

HONORABLE CARY J. RANDOLPH,  
Commonwealth's Attorney,  
Henry County,  
Martinsville, Virginia.

My dear Mr. Randolph:

This will acknowledge receipt of your letter of December 15, 1948, from which I quote in part:

"At a regular December monthly meeting of the Henry County Board of Supervisors, it was resolved that the Circuit Court be requested to appoint the day jailer and the night jailer of the Henry County Jail as Justices of the Peace; and that the County pay each of said jailers \$100.00 per year in addition to their previously set salaries as jailers; and that all the fees earned or due them as Justices of the Peace be turned over to the County Fund. The jailers live in different Magisterial Districts and neither district has its quota of three Justices of the Peace.

" \* \* \* I am requesting that you give me your opinion as to (a) whether or not a jailer might properly be a Justice of the Peace, (b) whether or not such a Justice's fees might be turned in to the County Fund, if the County pays the Official an increase in salary."

By §2868 of the Code the sheriff of a county is the "keeper of the jail thereof." By §2701 of the Code a sheriff, with the consent of the court, may appoint one or more deputies, who may discharge any of the official duties of the sheriff's office. I am of opinion, therefore, that the sheriff may designate a deputy as the keeper of the jail, but, this being one of the official duties of the sheriff's office, I am of opinion that he may designate no person other than a deputy to be such keeper of the jail.

Section 3093 of the Code, referred to in your letter, expressly provides that a Justice of the Peace cannot hold the office of a sheriff or deputy. I am, therefore, of the opinion that a jailer cannot properly be a Justice of the Peace.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**PUBLIC OFFICIALS—COMPATIBILITY—Member of General Assembly cannot be a member of Electoral Board, or of County School Trustee Electoral Board, but may serve as Commissioner of Accounts. F-249**

January 4, 1949.

HONORABLE CHARLES C. LOUDERBACK,  
Member of House of Delegates,  
Stanley, Virginia.

My dear Mr. Louderback:

This is in reply to your letter of December 28, in which you furnished additional information concerning the question of the legality of a person holding a position as a member of the General Assembly and at the same time

holding an office filled only by an appointment of a Circuit Court Judge. The offices to which you refer are:

1. Member of County Electoral Board
2. Member of County School Trustee Electoral Board
3. Commissioner of Accounts

The pertinent part of Section 84 of the Code, as amended, which deals with the appointment of members of the electoral board by a Circuit Court, is as follows:

" \* \* \* No person, nor the deputy of any person, holding any office or post of profit or emolument under the United States government, or who is in the employment of such government, or holding any elective office of profit or trust in the State, or in any county, city or town thereof, shall be appointed a member of the electoral board or a registrar or judge of election."

This office has previously ruled that the above quoted provision of Section 84 prohibits a member of the General Assembly from being appointed to a county electoral board.

In regard to the second office mentioned above, I quote from an opinion rendered by the former Attorney General, Abram P. Staples, as follows:

"Section 653a(1) of the Code provides that in each county there shall be a 'school trustee electoral board, which shall be composed of three qualified voters, who are not county or State officers \* \* \*.' It is apparent, in my opinion, that this provision makes the offices of membership on such school trustee electoral board and membership in the General Assembly incompatible." (Report of the Attorney General, 1943-44, at page 138).

I am aware that Section 653a(1) has been since amended by the General Assemblies of 1944 and 1948, but such amendments do not affect the conclusion reached by my predecessor.

There is no statutory provision prohibiting members of the General Assembly from being appointed Commissioner of Accounts and, since a Commissioner of Accounts is certainly not a "salaried officer" within the meaning of Section 44 of the Constitution, which prohibits a person holding a salaried office under the State government from being a member of the General Assembly, I am of the opinion that a member of the General Assembly may also be a Commissioner of Accounts.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**PUBLIC OFFICIALS—Compatability—**officer of local National Farm Loan Association can serve on County School Board. F-203  
**SCHOOLS AND SCHOOL BOARDS—**Member of Board can serve as officer of local National Farm Loan Association. F-203

March 14, 1949.

HONORABLE EDWARD MCC. WILLIAMS,  
Commonwealth's Attorney for Clarke County,  
Berryville, Virginia.

My dear Mr. Williams:

This is in reply to your letter of March 10, in which you ask whether or not the provisions of Section 290 of the Code of Virginia would disqualify from

service on the County School Board a man who is Secretary-Treasurer of a local National Farm Loan Association and a local Production Credit Association, one of the duties of which is the servicing of Federal Land Bank loans.

Section 290 of the Code of Virginia provides that, with certain exceptions not pertinent to your inquiry, no person shall be capable of holding any office under the Constitution of Virginia who holds any office or post of profit, trust, or emolument under the government of the United States. While local National Farm Loan Associations and local Production Credit Associations are organized under Federal statutes and subject to regulation by certain Federal agencies, they are simply local organizations of farmers and owners of farm lands who wish to borrow money under pertinent Federal statutes. It is my opinion that the officers of such local organizations are not, by virtue of holding such positions, Federal officers within the meaning of Section 290 of the Code of Virginia, and that they are not for that reason disqualified from service on the County School Board.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**PUBLIC OFFICIALS—Deputy Treasurer and Clerk of School Board  
cannot write insurance on public buildings. F-200**

January 14, 1949.

HONORABLE R. PAGE MORTON,  
Commonwealth's Attorney for Charlotte County,  
Charlotte Court House, Virginia.

My dear Mr. Morton:

This is in reply to your letter of January 5, in which you ask whether or not, in view of Section 2707 of the Code as amended by the General Assembly of 1948, a deputy treasurer of a county or a clerk of a school board of a county is permitted to write insurance policies on school buildings and other public buildings of the county, such as the county library, the public health center and the county agent's office.

Section 2707 of the Code, as amended, provides, among other things, as follows:

"No supervisor, superintendent of the poor or overseer of the poor, constable, special police, commissioner of the revenue, treasurer, attorney for the Commonwealth, clerk of the court, trial justice, sheriff, or any paid officer of the county shall become interested, directly or indirectly, in any contract, or in the profits of any contract, made by or with any officer, agent, commissioner, or person acting on behalf of the supervisors, the county school board, or superintendent of the poor of the county, or any overseer of the poor therein, or in any contract, fee, commission, premium or profit therefrom, paid, in whole or in part, by the county or any board, commission or agency thereof, \* \* \*."

The writing of insurance policies by the above enumerated officers, or "any paid officer of the county", on school buildings and county buildings is clearly prohibited. Therefore, the question to be decided is whether or not a deputy treasurer of a county or clerk of a county school board is a "paid officer of the county."

In my opinion, both a deputy treasurer of a county and a clerk of a county

school board are unquestionably paid officers of the county and, by virtue of such fact, are prohibited by Section 2707, as amended, from receiving any profit growing out of a contract made by or on behalf of the board of supervisors or the county school board.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**PUBLIC WELFARE—Legal settlement not synonymous with legal residence. F—231**

April 25, 1949.

HONORABLE ROBERT BOLLING LAMBETH,  
Commonwealth's Attorney,  
Bedford County,  
Bedford, Virginia.

My dear Mr. Lambeth:

I have your letter of April 14, 1949, advising that the local Superintendent of the Bedford County Welfare Department contends that the definition of "legal settlement" as defined in §2800 of the Code should be used for the purpose of ascertaining whether or not a person is a "legal resident" as provided in §1021 of the Code. You request my opinion in the matter.

In my opinion the statutes are essentially separate enactments and have no relation to one another. The word "settlement" as used in a statute relating to paupers has a different meaning from the word "residence" in other statutes. I am, therefore, of the opinion that the "legal settlement" as defined in §2800 should not be considered in determining the legal residence as provided in §1021 of the Code.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**PUBLIC WELFARE—Lien on Estate of Recipient of Public Welfare is Inferior to Claim for Funeral Expenses. F-231**

August 26, 1948.

HONORABLE EDWARD MCC. WILLIAMS,  
Attorney for the Commonwealth,  
Berryville, Virginia.

My dear Mr. Williams:

This is in reply to your letter of August 25, which I quote in full:

"On December 15, 1947, the Superintendent of Public Welfare of Clarke County filed and duly recorded a lien in the local clerk's office for sums paid to a recipient of public welfare. The recipient died about July 1, 1948, and his estate was insufficient to pay the claim of the Board of Public Welfare as recorded.

"The funeral director claims, under the terms of 1904(18), that he is

entitled to be paid \$100 on account of the funeral expenses of the recipient before the proceeds from recipient's estate are applied in payment of the recorded claim, or lien.

"Please advise me as to whether or not the position of the funeral director is maintainable."

The first paragraph of section 1904(18) of Michie's Code reads as follows:

"On the death of any recipient of assistance, the total amount paid as such assistance under this chapter shall be allowed as a claim against the estate of such recipient, prior to all other claims except prior liens and except funeral expenses not in excess of one hundred dollars, and except hospital bills, doctors' bills and medical expenses not in excess of one hundred and fifty dollars."

The second paragraph of this section provides that notice of such claim may, within one year after the death of the recipient, be filed with the clerk of the court to be recorded. It is to be noted that this is a claim against the recipient's estate and not against the recipient. Since it is inferior to a claim for funeral expenses, not exceeding \$100, it is my opinion that it cannot be given precedence just because the claim was recorded prior to the recipient's death.

Under section 1904(17), amounts paid as public assistance may be recovered in certain cases from the recipient himself, but under that section they are recovered as an ordinary debt and not by recording a notice of the claim under section 1904(18). It is my opinion, therefore, that the claim for actual funeral expenses, not exceeding \$100, has priority to the claim for public assistance paid the decedent.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**PUBLIC WELFARE—List of Persons Receiving Public Assistance Should Not be Made Public. F-231**

**BOARD OF SUPERVISORS—Lists of Persons Receiving Public Assistance Should Not be Made Public or Spread Upon the Minutes of Such Board. F-231**

July 1, 1948.

MISS IRMA F. BELL, *Superintendent*,  
Department of Public Welfare,  
Spotsylvania, Virginia.

Dear Miss Bell:

This is in reply to your letter of June 29, 1948. As indicated in the previous opinion of this office, a copy of which was sent to you with our letter of June 28th, it is the view of this office that since the Board of Supervisors is the tax levying body of the County, which makes the appropriation for the County's share of the payment of public assistance, it is entitled to be furnished with a list of persons receiving public assistance. The local board of public welfare should, therefore, as requested by the Board of Supervisors, furnish a list of such persons to the Board.

While the minutes and the proceedings of the Board of Supervisors are public records, it is my opinion that the Board of Supervisors should not make public, or place in its minutes, a list of persons receiving public assistance in view of the provisions of the Public Assistance Act, which reads as follows:



"If any person wilfully discloses information concerning applicants and recipients to purposes other than those directly connected with the administration of old age assistance, he shall be guilty of a misdemeanor, and upon conviction, shall be punished accordingly."

The general principle that records of the Board of Supervisors are public records does not, in my opinion, apply with respect to information which the statute specifically makes confidential. It would not be necessary for the Board of Supervisors to spread the list of persons receiving public assistance upon their official records and, in my opinion, the Board should not do so in view of the provisions quoted above.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**RECORDATION—Deed conveying standing timber indexed in Deed Index only. F-90a**

February 9, 1949.

HONORABLE ROBERT H. OLDHAM, *Clerk*,  
Circuit Court for Accomack County,  
Accomac, Virginia.

My dear Mr. Oldham:

This will acknowledge receipt of your letter of February 7 requesting my opinion as to whether or not recording deeds of standing timber should be indexed in both the Deed Index and the Miscellaneous Liens Index.

Standing timber is realty, therefore, I am of the opinion that recorded deeds of standing timber should be indexed only in the Deed Index.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**REFRIGERATED LOCKER PLANT, COLD STORAGE LOCKER—  
What Constitutes and When Operation Can be Regulated. F-371**

January 12, 1949.

HONORABLE J. MELVIN LOVELACE,  
Attorney for the Commonwealth,  
Suffolk, Virginia.

My dear Mr. Lovelace:

This is in reply to your letter of January 8, from which I quote:

"There is a young man here in Suffolk who operates a grocery store and in connection with his grocery business he has built a room 16 x 16 x 9, in which he keeps the temperature around zero, or below. This compartment is not equipped with the regular lockers, but the young man uses orange crates with one end of the crate knocked out and placed one on top of the other so that he can reach into the crate and get whatever is stored therein. This young man does not rent lockers and the only compensation, if it can be construed as compensation, is 4 cents a pound for cutting, wrapping and

packing in this locker room for his customers. He contends that this is not compensation but purely accommodation and what he hopes to get paid is from the groceries he sells while these people are visiting there getting the meat from this cold storage which he has packed and stored there for them. This room is built in the back end of his present store building and is not, as I said before, equipped with lockers, nor does he have the "sharp freeze or aging room" facilities, nor does he have the recording thermometer usually used in locker plants. The aforementioned service of wrapping, cutting and storing the meats is for use of his customers only, he does not advertise this phase of his business, nor does he solicit this kind of business, but it is used exclusively by his friends and customers. He states further that he charges the same thing if a customer brings meat or other food for human consumption there to be wrapped and later put in his own locker."

You ask whether the person should be considered as operating a refrigerated locker plant for compensation within the meaning of Chapter 164 of the Acts of Assembly of 1946 (Sections 1228(1) and following of Michie's 1948 Supplement) and, therefore, required to comply with the terms of that statute.

That Act declares that the public welfare requires the control and regulation of the operation of refrigerated locker plants, and of the sale, handling and processing of human food in connection therewith to eliminate unsanitary, unhealthful and fraudulent practices. It defines a refrigerated locker and refrigerated locker plant as follows:

"(1) 'Refrigerated Locker', 'Cold Storage Locker', 'Locker' means any separate or individual compartment, maintained at a temperature below ten degrees Fahrenheit, offered to the public for the storage and preservation of frozen food for human consumption, upon a rental or other basis providing compensation to the person offering such services.

"(2) 'Refrigerated Locker Plant', 'Cold Storage Locker Plant', 'Locker Plant', means any place, premises or establishment where facilities for the freezing of human food and its subsequent storage in refrigerated lockers is offered on a basis of compensation to the person offering such services."

It will be noted that the compensation for refrigerated locker plant services does not have to be upon a rental basis. Since the person of whom you speak receives 4 cents per pound for cutting, wrapping and packing meat in his refrigerated storage room in improvised containers or lockers, it is my opinion that he is engaged in the business regulated by the statute.

The fact that this particular activity is incidental to his grocery business and the fact that he does not consider that he is getting substantial compensation for this service does not alter the fact that he is being paid for furnishing refrigerated locker service and for the processing of food in connection therewith. In my opinion he is required to comply with the terms of the statute.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**RENT—Justice of the Peace has authority to issue distress warrant for rent in excess of \$1,000.00. F-381**

September 7, 1948.

HONORABLE MAJOR M. HILLARD,  
State Senator,  
Colony Theatre Building,  
Portsmouth, Virginia.

My dear Senator Hillard:

This is in reply to your letter of September 3 regarding distress warrants for rent due issued under section 5522 of the Code. You ask whether the Justice of the Peace can deliver the distress warrant to a High Constable for execution where the amount stated in the warrant is in excess of \$1,000, or whether it is mandatory that the Justice deliver the warrant to the City Sergeant to be executed.

Section 5522 of the Code reads as follows:

"Rent may be distrained for within five years from the time it becomes due, and not afterwards, whether the lease be ended or not. The distress shall be made by a constable, sheriff, or sergeant of the county or city wherein the premises yielding the rent, or some part thereof, may be, or the goods liable to distress may be found, under warrant from a justice, founded upon an affidavit of the person claiming the rent, or his agent, that the amount of money or other thing to be distrained for (to be specified in the affidavit), as he verily believes, is justly due to the claimant for rent reserved upon contract from the person of whom it is claimed."

This section makes no distinction between distress warrants of less than \$1,000 and those in excess of that sum, and I am not familiar with any other provision which makes such a distinction as to distress warrants for rent due. It is my opinion, therefore, that the warrant may be directed either to the High Constable of the City or to the City Sergeant for execution.

If you have in mind any other statutory provision bearing upon the subject which has not come to my attention, I will be glad to consider this matter further.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**RENT CONTROL—Federal Rent Control Law of 1947 Not Applicable to State Owned Property—Exceptions. F-268g**

August 17, 1948.

MR. S. K. CASSELL, *Business Manager*,  
Virginia Polytechnic Institute,  
Blacksburg, Virginia.

My dear Mr. Cassell:

This is in reply to your letter of August 10, in which you state that the Virginia Polytechnic Institute owns several houses and apartments which are rented to the staff of the Institution. You ask whether these houses and apartments are subject to Federal rent regulations.

Originally Federal rent control was exercised under the Emergency Price

Control Act of 1942. In defining the persons to whom the Act was applicable, the following language was used:

"(h) The term 'person' includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing; \* \* \* " (U. S. C. A., Tit. 50, App. §942).

In view of this definition it was held that that Act was applicable to the States and their political subdivisions. *Case v. Bowles*, 327 U. S. 92, and *City of Dallas v. Bowles*, 152 Fed. (2d) 464. This office had, therefore, advised State institutions to comply with Federal rent regulations adopted pursuant to said Act.

However, the Housing and Rent Act of 1947 provided that maximum rents should thereafter be governed by its provisions and not the provisions of the Emergency Price Control Act of 1942. The 1947 Act, in defining persons to whom the Act applied, provided simply that:

"The term 'person' includes an individual, corporation, partnership, association, or any other organized group of persons, or a legal successor or representative of any of the foregoing; \* \* \* "

It omitted the reference to governmental entities contained in the previous law. Since the language which had previously been construed as making the price control Act of 1942 applicable to States was omitted from the Housing and Rent Act of 1947, it would seem that Congress did not intend the provisions of the latter Act to apply to the States. Particularly is this true since as a general rule Acts of Congress are not construed as regulating activities of the several States in the absence of plain and unequivocal language.

Some doubt is thrown on this conclusion because of the fact that in the section of the 1947 Act forbidding the eviction of tenants except in certain cases there are several exceptions permitting States and political subdivisions thereof to evict tenants under certain conditions. It could be argued that, if States were not intended to be included, there would be no reason for providing exceptions as to them in certain cases. On the other hand, it may be that Congress intended the eviction section to apply to States, subject to the exceptions named, but did not intend other provisions of the Act to apply.

While the matter is not free from doubt, it is my opinion that, since the States are not included in the definition of the word "person" as used in the 1947 Act, the State and its agencies are not governed by the provisions of the statute, with the possible exception of the one dealing with eviction of tenants and that such agencies are free in fixing the rents to be charged for facilities owned by them.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**RETIREMENT SYSTEM—Purchase of Literary Fund notes of cities.**  
F-199**LITERARY FUND—Sale of City School Board notes to Retirement System.** F-199

March 22nd, 1949.

HONORABLE JESSE W. DILLON,  
Treasurer of Virginia,  
Richmond 15, Virginia.

Dear Mr. Dillon:

I am in receipt of your letter of March 17th, 1949.

You state in substance that the Board of Trustees of the Virginia Retirement System has tentatively agreed, pursuant to the provisions of sections 2672(20) and 643, Code of Virginia, with the State Board of Education to purchase from said Board securities and evidences of debt issued by the school board of the City of Hopewell to the State Board of Education in the amount of \$200,000. In effect the trustees propose to make available to the State Board of Education, as trustee and manager of the literary fund the amount stated and thus enable the Board to make the loan to the school board of the City of Hopewell for school construction purposes. The Trustees of the Virginia Retirement System will acquire and hold by assignment from the State Board of Education the obligations of the Hopewell school board.

You desire my opinion as to the validity of this transaction.

It is my opinion that this question was settled by the Supreme Court of Appeals in the recent case of *Almond v. Gilmer*, 188 Va., 1.

In that case our court held to be in contravention of the Constitution of Virginia those parts of the statutes under consideration which purported to authorize the State Board of Education to borrow from the Retirement Fund and channel such borrowed funds into the literary fund for the purpose of making loans to the school boards of the several counties. The basis of the decision being that the statutes were designed to authorize such transactions without approval of the qualified voters of the respective counties as required by section 115-a of the Constitution. The court reasoned that the contemplated transaction between the Retirement Board and the State Board of Education, which in effect adopted the literary fund as a mere conduit, did not impress the funds so channelled as literary funds, and thus bring them within the purview of the decision in *Board of Supervisors v. Cox*, 155 Va., 687.

An examination of the Court's opinion in *Almond v. Gilmer*, (supra) reveals with abundant clarity that the decision vitiates only those provisions of the enabling statutes which purport to authorize the Board of Trustees to use trust funds under its control to purchase long term "bonds, notes and other evidences of debt," without approval by referendum to the electors of the respective counties. The Constitutional inhibition imposed upon counties does not apply to municipalities.

In his able opinion of concurrence with the majority opinion, Mr. Chief Justice Hudgins said, at page 28:

"It will be noted that the provisions of section 115-a of the Constitution apply *only to counties, districts of the counties, and to school boards of the school districts and school boards of the counties. None of the provisions applies to municipalities.* The only constitutional limitation placed upon municipalities regarding the issue of bonds or other interest-bearing obligations, except for certain non-pertinent exceptions, is that the total amount of such indebtedness shall not exceed 18% of the assessed valuation of the real estate in the city or town subject to taxation as shown by the last preceding assessment for taxes. There being no constitutional inhibition, the legislature has power to authorize the municipal sub-divisions of the State to borrow money, within the limits stated, from the State Board of Education,

or from other parties without submitting the question to the electors of the respective municipalities for their approval." (*Italics supplied*).

Quoting again from the same source at page 31, it is said: "that those parts of the statutes involved which authorize the Board of Trustees to purchase such obligations of the school boards of the municipalities from the State Board, are valid."

Assuming that the 18% limitation prescribed by section 127 of the Constitution has been observed, I am of the opinion that the investment of trust funds held by the Virginia Retirement System in the bonds, notes or other evidences of debt of the school board of the City of Hopewell, is a valid exercise of the authority vested in the Board of Trustees by virtue of the statutes herein cited.

Very truly yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**SANITARY DISTRICTS—Governing Boards; Creation of. F-213a**  
**BOARDS OF SUPERVISORS—Creation of Governing Boards for Sanitary Districts. F-213a**

June 17, 1949.

HONORABLE W. R. BROADDUS, JR.,  
 Member of House of Delegates,  
 Martinsville, Virginia.

My dear Mr. Broaddus:

This is to acknowledge your letter of June 10, concerning the Fieldale Sanitary District of Henry County, from which I quote as follows:

" \* \* \* The citizens of that area desire to have certain ordinances passed, all of which would be appropriate and proper under Section 1560-o in my opinion. In addition, they desire to have the Board of Supervisors set up a board to be known as the Governing Board, which will be composed of citizens living in the Sanitary District who will have direct authority and control of the operation of the two plants. Under subsection g of the last above mentioned section, the Board of Supervisors is authorized to employ and fix the compensation of any technical, clerical, or other force and help which from time to time in their judgment may be deemed necessary, etc.' I, therefore, believe that the Governing Board, to be known as the Fieldale Sanitary District Board, could be created and function for the Board of Supervisors.

\* \* \* \* \*

"I would like to have your opinion as to whether or not the ordinances to be applied only to the Sanitary District would have to be passed in pursuance of Section 2743. If so, will it be necessary to publish the entire ordinance for two weeks prior to the proposal thereof, or will a notice stating that such an ordinance will be proposed and outlining in brief the purposes of the ordinance be sufficient? I am confident that if it is necessary to follow the provisions of Section 2743, the ordinance will have to be published in its entirety after its adoption."

As to your first question, I agree that the Governing Board described above could be created by the Board of Supervisors under the authority of subsection (g) of Section 1560-o. Of course, such a board's authority must be limited to the actual operation of the two plants in question and could not extend to such matters that are inherently vested in the governing body of the county.

The pertinent part of Section 2743 to which you refer provides that no ordinance or by-law " \* \* \* shall be passed until after notice of an intention to propose the same for passage shall have been published once a week for two successive weeks prior to its passage in some newspaper published in the county, and if there be none such, in some newspaper published in an adjoining county or a nearby city and having a general circulation in the county of said board, and no such ordinance or by-laws shall become effective until after it shall have been published in full force once a week for two successive weeks in a like newspaper."

It is my opinion that the above provision is applicable to all proposed ordinances, regardless of the districts or areas within the county that might be affected thereby. Also this office has previously held that a notice of the proposal of an ordinance need contain only a brief outline of its purpose and need not be published in full until it has actually been approved by the governing body of the county.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**SANITARY DISTRICTS—Severance of parts thereof. F-213a**

March 24, 1949.

HONORABLE HUGH B. MARSH,  
Commonwealth's Attorney for Fairfax County,  
Fairfax, Virginia.

My dear Mr. Marsh:

This is in reply to your letter of March 18, in which you request my opinion as to whether or not Chapter 465 of the Acts of Assembly of 1948 (Section 1560-b-1, as amended, of Michie's Code), which authorizes among other things, the severance of parts of certain sanitary districts, is applicable to Fairfax County's Sanitary District No. 3. You state that the district in question was created under the provisions of Sections 1560-m and 1560-n of Michie's Code, which sections are found as part of Chapter 460 of the Acts of Assembly of 1930, as amended.

Chapter 465 of the Acts of Assembly of 1948, under which the qualified voters of Sanitary District No. 3 wish to proceed, expressly states that its provisions apply only to sanitary districts "created under the provisions of this Act", which Act is Chapter 161 of the Acts of Assembly of 1926, as amended (Sections 1560-a—1560-1-3, inclusive, of Michie's Code).

Therefore, I concur in the conclusion reached by you that, since Sanitary District No. 3 was created under the provisions of Chapter 460 of the Acts of Assembly of 1930, as amended, the provisions of Chapter 465 of the Acts of Assembly of 1948, which amended Chapter 161 of the Acts of Assembly of 1926, are not applicable thereto.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**SCHOOLS AND SCHOOL BOARDS—Agreement with Town to Maintain School Building Where Town Owns Building lawful. F-252**

July 2, 1948.

MR. HENRY A. WISE,  
Superintendent of Schools,  
Accomac, Virginia.

Dear Mr. Wise:

The Honorable G. Tyler Miller has referred to this office your request for an opinion on whether a county can legally pay for repairs to a school building not actually owned by a County School Board. It appears in the instant case that the Onancock School is being used by Accomack County but is owned by the Town of Onancock.

I have been able to find no statute that specifically authorizes a County School Board to make repairs on a school building not owned by it, but I see no objection to the arrangement described in your letter, since it seems only equitable that a County School Board maintain buildings that are used as county schools, though title to the building is held by the town and not the School Board.

I call your attention to Chapter 335 of the Acts of Assembly of 1934 (found as section 2730c of Michie's Code of 1942) which provides in part as follows:

2. " \* \* \* Any two or more of the counties, cities and towns of this State through their respective boards of supervisors, councils or other governing bodies are hereby authorized and empowered to enter into such contracts and agreements as they may deem proper for or concerning the acquisition, construction, maintenance and operation of any project as defined in this act."

Since school buildings are included in the definition of the term "project" in the above Act, it is my opinion that the County would have the authority to enter into an agreement with the Town of Onancock and thereby pay for the repairs on the school building in question.

Very truly yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**SCHOOL AND SCHOOL BOARD—Board cannot pay Commonwealth's Attorney a fee for Conducting Condemnation suit therefor. F-203**

**COMMONWEALTH'S ATTORNEY—Cannot Contract with School Board. F-203**

January 20, 1949.

HONORABLE S. J. THOMPSON,  
Commonwealth's Attorney for Campbell County,  
Rustburg, Virginia.

My dear Mr. Thompson:

This is to acknowledge receipt of your letter of January 10, in which you requested my opinion on the following question:



"The Campbell School Board of Campbell County now finds it necessary to condemn certain land for school purposes, and the question has arisen, in view of the 1948 amendment to Section 2707 of the Code, as to whether or not said School Board can legally employ and pay the Commonwealth's Attorney as counsel in a condemnation suit, such compensation to be approved by the Court wherein such litigation is had."

This office has rendered opinions, prior to the 1948 amendment of Section 2707 of the Code, which at least indirectly declared that the payment of extra compensation to a Commonwealth's Attorney by the governing body of a county for legal services rendered outside of the official duties of his office was not prohibited by Section 2707. See Report of Attorney General, 1945-46, page 30.

However, it is my opinion that the 1948 amendment clearly prohibits the payment of extra compensation of a Commonwealth's Attorney for such legal services. The statute as amended not only mentions the office of Commonwealth's Attorney, but also contains the following provision:

" \* \* \* Provided, however, this section shall not apply to attorneys for the Commonwealth employed by the governing bodies of counties under the provisions of sections two hundred fifty-one and four hundred three of the Tax Code or section twenty-five hundred three of the Code of Virginia to collect taxes which are a lien on real estate."

This exception seems to be a clear indication that a contract for legal services is now embraced within the first part of the statute.

Therefore, since Section 2707 of the Code, as amended, also expressly prohibits the Commonwealth's Attorney from becoming interested in the profits of any contract made by or with the County School Board, it is my opinion that the School Board of Campbell County cannot legally pay the Commonwealth's Attorney for his services as counsel in a condemnation suit.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**SCHOOL AND SCHOOL BOARDS—Board may act as its own contractor—Private persons or concerns may donate services. F-203**

March 17, 1949.

HONORABLE CHARLES H. FUNK,  
Commonwealth's Attorney for Smyth County,  
Marion, Virginia.

