OPINIONS

OF THE

ATTORNEY GENERAL

AND

REPORT

TO THE

GOVERNOR OF VIRGINIA

From July 1, 1949 to June 30, 1950

Commonwealth of Virginia
Division of Purchasing and Printing
Richmond
1950
September 18, 1950.

HONORABLE JOHN S. BATTLE,
Governor of Virginia,
Richmond, Virginia.

My dear Governor Battle:

In accordance with Section 2-93 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.

All of the opinions included in the report went out over my signature. In the interest of economy, the signatures, salutations and portions of the addresses have been omitted.

Respectfully submitted,

J. LINDSAY ALMOND, JR.
Attorney General.
PERSONNEL OF THE OFFICE
(Postal office address, Richmond)

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<tr>
<th>Name</th>
<th>County</th>
<th>Official Title</th>
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<tr>
<td>J. Lindsay Almond, Jr.</td>
<td>Roanoke City</td>
<td>Attorney General</td>
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<td>Kenneth C. Patty</td>
<td>Tazewell</td>
<td>Assistant</td>
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<td>Henrico</td>
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<td>Charles City</td>
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<td>Walter E. Rogers</td>
<td>Richmond City</td>
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<td>C. Champion Bowles</td>
<td>Goochland</td>
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<td>Henry T. Wickham</td>
<td>Richmond City</td>
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<td>Frederick T. Gray</td>
<td>Chesterfield County</td>
<td>Special Assistant</td>
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<td>H. T. Williams, Jr.</td>
<td>Richmond City</td>
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<td>Louise W. Poore</td>
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<td>Eleanor W. Tilley</td>
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<td>Mabel G. Hurt</td>
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<td>Maurine S. Antonelli</td>
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**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. ............................................... 1948-1958

*Hon. J. D. Hanks, 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.
REPORT OF THE ATTORNEY GENERAL

CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES


CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES


CASES DECIDED IN THE SUPREME COURT OF APPEALS OF VIRGINIA

5. Baylor, Leon McClain v. Commonwealth. From Circuit Court of Caroline County. Operating motor vehicle while under the influence of intoxicants. Reversed and remanded.
23. Lawrence, Floyd Milton v. Commonwealth, ex rel. C. F. Joyner, Jr., Commissioner, etc. From Circuit Court of Fairfax County. Revocation of operator's license. Affirmed.
31. Scott, William B. v. Commonwealth, ex rel. C. F. Joyner, Jr., Commissioner, etc. From Circuit Court of Fairfax County. Revocation of operator's license. Affirmed.
41. Willits, James Edward v. Commonwealth, ex rel. C. F. Joyner, Jr., Commissioner, etc. From Hustings Court City of Roanoke. Revocation of operating privileges. Reversed and remanded, if Commonwealth so advised.
CASES PENDING BEFORE THE SUPREME COURT OF APPEALS OF VIRGINIA


3. Commonwealth, ex rel. C. F. Joyner, Jr., Commissioner, etc. v. James T. Butler. From Circuit Court of Mecklenburg County. Suspension of driving and registration privileges.


CASES DECIDED IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT


CASES PENDING IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1. Williams, Agra B. v. Virginia Military Institute, et als. Bequest to V. M. I. Plaintiff asserts V. M. I. has no power to accept. Motion to Dismiss. Pending.

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

1. Butler, Jessie v. Mary A. Thompson, et als. To enjoin the enforcement of the poll tax provision. Pending.


CASES PENDING OR TRIED IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

REPORT OF THE ATTORNEY GENERAL

CASES TRIED BEFORE THE INTERSTATE COMMERCE COMMISSION


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

30. Hancock, Claude William v. C. F. Joyner, Jr., Commissioner, etc. Circuit Court of Roanoke County. Suspension of driving privileges. Pending.
32. Joyner, Commissioner, etc. v. Robertson, James C. and Grady C. Circuit Court City of Richmond. Attachment proceedings.
34. Lawrence, Floyd Milton v. Commonwealth. Circuit Court of Fairfax County. Suspension of driving privileges. Petition dismissed.
35. Matthews, Howard G. and Matthews Trucking Company v. C. F. Joyner, Jr., Commissioner, etc. and J. Lindsay Almond, Jr., Attorney General, etc. Circuit Court City of Richmond. Order rescinding reciprocal privileges to use Virginia's highways pending payment of penalties due on account of conviction of overloading trucks. Judgment for plaintiff.

47. Scott, Wendell Oliver v. Commonwealth. Corporation Court City of Danville. Suspension of driving privileges. Sustained but time was reduced to three months.


54. Thomas, A. E. and D. D., T/A Thomas Brothers Wholesale Produce v. C. F. Joyner, Jr., Commissioner, etc. Hustings Court City of Roanoke. Penalty accrued on account of convictions of operating overloaded trucks over highways of Virginia. Relief denied.


62. Youth Development Society of Virginia, Inc. v. Glenn J. Jones and C. F. Joyner, Jr., Commissioner, etc. Law and Equity Court City of Richmond, Part II. Alias writ of attachment. Pending.

CASE PENDING BEFORE THE STATE CORPORATION COMMISSION


CASES PENDING OR TRIED BEFORE THE STATE INDUSTRIAL COMMISSION


The following Habeas Corpus Cases were all against W. Frank Smyth, Jr., Superintendent of Virginia State Penitentiary:

1. **Bowe, Watt.** Hustings Court, Part II, City of Richmond. Rule to Show Cause discharged. Petitioner remanded.
2. **Cooper, John W.** Corporation Court, City of Fredericksburg. Pending.
3. **Edmondson, Sam.** Hustings Court, Part II, City of Richmond. Petition granted. Prisoner released.
4. **Fenster, Herbert.** Hustings Court, Part II, City of Richmond. Rule to Show Cause discharged. Petitioner remanded.
5. **Fitzgerald, Arthur.** Hustings Court, Part II, City of Richmond. Rule to Show Cause discharged. Petitioner remanded.
8. **Hall, Livious.** Hustings Court of City of Portsmouth. Petition dismissed. Petitioner remanded.
9. **Inley, W. E.** Circuit Court of Elizabeth City County. Writ discharged. Petitioner remanded.
10. **Major, Leo John.** Hustings Court, City of Petersburg. Petition granted. Prisoner released.
11. **McQueen, Edward.** Hustings Court, Part II, City of Richmond. Rule to Show Cause discharged. Petitioner remanded.
12. **Mitchell, Willie.** Hustings Court, Part II, City of Richmond. Pending.
17. **Tann, Johnny.** Hustings Court, Part II, City of Richmond. Rule to Show Cause discharged. Petitioner remanded.
18. **Tann, Keystone.** Hustings Court, Part II, City of Richmond. Rule to Show Cause discharged. Petitioner remanded.
19. **Tate, James, alias George Tate.** Corporation Court of the City of Richmond. Writ discharged. Petitioner remanded.
22. **Tune, Johnnie.** Hustings Court City of Roanoke. Petitioner remanded.

1. Re: **Rennie Meeks—Habeas Corpus—Circuit Court of Goochland County.** Prisoner ordered released on payment of fine and costs.
ADULTERY AND FORNICATION—Not same as prostitution. F-27

Mr. Richard Marshall,
Justice of the Peace for Warwick County.

This is in reply to your letter of February 1 in which you asked whether or not a person charged with fornication, adultery or illicit cohabitation should be denied bail and held for a physical examination in accordance with Section 18-90 of the Code.

Section 18-90 provides, in part, as follows:

"Any person arrested in this State upon a charge of prostitution * * * shall be subjected to a physical examination for contagious venereal disease * * * and no person, whether convicted or not, shall be admitted to bail or release until pronounced * * * not dangerous in the community on account of such venereal disease; * * *." (Italics supplied)

While adultery and fornication are made crimes by Section 18-82 of the Code and lewd and lascivious cohabitation is made a crime by Section 18-84 of the Code, neither section condemns prostitution as such. Therefore, it is my opinion that Section 18-90 is not applicable to a person charged with fornication, adultery or illicit cohabitation when there is nothing in the warrant to indicate prostitution.

ALCOHOLIC BEVERAGE CONTROL—Absence of Commonwealth’s Attorney does not invalidate conviction. F-69

TRIAL JUSTICES—May suspend sentence for violation of A. B. C. Law. F-69

Honorable Julius Goodman,
Attorney for the Commonwealth for Montgomery County.

This is in reply to your letter of April 3, in which you state that a warrant was sworn out against a party for a violation of the Alcoholic Beverage Control Act, to wit: the sale of whiskey in violation of Section 4-58 of the Code. You further state that, though you were not notified of the case, the Trial Justice passed upon the case. I assume that the party was adjudged guilty since you say you believe that the case was heard upon a plea of guilty. You ask whether the case was properly acted upon in view of the provisions of sub-section “d” of Section 4-92 of the Code, which reads as follows:

"(d) Appearance by attorney for Commonwealth.—The attorneys for the Commonwealth are hereby directed to appear and represent the Commonwealth before the court or trial justice trying any person for any violation of this chapter in their respective jurisdictions, except for drinking in public; and no court or trial justice shall hear such a case unless the respective attorney for the Commonwealth or his assistant is present or has been duly notified of such a case pending."
While it is the policy of this office not to express opinions upon matters pending before a court, you will recall that on August 26, 1949, this office had occasion to express an opinion to you on the statute quoted above in connection with another matter.

As pointed out in that letter, the purpose of the statute was only to insure that violations of the Alcoholic Beverage Control Act be adequately prosecuted. For this reason it is my opinion that, if a person is tried and convicted without the Commonwealth's Attorney being advised, his conviction is nevertheless valid. Since the Commonwealth does not have the right of appeal, I do not think it could raise any question as to the validity of the proceedings in case the defendant is acquitted.

You also ask whether or not the Trial Justice would have the right to suspend a sentence imposed under Section 4-58. This section provides that the punishment for any violation of its provisions shall be a fine of not less than fifty dollars nor more than five hundred dollars and confinement in jail for not less than thirty days nor more than twelve months. However, there is nothing that prevents the Court or Justice from exercising the power to suspend the imposition or execution of sentence under the provisions of Section 53-272 of the Code (formerly Section 1922-b) just as it may do in the case of other offenses. It is my opinion, therefore, that the Trial Justice may suspend the sentence in the case of a conviction under Section 4-78.

ALCOHOLIC BEVERAGE CONTROL—County may restrict sale of wine and beer to "off-premises" only. F-210

June 20, 1950.

HONORABLE W. O. FIFE,
Commonwealth's Attorney for Albemarle County.

Your letter of June 10, 1950, addressed to the Honorable G. Stanley Clarke has been forwarded to me for reply. I quote from your letter as follows:

"The Board of County Supervisors of Albemarle County adopted an ordinance in 1942, under section 4675 (83b) of the Code of 1942, section 4-97 of the Code of 1950, prohibiting the sale of beer and wine in the County of Albemarle on Sundays. There is now a proposed ordi-

ance pending to repeal that portion of the ordinance of 1942 which prohibits the sale of beer on Sunday, and re-enact the 1942 ordinance so as to permit the sale of beer in the County on Sunday.

"The Board has inquired whether it would have the power to restrict sales to off-premises sales. In other words, does the Board have the power to limit those licensees in the County who now have on and off premises licenses to off-premises sales only?"

Section 4-97 of the Code of 1950 reads, in part, as follows:

"The 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, and the governing body of each city and town shall have authority to adopt ordinances effective in such city or town, prohibiting the sale of beer and wine, or either beer or wine, between the hours of twelve o'clock post meridian of each Saturday and six o'clock ante meridian of each Mon-
day, or fixing hours within said period during which wine and beer, or either, may be sold, and prescribing fines and other penalties for violations of such ordinances which shall be enforced by proceedings in like manner and with like right of appeal as if such violations were
misdemeanors; provided, however, that such ordinances shall not affect
the sale of beer and wine on passenger trains or steam vessels while
operating in interstate commerce."

As you know, the control of alcoholic beverages in Virginia is vested in
the General Assembly. However, that body has seen fit to surrender to
the governing bodies of the various counties the power to regulate the sale
of beer and/or wine between the hours of 12:00 P. M., on Saturday and 6:00
A. M., on Monday. The governing body of a county, under the provisions
of §4-97 of the Code, is empowered to prohibit entirely the sale of beer and
wine between the specified hours, and it is my opinion that, having the
power to completely prohibit the sale, the governing body of the county may
enact an ordinance which will prohibit completely the sale of wine and on-
premises beer. In so doing the governing body will be exercising a portion
of the power which has been granted it, and I do not believe it is objectionable
that they will have declined to exercise that portion of the power which re-
lates to off-premises sales of beer. It is a generally accepted principle that a
greater power includes a lesser power, and I believe that principle is ap-
licable to this situation.

ALCOHOLIC BEVERAGE CONTROL—No search warrant required to
seize unlawful whisky in plain view of officer.  F-381

April 18, 1950.

Mr. W. M. Price,
Sheriff of Bland County.

This will reply to your letter requesting my advice as to whether a search
warrant would be required to seize an unlawful amount of tax-paid liquor in
the amount of four gallons if it was in a truck in plain view of the arresting
officer.

Assuming that no transportation permit had been issued by the Board
pursuant to Section 4-72 of the Code of Virginia, and that the operator of
the truck was, therefore, violating Section 4-72, a search warrant would not
be necessary to seize the whiskey, as the transportation of it without a permit
is a misdemeanor. Section 15-557 of the Code, relating to the powers and
duties of the police force, grants authority for the arrest of a person commit-
ting an offense against the criminal laws of the State. In this case a search
is unnecessary, as the whiskey is in plain view of the officer. In cases where
a search is necessary a search warrant should be obtained as provided in
Section 4-56 of the Code of Virginia.

A. B. C. ACT—Abandonment of confiscated automobiles.  F-210a

FORFEITURES—Court has discretion to order abandonment where value
negligible.  F-210a

February 25, 1950.

Honororable J. Alden Oast,
Commonwealth's Attorney for Portsmouth.

I am in receipt of your letter of February 20th relative to the confiscation
of two automobiles of negligible value. You state that in your opinion the
confiscation of these vehicles would entail a greater cost than could be
realized from their sale. You desire to know if there is any law to justify
the abandonment of the proceedings lodged against this property.
The Alcoholic Beverage Control Act relating to the confiscation of automobiles contains no provision for the abandonment of cars under conditions outlined by you. I would suggest that you bring these facts to the attention of the court. It is my belief that the court would certainly have authority, in the exercise of a reasonable discretion, to enter an order directing the abandonment of this property on the ground that through confiscation proceedings nothing could be realized thereon. I believe that this would be in pursuance of sound public policy.

APPROPRIATION ACT—Deficit authorization only applies to biennium when made. F-268a

HONORABLE J. H. BRADFORD,
Director of the Budget.

This is in reply to your letter of July 7, in which you refer to Item 209½ of the Appropriation Act of 1948, by which the sum of $34,000 was appropriated to the State Teachers College at Farmville for the payment of an operating deficit. From your letter it appears that the operating deficit for the fiscal year ending June 30, 1948, was only $12,746.56, which was $21,235.44 less than had been anticipated at Farmville State Teachers College. You ask whether this balance of this deficit appropriation can legally be used by the Institution to supplement its regular appropriation for the current biennium.

Section 43 of the Appropriation Act provides that none of the monies appropriated thereby shall be expended for any other purpose than those for which they are specifically appropriated, except that, with the consent of the Governor, funds appropriated for one specific purpose may be transferred to some other object definitely and closely related to the object for which the appropriation was made. This office has on several occasions expressed the opinion that an appropriation to pay a deficit incurred or anticipated during a biennium is available only for the purpose of paying the deficit or such part thereof as was incurred during that biennium, and that, if the actual deficit was less than was anticipated, the balance of the deficit appropriation cannot be used to supplement the appropriation for general purposes for the next biennium. To do so would simply be to increase the total appropriations made to the department or agency by the General Assembly for its regular activities during the next biennium.

I do not think that it is material that in the case at hand the anticipated deficit was decreased because of the receipt during the previous biennium of summer school fees for a term which ran into the succeeding fiscal year. The funds were actually received during the fiscal year ending June 30, 1948, and, as required by law, were paid into the treasury with the result that the anticipated deficit for the fiscal year ending on that date was reduced. If this results in less funds being available for the coming biennium and necessitates a further deficit during that period, it will be necessary to secure the approval of the Governor, as in other cases. The previous deficit authorization applied only to the last biennium and would not be effective during the current biennium.
HONORABLE JOHN S. BATTLE,
Governor of Virginia.

This is in reply to your letter of June 2, which I quote in full:

"The Department of Agriculture and Immigration informs me that certain balances will remain unexpended at the close of business on June 30, 1950, in the appropriations for:

"Protecting live stock from disease and payment of indemnities on account of animals reacting to tests for Bovine tuberculosis and Bangs' Disease.-----------Item 246

"Operation of regional laboratories----------------Item 248

"The Department wishes to transfer approximately $95,000 from these balances to the unexpended balance in Item 596, for Two Regional Laboratories. If this transfer is authorized, it is planned to spend the money for the construction and equipment of a building at Richmond to be used as a laboratory by the Department of Agriculture and Immigration.

"Please give me your opinion as to whether or not my approval can legally be given to such transfers."

The appropriation contained in Item 596 is a capital outlay appropriation for two regional laboratories. In my opinion, neither the appropriation for protecting livestock from disease and the payment of indemnities on account of animals reacting to tests for Bovine tuberculosis and Bangs' Disease contained in Item 246, nor the appropriation for the operation of regional laboratories contained in Item 248 is sufficiently related to the appropriation contained in Item 596 to justify the transfer to that item and the expenditure of the money for the construction and equipment of a laboratory building at Richmond. I do not think that an appropriation for the operation of the laboratory can be expended for the construction of an entirely new facility which has not been approved by the General Assembly. Likewise, the appropriation thus made for protecting live stock from disease and the payment of indemnities on account of those reacting to tests for diseases is not related to the construction of an entirely new capital improvement. This appropriation contemplates expenditures made directly for the protection of live stock from disease or the payment of indemnities and not upon a capital improvement project. Section 43 of the Appropriation Act provides that none of the money mentioned in the Act shall be expended for any other purpose than those for which it is specifically appropriated except in cases where transfers are authorized to some other object definitely and closely related to the object for which the appropriation was made.
REPORT OF THE ATTORNEY GENERAL

APPROPRIATION ACT—Funds for indemnity program may be used in other methods of combating Bangs Disease. F-5

HONORABLE J. H. BRADFORD,
Director of the Budget.

This is in reply to your letter of July 27, in which you refer to Item 246 of the Appropriation Act of 1948, by which the sum of approximately $150,000 a year was appropriated to the Department of Agriculture and Immigration for protecting livestock from disease. This item provides that out of this appropriation there is appropriated the sum of $85,000 for the payment of indemnities on account of animals reacting to the tests for Bovine tuberculosis and for Bangs disease.

You state that the Commissioner of Agriculture and Immigration has informed you that there has been a gradual loss of confidence in the effectiveness of combating Bangs disease by the slaughter of animals reacting to the test, and that he desires to use a substantial portion of the money appropriated for the payment of indemnities on another method of combating Bangs disease. The other method consists of the vaccination of young dairy cattle to build up a gradual resistance to the disease. Some of the money appropriated for protecting livestock from disease and not earmarked for indemnities has been used in carrying out the vaccination program. You ask whether or not it would be legal to use some of the money appropriated for indemnities for the vaccination program.