My dear Mr. Funk:

This is in reply to your letter of March 4, from which I quote as follows:

"I have been asked to obtain a ruling from you on the following proposition:

"The Smyth County School Board proposes to build a new school building in Allison's Gap, Virginia, estimated to cost \$160,000.00. Allison's Gap is what might be known as a suburb of Saltville near the plant of the Mathieson Chemical Company. A large per cent of the patrons of the school are employees of the Mathieson Chemical Company.

"The Mathieson Chemical Company, who maintains a drafting and engineering department and men familiar with construction, has agreed to

provide certain of these services to the School Board without cost. The plans have been drafted and blueprinted by the Mathieson Chemical Company and submitted by the local School Board to the proper authorities in Richmond for approval. The Company is to furnish all necessary engineering and supervising of construction and is to purchase most of the material for the building. No compensation is to be made to the Mathieson Chemical Company for the services rendered by them. The School Board is to pay direct to the furnishers for the material purchased. All labor is to be paid direct by the School Board on warrants issued by the School Board.

"The county superintendent informed me that he felt sure several thousand dollars would be saved by the School Board that would otherwise be paid to architects and supervisors of construction. Also, that the buying power of the Mathieson Chemical Company would enable them to save considerable money over buying in the open market."

I have considered the project as outlined by you and I see no legal reason why the School Board should not take advantage of the services which the Mathieson Chemical Company offers to furnish without compensation. There is no law requiring School Boards to let such contracts after submitting the same to public bids, and it is my opinion that the Board may act as its own contractor with such assistance as you describe from the Mathieson Chemical Company if it is determined that it is to its advantage to do so. Of course, the Company should not be authorized to commit the School Board on contracts for the purchase of materials without approval from the Board on such contracts.

Since the Company is rendering the services without compensation, I do not think that it is required to be licensed as architects or contractors.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**SCHOOLS AND SCHOOL BOARDS—Board may condemn property for a central garage. F-203**

March 16, 1949.

HONORABLE G. TYLER MILLER,  
Superintendent of Public Instruction,  
Richmond 16, Virginia.

My dear Mr. Miller:

This is in reply to your letter of March 14, in which you request my opinion as to the authority of a School Board, under Section 669 of the Code, as amended, (Michie's Supp. of 1948) to condemn land for the purpose of erecting a central garage for the maintenance, repair and upkeep of county owned and operated school buses.

Section 669, as amended, specifically authorizes a School Board to condemn lands or other property "for school purposes," and it is my opinion that such language is broad enough to include the condemnation of land for the purpose described above.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General*

**SCHOOLS AND SCHOOL BOARDS—Board may secure real estate in adjoining county. F-203**

January 27, 1949.

HONORABLE B. D. PEACHY,  
Commonwealth's Attorney,  
City of Williamsburg and County of James City,  
Williamsburg, Virginia.

Dear Mr. Peachy:

This will acknowledge receipt of your letter of January 24, 1949, from which I quote as follows:

"The James City County School Board has requested me to get a ruling from you on their authority to purchase for school purposes real estate in an adjoining County. I can find nothing in the statutes prohibiting them from doing so, but I would like to have the benefit of your opinion."

I find no statute prohibiting the county school board from purchasing for school purposes real estate in an adjoining county. It will be noted that §669 of the 1942 Code provides for the condemnation of land for school purposes. This section contains no restrictions as to the location of property to be condemned. It would be most inconsistent to say that a school board is limited to the purchase of property for school purposes by county lines when it is not limited by condemnation. I am, therefore, of the opinion that a school board can purchase property in adjoining counties.

With kind regards, I am

Very truly yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**SCHOOLS AND SCHOOL BOARDS—Boards must expend funds in accordance with the limits set forth in the Budget. F-203**

March 30, 1949.

HONORABLE BOLLING LAMBETH,  
Attorney for the Commonwealth,  
Bedford County,  
Bedford, Virginia.

My dear Mr. Lambeth:

This is in reply to your letter of March 28, from which I quote as follows:

"Section 657, Code of Virginia, provides that the Division Superintendent, with the advice of the School Board, shall prepare a budget for the next scholastic year, and such estimate shall clearly show the necessary details in order that the Board of Supervisors and the taxpayers of the County may be well informed as to every item of the estimate.

\* \* \* \* \*

"I would appreciate your advice as to whether or not the School Board and the Division Superintendent are required to spend the money as budgeted, and to spend it for the purpose shown in the budget as presented to the Board of Supervisors and published prior to fixing the levy. In other words, does the law permit the School Board to spend the lump sum

allowed in the school budget for any school purpose they see fit, or is the School Board restrained and restricted to spend the money for the purposes shown in the budget."

As pointed out by you, §657 of the Virginia Code requires that the division superintendent of schools, with the advice of the school board, must prepare an estimate of the amount of money which will be needed during the next scholastic year for the support of the public schools of the particular county. This estimate must " \* \* \* clearly show all necessary details in order that the governing body and the taxpayers of the county or of the city, may be well informed as to every item of the estimate." On the basis of this estimate, the governing body of the county fixes the tax levy so as to net the money necessary for the operation of the schools.

Section 656 of the Code provides that "The school board shall have authority, and it shall be its duty \* \* \* in general, to incur costs and expenses, but only the costs and expenses of such items as are provided for in its budget without the consent of the tax levying body; \* \* \*."

In *Board of Supervisors v. County School Board*, 182 Va. 266, at page 278, the Supreme Court of Appeals had occasion to construe the above quoted portion of §656. That Court, in its opinion which incorporated the opinion of the lower court in the case, spoke as follows:

"Under this last quoted section, I am of the opinion that 'its budget' refers to the estimate submitted by the school board to the board of supervisors. If the school board wanted to expend money for purposes not set up in its estimate, then it would be required to get the consent of the tax levying body."

It is my opinion, based upon the above mentioned section of the Code, and the statement of the Court in the above styled case, that the School Board in expending funds provided for the operation of the county schools must spend money for the purposes and within the limits set up in its estimate or budget.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**SCHOOLS AND SCHOOL BOARDS—Compulsory Attendance law—compliance by sending child to school in another state. F-203**

September 15, 1948.

HONORABLE G. TYLER MILLER,  
Superintendent of Public Instruction,  
Richmond, Virginia.

My dear Mr. Miller:

This is in reply to your letter of September 14, in which you asked if children who live in Patrick County, Virginia, may attend schools in North Carolina, or whether section 683 of the Code requires them to attend school in Virginia.

Section 683, the compulsory attendance law, simply requires parents of children between the ages of seven and fifteen to send their children to a public school or to a private, denominational or parochial school, or have such children taught by a tutor or teacher of qualifications prescribed by the State Board of Education and approved by the Division Superintendent. In my opinion, this section does not require that the children be sent to school in Virginia.

In fact, the Code recognizes that children may attend even the public schools of an adjoining State, for section 693 authorizes the School Board of any county bordering on another State which grants the same privilege to the Commonwealth of Virginia to admit into its schools free of tuition persons of school age residing beyond the limits of this State but near thereto.

It is my opinion, therefore, that the compulsory attendance law is complied with when the children are sent to a public, private, denominational or parochial school in another State, and that attendance of the public schools of the adjoining State is satisfactory compliance, whether it be under a reciprocal agreement providing for free tuition or otherwise.

I recognize that this may present practical difficulty in enforcing the compulsory attendance law, because there is no method by which the Superintendent of Schools can obtain accurate attendance of the children in those cases. Section 685 of the Code, which requires that records be kept of the attendance of children and provides that such records shall be open to inspection by officers enforcing the compulsory attendance law and makes such records admissible in court, applies only to schools located in Virginia. I can only suggest that the Superintendent of Schools request the co-operation of the school authorities of the other State when the parents contend that their children are attending schools located therein.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**SCHOOLS AND SCHOOL BOARDS—Control of Proceeds From Fire Insurance. F-197**

June 27, 1949.

HONORABLE G. TYLER MILLER,  
Superintendent of Public Instruction,  
State Office Building,  
Richmond 16, Virginia.

My dear Mr. Miller:

This is in reply to your letter of June 17, with which you enclosed a copy of a letter dated June 11 written by Mr. T. D. Foster, Superintendent of Schools of Sussex County, regarding \$5500 received by the School Board as insurance upon the Yale school, which was struck by lightning in 1947 and completely destroyed.

Mr. Foster states that the School Board deposited this sum in bank on a certificate of deposit to the credit of the Court House District of Sussex County, and that the School Board intended to use it at some future time to help construct a gymnasium at Stony Creek. Mr. Foster's letter then states:

"In preparing the 1949-50 Courthouse District school budget the \$5500.00 (plus \$27.50 interest) was left on deposit and a levy of \$1.85 was requested. The member of the Board of Supervisors from Courthouse District requested and (with some implied misgivings but no dissenting votes) the other members approved a levy of 85c. The Courthouse District member stated that he wanted the School Board to transfer the \$5500.00 from the investment fund to the Courthouse District operating fund and set the levy accordingly.

"Now, I have been asked to get a ruling on the status of this \$5500.00. Is this fund under the control of the School Board or under the control of the Board of Supervisors? If it is under the control of the

School Board and the School Board does not see fit to use it for operating purposes the Courthouse District will not have sufficient funds to operate for the full 1949-50 session. The School Board may then request the Board of Supervisors for a temporary loan? In case this temporary loan is not granted could the School Board close the colored schools and stop all transportation in the Courthouse District?"

Under the provisions of Sections 676-678 of the Code all school property and the maintenance thereof is vested in the County School Board. In view of these provisions it is my opinion that the proceeds of the sale of school property or insurance funds received when such property is damaged or destroyed belong to the School Board and may be used by it for school purposes. However, if the School Board has in its possession such funds, the Board of Supervisors may properly take the same into consideration in fixing the county school budget and determining what other appropriation it should make for school purposes. Since this is so, the Board of Supervisors acted within its authority in reducing the levy proposed for the Court House District on the grounds that the School Board had available the proceeds of the insurance to assist in defraying the cost of maintaining the schools in that district.

I do not know what Mr. Foster has in mind when he states that the School Board may request the Board of Supervisors for a temporary loan. While the Board of Supervisors may, in addition to levying a tax for school purposes, make a supplemental appropriation to the School Board, I do not know of any authority for it to make a loan to the School Board as such. While the School Board may make a temporary loan from other sources, it can do so only in anticipation of the revenues for the current year.

As to closing the colored schools and stopping all transportation in the Court House District, I call your attention to Section 611 of the Code, which provides that a minimum school term of 180 school days shall be established and maintained in each county. Unless adequate provision is made to care for the school children of the Court House District in some other school of the county, it would appear to be a violation of the above Code section to close the schools in that district, particularly when funds are in fact available to maintain the required minimum term.

If provision is made to care for the pupils elsewhere, but inadequate transportation is provided, the school authorities may be prevented from enforcing the compulsory attendance law, as that does not apply to pupils who live more than a specified distance from public transportation.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**SCHOOL AND SCHOOL BOARDS—Division Superintendents—appointment of. F-258**

January 20, 1949.

HONORABLE ROBERT BOLLING LAMBETH,  
Attorney for the Commonwealth,  
Bedford, Virginia.

My dear Mr. Lambeth:

This is in reply to your letter of January 11, in which you ask whether the appointment of a division superintendent of schools must be made within sixty days prior to May 1 or whether the appointment may be made prior to

that time. You state that the reason you desire this information is that some of the citizens who are interested in the selection of the school superintendent have been informed by a member of the School Board that the appointment was made last year.

The second paragraph of Section 649, to which you refer, provides in part as follows:

"Within sixty days before May first, nineteen hundred and thirty-three and every four years thereafter there shall be appointed by the school board or boards of each school division, one division superintendent who shall be selected from a list of eligibles certified by the State Board of Education \* \* \*"

The first paragraph of this section provides that no one shall be eligible for appointment as division superintendent unless he meets the minimum requirements set up by the State Board of Education. It further provides that "in order that an applicant for the position of division superintendent may know what qualifications are required of him, the State Board of Education is hereby required to publish on the first day of February of the year in which such election is to take place, a statement showing the minimum qualifications for the position of division superintendent of schools, which statement shall be furnished to all applicants." Clearly the appointment could not be made until the minimum requirements of eligibility are established and furnished to all applicants and time given them to make their applications.

It is my opinion, therefore, that Section 649 requires the appointment to be made within the sixty day period prior to May 1 and that an appointment made prior to that time does not comply with the statute.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**SCHOOLS AND SCHOOL BOARDS—Division Superintendents; Election Of. Representation on Boards. F-201**

June 23, 1949.

HONORABLE G. TYLER MILLER,  
Superintendent of Public Instruction,  
Richmond 16, Virginia.

My dear Mr. Miller:

This is in reply to your recent letters in which you requested my opinion in regard to certain questions raised in letters received by you from Mr. Kyle T. Cox, Division Superintendent of Schools for Grayson County.

Superintendent Cox's first letter presented the following questions:

"Is the magisterial district the constitutional unit of representation on the county school board?"

"Are the school trustees elected by the School Trustee Electoral Board for the magisterial districts the only persons constitutionally authorized to vote in the election of a division superintendent of schools?"

Section 133 of the Constitution provides, among other things, that "the magisterial district shall be the basis of representation on the school board of such county or city, *unless some other basis is provided by the General Assembly.*" (Italics supplied).

Since the General Assembly has the authority to change the basis of representation as provided by the above constitutional provision and has done so, in so far as certain special town school districts are concerned, by the enactment of Section 653-a-2 of the Code, the answer to the first question set forth above must be in the negative.

Section 133 of the Constitution also provides:

"The supervision of schools in each county and city shall be vested in a school board, *to be composed of trustees to be selected in the manner* \* \* \* *provided by law.* \* \* \*

"There shall be appointed by the school board or boards of each school division, one division superintendent of schools, \* \* \*." (Italics supplied).

The General Assembly under the above constitutional authority provides by statute (Section 653-a-1 of the Code) the manner in which a school board is to be elected. Therefore, a School Trustee Electoral Board, which has authority to elect members of a county school board, except in the case of those members who represent special town school districts as provided for in Section 653-a-2 of the Code, is not a creature of the Constitution, but of the Legislature. The answer to the second question then must also be in the negative.

I quote from Superintendent Cox's second letter as follows:

"It is my hope you will request a review of the opinion in the case before the Supreme Court of Appeals of Virginia, begun in March, 1937, and decided in January, 1938, in which opinion Galax was denied a vote in the election of a division superintendent. The decision was rendered in the case of Roy E. Kyle v. J. Lee Cox.

"What has been done in the Legislature or elsewhere to nullify this decision?

"Would the General Assembly be required to provide a new plan for the election of division superintendent?"

In the case of *Kyle v. Cox*, 169 Va. 593, to which the Division Superintendent refers, the Supreme Court said at page 603:

"We have been referred to no statute and after a careful examination we have found no statute which gives the Galax school district the right to representation, participation or a vote in the meetings of the Carroll County School Board. This court has not the power of jurisdiction to grant the representatives of the Galax school district the right to vote in the meetings of the Carroll County School Board or the meetings of the Grayson board 'either or both'. The legislature has not prescribed such representation for it, and has not provided the means of representation by specifying how the representative or representatives shall be chosen, nor, if he or they could be legally chosen, how many votes he or they might have in the meetings of the boards of Carroll and Grayson 'either or both'."

The above decision was rendered on January 13, 1938. Chapter 278 of the Acts of Assembly of 1938, approved March 26, 1938, amended and reenacted Section 58 of the charter for the Town of Galax and provided that the special school district of Galax "shall be under the supervision of the division superintendent of schools of Grayson County." No legislation was enacted at that time concerning the said school district's vote or the election of a superintendent.

Chapter 28 of the Acts of Assembly of 1946 amended and reenacted Section 57 of the charter for the Town of Galax and provides:

"Said school district so created within the bounds of said corporate limits shall be called Galax School District of Carroll and Grayson Counties and shall be a separate and distinct unit within itself in so far as the



Constitution of the State of Virginia will permit, and shall be entitled to be represented by one member on the county school board of each of said counties, both of whom shall be members of the school board of the town and shall be designated by that board, and each of whom, respectively, shall be a resident of that part of the town which lies in the county on whose county school board he is designated to serve."

It can be seen, therefore, that the Town of Galax now has representation on the school boards of both Grayson and Carroll Counties and is entitled to a vote in an election of a division superintendent.

As a matter of interest, I quote from Chapter 224 of the Acts of Assembly of 1948, which added Section 60-a to the charter of Galax:

"The special town school district of Galax and Carroll County and Grayson County may, by ordinance of the town council and by and with the approval of the State Board of Education, be dissolved as a separate school district, and, upon such dissolution, said separate school district shall be and become a part of the respective county school units, and shall be managed, operated and controlled by the respective county school boards of such units. Such ordinance shall state what disposition is to be made of any balance in the school funds of the special town school district of Galax of Carroll County and Grayson County, at the time of its dissolution, and shall provide for disposition of any outstanding bonded indebtedness of such school district. Such ordinance shall also provide for the disposition of all school property, real and personal, the title to which shall remain in and be held by the school board of the special town school district of Galax of Carroll county and Grayson county until agreement has been reached on the disposition of such property and the ordinance has been approved by the State Board of Education."

In view of the above Acts, the second question set forth in Superintendent Cox's letter requires no comment.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**SCHOOLS AND SCHOOL BOARDS**—Division Superintendent of school cannot be elected clerk of the School Board. F-258

February 15, 1949.

HONORABLE ROBERT WHITEHEAD,  
Member of House of Delegates,  
Lovingston, Virginia.

My dear Mr. Whithead:

This is in reply to your letter of February 14, in which you ask whether the law permits a division superintendent of schools to be appointed and act as clerk of his school board.

You refer to the opinion rendered by the Honorable Abram P. Staples on October 11, 1934, while he was Attorney General, to Honorable Lewis Jones, Commonwealth's Attorney for Middlesex County, in which Mr. Staples stated:

"Section 655 of the Code of Virginia provides for the election by the school board of the clerk of the board upon the recommendation of the division superintendent. Under general principles I am of the opinion

that it would not be competent for the division superintendent to recommend himself for this position. If it were, he could decline to recommend any other person and practically have the power to name himself as clerk." I concur in the views expressed by Mr. Staples.  
With best wishes, I am

Very truly yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**SCHOOLS AND SCHOOL BOARDS—Elections of Superintendents; tie vote. F-258**

March 16, 1949.

HONORABLE A. LAURIE PITTS, JR.,  
Commonwealth's Attorney for Buckingham County,  
Dillwyn, Virginia.

My dear Mr. Pitts:

This is to acknowledge your letter of March 14, in which you state that you are advised that the coming election for a Superintendent of Schools will result in a tie vote of the School Board of Buckingham County.

You desire to know what procedure should be followed in the event such a situation arises, and ask specifically whether the School Board should call upon the "tie breaker" to decide the issue or certify the fact of a tie vote to the State Board of Education.

While Section 655 of the Code, as amended, (Michie's Supp. of 1948) provides for a "tie breaker" in case of a tie vote of the School Board, it also expressly provides that "nothing in this section shall apply to the election of the Division Superintendent of Schools."

Section 649 of the Code, as amended, (Michie's Supp. of 1948), which deals with the election of Division Superintendents, provides in part:

" \* \* \* In the event that the local school board fails to elect a division superintendent within the time prescribed by this section, the State Board of Education shall appoint such division superintendent."

Therefore, it is my opinion that, if the members of the School Board fail to elect a Division Superintendent within the time prescribed by law because of a tie vote or for any other reason, the State Board of Education should be notified in order that a Division Superintendent of Schools may be appointed in accordance with Section 649.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**SCHOOLS AND SCHOOL BOARDS—Fines levied against members may be paid out of public funds. F-203**

May 12, 1949.

HONORABLE JOHN T. DuVAL,  
Commonwealth's Attorney,  
Gloucester, Virginia.

Dear Mr. DuVal:

I am in receipt of your letter of May 9, 1949, requesting my opinion on the legal propriety of the payment of fines out of public funds by the School Board of Gloucester County, which fines were imposed on the 4th day of May 1949, by the United States District Court, Eastern District of Virginia, Richmond Division, in the civil action styled Alice Lorraine Ashley, an infant by A. W. Ashley, her father and next friend, et al., vs. School Board of Gloucester County, Virginia, and J. Walter Kenny, Division Superintendent.

Some days prior to the receipt of your request the Honorable George P. DeHardit, of counsel in the above styled action, discussed at length this matter with me. Mr. DeHardit took the position, supported by cogent legal reasoning, that the School Board of Gloucester County, a party defendant, as an entity sui juris, could properly discharge by payment out of public funds the total fine of \$1000.00.

The judgment of the District Court, insofar as here pertinent, is as follows:

"Superintendent and the three members of the Board, respectively, individually and in their official capacity, each fined the sum of Two Hundred Fifty (\$250.00) Dollars, making a total fine of \$1000.00, to be paid within thirty days from this date."

The School Board of Gloucester County is a body corporate and in such capacity it may sue and be sued. In the instant case it was sued in its corporate capacity and judgment has been entered against it by a court of competent jurisdiction. The fact that the judgment pro-rates the total fine among the individual Board members and the Superintendent and assesses them individually, does not affect the status of the liability of the School Board, as such. In "their official capacity" only the individual members constitute the Board. In his "official capacity" only the superintendent is the agent and servant of the Board. It was only through their official connection and identity with the Board that they were or could have been joined as party defendants.

I call your attention to section 656 and 657 of the Code of Virginia. These sections relate to the school budget and estimates which the local school authorities are required to submit to the Board of Supervisors and the authority of the school board in the discharge of its functions.

Section 656, provides, in part, as follows:

"In general, to incur costs and expenses, but only the costs and expenses of such items as are provided for in its budget without the consent of the tax levying body."

It is manifest that the item of the judgment in question was not embraced by the budget submitted as contemplated by section 657. In view of the holding in Board of Supervisors v. County School Board 182 Va., 266, I am of the opinion that the consent of the Board of Supervisors of Gloucester County for the payment of the fine out of public funds should be first obtained.

I am of the opinion that with such consent first obtained the School Board may lawfully satisfy by payment from public funds the judgment entered by the District Court on May 4th, 1949.

Very truly yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**SCHOOLS AND SCHOOL BOARDS—Funds; Use of Unexpended Balance. F-197**

June 14, 1949.

HONORABLE P. W. ACKISS,  
Commonwealth's Attorney for Princess Anne County,  
Virginia Beach, Virginia.

My dear Mr. Ackiss:

I am in receipt of your letter of June 3, from which I quote as follows:

"On June 29, 1948, a majority of the qualified voters of Kempsville Magisterial District, in Princess Anne County, Virginia, voted in favor of issuing \$325,000 in bonds in said District for the purpose of the construction of five additional classrooms, a first aid room, extension of cafeteria and additional lavatory facilities at the Bayside School, and four additional classrooms, gymnasium, extension of cafeteria and additional lavatory facilities for the Kempsville School in said District. The bonds were duly sold and funds deposited to the credit of this particular project and the School Board proceeded to carry out the wishes of the voters and complied in every detail with the construction of those buildings and facilities set out in the court order and on which the people voted.

"Due to the fact that the estimates were made on a rising market, but it turned out that most of the materials were purchased on a declining market, there is an unexpended balance from the proceeds of the sale of the bonds, of approximately \$80,000. The School Board of Princess Anne County desires to expend the unexpended balance of \$80,000 for school purposes wholly within Kempsville Magisterial District, to-wit: to begin the construction of the first wing of a new Negro high school. My question is whether or not this fund may be expended by the School Board within the Magisterial District for the construction of the first wing of a Negro high school for that district.

"If in your opinion this fund cannot be expended for the construction of a first wing of a new Negro high school, is there any way in which this fund can be loaned to the School Board pending an application for a Literary Loan for the erection of said Negro high school? The application has been on file with the proper authorities for more than a year, said application having been duly approved, but the Literary Fund not having sufficient funds could not make the grant, but it is contemplated that said grant will be made within the next year out of which the \$80,000 could be repaid, and to be used for such purposes as in your opinion said fund can be expended."

This office has previously ruled that funds obtained from a special levy for a specific purpose cannot be diverted to other uses and, in my opinion, the bond issue in question presents an analogous situation.

It certainly cannot be said that the bond issue would have been approved by the voters had it been known that a part of the fund so raised was to be used for a new wing of a high school. Therefore, I am of the opinion that the fund cannot be expended other than as specifically designated by the voters.

My opinion set forth above would be equally true as to your second suggestion concerning the disposition of the unexpended balance of the fund. Again, the voters did not approve a bond issue for the purpose of lending a part of the fund to the School Board, but approved it for the specific purpose of additional construction at the Bayside and Kempsville Schools.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**SCHOOL AND SCHOOL BOARDS—Joint School: How Funds are to be Administered. F-197**

January 24, 1949.

HONORABLE G. TYLER MILLER,  
Superintendent of Public Instruction,  
Richmond 16, Virginia.

My dear Mr. Miller:

This is in reply to your letter of January 11, regarding the handling of joint school funds when two or more counties establish joint schools under the provisions of Section 670 of the Code.

That section authorizes the local school boards, with the consent of the State Board of Education, to establish joint schools and provides that such schools shall be managed and controlled by the boards jointly in accordance with such rules and regulations as are promulgated by the State Board of Education. The rules and regulations of the State Board provide for a joint committee for control of the joint schools and that the amounts appropriated by the participating school boards "shall be made available by payment to the treasurer or finance officer, authorized by law to receive and disburse tax funds, in which such joint school is located."

The counties of Prince William, Fauquier and Fairfax have established a joint school under these rules and Mr. C. A. Sinclair, treasurer of Prince William County, in which county the school is located, has been designated to handle the funds for the joint committee of control. Mr. Sinclair has questioned whether he can be required to handle the same without additional compensation and whether the funds are covered by his official bond.

Section 700 of the Code provides that:

"All funds for school purposes in the counties, both State and local, shall be handled by the county treasurer and paid out in the same manner as other county funds are paid out by him under the provisions of section three hundred and fifty of the Tax Code of Virginia."

In view of this provision it is my opinion that all school funds, whether for operation of the school system of a single county or for the operation of a jointly owned school, must be held and paid out by the county treasurer in his official capacity as such. In the case of a school operated by two or more counties the joint funds should be handled by the treasurer of one or the other of the participating counties and, in my opinion, the State Board of Education acted reasonably in designating the treasurer of the county in which the joint school is located as the treasurer to handle the funds for the operation of that school. Having authority to adopt rules and regulations for the management of joint schools, the Board had authority to adopt the regulation.

Since the counties had authority to agree to operate the school jointly, the funds for the operation of the same are clearly official funds covered by the bond of the treasurer designated to handle the same and are such funds for which the banks in which they are deposited may be required to put up collateral in escrow under the provisions of Section 350 of the Tax Code. I agree with Mr. Sinclair that all public funds are required by statute to be deposited by the treasurer of a county in the name of his county. For this reason I think that the funds received for the operation of a joint school, when made available by the other participating counties to the treasurer of the county in which the school is located, should be deposited in the name of his county rather than in his name as treasurer for the regional school. The funds can then be paid out by him on warrants issued by the joint committee for control as provided by the rules of the State Board of Education.

Since county treasurers are required by law to handle school funds as a part of their regular duties, and, as indicated above, the State Board of Educa-

tion may properly say that funds for a joint school should be handled by the treasurer of the county where the school is located, I do not think that the joint committee for control can pay the treasurer additional compensation for handling the funds. The additional work and duties incident to the handling of such funds would simply be a matter for consideration by The Compensation Board in fixing the regular salary of the treasurer.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**SCHOOLS AND SCHOOL BOARDS**—Levy may be made to take care of anticipated deficit—Special tax may be levied for reserve construction fund. F-203

February 10, 1949.

HONORABLE PHILIP P. BURKS,  
Treasurer of Bedford County,  
Bedford, Virginia.

My dear Mr. Burks:

This is in reply to your letter of February 8, in which you ask certain questions concerning county school fiscal matters.

You state that it is anticipated that the Bedford County School Board will have to borrow some money with which to pay operating expenses at the close of the current fiscal year. You ask whether, if the amount of the anticipated deficit at the close of the current fiscal year is included in the county school board operating fund budget which is now being prepared for the next fiscal year, the Board of Supervisors may properly raise the county school operating fund levy to meet the said county school board operating fund budget.

Under Section 675 county school boards may make temporary loans, repayable within one year, in an amount not to exceed in the aggregate one-half of the amount produced by the school levy for the year in which the amount is borrowed. The approval of the tax levying body must be secured before such loan is negotiated. Both this section and section 656 provide that no school board shall expend, or contract to expend, in any fiscal year any sum in excess of funds available for school purposes for that fiscal year and provided for in its budget without first securing the approval of the tax levying body. I assume that the expenses which will result in the deficit have been or will be approved by the Board of Supervisors and that that Board will approve the negotiation of the temporary loan to secure funds to meet such expenses. If this be so and an item is included in the budget for the coming fiscal year for the repayment of the loan, the Board of Supervisors may properly fix the county school operating levy to meet the school board operating budget including such item.

Secondly, you ask, if the Board of Supervisors finds that there will be a balance in the county general fund at June 30, 1949, is the Board of Supervisors authorized to set up between now and June 30, 1949, a reserve or sinking fund for suggested future capital outlays for schools. You also ask if the Board of Supervisors is authorized to levy, in the year 1949, a special tax for school purposes and place the proceeds in a sinking fund to help meet capital outlays for schools in future years when the school board actually begins construction.