It is to be noted that the total appropriation is for the purpose of "protecting livestock from disease." While the Commissioner of Agriculture and Immigration is authorized to use the sum of $85,000 for the payment of indemnities under the slaughtering program, I do not think that he is required to use this sum for that particular method of combating disease. The use of any of the funds appropriated for protecting livestock from disease in carrying out a legitimate program designed to combat the disease would be within the general purpose of the appropriation. Section 43 of the Appropriation Act provides that:

"** the several appropriations made by this act may not only be used for the purposes specified in this act, but authority is hereby given to the governing board of any State department, institution or other agency, or, if there be no governing board, to the head of such department, institution or other agency named in this act, to transfer, within the respective department, institution or other agency, any such appropriations from the object for which specifically appropriated or set aside to some other object definitely and closely related to the object for which the appropriation was made, and provided an appropriation is also made by this act to said related object, and provided also that, in the opinion of the Governor and department head, later developments have rendered such transfer appropriate to carry out the original intention of the General Assembly in making this appropriation, subject, however, in every case to the consent and approval of the Governor, in writing, first obtained; **."

This provision, in my opinion, would authorize the transfer of the sums appropriated for the indemnity program to be used in other methods of combating Bangs disease such as the vaccination program which is being carried out by the Department of Agriculture and Immigration.
REPORT OF THE ATTORNEY GENERAL

APPROPRIATION ACT—Piedmont Sanatorium; funds may be transferred to related item for which appropriation was made. F-253

June 6, 1950.

HONORABLE JOHN S. BATTLE,
Governor of Virginia.

This is in reply to your letter of June 2, which I quote in full:

"Dr. L. J. Roper, State Health Commissioner, has requested my approval of a transfer of approximately $35,000 from the appropriation for maintenance and operation of the Piedmont Sanatorium for the biennium ending June 30, 1950 (Item 354) to an unexpended balance of $4,196 in the appropriation for additions to pumps, wells and lines at that institution (Item 734).

"This transfer is requested in order to provide funds for the installation of additional fire plugs and a 150 gallon storage tank at the Piedmont Sanatorium. This installation is recommended, according to Dr. Roper, by the Hospital Inspector of the State Board of Health and the State Fire Marshal.

"Please give me your opinion as to whether or not my approval can legally be given to such a transfer."

If the additional fire plugs and the storage tank are needed at the Piedmont Sanatorium to furnish adequate fire protection to the existing facilities of the institution, it is my opinion that the transfer can be made. Section 43 of the Appropriation Act of 1948 provides in part as follows:

"* * * the several appropriations made by this act may not only be used for the purposes specified in this act, but authority is hereby given to the governing board of any State department, institution, or other agency, or, if there be no governing board, to the head of such department, institution or other agency named in this act, to transfer, within the respective department, institution or other agency, any such appropriations from the object for which specifically appropriated or set aside to some other object definitely and closely related to the object for which the appropriation was made, and provided an appropriation is also made by this act to said related object, and provided also that, in the opinion of the Governor and department head, later developments have rendered such transfer appropriate to carry out the original intention of the General Assembly in making this appropriation, subject, however, in every case, to the consent and approval of the Governor, in writing, first obtained; * * *"

It is my opinion that the providing of additional lines, fire plugs and storage tanks needed to furnish adequate fire protection to existing facilities is sufficiently closely related to the maintenance and operation of the Sanatorium to make this transfer permissible under the above provision. It might even be said that the appropriation for maintenance and operation would embrace the furnishing of such necessary facilities and that the funds could be expended for the desired purpose without going through the transfer procedure prescribed by Section 43. However, since an appropriation has been made for this specific purpose, this is probably the best procedure to follow.
REPORT OF THE ATTORNEY GENERAL

APPROPRIATION ACT—Transfer of funds; William and Mary; transfer must be to related object for which an appropriation was made. F-268

HONORABLE JOHN S. BATTLE,
Governor of Virginia.

This is in reply to your request for my opinion upon whether the College of William and Mary can be authorized to transfer $110,000 from the appropriation which has been made by the Appropriation Act of 1950 to the College for a student activities building and to use the same with other funds that may be available for the construction of a men's dormitory at the College.

Section 46 of the Appropriation Act provides that none of the money appropriated thereby shall be expended for any other purposes than those for which they are specifically appropriated except that, with the consent of the Governor, an appropriation may be transferred from one purpose to some other object definitely and closely related to the object for which the appropriation was made, if an appropriation is also made to said related object.

Item 557 of Chapter 578 of the Acts of Assembly of 1950, the Appropriation Act for the coming biennium, contains an appropriation of $198,000 for a student activities building, but I find no appropriation contained in the Act specifically authorized to be used for a men's dormitory. In fact, the budget submitted to the last session of the General Assembly shows that the College of William and Mary requested an appropriation of $300,000 for a men's dormitory, but that no recommendation was made by the Governor that an appropriation be made for this purpose.

Item 559 of the Appropriation Act does provide $90,000 for "structures". It is my understanding that it is proposed to transfer the $110,000 set aside for the student activities building to this general appropriation for "structures" and use the total for the erection of a men's dormitory. Even if it could be said that a men's dormitory is closely related to a student activities building, it is my opinion that the general appropriation for "structures" cannot be used as the item to which the transfer is to be made, particularly in view of the fact that the College's request for an appropriation for a men's dormitory was rejected both by the Governor in submitting his recommendations and by the General Assembly in making the appropriations for the coming biennium. To call such a general appropriation, which would seem to be made purely for supplementary purposes, a closely related object to the student activities building would, in my opinion, be using the transfer authority contained in Section 46 of the Act for a purpose beyond that intended by the General Assembly.

APPROPRIATION ACT—Use of funds from item for "structures" to purchase land. F-268g

VIRGINIA EXPERIMENT STATION—Appropriation. F-268g

HONORABLE J. H. BRADFORD, Director,
Division of the Budget.

This is in reply to your letter of April 10, in which you advise that the Virginia Truck Experiment Station desires to buy a farm near Painter and Keller in Accomac County as a permanent location for its substation on the Eastern Shore to replace the substation that is located at Onley, which has heretofore been rented on a yearly basis. The farm which the agency desires
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to purchase consists of approximately 250 acres, of which 100 acres are under cultivation.

You refer to Item 546 of the Appropriation Act for the 1948-1950 biennium, by which approximately $140,000 was appropriated to the Virginia Truck Experiment Station for "structures." You ask whether or not any surplus funds remaining in this appropriation may be used for the purchase of the farm. Section 43 of that Appropriation Act provides in part as follows:

"None of the monies mentioned in this Act shall be expended for any other purpose than those for which they are specifically appropriated* * * provided, however, that the several appropriations made by this act may not only be used for the purposes specified in this act, but authority is hereby given to the governing board of any State department, institution or other agency, or, if there be no governing board, to the head of such department, institution or other agency named in this act, to transfer, within the respective department, institution or other agency, any such appropriation from the object for which specifically appropriated or set aside to some other object definitely and closely related to the object for which the appropriation was made, and provided an appropriation is also made by this act to said related object, and provided also that, in the opinion of the Governor and department head, later developments have rendered such transfer appropriate to carry out the original intention of the General Assembly in making this appropriation, subject, however, in every case, to the consent and approval of the Governor, in writing, first obtained; * * * ."

It may be that in some cases the purchase of land would be necessary and incidental to the erection of "structures" to be used in carrying out the functions of a department or agency, and that in such case an appropriation for "structures" could properly be used in part for the purchase of land upon which to erect the buildings. However, it is my opinion that an appropriation specifically for "structures" could not be used for the purchase of farm land to be used generally by the Virginia Truck Experiment Station in its experiment work, when the purchase of the land has no relation to the construction of necessary buildings. The budget for 1948-1950 submitted to the General Assembly, in setting up money for capital improvements and betterments, separates the funds requested for the purchase of land and funds requested for the erection of buildings and structures, and a different code number is used for each of these respective forms of capital improvements. Likewise, the Appropriation Act itself, in appropriating money to the several agencies, specifically makes appropriations for the purchase of land when that is the primary purpose for which the funds are to be used.

It is my opinion, therefore, that no part of the appropriation of $140,000 made by Item 546 can be used for the purchase of land not needed as an incident to the construction of buildings, since it does not appear that the need of funds for the purchase of an additional experiment farm has been submitted to and approved by the General Assembly. While Section 43 of the Appropriation Act, quoted above, authorizes certain transfers of appropriations to some other object definitely and closely related to the object for which the appropriation was made if an appropriation is also made to the related object, the only appropriation to which the transfer could be made in the case of the Virginia Truck Experiment Station is the general appropriation made by Item 198 for experimentation in truck crop development. This, of course, is the general appropriation for operating expenses and it is to be noted that appropriations for land are not generally included in the appropriations made for operating expenses, but are included instead in that part of the Appropriation Act dealing with capital improvements. It is to be doubted, therefore, whether this general appropriation could be used for the purchase of land. In any event, for the reasons stated above I do not consider the purchase of an additional experimental farm closely related to the
appropriations for structures made by Item 546 of the Appropriation Act. It is my opinion, therefore, that no part of this latter appropriation can be used for the purchase of the farm.

ARCHITECTS, ENGINEERS, ETC.—Person may be denied license only if required to be certified by state board and fails to meet requirements.

**F-195**

May 11, 1950.

**HONORABLE LOUIS LEE GUY,**

Member House of Delegates.