This office has previously ruled that the Board of Supervisors may appropriate funds or levy a special tax for the purpose of accumulating a reserve fund to be used for the construction of school buildings at a future time. I think, therefore, that both of the above questions should be answered in the affirmative. The county school budget is made up annually and, if it is desired to add

to this building fund each year, the item therefor should be included in each budget. I call your attention to section 698, under which the rate of a special county tax for capital expenditures is limited to one dollar and fifty cents on the one hundred dollars of assessed value.

You also ask if we have any prepared outline of the procedure to be followed for the issuance of bonds by county school boards. I am sorry that we do not have such an outline. I suggest that you consult the Commonwealth's Attorney for advice as to the required statutory procedure.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**SCHOOLS AND SCHOOL BOARDS—Levy to repay Literary Fund Loan must be a County wide levy, not a district levy. F-197**

May 18, 1949.

HONORABLE R. E. BOUCHER,  
Commonwealth's Attorney for Washington County,  
Abingdon, Virginia.

My dear Mr. Boucher:

This is in reply to your letter of May 7, in which you request my opinion as to whether a levy to repay a loan from the Literary Fund must be a county levy or whether it may be a levy only in the district in which the school building for which the loan was made is constructed.

I am enclosing a copy of an opinion rendered by this office on June 10, 1948, to the Honorable William Archer Royall, Commonwealth's Attorney of Tazewell County, which deals with this question. As you will see from this opinion and the cases cited therein, this question is not free from doubt. While it may be that the Board of Supervisors has the discretion to limit the levy to the particular district, it would seem the better practice to make the levy countywide.

The loan is a county obligation and is incurred by the school board representing the county at large. It could well be held that there is a distinction between an obligation of that character and a bond issue which has been approved by the voters of a particular district. In the latter cases, by approving the loan, the voters of the particular district would be agreeing to a district levy, while in the case of a Literary Fund loan the voters of the district do not approve the loan and the levy is imposed by supervisors elected from the county at large. Moreover, the use of the school may not be limited to those students residing in a particular district.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**SCHOOLS AND SCHOOL BOARDS—Member Of Electoral Board Serving On. F-249**  
**PUBLIC OFFICIALS—Compatibility Of. F-249**

June 21, 1949.

HONORABLE G. TYLER MILLER,  
Superintendent of Public Instruction,  
State Board of Education,  
Richmond 16, Virginia.

My dear Mr. Miller:

This will acknowledge receipt of your letter of June 17, 1949, enclosing a copy of a letter under date of June 16, 1949, to you from Mr. R. Douglas Ninninger, Division Superintendent of Schools, from which I quote in full as follows:

"I am writing to ask for a clarification of Section 644, Virginia School Laws, as to the eligibility of a Virginia division school board member under the following conditions:

"A Roanoke County School Board member has recently been appointed and has qualified as a member of the Roanoke County Electoral Board. This is the group which appoints election judges, etc., not the School Trustee Electoral Board.

"Does such a position disqualify him from service on the School Board? If so, would his resignation from the Electoral Board restore his legal position on the School Board without new action by the School Trustee Electoral Board?"

Section 644(1) of the Code (Michie, 1942) provides that "No state or county officer \* \* \* shall be chosen or allowed to act as a member of a county school board \* \* \*." Pursuant to this provision, this office has frequently expressed the opinion that various State and county officers may not be members of county school boards. The quoted language unquestionably covers a member of the county electoral board.

This office has also ruled that, in cases such as this, where a person who accepts and qualifies for a second and incompatible office is generally held to vacate, or by implication resign the first office. Therefore, if this party wishes to be a member of the School Board, he should resign from the Electoral Board, and then be reappointed by the School Electoral Board.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**SCHOOLS AND SCHOOL BOARDS—Members of Town Board must qualify before clerk. F-203**

March 14, 1949.

HONORABLE EDWARD McC. WILLIAMS,  
Commonwealth's Attorney for Clarke County,  
Berryville, Virginia.

My dear Mr. Williams:

This is in reply to your letter of March 10, in which you request my opinion as to whether or not a certain member of the County School Board has been duly



qualified as such. You state that he has been appointed one of three members of a separate school district for the Town of Berryville, and that the records of the Clerk's office show his qualification as member of the Town School Board, but there is no record in the Clerk's office to indicate that the person in question has qualified as a member of the County School Board.

Section 653-a2 of the Code authorizes the establishment of separate school districts for certain towns and the appointment of a Town School Board of three members by the Town Council. It further provides that when such separate school district is established one of the members of the Town School Board shall be designated by that Board as a member of the County School Board and entitled to serve as a member of the County Board. Section 653-a1 of the Code, dealing with County School Boards, provides that "all of such school trustees shall qualify before the County Clerk by taking the oath prescribed for State officers."

It is my opinion, therefore, that the person designated by the Town School Board to serve as a member of the County School Board should also qualify before the Clerk as a member of the County School Board. He, in effect, holds two offices and should qualify for both.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**SCHOOLS, SCHOOL BOARDS—Nepotism: wife of the Division Superintendent of Schools cannot be employed by Board. F-188**

September 13, 1948.

MR. H. M. PAINTER, *Superintendent*,  
Botetourt County Public Schools,  
Fincastle, Virginia.

Dear Mr. Painter:

I am in receipt of your letter of September 9th, 1948, from which I quote as follows:

"The purport of this letter is to obtain your opinion relative to the employment of two teachers, presumably affected by the Nepotism Law. One teacher, a college graduate, and who is closely related to the division superintendent, has been employed for the current session. She is a teacher by profession, and entered her profession in another state before marriage to the superintendent. After moving to this state she has from time to time done substitute work or has taught regularly. During the interim from the time of her coming to this state and until after her husband became division superintendent, she was forced to discontinue her teaching because two children were born into the home. Since the children have become older, and in order to meet an emergency, and in order to pursue her original profession, she has taught in the vicinity of her home.

"Will you therefore, please let me have your opinion (1) on the above described case and (2) whether or not a teacher related to the superintendent or a member of the school board may be employed temporarily in order to meet the existing emergency."

The pertinent provisions of Section 660 of the Code of Virginia, are as follows:

"It shall be lawful for the School board \* \* \* to employ or pay any teacher \* \* \* from the public funds if said teacher \* \* \* is the father, mother, brother, sister, wife, son, daughter, son-in-law, or daughter-in-law, sister-in-law, or brother-in-law of the Superintendent, or of any member of the school board. Provided, however, that this provision shall not apply to any such relative employed by any school board at any time prior to the effective date of this act, and provided, further, that this provision shall not apply to any person within such relationship or relationships who has been regularly employed by any school board prior to the taking of office of any member of such board, or division superintendent of schools."

Relative to the teacher, who is the wife of the Superintendent, I assume from your statement that she had never been employed by any school board in this State prior to the time her husband became Division Superintendent. If this be true, I am of the opinion that said teacher cannot lawfully be employed even though she was employed as a teacher in another state prior to the taking of office by the Superintendent. The spirit and purpose of the Act prohibits the making of a contract with a teacher for the first time when such teacher is related to the superintendent or a member of the School Board.

The Act does not apply to any such relative who was employed by the School Board prior to the effective date of the Act. The Act became effective in June 1938.

Relative to the emergency phase of your problem, the statute provides that, "where a teacher holding a certificate in force is not available, a former teacher holding an expired certificate may be employed temporarily as a substitute teacher to meet an emergency." This language was added to the statute by the amendment of 1940. The Legislature might have made an exception for relations in cases of emergency. It did not.

I am of the opinion, therefore, that a teacher within the degrees of relationship specified in the statute, cannot lawfully be employed temporarily to meet an emergency, even though the teacher be a former teacher holding an expired certificate and no teacher holding a certificate in force is available.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

#### **SCHOOLS AND SCHOOL BOARDS—No authority in Board for defending tort action against School Principal F-203**

May 6, 1949.

HONORABLE WILLIAM R. BLANDFORD,  
Attorney for the Commonwealth,  
Powhatan, Virginia.

My dear Mr. Blandford:

This is in reply to your letter of April 27 in which you state that recently one of the students in Powhatan High School was punished by the principal of the school and action for civil damages has been brought against the principal by the mother on behalf of the child. You ask whether the school board may pay the fee of the attorney for representing the principal should the judgment of the court be that the principal was acting within the scope of his authority.

The school board is not legally responsible for the torts of the teachers employed in the school and would have no authority to pay any judgment rendered against such teachers for their tortuous conduct. Since this is so, it is my opinion that they would not have any authority to employ counsel to represent the teacher in a civil suit to secure a personal judgment against the teacher.

It may be that the court will hold the principal not liable because of the fact that he acted within the scope of his authority. This, however, is simply a matter for the defense of the individual to the personal action brought against him and the fact that he may prove successful in this contention would not authorize the school board in paying his attorney's fee.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**SCHOOLS AND SCHOOL BOARDS—Only School Board can expend county funds for school construction. F-252**

April 29, 1949.

HONORABLE A. R. SINGLETON,  
Member of House of Delegates,  
Haysi, Virginia.

My dear Mr. Singleton:

This is in reply to your letter of April 27, from which I quote as follows:

"At the last meeting of our Board of Supervisors, an order was issued to the effect that \$65,000 was allocated for the purpose of erecting a school building at Haysi, Virginia. Due to the fact that we feel that \$65,000 would not build the building if it is to be built according to the State specifications, the Board is willing to turn this money over to a committee to do this building and the money will not be put in the hands of the School Board. The building is to be built on the School Board's property and since the building we have at the present time is in such a poor condition, there is no question that the schools will not welcome the opportunity to use the building after it is completed.

"Since there is some question as to whether this is legal for the Board of Supervisors to allocate this money without going through the hands of the School Board, I will appreciate it if you will advise me in this matter." Section 671 of the Code reads in part as follows:

"No public school house shall be contracted for, erected, or added to, until the plans and specifications therefor shall have been submitted to and approved in writing by the division superintendent of schools and the plans and specifications for said building or any addition have been approved by the Superintendent of Public Instruction. \* \* \*"

This section then prescribes certain minimum standards for the construction of school buildings. In view of this section, it is my opinion that the construction of a building admittedly for school purposes on property owned by the School Board would not be legal unless it is built according to the specifications set forth in this section and unless the plans and specifications have been submitted to and approved by the Superintendent of Public Instruction. I do not think that the requirements of this section can be avoided simply by having the money expended by some agency other than the School Board itself. For this reason I do not think that the proposal contained in your letter would be in compliance with the statute.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**SCHOOLS AND SCHOOL BOARDS: No authority to secure opinion of voters by referendum on questions of number of schools desired. F-203**  
September 8, 1948.

HONORABLE G. TYLER MILLER,  
Superintendent of Public Instruction,  
Richmond 16, Virginia.

My dear Mr. Miller:

This is in reply to your letter of August 30, in which you state that Mr. O. L. Emerick, Division Superintendent, has written that the School Board of Loudoun County has decided that it wishes to secure the opinion of the voters by some form of referendum on the definite question of whether they favor one or two high schools. He desires my opinion on whether it would be legal to have such a question voted upon at a special or regular election upon petition of the School Board and order of Court. It is further stated that the Board does not contemplate including any reference to the issuance of bonds in this referendum.

While section 131 of the Code provides that election officials shall render service in the matter of votes ordered for public school purposes, I have been able to find no statute that provides for the referendum described above.

Therefore, it is my opinion that the School Board has no authority to obtain the opinion of the voters by the method contemplated by it.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**SCHOOLS AND SCHOOL BOARDS—Payment for Option to Purchase Land only Permissible when Approved by Board of Supervisors. F-197**  
October 8, 1948.

HONORABLE G. TYLER MILLER,  
Superintendent of Public Instruction,  
Richmond 16, Virginia.

My dear Mr. Miller:

This is in reply to your letter of September 4, in which you ask whether a school board has authority to pay for an option on the purchase of land out of school funds at its disposal when it is possible that the purchase may not be consummated because of future developments, such as the failure to carry an election for a bond issue.

If it is deemed of sufficient importance to tie up the particular land in which the school board is interested pending the outcome of the election on the question of a bond issue, I think that the expenditure of funds for this purpose would be legally permissible even though the purchase may not be consummated. Whether the expenditure of funds for that purpose is justified when it is possible that the purchase may not be completed is simply a matter for the school board to determine as a matter of business policy.

Of course, you are aware that under Section 656 of the Code a school board may incur costs for only such items as are provided for in its budget unless the consent of the tax levying body is secured. In the case in question the budget of the school board contains an item of \$1000.00 for the "Purchase of Land." The option will cost \$500. The securing of an option is often a necessary preliminary step to the purchase of land and I think that under normal circumstances an appropriation for the purchase of land would authorize the expenditure of funds for an option. However, since it may prove impossible for the school board to

complete the purchase of the land, a question might be raised in this case. For this reason it might be desirable to secure the approval of the Board of Supervisors before making the expenditure in question.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**SCHOOLS AND SCHOOL BOARDS—Plan adopted by State Board of Education to distribute Minimum Education Program Fund is Lawful.**  
F-228

May 11, 1949.

HONORABLE G. TYLER MILLER,  
Superintendent of Public Instruction,  
Richmond 16, Virginia.

My dear Mr. Miller:

This is in reply to your letter of May 9, in which you request my opinion as to whether the procedures followed by the State Board of Education in distributing the Minimum Education Program Fund for 1946-47 and 1947-48 were in accordance with the provisions set forth in the Appropriation Acts of 1946 and 1947, respectively. You state that the procedures used by the Board in distributing this fund were as follows:

"(1) The Minimum Education Program Fund was not interpreted to be an equalization fund as such, but merely as a fund to assist eligible counties and cities in providing for a minimum program of education. This minimum program was defined in the 1946 Appropriation Act as the State average expenditure per pupil in average daily attendance for the preceding school year. However, this amount was limited to \$100 per pupil in average daily attendance through a change made at the Special Session of the General Assembly.

"(2) According to our interpretation, the local contribution toward the operation of schools was determined by subtracting all State funds (except those which might be provided, specifically from the Minimum Education Program Fund) from total expenditures for all school operations (excluding capital outlay and debt service). This difference was considered to be the amount received from 'local sources for school operations.'

"(3) The total amount from local sources for school operation, as determined by the procedure described in paragraph (2) above, was divided by the total true valuation of locally taxable wealth for the county or city as certified by the State Department of Taxation. This was done in order to determine whether or not 'an amount equivalent to a tax levy of seventy cents (70c) per one hundred dollars (\$100.00) of true valuation of locally taxable wealth' was provided from local sources which was one of the conditions required by law for a county or city to be eligible for aid from this fund.

"(4) Even though a county or city provided 'an amount equivalent to a tax levy of seventy cents (70c) per one hundred dollars (\$100.00) of true valuation of locally taxable wealth,' it was not approved as eligible for an allotment from the Minimum Education Program if funds available from both local sources and other State funds were sufficient to provide for an average expenditure per pupil for school operations in excess of the State average expenditure per pupil in average daily attendance or in excess of \$100 per pupil in A. D. A. (the limit of \$100 per pupil in A. D. A. having been fixed in the revision of the plan by the General Assembly in 1947)."

The pertinent part of Item 2½ of Chapter 1 of the Acts of the General Assembly, Extra Session of 1947, the Act appropriating certain funds for school purposes, reads as follows:

"Maintenance of minimum educational program—\$114,000 the first year, and \$175,000 the second year.

"When any county or city has projected a well planned educational program in the opinion of the State Board of Education and has raised from local sources for school operation, exclusive of capital outlay and debt service, an amount equivalent to a tax levy of seventy cents (70c) per one hundred dollars (\$100) of true valuation of local taxable wealth within such county or city, as determined by the State Department of Taxation, and is still unable, with other appropriations available under Items 112¼, 112½, and 112¾ of the Appropriation Act of the Assembly, 1946, Chapter 388, pages 812, 813, and 814, and under Item 2¼ hereof, to provide a minimum educational program of not less than the State average expenditure per child in average daily attendance for the preceding school year, or not to exceed \$100 per child in such average daily attendance, it shall be eligible in the discretion of the State Board of Education to receive additional State funds so as to provide sufficient moneys to enable the school authorities of such county or city to operate a minimum educational program as defined herein; \* \* \*."

The corresponding provision of the Appropriation Act of 1946 was similar to that quoted above except that it did not contain the provision with respect to the limit of \$100 per child in average daily attendance, this provision being added by the 1947 enactment.

The procedure outlined by you appears to be a direct compliance with the provision quoted above and, in my opinion, was a legal method of distributing the Minimum Education Program Fund.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**SCHOOLS AND SCHOOL BOARDS—Public funds cannot be used to subsidize private school bus routes. F-201**

April 18, 1949.

HONORABLE ROBERT BOLLING LAMBETH,  
Attorney for the Commonwealth,  
Bedford, Virginia.

My dear Mr. Lambeth:

This is in reply to your letter of April 8, in which you quote from the minute book of the Bedford County School Board concerning the purchase of a school bus and ask my opinion as to whether it is lawful for the School Board to subsidize private school bus routes.

While the minutes to which you refer are not entirely clear to me, it appears that the School Board paid a certain motor company from public school funds the exact purchase price of a school bus that had been purchased by a school bus driver and has made arrangements by which a certain amount of the school bus driver's monthly salary will be deducted in order to reimburse the School Board for the expense so incurred.

While a School Board has authority under section 656 of the Code to provide transportation for its pupils, the method of providing such transportation cannot, of course, be in violation of the general laws or the Constitution of the

State. For example, section 185 of the Constitution provides, among other things, that the credit of a county shall not be "directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation."

Assuming that the bus driver has legal title to the school bus, I concur with your conclusion that the aforesaid transaction is not within the law, for, in my opinion, it clearly violates section 185 of the Constitution. Therefore, my conclusion is that local School Boards cannot subsidize private school bus routes in the above manner.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**SCHOOLS AND SCHOOL BOARDS—Religious Education can be lawfully Taught Therein. F-228**

July 9, 1948.

HONORABLE G. TYLER MILLER,  
Superintendent of Public Instruction,  
State Board of Education,  
Richmond, Virginia.

My dear Mr. Miller:

This is in reply to your letter of June 30 in which you ask me to review certain plans for religious education in the public schools of Virginia as suggested by The Virginia Council of Churches, copies of which plans were enclosed in your letter. Your letter was also accompanied by a summary of replies to your questionnaire to Division Superintendents on the part played by the school authorities in weekday religious education classes.

In a letter from this office on April 12, 1948, the view was expressed that " \* \* \* the mere use of the public school building during regular school hours for non-sectarian non-compulsory religious instruction, under a 'released time' plan divorced from the type of school supervision criticized in the *Champaign Case*, would not be forbidden by the McCollum decision \* \* \*". The question presented by the three plans suggested by the Virginia Council of Churches is whether the elements of school supervision and compulsion are in fact removed.

The summary of replies to your questionnaire on the operation of weekday religious education in Virginia public schools in the past reveals certain responsibilities retained by the school authorities. It appears that, in the great majority of cases, the school authorities were responsible for the failure of the child to report to the religious education class, and were likewise responsible for the discipline of the child should he misbehave in class beyond the authority of the religious education teacher to control him. I have grave doubts as to the constitutionality of any plan operating in such a fashion.

However, it appears that the suggested plans of the Virginia Council of Churches contemplate that the school have no control, supervision or responsibility over the religious education classes. I quote below the pertinent part of Plan Number II enclosed in your letter.

" \* \* \* in situations in the state where a group of competent and responsible parents shall petition a county or city school board to release pupils of the elementary grades for non-compulsory, non-sectarian religious instruction for a period of one hour each week, the State Board of Education sanctions such an arrangement, providing that parent or guardian shall sign an appropriate request for such release and providing that parents in the

local community shall be responsible for securing these signed requests outside of the public school and providing that the school board granting such release and the parents to whom the pupils are to be released and such religious instructors as these parents may employ, shall understand and recognize that all classes in religious and moral instruction shall be operated independently of the control, supervision or responsibility of the public schools and providing further that no public funds may be used."

This plan states that the public school authorities shall have no control, supervision or responsibility over the classes in religious education. So long as the plan operates in this manner, it is my opinion that it is constitutionally unobjectionable.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**SCHOOLS AND SCHOOL BOARDS—State Board has no authority to establish a school division comprising a town. F-228**

March 23, 1949.

HONORABLE G. TYLER MILLER,  
Superintendent of Public Instruction,  
State Board of Education,  
Richmond, Virginia.

My dear Mr. Miller:

This is to acknowledge your letter of March 18, in which you enclosed a resolution passed by the Town Council of Cape Charles requesting that the schools of the town be removed from the jurisdiction of the school division of Northampton County and also from the jurisdiction of the Division Superintendent of that County and placed under the jurisdiction and supervision of a Superintendent of Schools appointed by and for the Town of Cape Charles, since its charter provides for a separate school district and authorizes the Council to organize and maintain its schools.

You wish my opinion as to whether or not the State Board of Education has the authority to establish the Town of Cape Charles as a separate school division in view of the limitation of the authority of the Board as set forth in Section 132 of the Constitution of Virginia.

As you pointed out, the pertinent part of Section 132 of the Constitution reads as follows:

"Powers and duties of State Board of Education.—The duties and powers of the State Board of Education shall be as follows:

"First. It shall divide the State into appropriate school divisions, comprising not less than one county or city each, but no county or city shall be divided in the formation of such divisions."

In the light of the above constitutional provision it is clear, in my opinion, that the State Board of Education has no authority to grant the request of the Town Council in this matter.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*



**SCHOOLS AND SCHOOL BOARDS—Teachers Scholarship Plan; State Board of Education may extend time for repayment of loans. Postponement of teaching service can be authorized.—F-188**

March 2, 1949.

HONORABLE G. TYLER MILLER,  
Superintendent of Public Instruction,  
State Board of Education,  
Richmond, Virginia.

My dear Mr. Miller:

This is in reply to your letter of February 25, concerning the administration of the teachers scholarship plan for which appropriations were made by the General Assembly at the Special Session in 1947 and at the Regular Session in 1948.

You point out that the scholarship law, as modified during the 1948 General Assembly, dealing with the payment of uncanceled loans, provided that "for extenuating circumstances the State Board of Education may in its discretion extend the time of repayment." There was no similar authorization of discretionary powers in the original law of 1947 and you desire my opinion as to whether or not the State Board of Education may exercise such discretionary powers for those teachers who received scholarships under the provisions of the Appropriation Act of 1947 and also approve postponement of the teaching service for those teachers.

Section 1 of Item 7 of the Appropriation Act of 1947, which deals with scholarships for senior and junior college students, provides that any amount uncanceled by teaching service shall be repaid in full, with interest, within a period of four years, while Section 2 of Item 7, which deals with summer school scholarships, does not provide a definite period for repayment of the amount uncanceled by teaching service.

Under both of the above sections, however, it would be simply a matter of collecting a debt of the Commonwealth. In my opinion, the State Board of Education could delay taking action to recover the debt when good reasons for not requiring immediate payment exist. A prime consideration in this connection is that the purpose of providing the scholarships was to secure the teaching services of the persons to whom the same were granted and not simply to make a loan to them to help them secure an education. If teaching service could be secured, though at a later date, by delaying the collection of the debt, the purpose of the legislation would be better carried out. This view is supported by the policy expressly announced in the 1948 Appropriation Act. Of course, the difficulty of making actual collection if action is postponed too long should always be considered.

Turning now to your second inquiry, the Act under consideration requires the student to agree to teach in a public school immediately upon graduation or upon completion of his summer school course. Therefore, you, in effect, ask whether or not the State Board of Education may, in its discretion, modify a scholarship agreement by approving a postponement of the teaching service.

I am of the opinion that there could be instances when the Board might properly authorize the postponement of the teaching service, bearing in mind the purpose of the Act, which has been discussed above.

Without attempting to define the limits of the Board's discretion in this matter, I will state, for an example, that, if there are no teaching assignments available at the time the recipient of the scholarship graduates, or the person in question perhaps is not suitable for the particular assignment, or possibly would be better suited upon completion of a graduate course, it is my opinion that he should be allowed to cancel the amount of his scholarship by teaching at a later date. On the other hand, if the recipient desires to enter graduate school or pursue some other field of endeavor for his own personal reasons, it is my opinion that in order to carry out the intent of the Act he should be required to

teach or repay the amount in accordance with Sections 1 and 2. This would certainly be true where there is a pressing need for the filling of a teaching assignment, since the appropriation was made to meet just such a situation.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**SENTENCES AND PUNISHMENT—Pre-sentence investigation proper when court could impose sentence of twenty years for two offenses. F-75b**

April 27, 1949.

HONORABLE E. HUGH SMITH,  
Judge, Twelfth Judicial Circuit,  
Heathsville, Virginia.

My dear Judge Smith:

This is in reply to your letter of April 25, in which you ask if the provision of Section 53-278.1 of the reorganization provisions of the new Code should be applied in a case where the defendant pleads guilty at one time to two indictments charging housebreaking with intent to commit larceny, in which the Circuit Court could impose a maximum sentence of twenty years for the two offenses.

I agree with you that, while a strict construction of the language of said section would limit its application to cases where a defendant could be sentenced for more than ten years for a single felony, it is a remedial statute and a liberal construction would make it applicable in any case whenever a court may at one time sentence an accused either for a felony or for more than one felony to a total term of confinement of more than ten years in the penitentiary either when he pleads guilty or pleads not guilty and is tried by the court. It may be held that the statute would not be mandatory in such a case as it is in a case where he may be sentenced for more than ten years for a single offense. I certainly think that it would be in line with the purpose of the statute to have a pre-sentence investigation by a probation officer in the type of case you present and that the better procedure would be to have such investigations in those cases.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**SERGEANTS AND CONSTABLES—May execute warrants directed to other officers. F-381**

November 3, 1948.

HONORABLE WILLIAM D. PRINCE,  
Trial Justice for Sussex County,  
Stony Creek, Virginia.

My dear Mr. Prince:

This is in reply to your letter in which you ask:

“Does the law permit county officers and town sergeants to serve civil

warrants (or processes) in the county for which they are appointed and towns for which sergeants are appointed?"

Section 6055 provides that process from any court may be directed to the sheriff or sergeant of any county or city. It is my opinion, therefore, that civil process should be directed to these officers and not to other county officers or to town sergeants. The process, itself, may be valid though not served by the sheriff of the county. I call your attention to the fact that Section 6055 further provides that, if the process "appear to be duly served and good in other respects, it shall be deemed valid although not directed to any officer, or if directed to an officer, though executed by some other person." The validity of the process in such case would be a matter for determination under the facts of the individual case.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**SHERIFFS—Arrests without warrants—Applicability of Sec. 4827a. F-136**  
**ARRESTS—By sheriffs without warrants. F-136**

March 22, 1949.

MR. W. PAT JENNINGS,  
Sheriff of Smyth County,  
Marion, Virginia.

My dear Mr. Jennings:

This is in reply to your letter of March 17, in which you ask if Section 4827a of the Code of Virginia applies to county sheriffs. This section reads in part as follows:

"(a) Members of the State police force of the Commonwealth, in uniform and displaying a badge of office, may, at the scene, upon reasonable grounds, based upon personal investigation, including statements of eye-witnesses, to believe that a crime has been committed by a person then and there present, apprehend such person without a warrant of arrest; and such officers may apprehend without warrant, persons charged with crime, upon receipt of a telegram or radio teletype message from an officer authorized to make arrests, in which telegram or teletype shall be given the name, or a reasonably accurate description, of the person wanted, the crime charged, with an allegation that the person wanted is thought to be fleeing or is likely to flee the jurisdiction of the courts of the State."

As you will see, this section applies specifically to members of the State police force of the Commonwealth and authorizes them to make arrests without a warrant in certain cases. It does not include sheriffs and, in my opinion, does not apply to them.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**SHERIFFS—Employees of not Subject to Jurisdiction of the Board of Supervisors. F-136**  
**BOARD OF SUPERVISORS—Has no authority to prescribe how Sheriff is to work his jailors. F-136**

January 27, 1949.

HONORABLE R. B. CURTIS, *Sheriff*,  
 County of Warwick,  
 Denbigh, Virginia.

Dear Mr. Curtis:

This will acknowledge your letter of January 21, 1949, from which I quote in full:

.. "At a recent meeting of the Board of Supervisors of Warwick County they issued an order in the form of a letter to me, directing me to work my three jailors in three eight hour shifts. I resent such an order, as my men and I have worked out our own schedule which adds to the efficiency of my office instead of retarding it. I do not believe the Board has any such authority under the law, and I will be very grateful for an opinion on same."

I am of the opinion that the Board of Supervisors do not have the authority to order you to work your jailors in three eight-hour shifts.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**SHERIFFS—Expenses to be determined by Compensation Board. F-385**  
 April 1, 1949.

HONORABLE S. PAGE HIGGINBOTHAM,  
 Attorney for the Commonwealth,  
 Orange, Virginia.

My dear Mr. Higginbotham:

This is in reply to your letter of March 22, from which I quote as follows:

"The Board of Supervisors of this County for some time has been providing short wave police radios for the sheriff's 2 cars and also a radio for the sheriff's office. The upkeep of these radios is considerable and the Board of Supervisors is of the opinion that Section 3487(4 and 6) of the Code requires the Commonwealth to bear its proportionate cost.