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

"I have re-examined House Bill 179 as it passed the last Session and became Chapter 104 Acts of Assembly 1950, page 116. Reference to that new act shows that it includes ceramic, refrigerating, sanitary, etc., 'and any other professional engineer' within those covered by Section 58-376, Code of Virginia, as being required to pay a revenue license tax before practicing their profession in Virginia. The new act also amends Section 58-376 by providing that no license shall be issued to any person desiring to practice engineering in this state unless that person has a certificate or other evidence showing he is certified to practice as an engineer by the State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors. This is made effective for the license year 1951 and thereafter."

"In consideration of this new Act, do you interpret it to mean that commencing January 1, 1951, all ceramic engineers, sanitary engineers, radio engineers, etc., have got to pass an examination under the State Board of Architects, Professional Engineers and Land Surveyors in order to continue practicing their profession? (There does not appear to be any grandfather clause in their favor)."

Chapter 3 of Title 54 of the Code establishes the State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors and defines its powers and duties and Section 54-17, contained therein, defines the term "professional engineer" as follows:

"The following terms, as used in this chapter, shall have the meaning given in this section:

(2) 'Professional engineer' shall be deemed to cover a civil engineer, mechanical engineer, electrical engineer, mining engineer, metallurgical engineer or a chemical engineer."

As can be seen from the above provision the term "professional engineer" was defined in the broad terms of the so-called major branches of the engineering profession and necessarily includes all of the so-called minor branches of the profession. For example, the Board at the present time holds examinations for industrial and structural engineers, though these specific branches of the profession are not expressly enumerated in Section 54-17 of the Code.

I will not attempt at this time to pass upon the question of whether or not the Board has the authority to require examinations in all the types of engineering mentioned in Section 58-376 of the Code, such as ceramic, sanitary, radio, etc., but will state that it is my opinion that, since Section 58-376 is a revenue measure, the amendments thereto do not add to the powers and duties of the State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors.
The Honorable C. H. Morrissett, State Tax Commissioner, has informed me that he construes the amendments to Section 58-376 as prohibiting a person from obtaining a license for the privilege of practicing the types of engineering mentioned therein only if he is required by the State Board to be certified and has not met such requirements. I concur in this construction.

BLIND COMMISSION—Hearing of appeals need not be before Commission itself. F-160

HONORABLE L. L. WATTS,
Executive Secretary, Commission for the Blind.

This is in reply to your letter of August 24th in which you request my opinion upon the proper interpretation of Section 53 of the Virginia Public Assistance Act of 1938 as amended. You asked whether or not it is necessary that the hearing of the appeals provided for by this Section be before the Commission for the Blind or whether the procedure outlined in your letter is authorized by the Act. I quote from your letter as follows:

"The procedure we have been following since the inauguration of the program in 1938 has been that the Commission for the Blind delegated to the Executive Secretary the authority for conducting hearings on appeals from Aid to the Blind clients who have felt they were aggrieved. This was thought to be advisable because of the infrequent meetings of the Commission, and the inconvenience it would cause the client, and other interested parties to the hearing, for the Commission to undertake to conduct these hearings as a group. I have, therefore, been conducting the hearings as prescribed by law and also by the rules and regulations adopted by the Commission and which have also been approved by the Federal Security Agency in Washington.

"In conducting these hearings I have heard the appellant, his witnesses and his attorney. Written records of these hearings have been made. These records with my recommendations are presented to the Commission for their decision. The Commission has always decided the case."

Prior to 1944, Paragraphs (a) and (b) of Section 53 read as follows:

"(a) Every individual whose claim for aid to the blind is denied shall be granted an opportunity for a fair hearing before the commission. To this end any applicant or recipient aggrieved by any decision granting, changing, suspending or refusing aid to the blind or by failure to make a decision within a reasonable time, under the provisions of this chapter, may, within thirty days after receiving notice in writing of such decision appeal therefrom, or ask for a review of the same by the commission in such manner and form as the commission may prescribe.

"(b) The commission shall set a date for the hearing of the appeal or review, reasonable notice of which shall be given in writing to the applicant or recipient and to the proper local board. The commission shall, if it deems proper, make or cause to be made an investigation of the facts. The commission shall give fair and impartial consideration to the evidence produced at the hearing which may consist of testimony of witnesses, reports of investigations of the local board and local superintendent or of investigations made or caused to be made by the commission, or any other facts which the commission may deem proper to enable it to decide fairly the appeal or review."
In 1944 they were amended so as to read as follows:

“(a) Any applicant or recipient aggrieved by any decision granting, changing, suspending or refusing or by failure to make a decision within a reasonable time under the provisions of this act, may, within thirty days after receiving notice in writing of such decision appeal therefrom to, or ask for a review of the same by, the commission.

“(b) The commission shall provide, upon request an opportunity for a fair hearing, reasonable notice of which shall be given in writing to the applicant or recipient and to the proper local board in such manner and form as the commission may prescribe. The commission shall if it deems proper make or cause to be made an investigation of the facts. The commission shall give fair and impartial consideration to the testimony of witnesses, or other evidence produced at the hearing, reports of investigations of the local board and local superintendent or of investigations made or caused to be made by the commission, or any other facts which the commission may deem proper to enable it to decide fairly the appeal or review.”

In my opinion, the 1944 amendment, in eliminating the first sentence of Paragraph (a) which referred to a “hearing before the commission” and in making the other changes in this Section, clearly authorizes the Commission to adopt regulations providing that the actual hearing shall be conducted by its Executive Secretary or other agent who should make his report to the Commission in order that they can properly review and decide the matter. This ties in with the power vested in the Commission by Section 37 to make such rules and regulations as may be necessary or desirable to carry out the purposes of the Act and to provide for the administration of the same.

It is my opinion, therefore, that the procedure outlined in your letter is authorized by the Act and that it is not necessary for the Commission itself to actually conduct the hearing on the appeal by a person whose claim for Aid to the Blind is denied.

BOARDS OF SUPERVISORS—Advisory referendum; no authority to call.
F-33

HONORABLE ROBERT C. GOAD,
Commonwealth’s Attorney for Nelson County.

June 20, 1950.

This is in reply to your letter of June 15, 1950, in which you ask my opinion on two questions. I quote from your letter as follows:

“There is a strong difference of opinion among the citizens of Nelson County on the question of whether or not a consolidated high school for all white children should be constructed, the effect of which would be to consolidate the four existing white high schools into one.

“(1) Does the Board of Supervisors of Nelson County have the authority under the law to order a special referendum on the question of consolidation, as set forth above?

“(2) And, if they do have such authority, does this Board have the further authority to pay the expenses of such an election out of the general fund of the County, or out of any public funds in the hands of the County Treasurer?”

I have had reason to review the Virginia statute on this subject previously, and I was unable then and am still unable to find any statute authorizing the board of supervisors of a county or a court to order an advisory
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referendum. If such an election were directed, several questions would arise. For example, your second question with reference to the expenses of the election and whether the election would be binding on the board of supervisors. There appears to be no statute authorizing such an election, and no statute stating that such an election would be binding, and it would seem strange to say that the board of supervisors or a court could direct that an election be held but that the governing body would not then be bound by the results of such an election. It is my opinion, therefore, that in the absence of specific legislative authority for the holding of an informative referendum such an election could not be ordered and the election machinery could not be used for that purpose.

BOARDS OF SUPERVISORS—Authority to amend budget. F-33

HONORABLE J. HASKINS ROGERS,
Treasurer of Brunswick County.

April 11, 1950.

This is in reply to your letter of April 4, which I quote in full:

"Your opinion on the following problem will be appreciated.

"A proposed county budget for all county purposes contains an item in the estimated school needs for 'Debt Service'. Said proposed budget is advertised in accordance with law, and upon the day advertised for public hearing and the laying of the levy, the Board of Supervisors ordered a unit levy for the year involved, appropriating a sum for school purposes as set forth in the proposed budget.

"The basis of the 'Debt Service' is for the purpose of paying the first installment and interest on a loan being received from the Literary Fund of Virginia. This item had been advertised as a need for the year covered by the proposed budget. However, it developed, after the levy had been ordered, that it might be possible to postpone this first installment and interest until the year immediately following that for which the proposed budget was advertised and levy ordered.

"The Board of Supervisors was then petitioned to enter an order allowing the School Board, in its discretion, to have the first installment and interest on said indebtedness postponed accordingly, and use the funds which had been included in the proposed budget for 'Debt Service' and so advertised, instead, for the purpose of purchasing equipment for a new school building now under construction.

"Does the Board of Supervisors have authority under the law to enter such an order?

"Would warrants drawn on the county treasurer against said funds by the School Board for such diverted purposes be legal warrants?"

The question presented by your letter is whether funds budgeted by the Board of Supervisors for the purpose of servicing a debt may be used for some other purpose when it is found that the sum will not in fact be needed for the budgeted purpose. Since the Board of Supervisors laid a unit levy for general county purposes, it cannot be said that these funds were derived from a levy specifically made for debt purposes. The sum budgeted for debt service may well have come in whole or in part from sources other than the levy, as for example A. B. C. funds. The levy being for general county purposes, the funds may be used for any appropriate county purpose, although not covered by the original budget. In this connection I am enclosing a copy of an opinion rendered to the Honorable Daniel W. McNeil, Commonwealth's Attorney for Rockbridge County, on March 20, 1950, dealing with a somewhat related question.
Section 22-72 provides in sub-paragraph (9) that in general a school board may 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. The implication is clear that, if the consent of the tax levying body is first secured, expenses not included in the budget may be incurred if funds are available. That such funds are available because it is later found that funds for items included in the budget did not have to be expended for the budgeted purpose is, in my opinion, immaterial. The consent of the tax levying body is necessary, since it may feel that it is best not to spend the funds for a new purpose so that a surplus will result, thus permitting a deduction in the levy the following year. But, if the Board of Supervisors authorizes the expenditure for the new purpose, it is my opinion that it can be made.

BOARDS OF SUPERVISORS—Authority to contribute funds for Bible teaching. F-33

HONORABLE W. EARL CRANK,
Commonwealth's Attorney for Louisa County.

I have your letter of May 5, 1950, which reads, in part, as follows:

"Since the teaching of the Bible in the public schools was stopped a couple of years ago the Federal Council of Churches in the County have employed a teacher to teach the Bible to the school children. The cost of this has heretofore been raised by private donations and contributions from the churches. There has been some suggestion that a delegation may appear before the Board of Supervisors of Louisa County to ask the Board to make a donation out of the General County Funds, and a member of the Board of Supervisors has requested that I write and ask your opinion as to whether or not the Board of Supervisors would have the authority to make a contribution out of the General County Funds for this purpose."

I have been unable to find any express authority for a county board of supervisors to make a donation out of general county funds for such a purpose as that inquired of in your letter and it is, therefore, my opinion that the board of supervisors has no authority to make such a contribution.

BOARDS OF SUPERVISORS—Authority to contribute to war memorial at county seat. F-33

HONORABLE I. R. DOWEL,
Commonwealth's Attorney for Page County.

This is in reply to your letter of October 17th from which I quote as follows:

"A group of citizens in the southern end of Page County have organized themselves into a corporation known as the Shenandoah Memorial Park Association, Inc. The purpose of this organization is to have an athletic field where baseball and other games will be played. They expect some time in the future to have an inside basket-ball court and promote other forms of sport. An admission will be charged for baseball games, basket-ball games, etc. They have asked the Board of
Supervisors to appropriate $3,000.00 to this organization, which they propose to spend in the development of this project.

"The American Legion of Luray, Virginia, has formed a corporation and built an American Legion Home. This home is used by the American Legion for their meetings and any form of entertainment that they may see fit to have. The VFW organization uses the home for the same purposes. Other organizations desiring to use the building are charged a fixed fee. The American Legion has requested the Board of Supervisors to appropriate to their organization the sum of $3,000.00.

"If the Board has the authority to make either of these appropriations it would have to be under Section 2742 of the Code as amended at the extra session in 1945. However the first could not fall within this statute because it isn't at the County seat. In the second the Board of Supervisors nor the people generally have no authority whatever over this home as provided in this statute. I am also of the opinion that the statute limits the County to the erection of one monument or memorial. Is this right or wrong?"

The pertinent part of Section 2742 of the Code, as amended, is as follows:

"And the board of supervisors may appropriate a sufficient sum or sums of money out of the funds of the county to complete or aid in the erection of a monument or memorial to the Confederate, or Spanish-American War, or World War I or World War II veterans of the county upon the public square thereof, or elsewhere at the county seat; and they are also authorized to make a special levy to raise the money necessary for the completion of any such monument or memorial, or the erection of a monument or memorial to such Confederate, or Spanish-American War, or World War I or World War II veterans, or to supplement the funds already raised or that may be hereafter raised by private persons, or by Confederate veterans, or by the American Legion, or other organizations, for the purpose of building such monuments or memorial; and they are also authorized and empowered to appropriate from time to time, out of any funds of such county, a sufficient sum or sums of money to permanently care for, protect and preserve the Confederate, or Spanish-American War, or World War I or World War II monument or memorial erected upon the public square, or elsewhere at the county seat, of the county, and to expend the same thereafter as other county funds are expended."

Therefore, I concur with your conclusions that the Board of Supervisors has no authority under the above Section to appropriate money to the Shenandoah Memorial Park Association, Incorporated, and I am unable to find another statute that would authorize such an appropriation.

Assuming that the American Legion Home to which you refer, is to be a memorial and is to be located at the County seat, I am of the opinion that Section 2742, as amended, authorizes the Board of Supervisors to make an appropriation in aid of its construction.

The fact that the Board of Supervisors and the people generally will have no authority over this home is immaterial when the Board of Supervisors is proceeding under the second paragraph of the statute which is quoted above.

I am further of the opinion that the above statute does not prevent the Board of Supervisors from making appropriations for more than one monument or memorial. It would appear to me that this matter rests entirely with the discretion of the Board.
BOARDS OF SUPERVISORS—Authority to control speed of boats on creek. F-33

HONORABLE A. B. JOHNSON,
Commonwealth's Attorney for Isle of Wight County.

I have your letter of October 12, 1949, in which you ask whether, in my opinion, the Board of Supervisors for Isle of Wight County has authority to fix and control the speed of boats going in and out of Jones' Creek at Rescue, Virginia. Section 4723 of the Code confers powers of a local nature on boards of supervisors, granting 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 the County may regulate speed of boats on waters within the county, if in fact the operation of such boats jeopardize the safety of persons or property in the county.

I know of no State law which will prevent the enactment of such an ordinance by the Board of Supervisors, and I do not think that such an ordinance would conflict or infringe upon the federal right to control navigation upon navigable waters of the State, especially in view of the letter enclosed by you from the Army Department to the effect that it is their policy to permit the municipalities or counties having jurisdiction to enforce such regulations on minor waterways.

BOARDS OF SUPERVISORS—Authority to designate out-of-state bank as paying agent for bonds. F-33

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

This is in reply to your request for my opinion as to whether the Board of Supervisors may designate an out-of-State bank as the paying agent in connection with bonds issued for Sanitary District No. 1 in Fairfax County. This would mean that the County would have to deposit with the out-of-State bank funds to be used for the payment of the principal of and interest on the bonds.

While this office has previously expressed the opinion that former Section 350 of the Tax Code, to which you refer and which is now contained in Article 2 of Chapter 20 of Title 58 of the new Code, contemplates that public funds should be deposited in banks located in Virginia, it is my opinion that this section is not applicable to the deposit of funds to be used for the payment of the sanitary district bonds in question.

You have indicated that those bonds were issued under the provisions of Chapter 161 of the Acts of Assembly of 1926, as amended. Section 10 of that Act (found in Michie's Code as Section 1560-j)), which was amended by Chapter 465 of the Acts of 1948, provides that the bonds issued thereunder shall be payable at such place or places as may be determined by the Board of Supervisors. In my opinion, this provision would authorize the Board of Supervisors to name an out-of-State bank as paying agent and to provide for the deposit of funds to be used to pay such bonds with such out-of-State bank. It is to be noted that similar language appears in Chapter 126 of the Acts of 1946, which also deals with the issuance of bonds for sanitary districts. See Section 1560-z-6 of Michie's 1948 Supplement.
BOARDS OF SUPERVISORS—Authority to enact ordinance regulating closing hours of businesses other than dance halls. F-33


HONORABLE CARY J. RANDOLPH,
Commonwealth’s Attorney for Henry County.

This is in reply to your letter of January 16, in which you ask if the Board of Supervisors can adopt an ordinance closing during certain night hours (a) business establishments serving food or drinks, (b) gas stations and other designated establishments, and (c) all retail establishments.

Boards of Supervisors have broad powers under Section 2743 of the Code, which authorizes them 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.”

This office in two former opinions—one addressed to Honorable A. Barclay Taliaferro, Commonwealth’s Attorney for Orange County, on February 20, 1940, and the other addressed to Honorable Edward McC. Williams, Commonwealth’s Attorney for Clarke County, on October 28, 1941—has expressed the view that under this provision of Section 2743 a Board of Supervisors would have authority to adopt an ordinance requiring the closing of public dance halls at certain hours if they were of opinion that the conditions in the county justified the same. The same reasoning would support an ordinance regulating other designated businesses if it was felt that the conditions surrounding the conduct of the businesses warranted this type of regulation.

However, considerable doubt is cast upon this view by the fact that the General Assembly in 1946 adopted an Act expressly authorizing Boards of Supervisors to regulate the closing hours of public dance halls. See Chapter 69 of the Acts of Assembly of 1946. The enactment of this statute indicates that the General Assembly considered special legislative authority necessary to authorize Boards of Supervisors to regulate the closing hours even of public dance halls. The inference would be that such legislative authority would be necessary to authorize such regulation of other business activities.

It is my opinion, therefore, that a local ordinance regulating the closing hours of any business other than public dance halls would be of doubtful validity.

BOARDS OF SUPERVISORS—Authority to enter contract for the furnishing of street lights inside and outside of sanitary district. F-33

April 18, 1950.

HONORABLE JOHN T. DUVAL,
Commonwealth’s Attorney for Gloucester County.

This is in reply to your letter of April 3rd in which you requested my opinion as to whether or not the Board of Supervisors has the authority to enter into a contract with the Virginia Electric and Power Company for the purpose of providing street lights in the Village of Gloucester and charge the costs against the Gloucester Sanitary District. You state that with a few exceptions all of the lights are located within the said Sanitary District.

I assume for the purposes of this opinion that the Gloucester Sanitary District was created under the provisions of Chapter 2 of Title 21 of the Code of Virginia. This being true, I am of the opinion that the governing body of the county has the authority to enter into the contract to which you refer and could charge the cost against the sanitary district funds, but would be limited to the cost of street lights solely within the District.
The above conclusion is based upon Section 21-118 of the Code, the pertinent part of which is as follows:

"After the entry of such order creating a sanitary district in such county, the governing body thereof shall have the following powers and duties, subject to the conditions and limitations hereinafter prescribed:

(2) To acquire by gift, condemnation, purchase, lease, or otherwise, and to maintain and operate any such water supply, sewerage, garbage removal and disposal, heat, light, fire fighting equipment and power and gas systems and sidewalks in such district.

(3) To contract with any person, firm, corporation or municipality to construct, establish, maintain and operate any such water supply, sewerage, garbage removal and disposal, heat, light, fire fighting equipment and power and gas systems and sidewalks in such district." (Italics supplied).