"I have been in communication with J. Gordon Bennett, Auditor, and also with the Compensation Board, requesting that this expense be allowed and that the Commonwealth pay its share of this cost. This they have refused to do, and, therefore, I am asking your office for a ruling on this question. \* \* \*

Section 4 of Chapter 386 of the Acts of Assembly of 1942, as amended, (Section 3487(4) of Michie's Code) requires sheriffs to keep an account of all expenses incurred by them and submit a statement thereof to the Compensation Board. If the Board finds that the annual allowance made to such officer is less than necessary to defray the *proper* expenses of the office, the annual allowance may be increased. Section 6 of the Act provides that the Commonwealth shall pay two-thirds of the expense allowances of such sheriffs.

Neither of these sections requires the Commonwealth to pay the two-thirds of the actual expenses incurred. They only require the State to pay two-thirds of the expenses properly allowed. They do not vest in the sheriff or the Board of Supervisors the power to determine what are the proper expenses of the sheriff's office. This matter is governed by Section 2 of the Act, which provides that the expenses of sheriffs shall be fixed by the Compensation Board in like manner as is provided for the fixing of the expenses of treasurers and other officers under Sections 10-12a of Chapter 364 of the Acts of 1934 (Michie's Code, Sections 3477-i-3477-1).

An examination of these last mentioned provisions shows that these officers are required to submit requests to the Compensation Board for the allowance of expenses for their offices, itemizing each item for which allowance is sought. The Board is then required to ascertain all facts relevant to the determination of the proper allowance to be made with respect to the expenses of their offices and to fix and determine such expense allowance accordingly. It seems clear, therefore, that the question of what are proper expenses is a matter for determination by the Compensation Board and not by the sheriff or the Board of Supervisors, and that there is no obligation on the part of the State to contribute to expenses incurred by the sheriff on authorization from the Board of Supervisors without approval from the Compensation Board.

I call your attention to Chapter 11 of the Acts of Assembly, Extra Session 1936-1937 (Section 2991-b of Michie's Code) under which the Governor was authorized to establish radio and teletype systems in various districts of the State to be operated in connection with the work of the law enforcement officers of cities, towns and counties and the State police. This Act authorized the Governor to make agreements with the localities whereby portions of the cost of establishing, purchasing, constructing, maintaining and operating such systems would be borne by the localities. The Act provided that the money appropriated thereby was not to be spent until agreements had been made with the localities providing that they should bear at least one half of such costs.

I also call your attention to Chapter 383 of the Acts of Assembly of 1938 (Sections 2154(233) et seq. of Michie's Code), which authorized the Division of Motor Vehicles to establish a teletypewriter communication system which could be made available to local police agencies. Under this Act the local agencies are to pay all rentals for their local equipment, the State paying the rental for wire or circuit mileage required to connect local stations with the basic systems.

These two statutes indicate a legislative policy in connection with radio and teletype systems which involve large expenditures for a basic system, as well as for local equipment, under which policy the respective State and local obligations would be fixed in accordance with their provisions. It is doubtful, therefore, whether the Compensation Board could consider the cost of maintaining the local equipment as normal operating expenses of the sheriff's office, to be paid in part by the State and the localities under the provisions of Chapter 386 of the Acts of 1942. This is particularly true when local equipment is installed without any agreement with the State or participation by the locality in the cost of the basic system which is necessary to serve the local system.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**SHERIFFS—Must serve as administrators when appointed, but may resign.**  
**F-136**

April 11, 1949.

HONORABLE ROBERT L. DEHAVEN, *Sheriff*,  
Frederick County,  
Winchester, Virginia.

My dear Mr. DeHaven:

This is in reply to your letter of April 6, from which I quote as follows:

"Quite a number of estates with practically no assets are being committed to me as Sheriff Administrator. Invariably these matters require the expenditure of time and effort out of all proportion to their importance—time and effort that had better be expended in the performance of the regular duties of Sheriff.

"Am I required to accept all of these appointments that are dumped into my lap, usually by lawyers, because they are unprofitable for anyone else to handle."

Section 5374 of the Code of 1942 provides that under certain circumstances the Court or clerk thereof shall, on the motion of any person, order the sheriff to act as administrator of an estate. This section provides further:

"The court may, however, at any time afterwards on reasonable notice to such sheriff or sergeant, revoke such order made by it or its clerk, and the court may in a proper case after reasonable notice to parties in interest permit the sheriff or sergeant to resign and allow any other person to qualify as executor or administrator."

It would appear, therefore, that while it is the duty of the Court or clerk to appoint the sheriff as administrator upon request as provided in this section, the sheriff, in proper cases, may resign.

In my opinion the practical way for you to relieve the present condition would be for you to have a personal conference with the Clerk and the Judge. You could explain to them that your office does not have the time to administer so many estates, and request the Judge to allow you to resign in whatever cases you consider necessary. In new cases, if it was agreeable with the Clerk and the Court, upon request for your appointment, the Clerk could advise the interested parties that you did not have time to administer these estates, and suggest that some interested party qualify as administrator, rather than proceeding under this section. Of course, if an applicant insisted upon the Court or Clerk appointing you, then he should do so. However, the Judge could let you resign if he considered it a proper case.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**SHERIFFS, SERGEANTS AND CONSTABLES—Under what Conditions Mileage can be paid. F-136**

November 22, 1948.

HONORABLE THURMAN BRITTS,  
Commonwealth's Attorney for Craig County,  
New Castle, Virginia.

My dear Mr. Britts:

This is in reply to your request for my opinion upon whether or not the sheriff is entitled to mileage for his automobile when he uses the same to conduct traffic for funerals held in his county, in serving civil papers, and in posting notices of election.

Chapter 386 of the Acts of Assembly of 1942, which abolished the fee system for sheriffs, provides that sheriffs shall be paid "allowances for the necessary expenses incurred in the performance of their duties, including the cost of \* \* \* necessary travel \* \* \*."

Section 4 of that Act, as amended, requires the sheriff to submit a statement of all expenses incurred by him to the Compensation Board. If that agency approves the expenses, the same are paid two-thirds by the State and one-third by the locality. I am informed by the Compensation Board that, since the statute imposes no duty upon the sheriff as to conducting traffic for funerals and the like, such traveling expenses are not allowed, but that travel expenses incurred in connection with the service of civil papers and the posting of notices of elections as required by law are allowed. In other words, where travel is performed in connection with duties imposed by law, the expense for the same is allowed, but not otherwise. In my opinion, the Compensation Board is correct in this procedure.

I call your attention to the fact that paragraph c of Section 4 of the above mentioned Act provides that:

"Notwithstanding the provisions of the foregoing subsection, the governing body of any county or city may, with the consent of the Compensation Board, enter into such agreement with the sheriff or sergeant of such county or city with respect to the traveling expenses, including the use of privately owned vehicles of such sheriff or sergeant and his deputies as the said governing body may deem proper."

It would seem that, if the Board of Supervisors desires the sheriff to engage in patrolling duties and the like in connection with the enforcement of local ordinances which involve travel not required by State law, and wish to pay for the expense of such travel out of local funds, that could be done with the approval of the Compensation Board under the authority of the above provision.

I am sorry that the large number of cases this office had before the Supreme Court at its November session has prevented an earlier reply to your letter.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**STATE BOARD OF EDUCATION—Text Books; Selection of And Contracts For. F-228**

June 30, 1949.

HONORABLE CASSIUS M. CHICHESTER, *Director*,  
Division of Statutory Research and Drafting,  
State Capitol,  
Richmond 19, Virginia.

My dear Mr. Chichester:

This is in reply to your letter of June 20, from which I quote as follows:

"At a recent meeting of the Commission to study and report on matters concerning the teaching of history and government in the secondary schools I was directed to propound to you the following question: 'Is the State Department of Education empowered under existing law to enter into contract with any authors for the preparation of history text books to be used in the State school system or is the power of the Department confined to a review of written texts submitted to it?'"

Section 132 of the Constitution and Section 617 of the Code, as amended, provide that the State Board of Education "shall select textbooks." These sections, in my opinion, do not permit the Board to enter into a contract with an author for the preparation of textbooks if such a contract would entail the expenditure of public funds, and I am aware of no existing law that would so empower the Board.

However, in view of the above sections, it is my opinion that the Board is not "confined to a review of written texts *submitted to it*." (Italics supplied).

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**STATE BOARD OF HEALTH—May adopt minimum standards for diet in Nursing Homes. F-224**

September 10, 1948.

DR. L. J. ROPER,  
State Health Commissioner,  
Department of Health,  
Richmond 19, Virginia.

My dear Dr. Roper:

This is in reply to your letter of September 8, in which you state that the State Board of Health has adopted the following resolution:

"There shall be a sufficient number of satisfactory meals served according to the patients' needs."

You further state that it has been your policy to construe the meaning of the above resolution to include a minimum of three well-balanced meals per day. It appears that a few nursing homes inspected by your Department do not serve meat, and you desire my opinion whether or not the Department of Health can legally insist that these homes include meat in the diets furnished patients.

As you pointed out, Chapter 15 of the Acts of Assembly of 1947 authorizes



the State Board of Health to prescribe and adopt minimum standards, rules and regulations for the operation of nursing homes. Assuming that meat is an element of a well-balanced meal, it is my opinion that your Department may require the homes in question to serve meat to those patients who desire it.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**STATE BOARD OF MEDICAL EXAMINERS—Persons Actually Practicing Medicine in Virginia must pay Prescribed Fee. F-182**

October 27, 1948.

DR. K. D. GRAVES, *Secretary-Treasurer*,  
State Board of Medical Examiners,  
Roanoke, Virginia.

My dear Dr. Graves:

This is to acknowledge your letter of October 22, from which I quote as follows:

"The District of Columbia has made a practice of issuing what they call borderline license certificates upon the payment of a nominal fee to our licentiates who live and have their office in Virginia and who are not living in the District of Columbia but have occasion from time to time to visit patients who either live in the District of Columbia or are in a District of Columbia hospital. We do not make a practice of this and the District of Columbia Board of Medical Examiners requests that we do so with the added stipulation that if we do not they may find it necessary to stop issuing these licenses to Virginia doctors.

"I do not find any authorization for this in our Code or By-laws. Will you kindly inform us whether or not this is permissible and if so whether or not it is obligatory for us to issue these licenses?"

As you know, Section 1617 of the Code provides that the Board of Medical Examiners may, in its discretion, arrange for reciprocity with the authorities of other states and territories having requirements equal to those established in this State and issue certificates to those applicants who have met such requirements. The fee for such certificates shall be fifty dollars.

The exceptions to Section 1608 of the Code, which requires a certificate in order to practice medicine, and to Section 1617 are set forth in Section 1621 of the Code and are not applicable to the situation described in your letter.

Therefore, it is my opinion that the Board has no authority to grant a so-called borderline license to persons practicing in the District of Columbia unless such persons meet the requirements set forth in Section 1617 of the Code which, of course, includes the payment of a fifty-dollar fee.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**STATE BOARD OF MEDICAL EXAMINERS—Revocation of licenses when licensee is in prison. F-182**

April 11, 1949.

DR. K. D. GRAVES, *Secretary-Treasurer*,  
Board of Medical Examiners,  
Roanoke, Virginia.

My dear Dr. Graves:

This is in reply to your letter of April 8, 1949, from which I quote as follows:

"Two licensees of the State Board of Medical Examiners have been convicted of criminal acts, namely; murder in the second degree and attempted rape, respectively, and are now serving penitentiary terms after being duly tried and sentenced.

"The State Board of Medical Examiners would like to revoke the license of each of these individuals and requests an opinion as to whether this action can be taken while the men are confined or would the Board have to wait until they have served their terms and can appear in person. One man is in the penitentiary in Richmond and the other is in a penitentiary in West Virginia."

Section 1614-a of the 1942 Code provides for the revocation or suspension of certificates issued by your Board, and reads, in part, as follows:

"In the matter of revoking or suspending the certificate of a practitioner of medicine, homeopathy, osteopathy, chiropractic or chiropody, the member of said board residing in the congressional district in which the said practitioner resides shall present to the said board in writing charges against the character or conduct of the said practitioner. If upon considering such charges the said board is of the opinion that a prima facie case has been made out the board shall appoint a time and place for a hearing thereon; no such hearing shall be held until said practitioner shall have been given at least ten days written notice of the time and place thereof, which notice, together with a copy of said charge, shall be served on him in accordance with the provisions of section sixty hundred and forty-one of the Code of Virginia.

"The practitioner shall have the right of attendance upon the hearing and to be represented by counsel; and to summons witnesses whose attendance the said board has the right to command. The cost of such counsel and the attendance of the said witnesses shall be upon the practitioner. The failure of the practitioner under charges to attend or his failure to defend himself, shall not serve to delay or avoid the proceedings."

The fact that the licensees mentioned in your letter are now serving time in the penitentiary is immaterial so far as the procedure is concerned. From a practical standpoint, I do not think that they would desire to appear before your Board, however, I understand from the Virginia Penitentiary that, under such circumstances, they do allow a prisoner to appear, provided he will pay all costs involved in making the trip, including the cost for a guard who will accompany him.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**STATE BOARD OF WELFARE AND INSTITUTIONS—May expend funds for membership in certain welfare organizations. F-231**

March 14, 1949.

MR. J. LUTHER GLASS,  
Chief of Court Services and Placement,  
Department of Welfare and Institutions,  
429 S. Belvidere Street,  
Richmond, Virginia.

My dear Mr. Glass:

This is in reply to your letter of March 4, in which you request my opinion on whether or not the State Board of Welfare and Institutions may legally pay membership fees to such organizations as:

Child Welfare League of America  
American Public Welfare Association  
Virginia Conference of Social Work  
National Conference of Social Work  
Child Welfare Information Service  
Virginia Council on Health and Care

I am not familiar with the activities of the above listed organizations, nor am I acquainted with the services rendered by them. However, I know of no legal limitation upon the power of the Board that would prevent the expenditure of its funds for such purposes if the Board feels, upon consideration of the nature of the organizations in question, that membership in them would further the public interest and the purposes of the Department.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**STATE CORPORATION COMMISSION—Can Fix Compensation for its Employees without Approval of Governor. F-81**

October 22nd, 1948.

HONORABLE WILLIAM M. TUCK,  
Governor of Virginia,  
Richmond, Virginia.

Dear Governor Tuck:

This is in reply to your letter of September 13, in which you request my opinion upon whether the State Corporation Commission has the authority under the Constitution and laws of the Commonwealth to fix the compensation of its employees within the amount appropriated to it by the General Assembly where such compensation exceeds an annual rate of \$1200.00, without the written approval of the Governor.

Chapter 88 of the Acts of Assembly of 1926 provides that the salary (when it is over \$1200.00 per year) of no officer or employee of any State institution, board, commission or agency which is not specifically fixed by law shall be hereafter increased, or authorized to be increased, without the consent of the Governor first obtained in writing. Section 5 of the Appropriation Act, Chapter 552 of the Acts of Assembly of 1948, contains a similar provision and requires the entrance rate of pay (when over \$1200.00) for each State employee to be fixed at such rate as is approved by the Governor.

The State Corporation Commission was created by the Constitution of Virginia in 1902. By the Constitution and express legislative enactment pursuant thereto it is vested with judicial legislative and administrative functions and powers. Its administrative powers are ancillary and essential to its proper functioning as a judicial and legislative entity of the Commonwealth. Primarily and essentially the Corporation Commission is a Court of record.

In *Commonwealth v. Atlantic Coast Line Railway Company*, 106 Va., 61, Cardwell, J. used the following language:

"The learned Attorney General, as the highest law officer of the Commonwealth, urged upon the Commission that in this proceeding it was invested with all the powers, and had imposed upon it all the responsibility, of a court of record. He earnestly contended that the Commission not only had the judicial authority to pass upon these constitutional questions, but that it was its manifest duty to do so, in so far as it was necessary to reach a final conclusion. This position of the Attorney General was not combatted by the learned counsel for the defendant company, but was conceded to be correct. Indeed it is no longer open to question.' \* \* \* The Constitution of Virginia, in section 156c provides, as to the Commission, that 'In all matters pertaining to the public visitation, regulation or control of corporations, and within the jurisdiction of the Commission, it shall have the powers and authority of a court of record', etc. This section gives the Commission, in the exercise of its judicial functions, authority to administer oaths, compel the attendance of witnesses, enter up and enforce its judgments and confers upon it other ordinary attributes of a court of general jurisdiction."

Mr. Justice Holmes in rendering the opinion of the Supreme Court in *Prentiss v. Atlantic Coast Line Company*, 211 U. S., 210, 53 L.Ed. 150, used the following pertinent language:

"The State Corporation Commission is established and its powers are defined at length by the Constitution of the State. There is no need to rehearse the provisions that give it dignity and importance or that add judicial to its other functions, because we shall assume that, for some purposes, it is a court within the meaning of Rev. Stat. Sec. 720, and in the commonly accepted sense of that word. Among its duties it exercises the authority of the State to supervise, regulate, and control public service corporations, and to that end, as is said by the supreme court of Virginia and repeated by counsel at the bar, it has been clothed with legislative, judicial and executive powers. *Norfolk & P. Belt Line R. Co., v. Com.* 103 Va., 289, 294, 49 S.E. 39. \* \* \*

In the same case Mr. Justice Fuller had this to say, relating to the character and status of the Corporation Commission:

"The Virginia State Corporation Commission was created and its functions, powers, duties and the essentials of its procedure were prescribed in detail by the Constitution of the State as well as by statute. It was made primarily a judicial court of record of limited jurisdiction, possessing also certain special legislative and executive powers. \* \* \* Not only do the Constitution and laws of Virginia make the commission a judicial court of record by clothing it with all the attributes of such a tribunal, but they expressly declare it a court, and require it to proceed only by due process of law and inquire into and determine every judicial question coming before it. It has repeatedly held itself to be a court and subject to all the obligations thereof, and the supreme court of appeals, the highest state judicial tribunal, has formally and expressly so held."

The concurring views of Mr. Justice Harlan seem pertinent to the instant inquiry:

"In my judgment, the Virginia State Corporation Commission, is, in every substantial sense, a court. It is shown conclusively to be such by the provisions of the Constitution and laws of Virginia, as interpreted by the highest court of Virginia and as summarized in the opinion of the Chief Justice."

While the Corporation Commission is not embraced, eo nomine, as a part of the judicial department set up by Article VI of the Constitution, yet that Article does embrace "such other courts, inferior to the Supreme Court of Appeals, as are hereinafter authorized, or as may be hereafter established by law."

Section 156(c) confers upon the Commission "the powers and authority of a court of record." In the field of its prescribed jurisdiction, the Constitution and the enabling statutes, confer upon the Commission every essential attribute of a court of record.

Section 156(a) of the Constitution designates the Corporation Commission as "the department of government," with certain defined powers. In order, however, for it to function in execution of the purposes for which it was created, the framers found it necessary to invest it with powers which belong to the judicial department of the State Government. Occupying as it does the Constitutional status of a Court of record, with right of appeal therefrom directly to the Supreme Court of Appeals, it is a court of record and as such a part of the Judicial Department.

As I interpret the decision of the Supreme Court of Appeals in *Commonwealth v. Dodson*, 176 Va., 281, it was there held that Chapter 88 of the Acts of 1926, and similar provisions of the Appropriation Act, should not be construed as applying to the legislative and judicial departments of State Government. The Court held that to so construe them would render them unconstitutional as being an unlawful delegation to the executive of control over those departments in violation of the requirement of separation of powers.

It is my opinion, therefore, that the State Corporation Commission has the authority to fix the compensation of its employees within the amount appropriated to it by the General Assembly without the written approval of the Governor, notwithstanding the provisions of the Appropriation Act herein cited.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**STATE CORPORATION COMMISSION—May Fix Rates and Fares  
of a Public Utility Which is being Operated by Government. F-81**

July 23, 1948.

HONORABLE WILLIAM M. TUCK,  
Governor of Virginia,  
State Capitol,  
Richmond, Virginia.

My dear Governor Tuck:

At your request I am writing in regard to the State Corporation Commission's jurisdiction to fix rates and fares of a public utility that is being operated by you, as Governor of the Commonwealth, in accordance with the authority vested in you by Chapter 9, Acts of Assembly, Extra Session, 1947.

It is my understanding that, pursuant to §6 of the Act, you designated, by proclamation issued June 28, 1948, the State Corporation Commission as your agent to operate the transportation facilities of the Citizens Rapid Transit Company.

It appears that an application for revision of zones and passenger rates and fares has now been made by the Commonwealth of Virginia at the relation of the Citizens Rapid Transit Company, and it is contended that the State Corporation Commission is without jurisdiction and ought not to take cognizance of such application for the following reasons:

1. The Citizens Rapid Transit Company is not in possession of and is not operating transportation facilities and, therefore, the said Company is not a utility.

2. The State Corporation Commission is an interested party by virtue of the fact that the Commission is in possession of and is operating the transportation facilities and is collecting all of the gross revenues therefrom.

3. Conceding that the application of the Citizens Rapid Transit Company may be heard, no changes in rates should be made effective until such time as the Company again possesses and operates the transportation facilities.

In answer to the first contention it is sufficient to say that The State Corporation Commission has jurisdiction to hear the application made by the Commonwealth of Virginia at the relation of the Citizens Rapid Transit Company for change in rates and fares, since the Transit Company is a utility within the meaning of paragraph b of §156 of the Constitution.

A utility is a utility irrespective of possession or ownership. To contend that the Transit Company is no longer a utility because the Commonwealth operates it is absurd, for it would follow that a utility, in order to oust the jurisdiction of the State Corporation Commission, would only have to empower its original officers and stockholders to relinquish their possession to others.

As to the second contention, the State Corporation Commission, under paragraph (C) of §156 of the Constitution, has the powers and authority of a court of record in the matter of fixing rates of transportation companies and as was pointed out above, it has original jurisdiction to hear a petition for rate changes by virtue of paragraph (b) of §156 of the Constitution.

It can be seen that the Commission, when acting in its capacity as a court of record, is a court that derives its power and jurisdiction from the Constitution and, therefore, the General Assembly may only increase such duties and powers, but cannot deprive it of any.

I also point out the fact that the Commission is operating the transportation facilities only as an agent for the Governor, and when sitting as a court of record, it is no more an interested party than any other trial court that hears and determines a case in which the Commonwealth is a party or has an interest.

Section 12 of Chapter 9 of the Acts of Assembly, Extra Session, 1947, provides that in the event of a disagreement as to the amount of net revenue to be paid to the Company or to the Commonwealth, either party may submit the matter to the State Corporation Commission. Therefore, it is contended that by implication the Commission is not such an agency as may be designated to operate a utility as contemplated by §6 of the Act.

Such a contention is not sound, since §6 is clear and unambiguous, and if the General Assembly had intended to exclude the State Corporation Commission from its provisions it would have so stated in the Act.

Also, it should be pointed out that in the instant case, the jurisdiction of the Commission to fix rates is under attack, and not its authority to arbitrate a dispute under §12.

The third contention has virtually been answered under the first set forth above, and it is enough to say that I find no authority for the proposition that the rates of a utility, having been fixed by the State Corporation Commission, should not become effective while the Commonwealth possesses and operates it.

In conclusion, therefore, it can be seen that I am of the opinion that the contentions set forth above are without merit and the State Corporation Commission has the jurisdiction to fix the rates of the utility in the instant case.

Very truly yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**STATE EMPLOYEES**—Employees of State Corporation Commission exempt from the provisions of the Virginia Personnel Act. F-81  
**STATE CORPORATION COMMISSION**—Employees thereof exempt from the provisions of the Virginia Personnel Act. F-81

September 1st, 1948.

HONORABLE J. H. BRADFORD,  
Director of the Budget,  
Richmond, Virginia.

Dear Mr. Bradford:

Pursuant to conference with you on August 30th, I have given study and consideration to your inquiry as to whether or not the employees of the State Corporation Commission are embraced by the provisions of the Virginia Personnel Act (Chapter 370, Acts of 1942).

I have examined the opinion on this subject submitted to Governor Darden on January 11th, 1944, by the Honorable Abram P. Staples, then Attorney General. In view of the express exemption set out in Section 6(1) of the Personnel Act, and the pertinent language contained in Section 155 of the Constitution, quoted in said opinion, a copy of which you have, I feel impelled to adhere to the conclusions reached and stated by Judge Staples.

In our discussion you pointed out that an amendment offered in the Senate designed to expressly exempt the Corporation Commission from the provisions of the Personnel Act, when that Act was under consideration, was rejected and that a similar amendment to the Appropriation Bill of 1948 was stricken in conference.

Considerations of legislative intent that might be evidenced by these circumstances could not be properly considered in view of the unambiguous provisions of the Constitution, and the statute, as herein pointed out.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**STATE EMPLOYEES RETIREMENT ACT**—Accumulated Fund Should be Paid to Estate When Death Occurred After Employment Ceased. F-243a

August 11, 1948.

HONORABLE FRANK P. EVANS, *Director*,  
Virginia Retirement System,  
Finance Building,  
Richmond 7, Virginia.

My dear Major Evans:

This is in reply to your letter of August 10, in which you ask for my opinion upon a matter arising under section 10 of the Virginia Retirement Act. You state that a State employee had designated his daughter as his beneficiary, to whom should be paid his accumulated contributions in the event of his death before retirement under the Act, but that on June 23, 1948, having ceased his employment, he filed a request that his accumulated contributions be paid to him, but died before the check was issued. You ask whether the accumulated contributions should be paid to his estate or to the person previously named by him as his beneficiary.

Section 10 of the Virginia Retirement Act reads in part as follows:

"Section 10. Withdrawal Before Retirement; Death Benefits.—Should a member cease to be an employee, or if a member has ceased to be an employee since the date of the establishment of the Virginia Retirement System, otherwise than by death, or by retirement under the provisions of this act, he shall be paid, on demand, or within thirty days thereafter, the amount of his accumulated contributions. Should a member die at any time before retirement, the amount of his accumulated contributions shall be paid to such beneficiary, if any, as he shall have nominated by written designation signed and acknowledged by such member before some person authorized to take acknowledgment and filed with the Board, otherwise to his executors or administrators. Any beneficiary so designated may be changed by the written designation of some other beneficiary, signed, acknowledged and filed as aforesaid. \* \* \*"

In my opinion, the second sentence of this section applies only when a member of the system dies while still in the State employment, and that the first sentence, which deals with the case of a member ceasing to be an employee otherwise than by death or retirement, should apply in the case you mention. In any event, since the party upon terminating his employment requested that his accumulated contributions be paid to him, this was a countermand of his previous instructions naming his daughter as his beneficiary, such as is authorized by the last sentence quoted above from section 10.

Since, if the individual had lived, the accumulated fund should have been paid to him, I think that it should now be paid to his estate rather than to the beneficiary previously named by him.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**STATE HEALTH DEPARTMENT—Dead body cannot be transferred to department if there is an objection by next of kin. F-91a**

May 5, 1949.

DR. L. J. ROPER,  
State Health Commissioner,  
Department of Health,  
Richmond 19, Virginia.

My dear Doctor Roper:

This is to acknowledge your letter of April 21 in which you enclosed a letter from Dr. Herbert S. Breyfogle, Chief Medical Examiner, concerning the interpretation of the words "if the said body is unclaimed and there is no objection by the next of kin of the deceased," found in section 1731 of the Code as amended by Chapter 76 of the Acts of Assembly of 1948.

The pertinent part of the above Act provides:

"All officers, agents and servants of every city and county in the State, and of every almshouse, prison, morgue, hospital, jail, or other public institution including institutions under the control of the State Department of Public Welfare in such city or county, and of every public asylum or institution for the insane in the State, having charge or control of any dead human body which is required to be buried at the public expense, \* \* \* shall notify the said board, \* \* \* whenever and as soon as any such body comes to his or their possession, charge or control; and shall, \* \* \* if the said body is unclaimed and there be no objection by the



next of kin of the deceased deliver such body, and permit the said board and its agents, and such physicians and surgeons as may, from time to time, be designated by the board, \* \* \* to take and remove any such body, to be used for the advancement of medical science; \* \* \*

I quote the following from Dr. Breyfogle's letter:

"The additional phrase concerning objections by relatives, however, would make it appear that although the relatives have no funds for the burial they can in effect prevent the transfer of the remains to the State Health Department. And in effect this means that the body must be buried at public expense. The Act, however, states that 'any dead human body which is required to be buried at public expense' shall be turned over to the State Health Department (see Chapter 19, Section 32-356 of Reorganization Provisions).

"What then is the force of an objection by the next of kin so far as burial at public expense is concerned? \* \* \*

First of all, by virtue of section 1-7 of the Reorganization Provisions of the Code of Virginia, the 1948 amendment to section 1731 has the effect of repealing any inconsistency found in section 32-356 of the Reorganization Provisions. Therefore, section 32-356 was, in effect, also amended to read that any dead human body which is required to be buried at public expense shall be turned over to the State Health Commissioner "if the said body is unclaimed and there is no objection by the next of kin of the deceased."

As to the force of an objection by the next of kin of the deceased, it prevents "the transfer of the remains to the State Health Department." The amendment does not affect the requirements necessary for a burial at public expense and I do not here pass upon them.

I also refer you to my letter of October 6 in which I concurred in the interpretation placed upon section 1731 by the City Attorney of Richmond.

With kind regards,

Sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

#### STATE HOSPITALS—Cost of ambulance service is not chargeable to the hospital. F-148

March 16, 1949.

MRS. TROY COLEMAN PENDLETON, *Superintendent*,  
Department of Public Welfare,  
Gate City, Virginia.