On the other hand, it is my opinion that neither the Sanitary District Commission nor the Board of Supervisors could charge the costs against the Sanitary District Funds if the district was created under the "Sanitation Districts Law of Nineteen Hundred and Thirty-eight" (Chapter 3 of Title 21 of the Code of 1950). See Section 21-168 of the Code.

As to whether or not the Board of Supervisors as the governing body of the county, could enter into an agreement for the establishment and maintenance of street lights within the county, I refer you to a former opinion of this office rendered by the Honorable Abram P. Staples to the Honorable Robert Randolph Jones on June 14, 1939. For your information a copy of that opinion is enclosed herein.

BOARDS OF SUPERVISORS—Authority to make appropriation for aid in constructing armory. F-33

February 22, 1950.

HONORABLE WILLIAM R. BLANDFORD,
Commonwealth's Attorney for Powhatan County.

You desire my opinion as to whether the Board of Supervisors may contribute by appropriation a sum of $10,000 toward the construction of an armory which will house a Company of the Virginia National Guard. You state that the Powhatan County War Memorial Recreational Building, Inc., a non-profit corporation, was organized to construct the building in question as a war memorial and as a recreational center for the white citizens of the County, and for the further purpose of promoting national defense by housing, permanently, a Company of the National Guard.

Section 15-696 of the Code authorizes a board of supervisors to appropriate sums of money for the aid in erection of a war memorial at the county seat, but it is not clear from your letter where the memorial to which you refer is to be erected. However, I call your attention to Section 44-113 of the Code, which is as follows:

"Counties, cities and towns may appropriate such sums of money as they deem proper to the various organizations of the national guard or naval militia, when such organizations are maintained within the limits of the counties, cities and towns respectively; and counties may appropriate such sums of money as they may deem proper to the various organizations of the national guard if such organizations are maintained in any incorporated town or city of the second class located within the geographical limits of such counties respectively."
It is my opinion that the above quoted section would permit an appropriation in aid of the construction of an armory which will permanently house an organization of the National Guard, but that such an appropriation should be made to the local organization and not directly to the Powhatan County War Memorial Recreational Building, Inc. The local organization could, of course, enter into a contract with the non-profit corporation in order to carry out the purpose for which the appropriation was made.

I am of the opinion that the answer to your question concerning whether the board of supervisors would be liable in a discriminatory suit for not providing recreational facilities for the colored race in the proposed building is in the negative. Regardless of whether the appropriation is made under the authority of Section 15-696 or under the authority of Section 44-113, it is a contribution over which the board of supervisors would exercise no control after it was expended for the proper purpose. In other words, the Powhatan County War Memorial Recreational Building, Inc., is a private corporation over which the Board would have no authority.

BOARDS OF SUPERVISORS—Authority to operate baseball field as part of recreational facilities. F-33

HONORABLE JULIAN S. CORNICK,
Commonwealth's Attorney for York County.

April 27, 1950.

This is in reply to your letter of April 25 regarding the Messick Athletic Association. In your letter you state:

"* * * This association has leased a parcel of privately owned land in York County on which they have constructed a baseball and athletic field. They sponsor a baseball team and when games are played on said field the public is welcomed and no fixed gate charge is made, yet they solicit contributions by 'passing the hat'. When no games are scheduled they permit school teams and other groups to play on the field at no charge. They call themselves a non-profit organization and state that their field collections do not meet their expenses. They plan to flood light the field for night games and have been negotiating with the Virginia Electric and Power Company toward this end. The power company informed them that there are two classes of sports lighting—municipal and commercial; that the rates and other costs of sports lighting in cases where a sports field is operated by a municipality or county are very favorable over commercial operation.

"Said association has petitioned the Board of Supervisors of York County to designate their association as its agent to operate the field so that the association may obtain the benefit of the municipal rates. To manifest the proposed operation as a municipal enterprise to the power company they wish the Board to write a letter to the power company substantially as follows:

""This is your authority to supply electricity for sports lighting to Messick Athletic Field in accordance with our Municipal Electric Service Agreement. The County of York has designated the Messick Athletic Association as its agent to operate the field so that the association may obtain the benefit of the municipal rates. To manifest the proposed operation as a municipal enterprise to the power company they wish the Board to write a letter to the power company substantially as follows:

"This is your authority to supply electricity for sports lighting to Messick Athletic Field in accordance with our Municipal Electric Service Agreement. The County of York has designated the Messick Athletic Association as its agent to operate the field. No charge will be made for the use of the field based on the amount of electricity used. The County will pay for electricity used and will not resell any of such electricity.'

"The association will indemnify the county against any possible public liability if the Board can and will sponsor the field, and, of course, it will
secure the county as to all power company costs and charges. In fact no county funds whatsoever will be expended in and about said athletic field operation, although the county would be responsible to the power company for its charges by reason of said letter."

You further state that the Board feels that the Association is performing a worthy service to the people of the County and desires to help if it can. You request my opinion as to whether the Board has the authority to enter into the proposed arrangement with the Association and the Power Company.

Section 15-697 of the Code authorizes any county to establish and conduct a system of public recreation and playgrounds. Under this section the county may acquire land and recreational facilities by gift, purchase, lease, condemnation or otherwise, and may expend funds to operate the facilities. Since the Association is willing to permit its field to be used by school teams and other groups in the County and admits the public free of charge to games sponsored by it, I think that it would be perfectly proper for the County to consider it a part of the recreational system of the County and, under Section 15-697 of the Code, to expend funds to help operate the field. It is my opinion, therefore, that it would be proper for the Board to contract for the power necessary to light the field. It can, of course, accept the financial assistance of the Association to help meet the cost of such service.

If the Association charged an admission for attendance at events conducted by it, I think it would be improper for the County to lend its name to a contract with the Power Company in order that the Association might secure a lower rate for electricity furnished to it in connection with its own events. However, since it appears from your letter that no admittance charge is required, I do not think that the fact that contributions are solicited to enable the Association to meet part of the expense of putting on the public sporting events would render the arrangement improper. In this connection it is noted that the copy of the charter of the Association submitted with your letter shows that it was organized under what was formerly Chapter 151 of the Code as a non-profit association. The Power Company should, of course, be fully advised of the nature of the arrangements entered into by the County and the Association for the use of the field as a public recreational facility.

BOARDS OF SUPERVISORS—Authority to purchase land for recreational purposes. F-33

HONORABLE S. J. THOMPSON,
Commonwealth's Attorney for Campbell County.

This is in reply to your letter of August 17 in which you asked whether or not the Board of Supervisors of Campbell County has the authority to purchase land and develop a lake for recreational purposes for the citizens of the county.

I call your attention to Chapter 35 of the Acts of Assembly of 1924, found in Michie's 1942 Code as §3032b which provides as follows:

"Any city, town or county may establish and conduct a system of public recreation and playgrounds; may set apart for such use any land or buildings owned or leased by it; may acquire land, buildings, and other recreational facilities by gift, purchase, lease, condemnation, or otherwise, and equip and conduct the same; may employ a director of recreation and assistants; may expend funds for the aforesaid purposes."

This statute also provides that upon the filing of a petition signed by ten per cent of the qualified voters, the authorities shall submit to the voters the
question of whether or not a system of public recreation and playgrounds shall be established, and that if the proposition is adopted by the voters, the proposed system shall be established.

While the law provides that the matter shall be submitted to the voters if the required petition is filed, and that the system shall be established, if approved by the voters, I do not think this procedure is necessary before the system can be established. In my opinion the Board of Supervisors can take independent action and proceed to purchase the necessary land, and establish the recreational park.

BOARDS OF SUPERVISORS—Authority to rent office space for use by Commonwealth's Attorney. F-33

HONORABLE JOHN T. DUVAL,
Commonwealth's Attorney for Gloucester County.

March 8, 1950.

I regret the delay in acknowledging your letter of February 24 in which you requested my opinion as to whether or not the Board of Supervisors would be authorized to rent office space for the use of the Commonwealth's Attorney when there is no space available in the Court House or in the other public buildings of the county.

Section 15-689 of the Code of 1950, reads as follows:

"The board of supervisors of each county or the council of each city shall, if there be offices in the courthouses of the respective counties and cities available for such purposes, provide offices for the treasurer, commonwealth's attorney, sheriff, commissioner of the revenue, commissioner of accounts and division superintendent of schools for such county or city. And the board of supervisors of any county or the council of any city may, if there be offices in their respective courthouses available for such purposes, provide offices for the judge of any court sitting in the county or city, and any judge of the Supreme Court of Appeals who may reside in the county or city, and if such offices are not available in the courthouse, they may be provided by the board of supervisors or council, if they deem it proper, elsewhere than in the courthouse of the county or city."

As you pointed out, the punctuation in the above-quoted section is different from that contained in the original statute, codified as part of Section 2854 of Michie's Code of 1942, in that in the original statute a comma is found after the words "division superintendent of schools for such county or city."

I am of the opinion that the punctuation change noted in the statute in question does not affect the authority of the Board to furnish office space for the officers named therein. The first sentence of the section makes it mandatory upon the Board to furnish offices in the Court House for certain county officers, if space is available. While this provision does not make it mandatory upon the Board to furnish offices elsewhere, it is my opinion that it does not prohibit the Board from so doing, and if the Board deems it necessary, in order to properly conduct the business of the county, it may do so.

I am further of the opinion that, since the second sentence of the above-quoted section refers to State officers, the qualifying phrase found therein, namely, "if they deem it proper," was necessary, for there would be considerable doubts as to the authority of the Board of Supervisors to rent office space for State officers on the theory that it was a necessary and proper expense of county government.

Therefore, it is my conclusion that the Board of Supervisors has the authority, as an ordinary governmental function, to secure an office for the use of the Commonwealth's Attorney at a rental to be determined by such governing body.
REPORT OF THE ATTORNEY GENERAL

BOARDS OF SUPERVISORS—Authority to supplement salary of game wardens. F-233

GAME WARDENS—Authority of board of supervisors to supplement salary of. F-233

HONORABLE CHESTER J. STAFFORD,
Commonwealth's Attorney for Giles County.

September 13, 1949.

Acknowledgment is made of your letter of September 7, from which I quote as follows:

"Section 3305, subsection 81, of the Code of Virginia provides that the governing body of a county may supplement the salary of the game warden out of the dog fund. In Giles County one-half of the entire fund remaining in the hands of the Treasurer on December 31 is transferred into a fund for replenishing and restocking.

"The Board of Supervisors of Giles County have asked me whether they could pay the supplement to the game warden's salary out of the general fund so that the game replenishing fund could be saved for the purpose of restocking.

"Please advise me as to whether the Board of Supervisors should continue to supplement the game warden's salary out of the dog fund or whether it is proper to pay this out of the general fund."

In my opinion the Board of Supervisors do not have the authority to supplement the salary of a game warden out of the general funds, but must use the funds as provided in Section 3305(81) if the salary is supplemented by the County.

BOARDS OF SUPERVISORS—Authority to support library. F-33

HONORABLE DEANE HUNDELEY,
Trial Justice for Essex County.

March 21, 1950.

This is in reply to your letter of March 16, in which you ask if the Board of Supervisors of Essex County has the right to include in the budget for the coming year an item to cover the salary of a librarian to care for the library of the Women's Club.

Section 42-11 of the Code of Virginia, which is contained in the chapter of the Code dealing with county and regional library systems, reads as follows:

"The governing body of any county in which no such free library system as provided in this chapter 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 §§13-220 to 13-237."

I am, of course, not advised whether the Women's Club in question is a society or association organized under the provisions of Sections 13-220 to 13-237 of the Code, which deal with companies, societies or associations not organized for profit and having no capital stock. If so, the appropriation would be authorized by the section quoted above; if not, the appropriation would not be authorized unless made under the provisions of Section 42-12 of the Code, which provides that the governing body of any county in which no such free library system as provided by Chapter 2 of Title 42 has been established may, in its
discretion, contract for library service with an adjacent city, town or State-supported institution of higher learning, or with a library not owned by a public corporation, but maintained for free public use. Section 42-12 provides that in such case the governing body may appropriate such sums of money as it deems proper for providing library service to the county.

Of course, before an appropriation would be authorized under either Section 42-11 or Section 42-12 free library service should be furnished to the people of the county by the library of the Women's Club.

BOARDS OF SUPERVISORS—Authority to tax to retire school bonds. F-33

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

June 22, 1950.

This is in reply to your letter of June 16, in which you ask if the Board of Supervisors is limited in the amount of levy it may lay to retire bonds which have been authorized by a vote of the people.

Since you refer to Sections 22-182 and 22-184 of the Code, I assume that you refer to bonds issued to finance the construction of school improvements. Both of these sections and others dealing with the issuance of bonds for school purposes, as well as the statutes dealing with the general bond issues by the county, provide that there shall be levied annually a tax sufficient to provide for the payment of interest and principal of the bonds issued. See Sections 22-128, 22-167, 22-177 and 15-604.

It is my opinion, therefore, that once the people have authorized the bond issue and the bonds are issued, the Board of Supervisors must lay a levy sufficient to pay the principal and interest of such bonds when they become due and that the only limit upon the amount of the levy is the amount of the obligation assumed by the county when the bonds are issued.

BOARDS OF SUPERVISORS—Authority to transfer funds placed in voluntary reserve fund. F-33

HONORABLE DANIEL W. MCNEIL,
Commonwealth's Attorney for Rockbridge County.

March 20, 1950.

This is in reply to your letter of March 6, in which you request my opinion as to the legality of the use of certain funds by the Board of Supervisors of Rockbridge County to pay certain current bills for repair work on the Court House. In your letter you write the following facts:

During the month of August, 1948, the Rockbridge County Court House was being remodeled and repaired and it was found that the county needed $7,600.00 to meet the bills in connection with this work. A sufficient sum to cover the cost of the work had been included in the 1948-1949 budget, but the taxes to be derived from the levy to cover the budget would not be collected until after the bills were payable. Instead of raising the needed funds by means of a temporary loan from a bank in anticipation of receipt of current revenue, the Board transferred $7,600.00 from a special fund which had been set up to repay a State Literary Fund loan as it became due.
The fund from which the sum needed was drawn was a so-called sinking or debt fund which had been set aside by the Board of Supervisors from the Alcoholic Beverage Control funds that had been paid to the county each year. At the time the $7,600.00 was transferred and used to pay the bills on the Court House repair work, there was an accumulation in this reserve fund of approximately six times as much as was needed to meet the current payments on the State Literary Fund debt. Seventeen days after the transfer was made, the A. B. C. funds from the State for the fiscal year ending June 30, 1948, were received and the amount of $7,600.00 was again added to the debt reserve fund.

Since a question has been raised as to whether the Board had the legal authority to carry out this transaction, you have requested my opinion on the matter.

This office has consistently expressed the opinion that funds derived from a tax levy for a specific purpose cannot be diverted from that purpose and used for normal operating expenses. It has also ruled that funds, however derived, and set aside in a sinking fund required to be set up and maintained either by law or by contract to pay a debt to mature in the future cannot be borrowed by the county and used for normal operating expenses. Such would be in contravention of and would defeat the purpose of the statute or the trust agreement requiring the sinking fund to be set up and maintained. I am enclosing copies of three former opinions of this office on this subject rendered by the Honorable Abram P. Staples when he was Attorney General. These opinions were rendered to W. Potter Sterne, Robert B. Ely, and T. Moore Butler, all Attorneys for the Commonwealth, on March 13, 1936, January 26, 1944, and June 26, 1947, respectively. I concur in these opinions.

It is my opinion, however, that there is a distinction between a legally required sinking fund and a voluntary reserve fund in which are set aside, surplus funds to be used for debt retirement. Normally sinking funds are required in cases of bond issues which mature in their entirety at one date in the future. They are not always required in the case of bond issues maturing serially.

In the case of loans made from the Literary Fund, the principal is payable in annual installments of from five to thirty years. See Section 22-112 of the Code of 1940 (Section 643 of the Code of 1919, as amended). There is no statutory requirement that a sinking fund be set up, the statute merely providing that the Board of Supervisors shall include in its levies, or appropriate a fund sufficient to meet its liabilities on the contract. The State Board of Education does not require as a part of the Literary Fund loan contracts that a sinking fund be established.

There was, then, no legal requirement that the County of Rockbridge set up a sinking fund to service its Literary Fund debt. Its action in setting aside funds in a reserve fund which would not only take care of its obligations for the current year, but would take care of its obligations for the next five years, also was voluntary on its part. The funds so accumulated were derived, not from a levy which had been laid to service the debt, but from sources the proceeds of which could be used for general county purposes.

Since the only legal obligation of the County was to meet the payments on the Literary Fund debt as it became due and since the transfer would not have resulted in a default in this obligation, it is my opinion that the Board of Supervisors acted within its authority in making the transfer.
HOorable A. O. Lynch,
Commonwealth's Attorney for Norfolk County.

This is in reply to your letter of July 30, from which I quote as follows:

"Under date of December 29, 1948, you furnished Mr. R. A. Robertson, Treasurer of Norfolk County, an opinion regarding the authority of the Board of Supervisors of Norfolk County to pay the Commonwealth's Attorney a fee for the collection of personal property taxes, holding that Section 2707, as amended in 1948, 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.

"On March 13, 1948, I was authorized to collect from the South Norfolk Bridge Commission, Incorporated, taxes on the toll bridge owned and operated by the Corporation, for the years 1945, 1946 and 1947. That part of the bridge lying in Norfolk County was annexed to the City of Portsmouth as of January 1, 1948.

"Many conferences regarding the matter were held with the attorneys for the Corporation, and I made one trip to Richmond to consult Mr. Morrissett, State Tax Commissioner.

"When I became convinced that no settlement could be made with the Corporation, I instituted suit in the Circuit Court of Norfolk County for the collection of these taxes, and recovered for Norfolk County the sum of $10,239.66.

"As will be seen, the contract for the collection of these taxes was entered into before the amendment to Section 2707 became law, and is not applicable in this case."

In view of the fact that Section 2707 prior to its amendment in 1948 had not been construed to prohibit a Commonwealth's Attorney from being employed by the Board of Supervisors to perform special legal services for the County which do not fall within his official duties, and since you were engaged by the Board of Supervisors of Norfolk County to collect certain taxes from the South Norfolk Bridge Commission, Incorporated, prior to the amendment in 1948, it is my opinion that it would be proper for the Board to pay you for your services and for you to receive the compensation.

As you point out in your letter, there is the additional fact that the taxes which you were employed to collect are taxes imposed upon the real estate of a bridge corporation. Though for purposes of taxation this particular property is classified as personal property, it is in fact real property. Since Section 2707 now contains an express exception authorizing a Commonwealth's Attorney to receive a fee for the collection of taxes which constitute a lien on real estate, it would seem that the services performed by you in this instance do fall within the intent of the exception, though not within the express language. I think, however, the controlling fact is that your contract for services was made prior to the amendment of the statute.
REPORT OF THE ATTORNEY GENERAL

BOARDS OF SUPERVISORS—Commonwealth's Attorney—No duty to clear title to property owned by county—Cannot be employed to do so. F-69

Honorable Virgil H. Goode,
Commonwealth's Attorney for Franklin County.

This is in reply to your letter of August 6, regarding the 400 acres which have been used by the County of Franklin for a Poor Farm for about 70 years and which the County now wishes to dispose of. You state that at the time the County supposedly purchased this property it was involved in litigation and that you have found no record title which would establish the ownership of this property by the County.