My dear Mrs. Pendleton:

This is in reply to your letter of March 11, in which you request my opinion on the following questions:

"When a patient, who is being committed to a hospital for the insane, is unable to be transported by car to such a hospital and an ambulance is necessary for transportation, is the Board of Supervisors responsible to pay for services of ambulance instead of the regular rate of transportation when transported by car? If not, who is responsible for payment?"

Section 1024 of the Code provides in part:

"\* \* \* All persons applying for admission to any hospital or colony shall be, when so required by the superintendent of such hospital or colony, delivered to the agent of such hospital or colony at the nearest or most convenient railroad station or steamboat landing to be designated by such super-

intendent, at the expense of the county or city of the person committed, provided, however, that the station or landing so designated by the superintendent shall not involve a travel at the expense of any such county or city of a greater distance by rail or boat than twenty-five miles from the nearest railroad station or boat landing at the court-house of the county or city of commitment or of the residence of the person committed. \* \* \*

It can be seen, therefore, that the county bears a certain part of the cost of transporting a patient committed to State hospitals, namely, the cost of transportation to the nearest railroad station when so required by the superintendent of the receiving hospital. In such instances, I am of the opinion that the Board of Supervisors has the authority to pay for the service of an ambulance if such service is necessary. However, if such ambulance service is not necessary, but merely desirable, or rendered at the request of the patient or his relatives, it is my opinion that the patient or his relatives should bear the expense of such transportation.

Section 1027 of the Code deals with the conveyance of patients committed to hospitals for the insane and provides:

"The cost of conveying persons committed to any hospital or colony, except those committed to the department for the criminal insane, from the railroad station or steamboat landing designated by the superintendent of such hospital or colony shall be paid from the funds appropriated for the support of said hospital or colony. Unless authorized to do so by the commissioner of State hospitals or superintendent of a hospital or a colony, no officer shall be allowed anything for carrying an insane, epileptic, feeble-minded or inebriate person to or from any hospital, or colony, either for himself or the insane, epileptic, feeble-minded or inebriate person."

When proceeding under the above section and application is made to the superintendent of a hospital for the admission of an insane person, the cost of transportation is paid by the hospital. In this situation it is my understanding that the various State hospitals, because of limited funds, do not furnish ambulance service and will not authorize the reimbursement of the cost of such service to the county or the sheriff or other agent transporting the patient to the hospital.

Therefore, it appears that the cost of ambulance service must be paid by the patients, or their relatives, who desire it.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**STATE INSTITUTIONS—Mary Washington College has Authority to Issue Refunding Bonds to Effect Redemption of Bond Issue.F-268c**

July 21, 1948.

MR. EDGAR E. WOODWARD, *Treasurer,*  
Mary Washington College,  
Fredericksburg, Virginia.

My dear Mr. Woodward:

This has reference to your letter of July 12, 1948, in which you ask if Mary Washington College has the authority to issue refunding bonds in order to exercise the option of calling certain revenue bonds issued under Chapter 49 of the

Acts of Assembly of 1933, as amended by Chapter 123 of the Acts of Assembly of 1936.

It appears that, under these Acts, the College offered two bond issues in 1938 for the purpose of constructing buildings under the P. W. A. program. One issue was for \$138,000.00 for the purpose of constructing an administration and classroom building. Funds for the payment of this issue and for the operation of the building were to be obtained from a special fee, chargeable to all students. The second bond issue was for \$82,500.00 for a dormitory. The revenue from the dormitory was to be used for the purpose of meeting the annual debt requirements and operation costs of the building.

Each of these bonds includes a provision giving the College the option to redeem any outstanding bond maturing on or after July 1, 1948, at 105% of the principal. This redemption option may be exercised on July 1, 1948, or on any interest payment date thereafter. The bonds bear interest at  $3\frac{1}{2}\%$ . It appears that a saving of approximately \$13,500.00 can be effected, if the bonds can be refunded at a lower interest rate.

The Act authorizing the issuance of the original bonds does not expressly empower Mary Washington College to issue refunding bonds. This being so, the right of the College to issue them depends upon whether any implied authority can be found.

An annotation in 135 A. L. R. at page 634 compiles a number of cases discussing the legal problem involved. The great majority of these cases express the view that the express power conferred on a governmental unit to issue bonds in the first instance includes, by necessary implication, the power to refund the original bonds, if the original bonds were subject to call, and if the refunding operation would not increase the obligation of the governmental unit.

Subsequent cases are in agreement with this rule. Thus, in *State v. City of Miami*, 19 So (2d) 780, (Fla-1944), it was held that " \* \* \* power expressly granted to issue bonds payable from revenue includes power to refund those bonds upon terms more favorable to the obligor—city. The \* \* \* refunding bonds are but a renewal and continuation of the existing debt."

It is my opinion that Mary Washington College, having retained the right to redeem these bonds, has the implied authority to issue refunding bonds for the purpose of effecting such redemption, if the refunding operation results in a saving to the College.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**STATE INSTITUTIONS—Persons other than employees or officials thereof can furnish supplies or perform work therefor. F.-231**

May 11, 1949.

MR. J. LUTHER GLASS,  
Chief of Court Services and Placement,  
Department of Welfare and Institutions,  
429 S. Belvidere St.,  
Richmond 20, Virginia.

Dear Mr. Glass:

This will reply to your letter of May 4 enclosing your entire file in the E. T. Burnett matter, which I am returning herewith as requested. You request an official opinion as to whether or not you may use State funds for your disposal in paying off Mr. Burnett the \$800.00 which he has agreed to accept for his interest in the building in question.

Section 4706 of the Virginia Code provides as follows:

"If any member of the board of visitors or directors of any State institution, or employee or agent thereof, or any trustee of any public trust or fund, or any salaried officer of any such State institution, or of any such public trust or fund, contract or be interested in any contract with such institution or with the governing authority of such public trust or fund in any manner for furnishing supplies or performing any work for said institution, or for the governing authority of said trust or fund, he shall be fined not exceeding five hundred dollars."

I do not feel that Mr. Burnett comes within the classification as provided by this section, as this is a State agency rather than a State institution, nor do I feel that the personal property involved could be considered as "supplies" as used in this act. I am, therefore, of the opinion that the funds in question can be used for the purpose of making an adjustment with Mr. Burnett.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**STATE LIBRARY BOARD—May make grant to library located in municipality of five thousand or more. F-217**

March 14, 1949.

HONORABLE RANDOLPH W. CHURCH,  
State Librarian,  
Richmond 19, Virginia.

My dear Mr. Church:

This is to acknowledge your letter of March 2, in which you state that a State aid grant for library service under the terms of Section 2 of Chapter 322 of the Acts of Assembly of 1948 is now in effect for the county free library system of Fairfax County, such grant being made before Falls Church became a city of the second class.

Since Falls Church is located in Fairfax County, you desire my opinion as to whether or not a State aid grant can now be made to the City of Falls Church on the basis of the fact that it is now recognized as a municipality with a population of five thousand or more.

The pertinent part of the Act in question (Subsection 2 of Section 365½ of Michie's Supp. of 1948) provides that under certain conditions grants of State aid may be made by the State Library Board to any qualifying library system or *qualifying library* (if located in a municipality with a population of five thousand or more, or located in a municipality of less than five thousand where no county or regional free library system exists) which has been established in any prior State fiscal year and lacks the prescribed ratio of books per capita.

Therefore, it is my opinion, in view of the above section, that, regardless of whether a State aid grant is in effect for the county free library system of Fairfax County, the library located in the City of Falls Church is eligible to receive a State aid grant if the requirements of the Act are met.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**STATE PROPERTY—Disposal of—Director of Accounts and Purchases  
Empowered to Sell all Surplus Tangible Property. F-227**

November 8, 1948.

HONORABLE A. B. GATHRIGHT, *Director*,  
Department of Accounts and Purchases,  
State Finance Building,  
Richmond, Virginia.

Dear Mr. Gathright:

This is in reply to your letter pertaining to Section 2-265 of the Reorganization Provisions of the Code of Virginia, which provides, among other things, that surplus supplies or equipment in the possession of any State department, division, institution or agency shall be transferred or sold by the Director of the Department of Accounts and Purchases with the consent of the head of such department, division, institution or agency having them in possession, or by order of the Governor.

You ask whether the above section requires "the disposal of all forms and character of State owned personal property" by the Director with the exception of property in the nature of securities.

I quote the following examples of property, listed in your letter, concerning which some questions have arisen:

"Farm products, including livestock in excess of the needs of the producing agency; accumulation of scrap paper, scrap metal and other forms of salvage, including trade waste from shop of Virginia Penitentiary; worn-out motor vehicles, road and farm machinery, and office equipment replaced by new equipment."

It is my opinion that the "surplus supplies or equipment" referred to in Section 2-265 includes all surplus tangible personal property in the possession of a State department, division, institution or agency and, of course, would include all of the properties listed above when such properties are deemed to be surplus.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**STATUTES—Person Triable under Terms of Statute in Effect at Time of  
Commission of Offenses. F-85****CRIMINAL LAW—Accused triable under the Terms of the Statute Ef-  
fective at the time of Commission of Offense. F-85**

August 3, 1948.

HONORABLE W. CARRINGTON THOMPSON,  
Commonwealth's Attorney for Pittsylvania County,  
Chatham, Virginia.

My dear Mr. Thompson:

This is in reply to your letter of July 26, from which I quote in part as follows:

"Chapter 454 of the Acts of Assembly of 1948 amends section 4414 of the Code to provide that, if a female child is between the ages of 14 and 16

and the jury finds that she is of bad moral repute and also a lewd female before the alleged offense, the defendant shall not be convicted of rape. This section, as amended, became effective June 29, 1948. My question is this: Is a defendant charged with statutory rape committed prior to the effective date of this new Act but tried thereafter allowed to show that the female is of bad moral repute and lewd, and thus escape conviction for statutory rape?"

You state that it is your belief that the above named Act does not mitigate the punishment, but provides that what was formerly an offense is no longer such. I concur with that interpretation.

As you point out, section 6 of the Code provides that "No new law shall be construed to repeal a former law, as to any offense committed against the former law, \* \* \*." Therefore, it is my opinion that a person charged with a violation of section 4414 of the Code prior to the effective date of the new Act cannot escape conviction for statutory rape by showing that the female was "of bad moral repute and also a lewd female."

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
Attorney General.

**STATUTES—Prohibiting and Limiting Sale of Fire Crackers Invalidates County Ordinance in Conflict therewith. F-66**

October 14, 1948.

HONORABLE VERNON C. SMITH,  
Member of House of Delegates,  
Grundy, Virginia.

My dear Mr. Smith:

This is in reply to your letter of October 6, in which you request my opinion as to whether the recent Acts of the General Assembly repeal or invalidate county ordinances regulating the sale, possession, use, etc. of firecrackers, Roman candles and similar fireworks.

Chapter 333, Acts of Assembly of 1948 (§4722(4a) of Michie's Supplement of 1948), which is concerned with the sale, use, etc. of fireworks, provides in part as follows:

"(5) This section shall not apply to Roman candles, sparklers, caps for pistols, nor shall it apply to fire crackers not in excess of two inches long and one-quarter inch in diameter, or pinwheels commonly known as whirligigs and spinning jennies, when used, ignited or exploded on private property with the consent of the owner of such property.

"(6) Provided, however, that nothing herein contained shall apply to any ordinance *prohibiting* the sale, storage, use, possession or manufacture of fireworks heretofore or hereafter adopted by any county, city or town." (Italics supplied).

It can be seen, therefore, that the Act in question expressly validates a county ordinance which *prohibits* the sale, use, etc. of fireworks.

However, it is my opinion that a county ordinance that permits the sale, use, etc. of fireworks other than those enumerated in Section 5 of the above mentioned Act would be invalid. For example, a county ordinance permitting the sale of firecrackers more than two inches long would be in conflict with Section 5 and thus invalid.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
Attorney General.

**SURPLUS PROPERTY OF STATE—Property Declared Surplus, Should be Handled by Department of Accounts and Purchases. F-227**

August 11, 1948.

HONORABLE A. B. GATHRIGHT, *Director*,  
Division of Purchase and Printing,  
Finance Building,  
Richmond, Virginia.

Dear Mr. Gathright:

This is in reply to your letter of August 9, in which you state that several instances have occurred where a State agency having custody of certain property has filed surplus property reports with your office and later, apparently in good faith, has proceeded to sell or otherwise dispose of the property without notifying or securing authority from the Division of Purchase and Printing. You request the opinion of this office as to whether this procedure is in accordance with the statute dealing with the disposition of surplus supplies.

Section 2-265 of the Code of Virginia of 1948 (formerly section 401-i) reads as follows:

"The Director of the Department of Accounts and Purchases shall transfer surplus supplies or equipment from one State department, division, institution or agency to another, and sell surplus supplies or equipment which may accumulate in the possession of any State department, division, institution or agency and pay the proceeds derived therefrom into the State treasury. No such surplus supplies or equipment shall be transferred or sold, however, without the consent of the head of the department, division, institution or agency having them in possession, or unless ordered by the Governor. No such supplies or equipment shall be sold or exchanged except as provided herein."

Once property has been declared as surplus by an agency having possession of the same and reported for disposal on the form sent to me with your letter, it is my opinion that its sale or transfer should actually be handled by the Department of Accounts and Purchases, as provided in the statute quoted above, and not by the agency reporting it as surplus.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**TAXATION—Capitation Tax is Assessable Against Resident of State. F-100c**

August 23, 1948.

MR. J. EARL RINKER,  
Deputy Commissioner of the Revenue,  
Winchester, Virginia.

My dear Mr. Rinker:

This is in reply to your letter of August 20, in which you ask whether a person who moved into Virginia after January 1, 1947, and before November 2, 1947, is required to pay his poll tax and, if so, by what date in order to be eligible to vote in the coming November election.

Under section 22 of the Tax Code a capitation tax is assessable against a person who moves into Virginia for the year in which he becomes a resident re-

ardless of whether he becomes a resident on the first day of January of that year or thereafter during the year. Since the person of whom you speak became a resident during 1947, he is assessable with the tax for that year and must have paid the same six months prior to the election, or by May 1, 1948, in order to be eligible to vote in the coming November election.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**TAXATION—Certain Sales may be Held by Licensed Merchants. F-9**  
January 25, 1949.

HONORABLE J. SYDNEY SMITH, JR.,  
Commonwealth's Attorney,  
818 National Bank of Commerce Building,  
Norfolk 10, Virginia.

My dear Mr. Smith:

This is in reply to your letter of January 11, regarding the right of the Hoffman Galleries to conduct auction sales of the merchandise mentioned in Chapter 581 of the Acts of Assembly of 1926 without limiting such sales to one a year.

Section 1 of the 1926 Act (which is found in Michie's Code of 1942 as §§2384o-2384n) reads as follows:

"Except as hereinafter provided, it shall be unlawful for any person, firm or corporation to sell, dispose of or offer for sale in the State of Virginia, at public auction, or cause or permit to be sold, disposed of or offered for sale at public auction in the State of Virginia, any diamonds, or any other precious or semi-precious stones or imitations thereof, watches, clocks, jewelry, gold, silver or plated-ware, china, glassware, art goods, rugs, tapestries or leather goods, whether the same shall be their own property or whether they sell the same as agents or employees of others; provided, however, that this section shall not apply to judicial sales or sales by any executor, administrator, or trustee under deed of assignment; nor to sales by or in behalf of licensed pawn-brokers in the manner prescribed by law, nor to the sale at public auction of the stock on hand of any person, firm or corporation that shall for the period of two years next preceding the sale have been continuously in business in the same city, town or county in the State of Virginia, as a retail or wholesale merchant dealing in the articles above mentioned; and *provided, further, that where such auction sales as are allowed under this act shall be held by such merchant, such sales shall be held continuously from day to day, and shall not continue longer than thirty days, Sundays and legal holidays excepted; nor shall the same dealer, either by himself or another, conduct another auction sale in connection with such business for a period of twelve months from the last date of a former sale.*" (Italics supplied).

Section 2 provides that, before any auction sale of the articles named in Section 1 may be held, the dealer shall obtain a license from the Commissioner of the Revenue and pay a license tax of \$100. This and the following five sections contain various provisions regulating the manner in which such sales shall be conducted. The purpose of the law is to prevent fraud by regulating certain types of auction sales.

If the Hoffman Galleries pays the required \$100 license tax for each auction



sale it conducts, files the necessary inventory and bond for each such auction and complies with all the other regulatory provisions of the Act, it is my opinion that it is not limited to one auction sale a year.

The underscored portion of Section 1 of the Act quoted above applies, in my opinion, to the provision immediately preceding it, which exempts from the Act certain auction sales by retail and wholesale merchants who have been continuously in business as such for a period of two years. The Legislature apparently felt that the established nature of the business of such merchants would insure against fraud and deception and exempted auction sales by them as well as auction sales by pawn-brokers, who are subject to other regulatory statutes, and auction sales by executors and trustees. In allowing the exception as to merchants, however, it provided that the sales should be for a continuous thirty-day period and could be held but once a year. In my opinion this limitation of but one sale a year was not intended to apply to those who comply with the regulatory features of the Act.

I note that it is contended that the Hoffman Galleries is in fact a merchant because a portion of the merchandise it sells belongs to it, having been purchased by it for resale, and that it is, therefore, within the class forbidden to have more than one auction sale a year. From the facts stated, it does appear that the Hoffman Galleries is liable for a merchant's license, though none has been secured by it. However, in so far as the 1926 Act is concerned, I do not think that it is limited to one auction sale a year if it complies with all of the regulatory provisions of that Act. The fact that a person may also be a merchant should not, and in my opinion does not, prohibit him from complying with the Act and holding auction sales thereunder. A merchant is exempted from the Act provided he holds only one auction sale a year. If he is willing to and does comply with all the regulatory provisions of the Act, I see no reason why he cannot hold other sales just as any other person who complies with the terms of the Act.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**TAXATION—Churches Not Exempt From Consumers Tax. F-260**

June 21, 1949.

HONORABLE WM. M. TUCK,  
Governor of Virginia,  
Richmond, Virginia.

My dear Governor Tuck:

This is in reply to your letter of June 17, requesting my opinion as to whether churches are exempt from the consumer's tax imposed by several localities upon utility bills.

As you have pointed out in your letter to the Reverend John W. Wood, paragraph (b) of section 183 of the Constitution of Virginia exempts from taxation only the buildings with the lands they actually occupy and the furniture and furnishings therein and endowment funds lawfully owned and held by churches or religious bodies and wholly and exclusively used for religious worship. Whether or not churches are exempt from the consumer's tax on utilities imposed by localities depends upon the wording of the ordinances adopted by the localities and the statute (usually a charter provision) conferring authority upon the localities to impose such tax. Generally, the statutory provisions authorizing localities to impose such a tax are in general terms without any provisions requiring exemption of churches and religious bodies. For example see Chapters

4 and 34 of the Acts of Assembly of Virginia of 1948, which confer such authority upon the City of Petersburg and the City of Norfolk.

In the absence of such an exemption in the statute or charter provisions authorizing such a tax or in the ordinance imposing the tax, it is my opinion that churches are not exempt.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**TAXATION—Licensed Pawnbrokers not Required to Secure Auctioneer's license to act as merchant. F-9**

October 28, 1948.

HONORABLE JOHN M. HART,  
Commissioner of the Revenue,  
Roanoke, Virginia.

My dear Judge Hart:

This is in reply to your letter of October 25, in which you state that an application has been made for a general auctioneer's license, the object being to have an auction sale of the goods which have accumulated in the stock of the United Pawn Shop, a licensed pawnbroker who has been in business for a number of years. You ask whether, upon the issuance of a general auctioneer's license (Section 164 of the Tax Code), such auction sale may be made without the payment of the license tax required by Section 2 of Chapter 581 of the Acts of General Assembly, 1926, and the compliance with the other provisions of that statute.

Section 1 of the 1926 Act (which is found in Michie's Code of 1942 as Section 2384-o-2384-n) reads as follows:

"Except as hereinafter provided, it shall be unlawful for any person, firm or corporation to sell, dispose of or offer for sale in the State of Virginia, at public auction, or cause or permit to be sold, disposed of or offered for sale at public auction in the State of Virginia, any diamonds, or any other precious or semi-precious stones or imitations thereof, watches, clocks, jewelry, gold, silver or plated-ware, china, glassware, art goods, rugs, tapestries or leather goods, whether the same shall be their own property or whether they sell the same as agents or employees of others; provided, however, that this section shall not apply to judicial sales or sales by any executor, administrator, or trustee under deed of assignment; nor to sales by or in behalf of licensed pawn-brokers in the manner prescribed by law, nor to the sale at public auction of the stock on hand of any person, firm or corporation that shall for the period of two years next preceding the sale have been continuously in business in the same city, town or county in the State of Virginia, as a retail or wholesale merchant dealing in the articles above mentioned; and provided, further, that where such auction sales as are allowed under this act shall be held by such merchant, such sales shall be held continuously from day to day, and shall not continue longer than thirty days, Sundays and legal holidays excepted; nor shall the same dealer, either by himself or another, conduct another auction sale in connection with such business for a period of twelve months from the last date of a former sale."

Section 2 provides that, before any auction sale of the articles named in Section 1 may be held, the dealer shall obtain a license from the Commissioner of

the Revenue and pay a license tax of \$100. This and the following five sections contain various provisions regulating the manner in which such sales shall be conducted.

The purpose of the law was to prevent fraud by regulating certain types of auction sales. The language "except as hereinafter provided" obviously refers to the regulatory provisions contained in Section 2 and following of the Act and does not refer to sales by executors and the other persons named in the latter part of Section 1. While the language used there is that this "section" shall not apply to sales by executors, licensed pawnbrokers and certain others, it is my opinion that this language was intended to exempt sales by those named from all of the regulatory provisions contained in the Act. Since Section 1 does not apply to them, they can conduct the sales without complying with the regulatory provisions "hereinafter provided" in the Act.

To construe the Act otherwise would be to hold that auction sales of the type of property mentioned could be made only by those to whom Section 1 is said not to apply. Obviously it was not intended to prevent others who complied with all of the regulatory provisions from holding such sales. Further, if licensed pawnbrokers had to comply with Section 2 and following of the Act, executors and those conducting judicial sales would also have to comply therewith. Clearly, that was not intended by the law. Apparently it was felt that pawnbrokers need not be made subject to the Act because of the regulation to which they are subject under Section 191 of the Tax Code. Likewise merchants that have been continuously in business for two years were excepted, apparently because it was felt that the established nature of their business would insure against fraud and deception.

Section 8 of the Act provides that no person shall be relieved or exempted from the requirements of the Act by reason of associating temporarily with any licensed merchant, dealer or general auctioneer or by conducting such business in connection with or as a part of or in the name of any such licensed merchant, dealer or general auctioneer. This is a clear indication that such licensed merchants, themselves, are exempt from the Act by the exception clause contained in Section 1. Since this is so, the same is true of licensed pawnbrokers because the same language excepts them both.

It is my opinion, therefore, that the exception clause in Section 1 exempts sales by or for licensed pawnbrokers and the others there named from the requirements of Section 2 and the following of Chapter 581 of the Acts of Assembly of 1926.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**TAXATION—Limitation as to School Taxes only applies to Raising a Reserve Fund for Capital Expenditures. F-197**

January 27th, 1949.

HONORABLE RAYMOND J. BOYD,  
Attorney for the Commonwealth,  
Lebanon, Virginia.

Dear Mr. Boyd:

This is in reply to your letter of January 14th, in which you ask whether there is any limitation upon the amount of taxes which may be levied as a special district school tax for the payment of indebtedness incurred by the issuance of bonds under section 673 of the Code.

Section 673 provides that when bonds are issued to provide improvements at the expense of a school district, the election shall be held only in the district and "the tax sufficient to pay the interest on the bonds, and the sinking fund to redeem the same, shall be levied in such school district, or districts only." Section 698, in dealing with the tax levy which may be made for the payment of indebtedness, provides as follows:

"For capital expenditures and for the payment of indebtedness or rent, the governing body of any county or city may levy a special county tax, a special district tax, or a special city tax, as the case may be, on all property subject to local taxation, such levy or levies to be at such rate or rates as the governing body levying the tax may deem necessary for the purpose or purposes for which levied, except that where the tax is for raising funds for capital expenditures the rate shall not be more than one dollar and fifty cents on the one hundred dollars of the assessed value of the property in any one year, provided that in the county of Bland such rate may be two dollars."

In my opinion the limitation of one dollar and fifty cents on the one hundred dollars of assessed value, applies only where the levy is made for the purpose of raising a reserve fund for capital expenditures, and does not apply where the levy is made for the purpose of repaying an indebtedness incurred after approval of the voters. The quoted language authorizes a special district levy for any one of three purposes: for capital expenditures, the payment of indebtedness, and for rent. The levy may be at such rate as the Board of Supervisors may deem necessary, except in the one instance where funds are being raised for capital expenditures.

Very truly yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**TAXATION—Manufacturers of lumber not liable for tax when sawing for owner.—F-220**

February 9, 1949.

HONORABLE W. FRANCIS BINFORD,  
Trial Justice for Prince George County,  
Prince George, Virginia.

My dear Mr. Binford:

This is in reply to your letter of February 2, from which I quote as follows:

"In preparing returns under the Forest Products Tax Account as provided by Acts of 1948, Chapter 449, Page 875, the law provides that the tax does not apply to an individual owner of timber who actually severs or cuts same from his own premises to be utilized by him in the construction or repair of his own structures, buildings, or improvements, etc.

"Does this also exempt the manufacturer who saws the timber so severed by the owner of same when he brings it to a sawmill to be sawed into lumber?"

Section 2 of the Act provides that the tax shall be levied "upon every person engaging in this State in the business of *severing timber*" (italics supplied), and Section 4 exempts those owners of timber "who occasionally severe or cut the same from their own premises" for their own use.

It is further found in Section 6 of the Act that the manufacturer shall make

the necessary reports and *pay the tax* to the Department of Taxation. Therefore, upon reading this section in conjunction with Section 2, it is my opinion that the manufacturer in the instant case would not be liable for the payment of the tax, since he is sawing timber for an individual who is exempt by virtue of Section 4.

Of course, the manufacturer, for his own protection, should satisfy himself and be able to show the Department of Taxation that the individual in question has actually severed the timber from his own premises and for his own use.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**TAXATION—Member of the Armed Forces is relieved from paying poll taxes in time of war.—Penalty on other taxes abated during period of military service. F-356a**

February 21, 1949.

HONORABLE PHILIP P. BURKS,  
Treasurer of Bedford County,  
Bedford, Virginia.

My dear Mr. Burks:

This is in reply to your recent letter, from which I quote as follows:

"A Bedford County taxpayer who was assessed with state and county taxes for the year 1948, and who is now in the U. S. Army, has made application to be relieved of paying the 5 per cent penalty which was added for failure to pay said taxes on or before December 5, 1948. Am I authorized under the law to relieve said taxpayer of the said penalty?"

"Are persons who were in armed forces for any part of the year 1948 relieved of paying their state capitation tax for said year in order to qualify to vote?"

First, I point out that Chapter 48 of the Acts of Assembly of 1944, as amended (Section 373a1 of the Tax Code, Michie's Supplement of 1948), which authorized the abatement of penalties and interest on certain taxes assessed against persons in the armed services, expired by its own limitation on June 30, 1948.

However, it is my opinion that the Soldiers' and Sailors' Civil Relief Act is applicable to the situation described above and answers your first question. It reads in part as follows:

"(1) The provisions of this section shall apply when any taxes or assessments, whether general or special (other than taxes on income), whether falling due prior to or during the period of military service, in respect of personal property, money, or credits, or real property owned and occupied for dwelling, professional, business, or agricultural purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

\* \* \* \* \*

"(4) Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of 6 per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon." (50 USCA, App. §560).

In answer to your second question, Section 2 of Article XVII of the Constitution of Virginia reads as follows:

"All poll taxes for the years 1942, 1943 and 1944, assessed or assessable against any person who is, or who at any time during the existing World War II has been, a member of the armed forces of the United States in active service, are hereby canceled and annulled.

"And, also, all poll taxes assessed or otherwise assessable for *every year during any part of which such person is a member of said forces in active services during said war* or any future war, and, also, for the three years next preceding such person's discharge from said active service, provided such discharge is not dishonorable, although such person was not in said service during all of said years, are hereby canceled and annulled. Members of the armed forces of the United States in active service in time of war shall be exempt from future assessments of poll taxes by this State for all years during a part of which they are hereafter engaged in such service." (Italics supplied).

While hostilities have, of course, ceased, this office has previously ruled that a "state of war" still exists and, therefore, the above section of the Constitution is applicable at the present time.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**TAXATION—Members of the Armed Forces Residing in Virginia solely by reason of Military Orders, are Exempt from Personal Property Tax.**  
F-356a

November 24, 1948.

MR. H. W. JOHNSON,  
Commissioner of the Revenue,  
Prince George, Virginia.

My dear Mr. Johnson:

This is in reply to your letter regarding the assessment for local taxation of tangible personal property owned by United States Army personnel stationed at Camp Lee in Prince George County.

The Soldiers and Sailors Civil Relief Act, 50 U. S. C. A., App. §574, reads in part as follows:

"(1) For the purpose of taxation in respect of any person, or of his personal property, income or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled,

compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district: Provided, That nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. \* \* \*

Whether Army personnel stationed in Virginia are here solely by reason of military orders or whether they were originally resident of this State or have adopted Virginia as their residence is a question depending upon the facts of each particular case. If they are residing here temporarily solely because they are stationed here pursuant to military orders and have not abandoned their residence in some other State, the provisions of the above Act exempt his personal property from taxation in this State.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**TAXATION—Merchants Licenses; under what circumstances required. F-65**

February 17, 1949.

HONORABLE HAROLD B. SINGLETON,  
Member of House of Delegates,  
Madison Heights, Virginia.

My dear Mr. Singleton:

This is in reply to your letter of January 27, in which you set forth the following facts:

A person secures a retail merchant's license in Amherst County, Virginia. She has four or five girls working for her who solicit orders for merchandise by sample. After the orders are taken the merchandise is ordered from a wholesale concern and, when received, the same is delivered to the purchaser by the person who solicited the orders. The proceeds collected, after deducting the profits, are sent direct to the wholesale house and copies of the orders are turned over to the person in charge, who holds the retail merchant's license.

You ask whether it is necessary for the person running the business to secure any other State license or whether she can conduct her business in that manner anywhere in the State under one license. You also ask whether the localities can parallel the State license and whether each person soliciting by sample, under the direction and in charge of the general manager, is required to hold an individual State license.

I judge from the above facts, as recited by you, that the person running the business maintains but one store or place of business and that that is located in Amherst County. If that be so, it is my opinion that she is required to secure only the one State license and that she can conduct her business in the manner outlined by you under such license. Section 188 of the Tax Code, which deals with the State license required by retail merchants, contains the following paragraph:

"No additional license, State or local, shall be required of any person, firm or corporation licensed as a merchant in this State for engaging in the business of selling goods, wares or merchandise by sample, where delivery is not made at the time of the sale and where the goods, wares or merchandise subsequently delivered are not the samples."

In view of the provision which I have quoted, no additional license, State or local, can be required on account of the order taking activities of the agents of the person running the business, either of the person conducting the business or of the individual agents soliciting the orders by sample.

Section 296 of the Tax Code provides that:

"In addition to the State tax on any license, the council of a city or town may, when anything for which a license is so required is to be done within the city or town, impose a tax for the privilege of doing the same, and require a license to be obtained therefor; \* \* \*."

If the place of business of the person running the business you describe was located in a city or town, instead of in Amherst County, this provision would authorize such city or town to parallel the State retail merchant's license, but, if the only activities conducted in cities and towns is the soliciting of orders by sample for the person whose place of business is located elsewhere, the language quoted from Section 188 precludes the imposition of any city or town license. There is no statute authorizing counties to impose license taxes.

The above views are based upon the assumption that the person to whom you refer is actually engaged in the business of buying and selling on her own account as a retail merchant and is not selling on commission for the wholesalers or manufacturers from whom the merchandise is ordered. However, if the girls who are engaged in the selling activities are independent contractors selling on commission and are not mere employees, each of them may be subject to a State tax under Section 174 of the Tax Code and to a corresponding city or town license tax as commission merchants.

Very truly yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**TAXATION—Paid on day Letter is Postmarked. F-270**  
**ELECTIONS—Capitation Tax must be Actually Received by Treasurer**  
**Within Prescribed Time. F-270**

December 20, 1948.

HONORABLE CLIFTON C. SIMMS,  
 Treasurer of Grayson County,  
 Independence, Virginia.

My dear Mr. Simms:

This is in reply to your letter of December 11, in which you ask the following questions:

"1. When December 5th falls on Sunday is a County Treasurer permitted to omit the penalty on all taxes paid on Monday, December 6th?"

"2. When payment of taxes is made by mail and postmarked December 5th or 6th and not received by the Treasurer until the 8th of December, shall the Treasurer be permitted to omit the penalty as required in Section 372 of the Tax Code of Virginia?"



"3. Does this also apply to payment of capitation tax made by mail when a County Treasurer closes his books on such payments so far as a qualified list is concerned, six months prior to any election?"

This office has previously ruled that, when December 5 falls on Sunday, taxes may be paid on December 6 without the imposition of a penalty.

The statutes relating to the imposition of penalties for the non-payment of taxes do not define "payment." It is my information that insofar as State taxes are concerned it is the uniform practice throughout the State not to impose penalties for the non-payment of taxes where the taxpayer mails the check for the payment of his taxes on or before the last day on which payment can be made without penalty. The State Tax Commissioner advises me that he has recognized and acquiesced in this practice. Since this practice is in accord with the rule that statutes imposing a penalty should be strictly construed against the State, it is my opinion that you would be justified in receiving taxes without penalty if the check was sent by mail postmarked at any time on December 6.

With respect to the payment of capitation taxes for the purpose of voting, however, the Constitution requires that they be paid at least six months prior to the election. It is my opinion, and this office has heretofore so ruled, that, if the tax is not actually received by you by that time, it has not been paid within the requirements for such payment for the purpose of voting. While this may seem inconsistent, in the latter case it is a question of a person meeting the mandatory requirements of the Constitution in order to have the privilege of voting, while in the former it is a question of whether a statute should be construed as imposing a penalty upon him.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**TAXATION—Poll Tax; Statute Imposing Constitutional. F-100c**

June 2, 1949.

MISS ELSA B. ROWE, *Treasurer*,  
County of Northumberland,  
Heathsville, Virginia.

My dear Miss Rowe:

This is in reply to your request for my opinion as to whether the last sentence of Section 22 of the Tax Code is constitutional. This provision reads as follows:

" \* \* \* Notwithstanding any of the provisions of sections six and four hundred and twenty-four of the Tax Code, or any other provisions of law, the said capitation tax of one dollar and fifty cents per annum is hereby levied upon every person not less than twenty-one years of age who moves into Virginia and becomes a resident, for the year in which he first becomes a resident, regardless of whether he was a resident on the first day of January of said year or became a resident thereafter during the said year."

Section 173 of the Constitution provides that the General Assembly shall levy a State capitation tax of, and not exceeding one dollar and fifty cents per annum on every resident of the State not less than twenty-one years of age, except those pensioned by this State for military services. The last sentence of Section

22 of the Tax Code in no way conflicts with this section of the Constitution. In my opinion, it but carries out the mandate therein contained and is clearly constitutional.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**TAXATION—Property owned by educational institutions: when not exempt from taxation. F-266**

April 25, 1949.

MR. ROBERT P. JACKSON,  
Commissioner of the Revenue,  
Hillsville, Virginia.

Dear Mr. Jackson:

This is in reply to your letter of April 15, in which you enclosed a letter from Morris Harvey College, of Charleston, West Virginia, inquiring if property owned by it, consisting of 1270 acres of undeveloped mineral lands situated in Carroll County, Virginia, is entitled to exemption from taxation under Section 435 of the Tax Code because of its status as a non-profit educational institution.

Paragraph (d) of Section 183 of the Constitution, enacted as part of paragraph (d) of Section 435 of the Tax Code, is as follows:

*"Property owned by public libraries, incorporated colleges or other incorporated institutions of learning, not conducted for profit, together with the endowment funds thereof not invested in real estate. But this provision shall apply only to property primarily used for literary, scientific or educational purposes or purposes incidental thereto. It shall not apply to industrial schools which sell their product to other than their own employees or students." (Italics supplied).*

I assume from your letter that the property in question is not used primarily for "literary, scientific or educational purposes or purposes incidental thereto." Therefore, it is my opinion that it is not exempt from taxation under the above quoted constitutional provision.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**TAXATION—Real Estate Appraisers May Serve as Members of Equalization Board.—F-273**

December 16, 1948.

HONORABLE W. HOWARD ELLIFRITS, *Clerk*,  
Shenandoah County Circuit Court,  
Woodstock, Virginia.

My dear Mr. Ellifrits:

This is in reply to your letter of December 8, in which you ask a question pertaining to the reassessment of real estate in Shenandoah County. You wish to know whether the same six men who served as appraisers in making the gen-

eral reassessment may act as an Equalization Board to sit and hear complaints as to the appraisals.

Under §344 of the Tax Code, the creation of a board of equalization for real estate assessments is discretionary with the board of supervisors of each county. It is not necessary to have an equalization board following each general reassessment. An equalization board, if created, is designed to hear complaints of inequalities or errors in assessments, and to equalize any assessments if necessary in order that the burden of taxation shall rest equally upon all citizens of the county. The appraisers themselves can perform this function without being appointed as an equalization board. These appraisers may, after all appraisals have been made, publish a tentative list of appraisals and give the taxpayers an opportunity to raise any complaints which they may have to the figures. Following the posting of the tentative list and the hearing of complaints of any taxpayers who may think they are aggrieved, the appraisers could then make any adjustments they felt necessary and complete and publish the reassessment.

If the Board of Supervisors of Shenandoah County feels, however, that there should be a Board of Equalization separate and distinct from the appraisers, then this could be done under §344 of the Tax Code. I call your attention to the fact that this section provides that the Board of Equalization shall be composed of not less than three, nor more than five, members, but I know of no provision of law which would prevent the appointment to the Equalization Board of the same men who served as appraisers.

With kind regards, I am

Very sincerely yours.

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**TAXATION—Real Estate—Assessment for a Sewage System in Counties having Population of less than Five Hundred Inhabitants per Square Mile is Valid. F-33**

December 31, 1948.

HONORABLE HUGH B. MARSH,  
Commonwealth's Attorney for Fairfax County,  
Fairfax, Virginia.

My dear Mr. Marsh:

This is in reply to your letter of December 14, in which you requested my opinion as to whether or not Chapter 305 of the Acts of Assembly of 1944, as amended, which is applicable to Fairfax County, is in conflict with Section 170 of the Constitution of Virginia, the pertinent portion of which reads as follows: "Except in cities and towns and counties having a population greater than 500 inhabitants per square mile, as shown by the United States Census, no taxes or assessments for local public improvements shall be imposed on abutting land owners." Fairfax County does not have a population greater than five hundred people per square mile.

The pertinent part of Section 1 of the above named Act authorizes the governing bodies of certain counties "to levy assessments upon property owners in any sanitary district in such county for all or any part of the cost of constructing, reconstructing \* \* \* sewage systems and parts thereof for the use of such sanitary districts."

Section 2 of the Act provides that the governing body of the county, by resolution, shall declare the improvement "to be of general benefit to the sanitary district and to the property therein affected," and Section 8 provides that all assessments shall be determined in proportion to the peculiar benefits which will accrue to each property by virtue of the improvement, and in no case shall any assessment be made in excess of such peculiar benefits.

In the case of *Strawberry, etc, v. Starbuck*, (1918) 124 Va. 71, the Supreme Court of Appeals held that the Drainage Act of 1914 was not in conflict with the provisions of Section 170 of the Constitution and, while that section has since been amended, the question under consideration here is not affected thereby. The Act provides for the establishment of drainage districts in the several counties and for the assessment of land located within the districts in accordance with the benefit it would receive from the improvement.

While the Court declared in the case cited above that the improvements contemplated under the Drainage Act were not such improvements as were prohibited by Section 170 of the Constitution, it also said at page 86:

" \* \* \* The assessments under the drainage act are not assessed against 'abutting' owners as a class, but assessed against all landowners whose lands within the drainage district are benefited, and no assessments can be made upon landowners simply because their lands abut or are merely adjacent to the district, however great the benefit to them may be. The prohibition, it will be noted, is against assessments against 'butting' landowners, and in such discussion it must be always remembered that it is not enough to suggest a constitutional restraint. If there be doubt, that doubt must be resolved in favor of the constitutionality of the act under consideration." (124 Va. 71, 86-87)

The question is not free from doubt, but it is my opinion that the principle laid down in *Strawberry v. Starbuck*, supra, should be applied to the Act under consideration here, thereby reaching the conclusion that it is not in conflict with Section 170 of the Constitution.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**TAXATION—Real Estate of Decedent To Be Included in Determining Tax upon qualification. F-263**

June 13, 1949.

HONORABLE C. H. MORRISSETT,  
State Tax Commissioner,  
Richmond, Virginia.

My dear Mr. Morrissett:

This is in reply to your letter of May 27, in which you refer to an opinion rendered by this office on July 18, 1941, to the Honorable W. C. Crismond relative to the proper interpretation of Section 5371-a of the Code, which opinion appears at page 30 of the Report of the Attorney General for the year ending June 30, 1942.

Section 5371-a of the Code reads as follows:

"The several courts in this State, and the clerks thereof, having jurisdiction to appoint personal representatives, guardians and committees may, in their discretion, when the amount coming into the hands or possession of the personal representative, guardian or committee does not exceed five hundred dollars, allow any such personal representative, guardian or committee to qualify by giving bond without surety, and on estates of decedents of one hundred dollars or less in value, there shall be no tax or court costs upon such qualification."

In the opinion to which you refer the view was expressed that the word "estates" as used in this section includes only such property, whether real or personal, which comes into the hands of the personal representative to be administered by him and that real property which he is not charged by the will of the decedent to administer is not included thereby. You ask that this opinion be reviewed as to the question of the tax to be imposed upon the qualification on an estate when the property to be administered by the personal representative is less than \$100, but real estate in excess of this sum is left as a part of the decedent's estate.

I am enclosing a copy of the opinion to which you refer, from which you will see that this office was there chiefly concerned with the question of whether any court costs should be assessed upon a qualification when the only purpose of such qualification was to secure the administration of assets amounting to less than \$100. While the language used in the opinion was broad enough to apply to the tax question, this was not the primary question. I agree with you that the tax question is governed by Section 125 of the Tax Code, which deals specifically with the tax on wills and administrations and the pertinent part of which reads as follows:

" \* \* \* provided, however, that the tax imposed by this section shall not apply to estates of decedents of one hundred dollars or less in value.

"The value of all real estate shall be included in determining the tax imposed by this section, although the personal representative does not administer upon the real estate and whether or not the personal representative under the will is charged with any duty with respect to the real estate; provided, however, that if the estate of any decedent, whose will is admitted to probate or on whose estate qualification is had in this State, consists partly of real estate situated outside this State, then the value of such real estate situated outside this State shall not be considered in computing the taxes herein imposed."

This section was last amended in 1946, as was Section 5371-a. Since it deals specifically with the tax to be imposed and still contains the language quoted above, it is my opinion that the value of all real estate in the State of Virginia left by the decedent should be included for the purpose of determining the tax.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**TAXATION—Real Estate owned by Peninsula Airport Commission not  
Subject to Taxation. F-49**

December 22, 1948

MR. WILLIAM E. ALLAUN, JR., *Secretary*,  
The Peninsula Airport Commission,  
311 Melson Building,  
Newport News, Virginia.

My dear Mr. Allaun:

This is in reply to your letter of December 3, in which you request my opinion as to whether or not The Peninsula Airport Commission is subject to real estate taxes assessed by either Warwick County or York County, in which counties the real estate owned by the Commission is located.

The Commission was created under Chapter 22 of the Acts of Assembly of 1946, which authorized the governing bodies of the Counties of Warwick, Eliza-

beth City and York, the Cities of Newport News and Hampton and the Town of Phoebus, or any two or more of them, to establish the same for the operation of airport facilities. It has authority to exercise within its area such powers and authority with respect to airports and air navigation facilities as may be conferred by law upon the governing bodies of the counties and cities of the State. All of the above named localities, except the County of York, are members of the Commission.

While the Commission is declared to be an independent body corporate, it is governed by a board whose members are appointed by the participating localities, it is financed from funds appropriated by the localities and upon cessation of its activities all of its assets will be distributed to such localities on the basis of their financial participation. It seems clear, therefore, that the property of the Commission is owned indirectly by the participating localities and that the Commission was authorized to be created as a means whereby those localities could jointly carry on the operation of airport facilities instead of doing so by individual action.

Section 183 of the Constitution provides that property owned "directly or indirectly" by any political subdivision of the Commonwealth shall be exempt from taxation. While property which is "leased or shall otherwise be a source of revenue or profit" is excepted from the above exemption, this has repeatedly been held to apply only to property from which a "net revenue" is derived. See *Mumpower v. Housing Authority*, 176 Va. 426; *City of Newport News v. Warwick County*, 159 Va. 571. While, under the Act pursuant to which it was created, the Commission may make charges in connection with the operation of its facilities, I understand from your letter that it is actually operated on a non-profit basis. Assuming this to be the case, it is my opinion that, as long as it is so operated, the property of the Commission is exempt from taxation under the provisions of Section 183 of the Constitution.

The questions of what should be considered in determining whether the property is a source of net revenue and, if so, under what circumstances it would then become subject to taxation are matters which would necessitate application of the principles enunciated in *Norfolk v. Nansemond Supervisors*, 168 Va. 606; *Warwick County v. City of Newport News*, 153 Va. 789; as well as the cases cited above and others. Since these questions apparently are not involved, I express no opinion with respect thereto.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**TAXATION—Real Estate—when reassessment of is mandatory. F-15**

February 9, 1949.

HONORABLE BERNARD MAHON,  
Attorney for the Commonwealth,  
Bowling Green, Virginia.

My dear Mr. Mahon:

This is in reply to your letter of February 7, which I quote below:

"The population of Caroline County is approximately 14,000. Under the provisions of the Tax Code, Section 242, a general reassessment of the real estate in the county in the year 1949 appears to be mandatory.

"We would like to defer the assessment until after the Legislature meets in 1950. Please advise whether this can be done."

The Fifth Paragraph of Section 242 of the Tax Code reads as follows:

"There *shall* be a general reassessment of real estate in the year nineteen hundred and forty-nine and every eighth year thereafter in each of the counties of this Commonwealth containing less than sixteen thousand population but not less than nine thousand, according to the United States census of nineteen hundred forty; but if any such county has a general reassessment of real estate therein in the year nineteen hundred forty-six, nineteen hundred forty-seven or nineteen hundred forty-eight, there shall be no general reassessment in such county in the year nineteen hundred forty-nine, and the next general reassessment of real estate therein shall be in the eighth year after the last general reassessment, and subsequent general assessment therein shall be in every eighth year thereafter."

The above provision is mandatory and, therefore, it is my opinion that, unless there was a general reassessment in Caroline County in 1946, 1947 or 1948, there must be such a general reassessment in the year 1949.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**TAXATION—REASSESSMENT OF REAL ESTATE—Procedure for qualification of assessors. F-15**

February 14, 1949.

HONORABLE H. M. WALKER, *Clerk*,  
Circuit Court of Northumberland County,  
Heathsville, Virginia.

My dear Mr. Walker:

I have your letter of February 10, 1949, asking that I inform you as to the proper and necessary procedure for the qualification of assessors of land appointed by the Circuit Court. You also advise that when the last general reassessment was made in your county in 1925, bonds in the penalty of \$5,000.00 were executed by the assessor and assistant assessor.

Section 2241 of the Code of 1919 provided for such a bond, however, this law was amended by the Acts of the General Assembly in March 1930. The present procedure is in §242, Chapter 18 of the 1948 Accumulative Supplement to the Virginia Code of 1942, and reads, in part, as follows:

"Every such general reassessment of real estate in a county shall be made by such person or persons, officer or officers, as designated for that purpose by the circuit court of the county, or by the judge in vacation."

The present Act does not make any reference to the usual oath of office, however, it does make a provision for the removal of assessors by the Judge, for the lack of the proper performance of his duties.

With kind regards, I am

Very truly yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**TAXATION—Recordation tax is based on actual value of property conveyed or the consideration recited in deed, whichever is greater. F-90a**

February 17, 1949.

HONORABLE W. L. PRIEUR, JR.,  
Clerk of Courts,  
Norfolk, Virginia.

My dear Mr. Prieur:

This is in reply to your letter of February 3, in which you ask the following three questions:

"1. A owns a lot and contracts to sell the lot to B for \$1,000. B makes a down payment of \$100 on the lot, but does not get a deed for the lot. B then applies for a construction loan for \$10,000 and a local building and loan association grants the loan. At that time the house has not been erected. B then offers for recordation his bargain and sale deed, advising the clerk that the tax should be based on \$1,000, the true consideration. Simultaneously the building and loan association offers for recordation the deed of trust, and pays a tax on the indebtedness secured, to-wit: \$10,000. What tax should the clerk collect on the bargain and sale deed? I am of the opinion that it should be based only on the \$1,000, that is \$1.50.

"2. B contracts to purchase a lot for \$2,000 from A. B is a contractor and erects a building on the lot, and when completed, sells the house and lot to C for \$10,000 and requests A to make a deed direct to C, and at the same time records a purchase money deed of trust for \$8,000. What tax should C be required to pay on his bargain and sale deed? In this case I am of the opinion that it should be on the entire amount of \$10,000, that is \$15.00.

"3. William P. Cherry signed a contract dated May 14, 1948 to buy a few lots of land located on the plat of Commodore Park in the City of Norfolk, at the price of \$1,050 per lot, the seller being Robert C. Bayliss.

"As soon as said contract was signed and in the possession of Mr. Cherry, he started the construction of a building on one of the lots, namely, lot 188. Mr. Cherry is a builder and erects houses to sell.

"As soon as the building was completed he applied to the Mutual Federal Savings and Loan Association of Norfolk for a loan on the new house and lot; a loan of \$8,500 was granted. As soon as this loan was granted, Mr. Cherry asked the seller to have the deed prepared and executed, and sent to Mr. Paul White, broker in the McKevitt Building, for delivery to Mr. Cherry upon payment of the balance of \$1,050 purchase price.

"Today the loan was closed by the attorney; Mr. White was paid the balance due on the purchase price of the lot and received from him the bargain and sale deed conveying lot 188 to William P. Cherry; this deed is actually dated January 21, 1949; it was acknowledged in Richmond, Virginia, on January 25, 1949.

"The deed and the deed of trust is offered for recordation and the person offering the deed and deed of trust states that the purchase price of the lot is \$1,050, and offers to pay a tax on \$1,050, and at the same time records a purchase money deed of trust in the sum of \$8,500. What tax should I collect on the deed of bargain and sale? I am of the opinion that it should be on \$1,050 only."

I agree with your conclusions on the first two questions, but it is my opinion that in the third situation described by you the tax should be based upon the value of the land plus the value of the building which had been erected thereon. Section 121 of the Tax Code provides that the tax on every deed admitted to record shall be fifteen cents on every hundred dollars or fraction thereof of "the consideration of the deed or the actual value of the property conveyed, whichever is greater."



In the first case presented by you the deed of bargain and sale is executed before the building is constructed. The tax, therefore, should be based upon the consideration named in the deed unless the value of the lot itself is greater than that figure. The fact that a loan of \$10,000 had been secured in anticipation of the construction of a building and the fact that a deed or trust securing such loan is offered for recordation simultaneously with the deed of bargain and sale does not alter the value of the property conveyed by this last mentioned deed, that is to say the land alone.

However, in the last two situations the building had been constructed at the time the deed was executed. The deed, therefore, conveyed legal title to the land and all improvements thereon. The tax, therefore, should be based upon the total value of the whole property conveyed, including the building, since that is greater than the consideration named in the deed.

While, in the third case, the person who had the contract for the purchase of the land and who built the building thereon had the deed of bargain and sale convey the property to him instead of a third party as in your second question, the property actually conveyed by the deed was the same in both cases, that is to say the land and the building erected thereon. Though, in the third case, the builder by virtue of his contract to purchase had an equitable interest in the land and no doubt constructed the building at his own expense with the consent of the owner of the lot, legal title to the building was in the owner of the land and did not pass until the deed to the lot was executed. The statute makes no exception as to any equities in the real estate, but provides that the tax shall be upon the value of the "property conveyed" if that be greater than the consideration.

While this may appear to work a hardship, such result could have been avoided if the deed to the lot had been executed prior to the construction of the building. It is not clear why the parties have handled the transaction as they have, but it does appear that, by doing so, they have subjected themselves to a higher recordation tax under the language of the statute.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**TAXATION—Recordation tax on Deed of Trust—when exemption applicable. F-90a**

February 24, 1949.

HONORABLE T. BRYAN TATE, *Clerk*,  
Corporation Court of Danville,  
Danville, Virginia.

My dear Mr. Tate:

This is in reply to your letter of February 23, in which you state:

"Does the exemption from recordation tax applicable to supplementary deeds of trust, as set forth in Section 121 of the Tax Code, extend to a deed of trust that is given as supplementary security to a vendor's lien?

"The facts are these: A conveys a building and lot to B, and reserves a vendor's lien to secure the unpaid portion of the purchase price. B then gives A a deed of trust on the equipment in the building as further security for the unpaid portion of the purchase price, and calls it a supplementary deed of trust to the vendor's lien. The question is whether or not a recordation tax should be paid on this supplementary deed of trust."

Section 121 of the Tax Code, imposing a tax upon instruments admitted to record, provides in part as follows:

"This section is not to be construed as requiring the payment of any tax for the admitting to record of any deed of trust, mortgage, contract, agreement, or other writing supplemental to any deed of trust, mortgage, contract, agreement, or other writing theretofore admitted to record and upon which the tax herein imposed has been paid, hereinafter called the original instrument, where the sole purpose and effect of the said supplemental deed of trust, mortgage, contract, agreement, or other writing is to convey, set over, or pledge property, real or personal, in addition to or in substitution (in whole or in part) of the property conveyed, set over, or pledged in the original instrument, to secure or to better secure the payment of the amount contracted for in the original instrument; but in such case there shall be no tax for the admitting to record of said supplemental deed of trust, mortgage, contract, agreement, or other writing."

Section 121 imposes a tax upon deeds of bargain and sale based upon the consideration or the value of the property whichever is greater. It also imposes a tax upon deeds of trust and mortgages based upon the amount of the obligation secured thereby. In the case you put, when the deed of bargain and sale was offered for recordation a tax was imposed upon it as a deed of bargain and sale. No tax was imposed upon the reservation of the vendor's lien based upon the unpaid purchase price, the obligation for which the lien was reserved.

The purpose of the language quoted above, which exempts certain supplemental instruments, was to permit the recordation, without additional tax, of a supplemental deed of trust or mortgage furnishing additional security for an obligation secured by a previous instrument upon which a recordation tax based upon the *amount of such obligation* had been paid. The deed of trust in the case you put does not come within this purpose.

It may be true that it is supplemental to the transaction for which the deed of bargain and sale was given and also that it furnishes security for the unpaid purchase price in addition to the vendor's lien. However, such security is not in addition to *property conveyed, set over or pledged* by the deed of bargain and sale. B did not convey, set over or pledge the vendor's lien. In fact, it was not even necessary for B to execute the deed of bargain and sale. The vendor's lien was simply *reserved* by A, the grantor.

Since B had not conveyed, set over or pledged any property to A by the original instrument and no tax based upon the amount of the obligation secured had been paid on any previous instrument, it is my opinion that the deed of trust covering the equipment in the building does not come within the language of that portion of Section 121 quoted above, which, since it is a provision of a tax statute affording an exemption, must be strictly construed. For this reason, it is my opinion that the recordation tax is required for recordation of this instrument.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
Attorney General.

**TAXATION—Recording Deed of Trust: Tax chargeable on principal amount secured. F-90a**

April 26, 1949.

BENJAMIN W. MEARS, Esq.,  
Attorney at Law,  
Eastville, Virginia.

My dear Mr. Mears:

This is in reply to your letter of April 14, in which you state that the Clerk

of the Circuit Court of Northampton County requested that you write to ascertain if the State tax of 15 cents per hundred should be paid on the recordation of a deed of trust under the following circumstances:

"On August 8, 1928, a mother executed a deed of trust to Benj. W. Mears, Trustee, on a farm in Northampton County, Virginia, securing the payment of five (5) certain bonds to her children, one in the amount of \$4,195.77, which was first secured, and the other four (4) bonds were for \$4,182.70 each, and were equally secured. Interest was due on these bonds from June 1, 1928. The mother has not paid any of this indebtedness, and informed me a few days ago that she desired to renew the deed of trust securing all five (5) of the children without preference or priority. The new deed of trust has, therefore, been executed securing one of the children the sum of \$4,195.77, with interest from June 1, 1928, and the other four (4) children \$4,182.70 each, with interest from June 1, 1928, or a total of \$20,926.57, with interest from June 1, 1928. The principal indebtedness secured by the new deed of trust was the same amount as was secured under the deed of trust dated August 8, 1928.

"The new deed of trust which is now to be recorded recites the fact that it secures the same indebtedness which was secured by the deed of trust dated August 8, 1928."

The pertinent part of Section 121 of the Code, as amended, which provides that a recordation tax on deeds of trust shall be fifteen cents on every hundred dollars and shall be based upon the amount of bonds or other obligations secured thereby, is as follows:

"This section is not to be construed as requiring the payment of any tax for the admitting to record of any deed of trust, mortgage, contract, agreement, or other writing supplemental to any deed of trust, mortgage, contract, agreement, or other writing theretofore admitted to record and upon which the tax herein imposed has been paid, hereinafter called the original instrument, where the sole purpose and effect of the said supplemental deed of trust, mortgage, contract, agreement, or other writing is to convey, set over, or pledge property, real or personal, in addition to or in substitution (in whole or in part) of the property conveyed, set over, or pledged in the original instrument, to secure or to better secure the payment of the amount contracted for in the original instrument; but in such case there shall be no tax for the admitting to record of said supplemental deed of trust, mortgage, contract, agreement, or other writing."

The above provision exempts from the tax any supplemental deed of trust that pledges property in addition to the property pledged in the original deed of trust or any deed of trust that pledges property as a substitute for the property pledged in the original deed of trust. You state that the deed of trust in question has been given "to renew" the original deed of trust in order to secure the same indebtedness without preference or priority. Since it also appears that neither additional property nor different property is pledged and that this new deed of trust is, in fact, given for the sole purpose of securing payment after the twenty year period of the statute of limitations has run on the original deed of trust, I am of the opinion that the tax of fifteen cents per hundred is due on this deed of trust and should be based on the total amount of the five bonds in question.

While the question of whether or not the accumulated interest to which you refer should be included in ascertaining the recordation tax is, in my opinion, a debatable one, it is my understanding that the administrative practice of the Tax Department is to exclude interest, even though certain, unless it is a part of the principal amount named in the bonds secured by the deed of trust. Therefore, in

view of such practice, I am of the opinion that the tax should be based upon the principal amount named in the bonds secured by the deed of trust.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
Attorney General.

**TAXATION—School Taxes Collected from Annexed Area by County should be Used for School Purposes by Town. F-197**

October 19, 1948.

HONORABLE DAVID GOODMAN,  
Town Treasurer,  
Abingdon, Virginia.

My dear Mr. Goodman:

This is in reply to your letter of October 14, in which you state that the Town of Abingdon operates its own schools through a three-member School Board, and that the school taxes to operate such town schools are levied in the Town, as in the districts, by the Board of Supervisors, collected by the County Treasurer and then turned over to the Town Treasurer for deposit in the Town's school fund.

You further state that 932 acres of the Abingdon Magisterial District will be annexed to the Town effective December 31, 1948, and desire my opinion on the following questions:

"1. Shall the school tax collected from the annexed area by the County Treasurer be turned over to the Town Treasurer for deposit in the Town school fund to be used in the same manner as other school taxes, collected from within the present Town by the County Treasurer? or

"2. Shall the school tax collected from the annexed area by the County Treasurer be turned over to the Town Treasurer and be considered the same as the town taxes that will be levied in the annexed area and be spent, as provided for in Code Section 2958, for capital improvements in the annexed area even though the tax is levied by the Board of Supervisors solely for school purposes?"

Since Section 2958 of the Code (Michie's Supplement of 1948), to which you refer, relates only to those taxes collected by the Town after the effective date of the annexation, it is my opinion that the section does not apply to the situation described by you.

Section 653a3 of the Code (Michie's Supplement of 1948), which deals with the Town school district's share of school funds, provides among other things that:

"For the benefit of each town school district operated by a school board of three members, the county school board shall require the county treasurer to pay over to the town treasurer, if and when properly bonded, the following funds to be used *for school purposes within such special town school district: \* \* \**" (Italics supplied).

Therefore, I am of the opinion that the procedure outlined in question one, set forth above, should be followed by the Town of Abingdon.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
Attorney General.

**TAXATION—State Institution not Subject to Admission Tax Ordinance of Town. F-259**

November 24, 1948.

MR. H. K. GIBBONS, *Business Manager*,  
Madison College,  
Harrisonburg, Virginia.

My dear Mr. Gibbons:

This is in reply to your letter of November 16, regarding the applicability of the Admission Tax Ordinance of the City of Harrisonburg to movies, lectures and concerts held by Madison College in connection with its Student Activities Program.

I have examined the ordinance adopted by the City of Harrisonburg and the provisions of the catalogue of the College to which you refer. It is not clear that the student activities fee, a part of which is assigned to the Lyceum fund for the financing of the Lyceum course, should be considered as an admission charge within the meaning of the ordinance. If this is a charge made to all students whether or not they attend the course of lectures, concerts and movies, a part of which is used simply to defray the cost of such activities for which no independent admission charge is made, it would not seem that it is covered by the ordinance. In any event, for the reasons stated below, I do not think the ordinance applies.

I agree with Mr. Lawrence Hoover, the City Attorney, that the tax imposed by the ordinance is levied against the individual and not against the College as an instrumentality of the State. The ordinance, however, goes further than simply levying the tax against the individual. It imposes the duty of collecting the tax, filing reports in connection with the same, and of remitting the amounts collected upon the person, corporation or agency receiving the payment for the admission. If applied to movies, lectures and concerts held by Madison College for its students, the ordinance would have the effect of making that State instrumentality the agent of the city in the collection of the tax. In the absence of specific legislative authority, either by some provision of the city charter or otherwise, permitting a city to make such an ordinance applicable to State agencies, it is my opinion that the ordinance cannot be made to apply to such agencies.

A municipal corporation is the creature of the Legislature and has no powers not granted to it by that body. It is a well established rule of the old English common law that the sovereign is not bound by any statute unless the same is in express terms made to extend to the sovereign. This common law rule is equally applicable to our State government, and is founded upon the grounds of expediency and public convenience. It is presumed to be the legislative intent to exclude the State from the operation thereof, unless the same is made to apply to the State in express words (25 R. C. L. 783-5). I know of no statute expressly authorizing Harrisonburg to impose duties upon a State agency with respect to the collection of admission taxes imposed by it and, unless Mr. Hoover can refer you to a charter or statutory provision authorizing such action, it is my opinion that Madison College is under no duty in respect thereto and should not consider the ordinance applicable to it.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**TAXATION—War Risk or National Life Insurance: Proceeds of—subject to State Inheritance taxes. F-263**

November 18, 1948.

MR. CARLETON PENN, *Director*,  
Division of Inheritance and Gift Taxes,  
State Department of Taxation,  
Richmond, Virginia.

My dear Mr. Penn:

This is in reply to your letter in which you ask whether the proceeds of War Risk Insurance or National Service Life Insurance issued by the United States Government to members of the armed forces is assessable for inheritance taxes by the Commonwealth of Virginia.

You refer to that provision of the World War Veterans Act which provides that "payments of benefits \* \* \* shall be exempt from taxation \* \* \*." 38 U. S. C. A. §454a. However, that statute has been held by the United States Supreme Court not to prevent such payments from being included as a part of the estate of a decedent for the purpose of computing estate taxes.

In the case of *U. S. Trust Co. v. Helvering*, 307 U. S. 57, 83 L. Ed. 1104, the court noted the conflict which had existed on this point in the following language:

"State courts have differed as to whether proceeds of War Risk Insurance are subject to death duties imposed by the States. See, for example, *Re Harris*, 179 Minn. 450, 229 N. W. 781; *Tax Commission v. Rife*, 119 Ohio State 83, 162 N. E. 390; *Wanzel's Estate*, 295 Pa. 419, 145 A. 512; *Watkins v. Hall*, 107 W. Va. 202, 147 S. E. 876 (holding these proceeds not subject to such excises); and *Re Sabin*, 224 App. Div. 702, 228 N. Y. S. 890; *Re Dean*, 131 Misc. 125, 225 N. Y. S. 543 (contra). In view of this fact and the importance of an authoritative interpretation of the Federal statutes involved, we granted certiorari, 305 U. S. 591, ante, 374, 59 S. Ct. 245." (83 L. Ed. 1104, 1107, Note 3).

It then proceeded to hold that the Federal statutes involved did not exempt such payments from estate taxes, using the following language:

"An estate tax is not levied upon the property of which an estate is composed. It is an excise imposed upon the transfer of or shifting in relationships to property at death. \* \* \* In an analogous situation, Federal bonds exempt by statute from all taxation have been held subject to a Federal inheritance tax. And State inheritance taxes can be measured by the value of Federal bonds exempted by statute from State taxation in any form. Similarly, the statutory immunity of War Risk Insurance from taxation does not include an immunity from excises upon the occasion of shifts of economic interests brought about by the death of an insured." 83 L. Ed. 1104, 1107.

It is well established that the inheritance tax imposed by the State of Virginia is an excise as distinguished from a property tax. See *Jeffress v. Commonwealth*, 152 Va. 100, and *Commonwealth v. Fleet*, 152 Va. 356. It is my opinion, therefore, that, if proceeds of War Risk Insurance or National Life Insurance are payable to and become a part of the estate of a decedent, they should be included as a part of the estate of the decedent for the purpose of computing the inheritance taxes assessable by the Commonwealth.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**TAXATION—When taxes on real estate deemed delinquent. F-262**

February 8, 1949.

HONORABLE JOHN H. POWELL, *Clerk*,  
Circuit Court of Nansemond County,  
Suffolk, Virginia.

My dear Mr. Powell:

This is in reply to your letter of February 1, in which you ask for an interpretation of Section 282 of the Tax Code, which provides that no lien upon real estate for taxes and levies due and payable to the Commonwealth or any political subdivision thereof which has been or shall hereafter become delinquent for twenty or more years shall be enforced after such time.

I am enclosing a copy of an opinion rendered by the Honorable Abram P. Staples on June 28, 1946, when he was Attorney General, in which opinion he held that real estate taxes for any year become delinquent as of June 30 of the following year. While his opinion concerned House Bill 133 of the Session of 1946, which was amended slightly before it was enacted as Chapter 360 of the Acts of that year, the amendment did not affect the question involved.

I concur in Mr. Staples' opinion. You will note that under Section 372 of the Tax Code, while a penalty is assessed as of the 5th day of December if the taxes for any year are not paid by that date, interest is not imposed until the 30th day of June of the year next following the assessment year, which is the date fixed by Section 388 of the Tax Code as the time as of which the delinquent lists compiled by the treasurers shall speak.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**TAXATION—Writ Tax not Imposed on Annexation Proceeding. F-8  
PROCEDURE—Annexation Proceeding Should be on Law Docket. F-8**

August 2, 1948.

HONORABLE JOE W. PARSONS, *Clerk*,  
Circuit Court of Grayson County,  
Independence, Virginia.

My dear Mr. Parsons:

This is in reply to your letter of July 30, in which you ask whether a petition for annexation by a town should go on the law docket or the chancery docket of the court.

Annexation proceedings are special statutory proceedings which, in my opinion, should be placed upon the law docket of the court.

You also ask whether any writ tax should be collected upon the filing of the annexation petition by the town.

Since section 126 of the Tax Code, which imposes the writ tax, does not specifically require such tax upon actions instituted by municipalities, it is my opinion that none should be collected. See *Pelouze vs. Richmond*, 183 Va. 805.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**TAXATION—Y. M. C. A. For Railroad Employees Not Taxable As A Hotel. F-152**

June 8, 1949.

HONORABLE GUY WHITED,  
Commissioner of Revenue,  
Russell County,  
Lebanon, Virginia.

My dear Mr. Whited:

This has reference to your letter of May 26, raising the question of whether the Clinchfield Y. M. C. A. should be licensed as a hotel. It appears that this Y. M. C. A. operates a boarding house at Dante, Virginia, exclusively for the employees of the Clinchfield Railroad Company. Some of these employees work at Dante and stay regularly at the Y. M. C. A., while others, as crews of trains of the Clinchfield Railroad Company running between Erwin, Tennessee and Dante, Virginia, frequently have occasion to spend the night at this Y. M. C. A.

Section 181 of the Tax Code provides for the licensing of persons engaged in the operation of a hotel. That section provides, in part, as follows:

"Any person who keeps a public inn or lodging house of more than ten bed rooms where transient guests are fed or lodged for pay in this State, shall be deemed for the purposes of this section to be engaged in the business of keeping a hotel. A transient guest is one who puts up for less than one week at such hotel, but such a house is no less a hotel because some of its guests put up for longer periods than one week. \* \* \*."

Whether the Clinchfield Y. M. C. A. is a hotel within this section depends upon whether it is a " \* \* \* public inn or lodging house \* \* \*" of more than ten bedrooms. Upon the facts as expressed in your letter, only employees of the Clinchfield Railroad Company may be fed and lodged there. That being so, I do not think the Y. M. C. A. is a public lodging house within the meaning of §181 of the Tax Code.

I note that your letter makes reference to §1585 of the Code, which deals with the inspection of hotels by the State Board of Health. I do not think that this section is pertinent to the question of whether you should collect a license tax from the Clinchfield Y. M. C. A., and for that reason my answer is not based upon it.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**TAXES—Circumstances under which a Peddler's License is Required. F-218**  
September 28, 1948.

HONORABLE GEORGE ABBITT, JR.,  
Commonwealth's Attorney,  
Appomattox, Virginia.

My dear Mr. Abbutt:

This is in reply to your letter of September 11, in which you state:

"Under our peddlers' and merchants' license statutes how much time has to elapse between a salesman's contact and sale to an individual and the actual delivery for a salesman not to be classified as a peddler? In other words, if a salesman approaches a household with a sample of his wares and the



holder agrees and offers to buy, can the salesman have a helper, both riding in the same car, which helper, after the salesman completes the foregoing, deliver the article sold in a space of five minutes following the original contact.

"Would there be any difference if the actual delivery was not made until one hour or ten hours after the original contact; or one day or ten days after the original contact? Assuming the salesman is not classified as a peddler, but is soliciting and taking orders for goods and chattels that are kept in a stockroom, which is not open to the public and in which no sales are made, what license is required?"

In my opinion the facts stated in the first paragraph quoted above bring the person within the provisions of Section 192 of the Tax Code, the peddlers' license tax statute, the first paragraph of which states that:

"Any person who shall carry from place to place, any goods, wares or merchandise, and offer to sell or barter the same, or actually sell or barter the same, shall be deemed to be a peddler \* \* \*"

I think this is true even though the party is licensed as a merchant. While Section 188 of the Tax Code provides:

"No additional license, State or local, shall be required of any person, firm or corporation licensed as a merchant in this State for engaging in the business of selling goods, wares or merchandise by sample, where delivery is not made at the time of the sale and where the goods, wares or merchandise subsequently delivered are not the samples."

Section 192 contains the following provision:

"\* \* \* All persons who keep a regular place of business, open at all times in regular business hours and at the same place, who shall elsewhere than at such regular place of business, personally, or through their agents, offer for sale or sell, and at the time of such offering for sale, deliver goods, wares and merchandise, shall also be deemed peddlers as above, \* \* \*"

Where the person carries the goods about with him in a vehicle ready for immediate delivery which takes place within the space of five minutes after the original contact, the delivery is, in my opinion, made at the time of the sale within the meaning of the above provisions and subjects the person to the peddler's tax even though he is licensed as a merchant.

If the person maintains a regular place of business open at all times in regular business hours, and is thus subject to a merchant's license tax, he is not liable for a peddler's license tax by selling by sample for subsequent delivery when the goods delivered are not the samples. In such case subsequent delivery would, in my opinion, mean any case in which the goods are not carried with the person so as to be available for immediate delivery.

However, if the person maintains no regular place of business, he would come within that portion of Section 192 dealing with peddlers which reads as follows:

"All persons who do not keep a regular place of business (whether it be a house or a vacant lot, or elsewhere) open at all times in regular business hours and at the same place, who shall offer for sale goods, wares and merchandise, shall be deemed peddlers under this section. \* \* \*"

You will note that this provision covers *offers for sale* and does not require delivery at the time of such offer. The fact that delivery is not made for some time, even days after the offer would not exempt him from the peddler's tax. It would seem, therefore, that if the person merely keeps his goods in a stockroom and does not maintain a regular place of business open to the public, he would be liable for a peddler's license tax even under the second paragraph of your letter if he has not paid a merchant's license tax.

I assume that you do not have reference to peddlers who sell to licensed deal-

ers or retailers. For your information Section 192-b, dealing with such peddlers, requires delivery to be made at the time of the sale or on the same day thereof.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**TAXES—Limitation in General Law Fixing Levy not applicable to Town Where Charter Thereof Authorizes such Levy. F-60.**

September 30, 1948.

HONORABLE LA RUE VAN METER,  
Commissioner of the Revenue,  
Falls Church, Virginia.

My dear Mr. Van Meter:

This is in reply to your letter of September 22, in which you ask if Section 2907 of the Code applies to the City of Falls Church, which has just changed from the status of a town to that of a city of the second class.

Section 2907 provides that the tax levied on property by such a city shall not exceed the limits fixed by its charter and, if its charter fixes no such limit, then the levy shall not exceed \$2 on the \$100 of value of such property. The charter of the Town of Falls Church is contained in Chapter 378 of the Acts of Assembly of 1946 and the second paragraph of Section 3 thereof provides as follows:

"To fix or set, levy and collect taxes on property, subject to limitations prescribed by the Constitution and laws of Virginia in force at the time of imposition of such taxes; provided, however, that the tax for all purposes on property within the town shall not exceed one dollar and forty cents (\$1.40) on each one hundred dollars (\$100.00) of assessed valuation except (a) for amounts necessary to pay interest, principal, or sinking fund of any bonded indebtedness of the town, (b) taxes for fire protection, (c) special assessments for local improvements, water works and sewer system, and (d) taxes that the general laws of Virginia permit towns to levy in excess of their charter limitations. The fire protection tax levied by the town shall be the only such fire protection tax levied therein."

This charter provision provides a limit upon the levy which can be made by the town, consisting of \$1.40 plus definitely ascertainable sums for certain specific purposes. It is my opinion, therefore, that the \$2 limit specified by Section 2907 does not apply to the City of Falls Church, but that that city is governed by the terms of the above charter provision.

You also ask whether or not a levy consisting of certain items set forth in your letter would be within the charter limitations. The charter provision clearly authorizes, in addition to the amount of \$1.40, sums to be included in the levy for interest on bonded indebtedness and for fire protection. I assume that the amounts set forth in your letter for these latter two purposes are the amounts needed for these purposes. The charter provision also authorizes the levy to include an additional sum of 25 cents which Section 294 of the Tax Code authorizes towns to levy in excess of any specific limitation in the charter.

You also list an additional sum of 25 cents as being imposed under Chapter 293 of the Acts of Assembly of 1948 (Section 3078-d of Michie's Code of Virginia). This Chapter authorizes the governing bodies of counties, cities and towns to establish and maintain post-war public works reserve funds and authorizes the governing bodies to include as a part of the annual levy such sum as may be deemed necessary for this purpose. While Section 7 of this Act provides that

the reserve fund authorized thereby may be established notwithstanding anything in the charter of the city or town to the contrary, the purpose of this provision, in my opinion, was to remove any general disability to impose taxes for the purpose of accumulating a reserve fund. This Act does not expressly state that taxes imposed for such purpose may increase the limit of the levy which may be made by the town and I think it very doubtful if the Act would be so construed.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**TAXES—Peddlers tax cannot be imposed on concern paying a capital tax.  
F-65**

March 10, 1949.

MR. T. JEFF EGGLESTON,  
Commissioner of the Revenue,  
Martinsville, Virginia.

My dear Mr. Eggleston:

This is in reply to your letter of March 5, from which I quote in part as follows:

"The Krispy Kreme Doughnut Company, a North Carolina Corporation, also domesticated in Virginia, with plants at Alexandria and Danville, simultaneously sells and delivers its bakery products in the City of Martinsville. The truck from which sales and deliveries are made comes, however, from a plant in North Carolina. Although the corporation does pay a capital tax to the Commonwealth, it is not upon capital which produces the bakery products sold in Martinsville."

You asked whether or not this Company is subject to the State license tax imposed by Section 192-b of the Tax Code, which requires a peddler's license of every person, firm, or corporation who or which peddles goods, wares, or merchandise by selling and delivering the same at the same time to licensed dealers or retailers at other than a definite place of business operated by the seller.

You also asked whether this Company would be subject to a local license tax to the City of Martinsville under the "catch-all" provision of the local tax ordinance under which a city license tax equal to the amount of the State license tax is imposed in every case in which a license is required by the State on any business not specifically enumerated in the local tax ordinance.

Section 188 of the Tax Code, imposing a license tax upon merchants, contains the following provision:

"A manufacturer taxable on capital by the State may, except as in this section provided, sell and deliver at the same time to licensed dealers or retailers, but not to consumers, anywhere in the State, without the payment of any license tax of any kind for such privilege to the State, or to any city, town or county."

Section 192-b of the Tax Code, dealing with the tax on peddlers to dealers and retailers, also exempts from its provisions a manufacturer taxable on capital by this State. Since the Krispy Kreme Doughnut Company pays a capital tax to the State of Virginia because of its manufacturing activities at its plants in Alexandria and Danville, it is my opinion that it can sell and deliver at the same time to licensed dealers or retailers anywhere in the State without the payment of

any license tax of any kind for such privilege to the State or to the City of Martinsville. This Company comes within the express terms of the exemption provided by the language quoted above from Section 188 of the Tax Code and, even though the capital tax paid by it is not upon the capital which produces the bakery products sold in Martinsville, in my opinion it may, nevertheless, peddle to licensed dealers in Martinsville without paying a peddler's license tax.

Since no State tax is required, it would follow that the Company would not have to pay a local tax under the "catch-all" provision of the Martinsville tax ordinance.

This matter has been discussed with the State Tax Commissioner and he advises that he agrees with the conclusions stated above and has so construed Sections 188 and 192-b of the Tax Code in similar instances in the past.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**TAXES—Reassessment of real estate—Time for completion; Non compliance. F-15**

March 16, 1949.

HONORABLE ROBERT R. GWATHMEY, III,  
Commonwealth's Attorney for Hanover County,  
1201 Mutual Building,  
Richmond 19, Virginia.

My dear Mr. Gwathmey:

This is in reply to your letter of March 1, in which you state that the general reassessment of real estate in Hanover County was undertaken in 1948 pursuant to Section 242 of the Tax Code, but that the assessors have not yet been able to complete the reassessment and probably will not be able to do so for another month or so. You have requested that I advise you prior to the April meeting of the Board of Supervisors as to the legal status of this reassessment in order that the Board may know whether, in fixing the levy for this year, it should be guided by the reassessment or the old assessment.

Section 242 of the Tax Code directed that "there shall be a general reassessment of real estate in 1948 and every eighth year thereafter" in each county having a population of less than 26,000, but not less than 16,000. Section 247 of the Tax Code reads in part as follows:

" \* \* \* In every city and county the person or persons, or officer or officers, making such reassessment shall complete the same and comply with this section not later than December thirty-first of the year of such reassessment provided that the judge of any court in the clerk's office of which the original of such reassessment is required to be filed may, for good cause, extend the time for completing such reassessment and complying with this section for a period not exceeding sixty days from the thirty-first day of December of the year of such reassessment. \* \* \* "

I have been unable to find any case construing the above provision or dealing with the effect of a reassessment not completed within the time there specified. However, in the case of *Whitlock v. Hawkins*, 105 Va. 242, the Court had under consideration Chapter 23 of the Code of 1887 as amended in 1903 dealing with the quinquennial reassessment of real estate for State taxation.

Section 443 of that Code was quite similar to the present Section 247 of the

Tax Code and provided that a copy of the reassessment "shall be delivered to the commissioner of the revenue of the county on or before the first day of June, in the year in which the assessment is made; but, for good cause shown, the judges of the circuit or corporation courts, respectively, may extend the time of making the returns of such assessment to the first day of July next succeeding." It also provided that any assessor failing to comply with this requirement shall forfeit his right to compensation for his services. The assessors making the 1905 reassessment in the City of Richmond did not return the assessment in the time prescribed. In dealing with this question the Court said:

"There remains one question to be disposed of, which arises in respect to the assessment in the city of Richmond. It is claimed that it is invalid because there was no return made of such assessment within the time prescribed by law; but we cannot agree to the correctness of this position, the effect of which would be to render all assessments of lands of the Commonwealth void if the assessors failed to return their assessments until after the date fixed by law for their delivery.

"Time is not, in this case, of the essence of the transaction, nor is it anywhere in the act made a condition of its validity. The assessments should be returned in time to give all persons affected by them opportunity to make objection and obtain redress; but when this has been done we think that every necessary condition has been satisfied and that the provision relied upon is directory and not mandatory in its operation." (105 Va. 242, 266).

While the statute involved in that case used the word "shall" and appeared to be mandatory, the Court held that the failure to comply therewith did not render the reassessment invalid, since the taxpayer was not adversely affected by the non-compliance. In this the Court was following well accepted principles of construction of statutory requirements regarding the assessing of taxes. In 51 American Jurisprudence, at page 618, it is said:

"While the statutes of most states provide in considerable detail how the work of assessing the taxes shall be performed, compliance with all of these provisions in exact conformity to the law is not necessarily a condition precedent to a valid tax. The test is whether the provision is for the benefit and protection of the individual taxpayer or is merely for the orderly administration of public affairs. All those provisions which are intended for his security, for insuring an equality of taxation, and to enable one to know with reasonable certainty for what real and personal estate he is taxed, and for what all those who are liable with him are taxed, are conditions precedent which must be observed; otherwise, the assessment will be invalid. \* \* \* Many regulations, however, are made by statute, designed for the information of assessors and other officers, and intended to promote method, system, and uniformity in the modes of procedure, the compliance or noncompliance with which in no respect affects the rights of taxpaying citizens. Such provisions may be considered directory merely, and noncompliance with them does not affect the validity of the tax. \* \* \*"

See also *Appeal of Baldwin*, 33 Atl. (2d) 773 (Penn., 1943), in which it was held that the time for completing and making returns of a reassessment was merely directory and not mandatory.

Section 443 of the Code of 1887 differs slightly from the present section 247 of the Tax Code in that the latter requires the persons making the reassessment to "complete the same and comply with this section *not later than* December thirty-first" and provides that the time may be extended for a "period *not exceeding* sixty days." The situation was also different in that under the Code of 1887 the time for completing the reassessment was in the middle of the year and now the time is at the end of the year. Section 250 of the Tax Code provides that:

"Taxes for each year on real estate subject to reassessment shall be extended on the basis of the last general reassessment made prior to such year subject to such changes as may have been lawfully made."

The weight to be given to the case of *Whitlock v. Hawkins, supra*, is also affected by the fact that, for other reasons, the 1903 amendment to Chapter 23 of the Code of 1887 had been held invalid and in 1906 it had been reenacted and the reassessments made under the 1903 amendment were ratified and confirmed.

It is possible that the Courts, following the *Whitlock Case* and the general principles stated in American Jurisprudence quoted above, would hold that the failure to complete the reassessment in Hanover County in 1948 or within the extension of sixty days does not render the reassessment invalid or even prevent its use as the basis for the levy in 1949. However, in view of the difference in the language of the statutes, in the time of year the reassessment is now made and in view of the language of Section 250, I cannot give an unqualified opinion to that effect. This is particularly true since in 1948 there were two sections added to the Tax Code authorizing certain counties which had not made or completed their reassessment in the year required by Section 242 to have such reassessment made the next succeeding year. See Sections 242-c and 242-e of the Tax Code. This is an indication that the Legislature considered the provisions of Section 242 and 247 to be mandatory. Until the Courts have passed upon these sections, it cannot be stated with certainty that they would not be held to be mandatory and that any reassessment not complying with their provisions would not be held invalid.

In view of the effect upon the County's finances, if the levy is made upon a tax base computed on the basis of the reassessment and such reassessment should later be held invalid, it would appear that the advisable course would be to levy the tax on the basis of the old assessment. The reassessment can then be completed and legislation permitting its use as the basis of future levies can be requested at the next session of the General Assembly.

This letter is somewhat lengthy, but, since I do not think that a positive opinion can be expressed, I wished to point out the uncertainties of the matter in order that you and the Board of Supervisors can be fully advised in determining the course of action to be adopted.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General*

#### **TOLLS—Vehicles Carrying Students Exempt From.—F-201**

June 23, 1949.

HONORABLE JOHN T. DUVAL,  
Commonwealth's Attorney for Gloucester County,  
Gloucester, Virginia.

My dear Mr. DuVal:

This is in reply to your letter of June 20, in which you desire my opinion as to whether or not a student who has enrolled to attend a summer school session at the College of William and Mary is entitled to free transportation over the Gloucester-Yorktown Ferry on trips going to and from his home while attending the summer school.

As you pointed out, Section 694 of the Code provides that it shall be unlawful to collect tolls for the use of any roads or highways or bridges in this State by a vehicle when the same is carrying a student to and from immediate attendance upon any school, college, or other educational institution in the State.

It is my opinion that the use of the word "highways" in Section 694 includes

"ferries," for it has long been settled in this State that a public ferry is a public highway. See *Almond v. Gilmer*, 188 Va. 822, 838; *State Highway Commissioner v. Yorktown Ice, etc. Corp.*, 152 Va. 559, 568; and *Chesapeake Ferry Company v. Hampton R. T. Co.*, 145 Va. 28, 39. Therefore, it is my conclusion that it is unlawful for the ferry in question to collect tolls in this instance.

For your information I am enclosing a copy of a former opinion of this office concerning the right of a student to be exempt from the payment of a bridge toll. Report of the Attorney General, 1943-44, page 208.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**TREASURERS—Depository Security not required unless Funds are deposited in the name of the State Treasurer. F-130**

March 23, 1949.

HONORABLE WALTER B. GENTRY,  
Treasurer of the City of Richmond,  
Richmond, Virginia.

My dear Mr. Gentry:

This is in reply to your letter of March 21, in which you state that the State revenues collected by you in your capacity as Treasurer for the City of Richmond are deposited in several Richmond banks in the name of "Walter B. Gentry, Treasurer of the City of Richmond." You also state that you have advised the banks that these funds belong to the State of Virginia exclusively and have directed them not to honor any checks drawn on the accounts unless the same are drawn in favor of and made payable to the Treasurer of the State of Virginia. You ask whether under these circumstances these funds comes under the law which requires a bank to secure State funds.

While Sections 585(69) and 2156-2162, which deal with the deposit of State funds in State depositories, require banks selected as such depositories to secure funds deposited by the State Treasurer or deposited by any State agency or officer to the credit of the State Treasurer, it is my opinion that these sections do not require banks to secure funds deposited in the name of anyone other than the State Treasurer. For this reason I do not think that the banks are required to secure funds deposited by you in your name as Treasurer of the City of Richmond, even though the funds so deposited are State funds.

However, I call your attention to Section 4149(49), which reads in part as follows:

"No bank or trust company shall give preference to any depositor or creditor by pledging the assets of such bank or trust company, except as otherwise authorized in this section; provided, that any bank or trust company may deposit securities for the purpose of securing deposits of the United States government, and its agencies, and the Commonwealth of Virginia, its agencies, and its political subdivisions, and for the purpose of securing sureties on surety bonds furnished to secure such deposits, or may, in lieu of depositing such securities to secure deposits of political subdivisions of the Commonwealth, by its board of directors, adopt a resolution before such public funds are deposited therein, to the effect that, in the event of the insolvency or failure of such bank or trust company, such public funds thereafter deposited therein shall, in the distribution of the assets of such bank or trust company, be paid in full before any other depositors shall be paid deposits thereafter made therein, and the adoption of such resolution shall be deemed

to constitute a binding obligation on such bank or trust company; and further provided that any bank or trust company is authorized: \* \* \* \*

While this provision does not require the banks to secure State funds deposited in the manner described by you, it is my opinion that it does authorize them to do so. If the banks handling the funds collected by you are willing to secure the deposits under the provisions of this section, it might be advisable for you to contact the State Treasurer for suggestions as to the form of security which should be taken from the banks. If this office can be of assistance in connection with the matter, please advise me.

If no satisfactory arrangements can be made with the banks under Section 4149(49), the banks could be required to provide adequate security for these funds by having them deposited directly to the credit of the State Treasurer, in which case the provisions of the statutes first mentioned above would apply.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**TREASURERS—Not Entitled to Fee for Copying and Certifying Poll Tax Lists. F-130**

November 9, 1948.

HONORABLE CLIFTON C. SIMMS,  
Treasurer of Grayson County,  
Independence, Virginia.

My dear Mr. Simms:

This is in reply to your letter of November 6, in which you ask if a county treasurer is entitled to receive from his county three cents for every ten words for copying and certifying poll tax lists, as provided in Section 112 of the Code, in addition to his regular salary.

Chapter 426 of the Acts of Assembly of 1932, which placed county treasurers upon a salary basis, provided that "all fees and commissions heretofore provided by law to be paid treasurers \* \* \* are hereby abolished."

In view of this provision, it is my opinion that county treasurers are not entitled to the fee provided by Section 112 for copying and certifying the lists.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

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**TRIAL JUSTICES—Arrest Fees and Costs for Retention of Prisoners Resulting from Violation of Town Ordinances payable to Town. F-136a**

August 27th, 1948.

HONORABLE MARVIN G. GRAHAM,  
Member House of Delegates,  
Pulaski, Virginia.

Dear Mr. Graham:

Mr. J. Gordon Bennett, State Auditor, has referred your letter of August 18th, to this office for reply. In your letter to Mr. Bennett you state the following:



"The Town of Pulaski is now considering placing jurisdiction for the trial of offenses under town ordinances with the Trial Justice Court of Pulaski County. The Town now pays the county for the admittance of town prisoners to the county jail and for their retention there, and it also, of course, pays the entire salary of the town police officers.

"In the event that the Trial Justice is given jurisdiction over all offenses under town ordinances, will the arrest fees, and the charges for admittance to and retention in jail assessed against convicted persons for offenses under town ordinances, be paid by the Trial Justice into the treasury of the town in the same manner that fines imposed upon such convicted persons are payable?"

The Charter of the Town of Pulaski, Chapter 337 of the Acts of Assembly of 1948, authorizes the appointment of a Police Justice to try violations of Town ordinances, should the Council adopt a resolution as provided in Section 4987j6 of the Code. The Charter further provides that if such resolution is not adopted, or if the same be subsequently repealed after adoption, the provisions of the trial justice act vesting jurisdiction to try violations of town ordinances, shall be operative.

Section 4987(m), relating to Trial Justices, provides:

"All fees paid to and collected by the trial justice, the substitute trial justice, the trial justice clerk, or substitute trial justice clerk, but not including fees belonging to officers other than the trial justice, his clerk, or clerks, shall be paid promptly to the Clerk of the Circuit Court, who shall pay same into the State Treasury. \* \* \* Fines collected for violations of City, Town or County ordinances shall be paid promptly into the treasury of the city, town or county whose ordinance has been violated. \* \* \*"

In my opinion those items of costs which are designed to reimburse the town for expenditures made by it in connection with the prosecution should be paid into the town treasury along with the fines collected for violation of the town ordinances. Generally costs are assessed for the purpose of reimbursing the government for the expenses of the prosecution and, while the fee of the trial justice and his clerk are required to be paid into the State Treasury, and thus aid in the payment of their salaries which are paid by the State, the items mentioned by you are for expenses which are borne by the town by way of salaries for its police officers, and expenses paid to the county for admittance and maintenance of town prisoners in the county jail. While not expressly covered by the language of Section 4987m, they are in the nature of fees belonging to officers other than the trial justice and his clerks which are not required to be paid by the trial justice to the Clerk of the circuit court.

Though normally the board of prisoners prior to conviction is not taxed as costs (See the Opinions of the Attorney General for the year 1942-1943, at Pages 55 and 56), it appears that Section 18 of the Charter of the Town of Pulaski contains an express provision for the taxing of this item in cases involving violations of its ordinances. While this section refers to the costs to be assessed by the Police Justice, it is my opinion that it would be applicable when the Town vests authority in the Trial Justice to try such violations.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**TRIAL JUSTICES**—Not eligible to be Appointed Justice of the Peace of Towns. F-136a  
**CITIES, TOWNS AND COUNTIES**—No Authority to Appoint County Trial Justice as Local Officer. F-136a

August 25, 1948.

HONORABLE PORTER R. GRAVES,  
Trial Justice for Rockingham County,  
First National Bank Building,  
Harrisonburg, Virginia.

My dear Mr. Graves:

This is in reply to your letter of August 24, in which you ask whether the Town of Elkton has authority to enact an ordinance vesting in a trial officer other than the Mayor of the Town the jurisdiction to try violations of town ordinances and, if so, whether you could be employed as such trial officer in view of the fact that you are Trial Justice of Rockingham County.

Section 3111-a of the Code provides that any incorporated town in this Commonwealth may provide in its charter for the election or appointment of a justice of the peace for the town, who shall be clothed with the power to try violations of town ordinances in place of the mayor of the town. I find no provision in the charter of the Town of Elkton, as enacted by Chapter 550 of the Acts of Assembly of 1926, providing for the election or appointment of such justice of the peace. Unless the town charter has been amended since that time, it is doubtful whether the Town would have the authority to vest the jurisdiction to try violations of town ordinances in any trial officer of the Town other than the mayor. While section 3 of the charter provides that there shall be certain designated officers of the Town and such other officers as the Council deems necessary, I think it is doubtful that this provision would be held to authorize the appointment of such a trial officer, in view of the fact that section 12 of the charter specifically vests the authority to try violations of town ordinances in the mayor.

In any event, it is my opinion that you would be ineligible to be appointed as such special justice of the peace for the Town of Elkton because of the provision of section 4987-1 of the Code which reads as follows:

"Any person hereafter appointed to the office of trial justice shall not be eligible to hold the office of justice of the peace elected or appointed other than under the provisions of sections forty-nine hundred and eighty-seven-a to forty-nine hundred and eighty-seven-o, both inclusive."

Since section 3111-a of the Code states that a town may provide in its charter for the appointment or election of a "justice of the peace" to try violations of town ordinances in place of the mayor, an office created for that purpose, regardless of the name given the position, would in my opinion come within the prohibition of the language quoted above.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**TRIAL JUSTICES**—Of county also trial justices of towns located therein.  
F-136a

September 16, 1948.

HONORABLE LARUE VAN METER,  
City Attorney,  
Falls Church, Virginia.

My dear Mr. Van Meter:

This is in reply to your letter of September 8, in which you state that the

Town of Falls Church is presently in the transition stage from the status of a town to that of a city of the second class, and that the question has arisen as to the jurisdiction of the trial justice provided for by section 18 of the charter of the Town (Chapter 378, Acts of Assembly of 1946).

This section authorizes the Council to create by ordinance the office of trial justice for the Town and provides that "such trial justice may, insofar as not in conflict with the general laws of the Commonwealth relating to trial justices, have jurisdiction and powers similar to the jurisdiction and powers of police justices in cities."

Under the trial justice statutes, sections 4987a et seq. of the Code, the trial justices appointed for counties are also the trial justices for the towns located therein. Section 4987f5 provides that no justice of the peace or mayor in any incorporated town shall exercise the jurisdiction conferred upon trial justices. This last mentioned section is qualified by section 4987f6, which authorizes the council of a town to confer upon the mayor or other trial officer the jurisdiction to try violations of town ordinances.

The fact that the charter of the Town of Falls Church authorizes the appointment of a trial officer designated as a "trial justice" does not make such officer a trial justice within the meaning of sections 4987a et seq. with the general jurisdiction thereby conferred upon trial justices. The trial justice of the Town of Falls Church provided for by the town charter is only such a special justice of the peace as is authorized by section 3111a of the Code and would have only the jurisdiction which section 4987f6 authorizes town councils to confer upon trial officers of the towns. The charter of the Town of Falls Church confirms this in providing that the jurisdiction of such officer shall not conflict with the general laws relating to trial justices.

Since, when Falls Church was a town, the "trial justice" provided for by its charter, had only the jurisdiction specified in section 4987f6, I do not think his jurisdiction is enlarged when the town becomes a city of the second class by increase in its population. The town charter does not so provide, nor can I find any general statute which would have this effect.

The statutes relating to the transition of towns to cities of the second class are not entirely clear on this question, since they do not deal specifically with trial justices or their jurisdiction. Section 2895, however, which follows the provisions relating to certain specific officers, provides that "All other officers of the town shall be and continue officers of the city until the expiration of the term for which they were chosen or until they are removed according to law or their offices abolished by the common council." Since under section 4987a the trial justice of the county is appointed for the towns located therein as well as the county, it would seem that such trial justice would be one of the officers whose duties and functions are continued by section 2895. I understand that this is the practice followed in several cases where this problem has arisen. In some cases the newly created city and the county have taken the precaution of following the procedure prescribed by section 4987c to have the trial justice specifically appointed for such city and county jointly.

You also state that the town presently has no sergeant and ask if the municipality may appoint one for the transition period. Since section 9 of the charter authorizes the Council in its discretion to provide for a town sergeant, it is my opinion that the Council may proceed to elect one. You will note that section 2886 of the Code continues the town charter in effect. I do not think that section 2893, which deals generally with the election of officers, conflicts with the charter provision or prevents the election of a town sergeant under the charter provisions prior to the November, 1949, elections.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**TRIAL JUSTICES—Papers filed with Clerk of Circuit Court Cannot be Withdrawn. Such Clerk May Issue Executions on Judgments after Two Years when Plaintiff can Recover Costs. F-136a**

December 15, 1948.

HONORABLE JOHN H. BOOTON,  
Trial Justice for Page County,  
Luray, Virginia.

My dear Mr. Booton:

This is in reply to your letter of December 3, in which you ask several questions concerning Section 4987j of the Code.

You call attention to the fact that, while under this section the trial justice retains all papers connected with civil proceedings for a period of six months after judgment and then delivers the same to the clerk's office of the circuit court, the trial justice may issue abstracts of judgment and executions for a period of two years. You ask whether the trial justice or his clerk has authority to withdraw the papers from the office of the clerk of the circuit court for the purpose of issuing such abstracts and executions.

The statute does not provide for the withdrawal of such papers from the office of the clerk of the circuit court after they have been delivered to him and, in my opinion, the trial justice and his clerk have no authority to do so. However, this would appear to be unnecessary, since Section 4987-i requires the trial justice to keep a docket in which are entered all causes tried by him and the final disposition of the same together with an account of costs. Such information as may be needed when abstracts of judgment or additional executions are desired can be secured from the entries made in this docket.

You also ask if, after a judgment has been rendered and execution issued thereon, but the same has not been docketed within the two-year period, the judgment may thereafter be docketed and, if so, who would have the authority to issue executions and abstracts of such judgment.

After two years the trial justice no longer has authority to issue abstracts of or executions on a judgment rendered by him. However, since all of the papers, including the warrant with the judgment noted thereon, have then been filed in the office of the clerk of the circuit court, it is my opinion that the clerk of such court may issue executions on the judgment and abstracts for the docketing of the same. Since he has the original papers, I think he can issue executions and abstracts at anytime during the life of the judgment and is not precluded from doing so just because the judgment was not docketed during the two-year period.

You further ask how, after court costs have been ascertained, fixed and allowed by the trial justice in his judgment, can the plaintiff recover further costs incurred by him in the collection of such judgment. Section 6497 of the Code provides:

"Subject to the limitations prescribed by chapter two hundred and seventy-one, a party obtaining an execution may sue out other executions at his own costs, though the return day of a former execution has not arrived; and may sue out other executions at the defendant's costs, where on a former execution there is a return by which it appears that the writ has not been executed, or that it or any part of the amount thereof is not levied, or that property levied on has been discharged by legal process which does not prevent a new execution on the judgment. In no case shall there be more than one satisfaction for the same money or thing."

In those cases where the executions are issued at the cost of the defendant, the cost incident thereto should be added to the costs previously fixed and col-

lected by the sheriff when he obtains satisfaction of the execution. Costs incident to garnishment proceeding would be included in the judgment rendered thereon.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**TRIAL JUSTICES—Power to Grant Bail. F-27**  
**BAIL AND RECOGNIZANCES—When Trial Justice May Grant Bail.**  
**F-27**

June 30, 1949.

HONORABLE F. C. FITZHUGH, SR.,  
Trial Justice for the Town of Cape Charles,  
Cape Charles, Virginia.

My dear Mr. Fitzhugh:

This is in reply to your letter of June 24, from which I quote as follows:

"The Town has a taxicab ordinance prohibiting any person from operating a taxicab in the Town who is not properly licensed by the Town after application and investigation, and the payment of a license fee. James Mason and Amos Wynder on May 25, 1949, were convicted by the Trial Justice of the Town of Cape Charles for violation of the taxicab ordinance, and were fined and given a jail sentence. They took an appeal to the Circuit Court and the Trial Justice of the Town fixed the appeal bond in the amount of \$200.00 for Mason and \$500.00 for Wynder, but neither posted the bonds with the said Town Trial Justice, and they were sent to jail in Eastville, which is used by the Town under an arrangement. Thereupon the Trial Justice of Northampton County released Mason and Wynder upon posting of \$100.00 each with him. I inquire as to the authority of the Trial Justice of Northampton County to fix said bonds and to release the said prisoners.  
\* \* \* "

Section 4829a of Michie's Code concerns the powers of trial justices in matters of granting bail. That section provides that trial justices " \* \* \* shall have the power and jurisdiction within their respective cities and counties to admit to bail, upon recognizance with surety, persons charged with crime; but none of the said officers shall admit to bail in any case after any court of record having jurisdiction to admit to bail in the case, or the judge thereof, has acted upon the application or pending proceedings before said court or Judge to obtain bail."

It is my opinion that this section authorizes the Trial Justice of Northampton County to grant bail to the persons mentioned in your letter, even though they have been convicted of the violation of a town ordinance by the Trial Justice of Cape Charles. Under this section it appears that the county trial justice can admit any person charged with crime in his county to bail, unless a court of record having jurisdiction to admit to bail in the case has previously acted upon the application. As the Trial Justice Court of Cape Charles is not a court of record, it appears to me that this section permits the Trial Justice of Northampton County to grant bail in this case.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,  
*Attorney General.*

**TRIAL JUSTICES—Town is Without Authority to Contribute Toward Salary of Trial Justice. F-136a**

**CITY, TOWNS AND COUNTIES—Towns are without Authority to Contribute Toward Salary of Trial Justice. F-136a**

August 3, 1948.

HONORABLE MARVIN G. GRAHAM,  
Member of House of Delegates,  
Pulaski, Virginia.

My dear Mr. Graham:

This is in reply to your letter of August 2, in which you ask, if a town council repeals a previous resolution vesting in its mayor or other trial officer the jurisdiction to try violations of its town ordinances, thus restoring jurisdiction over such offences to the trial justice of the county, would there then be any obligation upon the town or any authority in its council to contribute toward the payment of the trial justice's salary.

The salaries of trial justices are fixed by the committee provided for by section 4987e of the Code, subparagraph 5 of which provides that the State shall pay all of the salaries of the trial justices. In view of this section of the Code, it is my opinion that the committee appointed thereunder is to fix the compensation of trial justices and that the compensation so fixed shall be the entire compensation paid. I can find no statute authorizing towns to allow additional compensation. For this reason, it is my opinion that the town under the circumstances stated by you would not only have no obligation to contribute toward the salary of the trial justice, but would have no authority to do so.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**TRIAL JUSTICES—Towns have no authority to supplement salaries of Trial Justices.—F-249**

**PUBLIC OFFICERS—Compatability; Trial Justice cannot act as Town Attorney. F-249**

March 14, 1949.

HONORABLE GEORGE F. WHITLEY, JR.,  
Trial Justice of Isle of Wight County,  
Smithfield, Virginia.

My dear Mr. Whitley:

This is in reply to your letter of March 10. In that letter you state that you are Town Attorney of the Town of Smithfield in addition to being Trial Justice of Isle of Wight County. The town council of Smithfield, by appropriate action, has determined that, effective April 1, 1949, all cases involving violations of town ordinances shall be heard by the Trial Justice of Isle of Wight County.

You ask if the town can supplement the salary paid to you as Trial Justice by the State so as to compensate for the additional time and inconvenience entailed in hearing town cases. You also ask if the office of Trial Justice of Isle of Wight County and Town Attorney of Smithfield are compatible.

In response to the first question raised by you, I am enclosing a copy of an opinion to the Honorable Marvin G. Graham of August 3, 1948. In this opinion

this office expressed the view that a town has no authority to supplement the salary of a trial justice.

As to the other question raised by you, it is my opinion that the positions of Trial Justice and Town Attorney are not compatible. As you point out in your letter, you, as Town Attorney, aid in the drafting of town ordinances. As Trial Justice it appears you would have occasion to hear cases involving the constitutionality or interpretation of these same ordinances. There is also the possibility, as pointed out by you, of prosecutions for the violation of town ordinances by the Town Attorney in the Trial Justice Court. While you state that such a prosecution in the future would have to be handled by some other attorney, it appears to me that the fact that you could not fully carry out the duties of both offices indicates their incompatibility.

In Volume 42 of American Jurisprudence, at page 936, I find the following statement on this matter:

" \* \* \* Incompatibility of offices exists where there is a conflict in the duties of the offices, so that the performance of the duties of the one interferes with the performance of the duties of the other. This is something more than a physical impossibility to discharge the duties of both offices at the same time. They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant so that, because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. It is not an essential element of incompatibility of offices at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office is superior to the other in some of its principal or important duties, so that the exercise of such duties may conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible. It is immaterial on the question of incompatibility that the party need not and probably will not undertake to act in both offices at the same time. The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices. \* \* \* "

Also in Volume 2 of McQuillen on Municipal Corporations, at page 143, it is stated that " \* \* Two offices are said to be incompatible when the holder cannot in every instance discharge the duties of each. \* \* \* ."

Upon consideration of the duties imposed upon you as Trial Justice and as Town Attorney, it is my opinion that these two offices will become incompatible on April 1, 1949, when the action of the town council of Smithfield becomes effective.

With kind regards, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

**TRIAL JUSTICE COURTS—Upon Appeal, papers must be taken immediately to Clerk of Circuit Court; otherwise, same to be retained ten days.**  
F-85

January 28, 1949.

HONORABLE FRANK W. BURKS, *Clerk*,  
Trial Justice Court for Bedford County,  
Bedford, Virginia.

My dear Mr. Burks:

This is in reply to your letter of January 19, from which I quote as follows:

“ \* \* \* when a defendant has been convicted in our court and fined \$100 and costs of \$10, 30 days suspended jail sentence, gives bond for an appeal to the Circuit Court, should we immediately take the papers with warrant to the Clerk of the Circuit Court, or hold the warrant and papers ten days giving the defendant that time to come in and withdraw his appeal by the payment of same?”

The general law (§4989 of the Code) requires the papers in criminal cases to be “forthwith” returned and filed with the Clerk of the Circuit Court. Therefore, it is my opinion that, when a defendant has been convicted in the Trial Justice Court and gives an appeal bond, the papers should immediately be taken to the Clerk of the Circuit Court, since final disposition of the case in the Trial Justice Court has been made.

However, if an appeal is not immediately noted, the Trial Justice Court should retain the papers until the expiration of ten days, since the defendant has the right to an appeal within that time.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**VETERANS—Clerks required to record information concerning persons in Armed Services. F-116**  
**CLERKS—Must record information concerning persons in Armed Services.**  
F-116

March 28, 1949.

HONORABLE J. ROBERT SWITZER, *Clerk*,  
Circuit Court of Rockingham County,  
Harrisonburg, Virginia.

My dear Mr. Switzer:

This is in reply to your letter of March 22, in which you request my opinion as to whether Chapter 31 of the Acts of Assembly of 1944, as amended, (Section 3392-a of Michie's Supplement of 1948) is applicable to records of those persons who have been inducted into the armed forces of the United States under the recent draft, or who have volunteered.

The Act to which you refer requires a clerk, in whose office deeds may be admitted to record, to obtain from the chairman of each draft board in his county or city a list or lists of all residents of such county or city who “have been or shall hereafter during the continuance of the present World War II be inducted into the armed forces of the United States” and to record the information contained therein. The duty of recording the information contained in the discharge



papers "of any person who served in the armed forces of the United States, or its associates, during World War II" is also imposed upon the clerk.

This office has previously ruled that a treaty terminates a war (Report of the Attorney General, 1945-1946, page 164). Therefore, since all the treaties necessary to end World War II have not been entered into at this time, a technical state of war still exists.

Consequently, in view of the language contained in Chapter 31 of the Acts of Assembly of 1944, as amended, which is quoted above, it is my opinion that its provisions are still in effect and the recordation of the discharges to which you refer should be recorded along with and indexed in the same book containing the discharges previously recorded in accordance with the Act in question.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**VIRGINIA MILITARY INSTITUTE—Board of Visitors without Authority to Lease Property. F-268h**

January 28, 1949.

MAJOR GENERAL R. J. MARSHALL, *Superintendent*,  
Virginia Military Institute,  
Lexington, Virginia.

My dear General Marshall:

This is in reply to your letter of January 18, in which you ask my opinion as to whether or not the Board of Visitors of the Virginia Military Institute has the authority to lease property belonging to the Institute to the City of Lexington for a period of 99 years.

I have been unable to find any general or special legislation empowering the Board of Visitors of the Virginia Military Institute to enter into a lease of the nature described above. Therefore, in the absence of such legislation it is my opinion that the Board has no authority to lease the property in question.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**VIRGINIA POLYTECHNIC INSTITUTE—Entitled to Appropriations When Revenue Bonds Issued. F-268g**

June 28, 1949.

HONORABLE J. H. BRADFORD,  
Director of the Budget,  
Governor's Office,  
Richmond, Virginia.

My dear Mr. Bradford:

This is in reply to your letter of June 27, regarding the appropriation of \$350,000 for a student dormitory at Virginia Polytechnic Institute, which was made subject to the following provision:

"It is hereby provided that this appropriation of \$350,000 for the said student dormitories shall become available for expenditure only upon a certificate by the Governor to the Comptroller that the additional sum of not less than \$480,000 for the said dormitories has been made available by the Virginia Polytechnic Institute by the issuance of revenue bonds, in accordance with the provisions of Chapter 127 of the Acts of Assembly of 1946."

You state that the Board of Visitors of V. P. I. has carried out the procedure prescribed by this Act by selling the bonds, which action has been approved by the Governor. However, due to a delay in getting the bonds printed, the actual delivery of the bonds to the successful bidder has not been made and will not be made for several weeks. You ask if under these circumstances the Governor can legally release the \$350,000 conditional appropriation prior to the time the bonds are actually printed and delivered to the successful bidder and the money paid to V. P. I.

Since V. P. I. has taken all the required steps to authorize the issuance of the bonds and has made a binding contract for the sale to the successful bidder, it is my opinion that it has complied with the conditions of the appropriation. The fact that the bonds have not actually been delivered and the purchase price received, which has simply been caused by a delay in the printing of the bonds, would not in my opinion prevent the release of the appropriation at this time.

With best wishes, I am

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**VIRGINIA REAL ESTATE COMMISSION—Broker having Perfected an Appeal May Continue to Operate during Pendency Thereof. F-273**

August 12th, 1948.

MR. R. L. RUSH, *Chairman*,  
Virginia Real Estate Commission,  
9 Franklin Road, S. W.,  
Roanoke, Virginia.

Dear Mr. Rush:

I am in receipt of your letter of August 11th, relative to the right of a real estate firm or broker, after an appeal has been taken from the decision of the Commission refusing a license, to continue operation pending determination of the appeal by the Court having jurisdiction of same.

I assume that the appeal in the instant matter was perfected prior to June 29th, 1948.

If this be true I find no authority, express or implied in the pertinent statutes, conferring power upon the Virginia Real Estate Commission to proceed against the applicant for doing business without a license issued by the Commission.

The above opinion is based upon Section 4359(85) of the Code of 1942, prior to the Amendment of the Legislature of 1948.

The General Assembly of 1948 (Acts of Assembly 1948, Page 1000, Chapt. 496) amended Section 4359(85) supra, which, insofar as pertinent, reads as follows:

"Any person, firm, co-partnership, corporation or association appealing from a decision of the Commission shall within ten (10) days following receipt of the Commission's decision from which appeal is noted, post a bond

of twenty-five hundred dollars (\$2,500.00) in favor of the Commonwealth of Virginia, conditioned to faithfully observe the provisions of all sections of this act during the pendency of said appeal and to pay to any one all damages that he may sustain by reason of any transaction with the appellant during the pendency of said appeal and caused by the misconduct or wrongful act, or acts, of the appellant. Such bond shall be filed with the Virginia Real Estate Commission. No bond shall be accepted unless it be with a surety company authorized to do business in the Commonwealth of Virginia.

"Any person, firm, co-partnership, corporation or association failing to post such bond shall discontinue all operations as a real estate broker or real estate salesman during the pendency of said appeal."

This Act became effective at the first moment of June 29th, 1948.

If the appeal in question, therefore, was perfected subsequent to the effective date of the aforementioned Act, and the bond has not been posted, then it is a violation of the penal provisions of Section 4359(88) to operate and the Commission should file complaint with a Court of competent jurisdiction, or take the matter up with the legal officers of the proper jurisdiction.

Furthermore, I would advise, in event the appeal was perfected prior to June 29th, 1948, that the matter of continued operation be called to the attention of the Attorney for the Commonwealth with the view of requesting the Court, in which the appeal is pending, to require posting of the bond as a condition of further continuance of the case.

Sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General.*

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**WORLD WAR ORPHANS ACT—Benefits can be Paid under certain Circumstances. F-356a.**

April 7, 1949.

HONORABLE G. TYLER MILLER,  
Superintendent of Public Instruction,  
Richmond, Virginia.

My dear Mr. Miller:

This is in reply to your letter of March 25, in which you desire my opinion as to whether or not, under the provisions of the Virginia World War Orphan Act, the benefits are payable to any vendor other than the educational institution in which the beneficiary is a student. You ask this question with reference to the following situations:

"(1) The University of Virginia does not sell books and instructional supplies; it does not provide table board and its rooming facilities for students are inadequate to supply the needs of its student body. Students must buy their books and supplies from commercially operated book stores; their meals in restaurants or boarding houses and those for whom there are no quarters in University property must rent rooms in the community.

"(2) At present there is at least one beneficiary of the War Orphan Education Act who is a student at the University and who lives in Charlottesville. Her mother, a widow, rents rooms to University students in order to supplement her income. The mother states that she could and would rent her daughter's room if the daughter were not occupying it. She reasons that her daughter's board and room rent would be paid from the War Orphan Education Fund if the daughter were attending a school away from home which offered these facilities to its students."

The Act to which you refer is found as Item 129 of the Appropriation Act of 1948 and provides, among other things, that the scholarship fund "shall be expended for the sole purpose of providing for matriculation fees, board and room rent, books and supplies" at any educational institution in the State of Virginia for the use and benefit of orphans of soldiers, sailors and marines who were killed in action or died, or who are totally and permanently disabled as a result of service during either World War. It further provides that "the amounts that may become due to any such educational or training institution \* \* \* shall be payable to such institution \* \* \* on vouchers approved by the State Board of Education."

While the above Act, in my opinion, does not contemplate *direct* payment to vendors other than the educational institutions in which the beneficiaries are students, it must be borne in mind that the scholarship fund was created for the benefit of the student who qualifies under the Act and not for the benefit of the educational institution which the beneficiary may wish to attend. Furthermore, in view of the fact that a student who qualifies for a scholarship is entitled to benefits in the amount of \$400, which is considerably more than the matriculation fee at the University of Virginia, I am also of the opinion that the scholarship fund was not created with the intent to limit the benefits of a student because of the lack of adequate rooming and eating facilities or because of the absence of a University owned and operated bookstore.

Therefore, if the University is willing, and I understand that it is, to make arrangements with the scholarship students and the individual vendors concerning the expenses incurred by such students because of the lack of the above mentioned facilities, and supervise and control the payments due the vendors, it is my opinion that the requirements of the scholarship will be met and that the State Board of Education may then approve the disbursement of the scholarship fund through the University.

With regard to the second situation mentioned in your letter, it is my opinion that the scholarship fund is applicable to all students who qualify, irrespective of their place of residence, so long as the necessary arrangements are made with the University.

Very sincerely yours,

J. LINDSAY ALMOND, Jr.,

*Attorney General*

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