You have been requested by the Board of Supervisors to do whatever is necessary to get the title to the property in marketable shape, and you ask whether or not it is the duty of the Commonwealth's Attorney to perform services of this nature or whether the Board of Supervisors should pay him reasonable compensation therefor.

I find no statute imposing such duties as this upon the Commonwealth's Attorneys and it is my opinion that they do not fall within the official duties of the office. Formerly it was held proper for the Board of Supervisors to employ the Commonwealth's Attorney to perform such services as these and to pay him reasonable compensation therefor. However, Section 2707 of the Code, which forbids certain officers from making contracts with Boards of Supervisors was amended in 1948 and now expressly names the Commonwealth's Attorney as one of the officers who are forbidden to contract with the County. This statute now makes an express exception allowing the Commonwealth's Attorney to be employed to collect taxes which are a lien on real estate, but does not except other legal services which might be needed by the County.

Though some question may be raised as to the wisdom of forbidding the Commonwealth's Attorney to perform and to receive compensation for legal services for the County not within his official duties, it is my opinion that the statute as now written would prohibit such contracts with the County.

It is, therefore, my opinion that the County should employ some other attorney to perform the necessary legal services involved in clearing title to the property mentioned.

HONORABLE E. O. Russell,
Clerk,
Board of Supervisors of Loudoun County.

This is in reply to your letter of July 21, requesting my opinion upon the proper interpretation of Section 2773(29) of the Code of Virginia (Michie's, 1942).

You ask what authority the Board of County Supervisors has under paragraph (b) of this section with respect to the removal of the County Executive. This paragraph reads as follows:

"(b) The county executive shall not be appointed for a definite tenure, but shall be removable at the pleasure of the board of county supervisors. In case the said board determines to remove the county executive, he shall be given, if he so demands, a written statement of the
reasons alleged for the proposed removal and the right to a hearing thereon at a public meeting of the said board prior to the date on which his final removal shall take effect, but pending and during such hearing the board of county supervisors may suspend him from office, provided that the period of suspension shall be limited to thirty days. The action of the board in suspending or removing the county executive shall not be subject to review."

It is my opinion that under this provision the Board of Supervisors has complete power to remove the County Executive for any reason deemed by it to be sufficient. The provision requiring a written statement of the reasons alleged for the proposed removal and a public hearing does not, in my opinion, modify the power which the Board has in this respect. It would, of course, as a practical matter tend to prevent an abuse of the power and renders unlikely a removal of the County Executive for a purely capricious reason. That apparently was the sole object of this provision, since the statute provides that the Board's action in removing the County Executive is not subject to review.

You also ask whether the Treasurer or the Commissioner of the Revenue would be eligible for appointment as County Executive. Paragraph (a) of this section provides that no member of the Board of County Supervisors shall during the time for which elected be chosen County Executive, nor shall such powers be given to a person who at the same time is filling an elective office. It also provides, however, that the head of one of the departments of county government may also be appointed County Executive. I call your attention to the fact that, if the County Executive Form of Government is adopted, the positions of County Treasurer and County Commissioner of the Revenue are abolished and their duties are transferred to the Director of Finance. Your second question would only arise when the County Executive is chosen prior to the time of the appointment of a Director of the Department of Finance and his assumption of the duties of County Treasurer or Commissioner of the Revenue. In such case, since the Treasurer and Commissioner of the Revenue are elective officers, they could not assume the duties of County Executive prior to resigning as County Treasurer or Commissioner of the Revenue, as the case may be. If their duties have been assumed by the party named as Director of the Department of Finance, you can see that the statute expressly provides that the party so named, being head of one of the departments of county government, could be appointed County Executive.

BOARDS OF SUPERVISORS—County; no authority to appropriate funds to insure employees in absence of statute. F-33.

INSURANCE—Group; group life insurance policy for county employees not lawful. F-33

Honorable Daniel W. McNeil, Attorney for the Commonwealth for Rockbridge County.

I have your letter of January 31, 1950, in which you inquire whether, in my opinion, the Board of Supervisors of Rockbridge County has the right to appropriate public funds to help pay the cost of group insurance for County employees. The specific question to which you desire an answer is whether such use of public funds would be invalid because it favors a special class.

In an opinion to Mr. John B. Boatwright, Jr., under date of September 12, 1945, the Honorable Abram P. Staples, then Attorney General, ruled that
such use of public funds by the Commonwealth of Virginia would be constitutional.

In that opinion reference was made to 37 American Jurisprudence, Municipal Corporations, Section 124, where the following language appears:

“A municipal corporation, having power to increase the wages of its employees, may take out group insurance for their benefit, the expenditure being viewed by the courts as for a public purpose.”

It would appear that the same reasoning applied there would apply with equal force with reference to counties. However, an examination of the statutes in this Commonwealth has led me to conclude that the county boards of supervisors have no such inherent power.

Section 51-112 of the Code of 1950 expressly provides that under certain conditions the governing bodies of cities and towns may appropriate funds for such a purpose. Section 51-114 of the Code makes provision that several acts previously adopted authorizing certain counties to establish pension, group insurance, and retirement plans be continued. It would seem logical to conclude that if the counties had an inherent power to establish such plans, then cities and towns would likewise have such power and since the Legislature deemed it necessary to specifically provide such power in cities, towns, and certain counties that they do not have any such power without such a specific grant. Therefore, unless Rockbridge County is one of those counties specifically authorized to establish such a plan under Section 51-114, I do not believe the Board of Supervisors should use public funds for such purpose.

I must advise you further that, under the present insurance laws of this State, it is unlawful to make a contract of life insurance to cover any group in this State except as provided by Chapter 12 of Volume 6 of the Code of Virginia, 1950. (See Code Section 38-427).

Those groups which may be legally covered are listed in Section 38-428 of the Code. Section 38-428 (3) provides:

“Life insurance covering not less than fifty employees of the Federal, State or a municipal government or of any department thereof, or of any Federal, State or municipal bureau, board, commission or institution, with or without medical examination, written under a policy issued to the Governor of the State, or to the head of any Federal, State or municipal department, bureau, board, commission or institution, as the case may be, the premium on which is to be paid by the employees and insuring only all employees, or all of any class or classes thereof determined by conditions pertaining to the employment, for amounts of insurance based upon some plan which will preclude individual selection, for the benefit of persons other than the employer; provided, that when the benefits of the policy are offered to all eligible employees, not less than seventy-five per centum of such employees may be so insured;”

There is some doubt that the term municipal government as used in this section applies to county government and you will also note that this section further provides that the “premium * * * is to be paid by the employees.”

It is my understanding that a bill is contemplated amending this section to provide that group insurance policies may be written in cities, towns and counties even though the city, town, or county pays, or shares in paying the premium, but it is not my understanding that this would empower all counties to adopt such plans but would only apply to towns and cities and such counties as have been authorized to make such expenditures.
BOARDS OF SUPERVISORS—Deputy Clerk of Court cannot contract with.  F-116

HONORABLE R. W. BICKERS,
Clerk of Circuit Court of Greene County.

This is in reply to your letter of August 8, in which you state that it is planned to install a new system of indexing the deeds in the Clerk's office of your County. You ask whether or not you or your deputy, who is paid a small salary by the Board of Supervisors, may contract with the Board of Supervisors to do this work when you are not busy with your regular duties as Clerk.

Section 2707 of the Code as amended in 1948 provides that no clerk of a court or any paid officer of a county shall become interested directly or indirectly 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. In view of this provision, it is my opinion that neither you nor your deputy would be authorized to contract with the Board and receive compensation from it for the performance of this special work of installing a new system of indexing the deeds.

BOARDS OF SUPERVISORS—Deputy director of finance may be designated to countersign county warrants in absence of director.  F-83

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.

This is in reply to your letter of July 20, in which you ask if the Board of Supervisors of Warwick County has the authority to designate someone to countersign county warrants or checks in the absence of the Director of Finance, who under the county manager law is required to countersign these documents.

While paragraph e of Section 2773(60), which deals with the Department of Finance of counties having the county manager form of government, provides that no money shall be paid out except upon check signed by the Chairman of the Board of Supervisors, or such other person as may be designated by the Board, and countersigned by the Director of the Department of Finance, this paragraph also provides that the Director of Finance shall exercise all the powers conferred and perform all the duties imposed by general law upon County Treasurers. Paragraph i of this section also provides that "the Director may have such deputies or assistants in the performance of his duties as may be allowed by the Board of County Supervisors."

Paragraph j of Section 350 of the Tax Code, dealing with County Treasurers, provides:

"** that the treasurer may, with the approval of the board of supervisors, by resolution entered of record on the minute book of the board, designate one of his deputies who shall have authority to sign any such checks whenever the necessity therefor shall arise by reason of the sickness or unavoidable absence of the treasurer, or his disability to sign such checks for any other reason."

In view of these statutory provisions it is my opinion that a deputy of a Director of Finance may be designated, in accordance with Section 350 of the Tax Code, to countersign county warrants or checks in the absence of the Director of Finance. The action taken by the Board of Supervisors of Warwick County in this connection was, therefore, proper.
BOARDS OF SUPERVISORS—Monthly distribution ledger; who prepares.

F-33

April 11, 1950.

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

This is in reply to your letter of March 23, in which you ask, if a Board of Supervisors requests a distribution ledger to be installed so that the Board may know each month the charges made against the appropriations set up by its budget, what officer shall keep the distribution ledger.

You refer to Sections 15-581 and 58-920 of the Code, which deal with certain records kept by county treasurers, but in my opinion these sections do not apply to such an appropriation distribution ledger as you mention. Since the Board of Supervisors approves the budget, makes the appropriations and issues the warrants for the payment of county obligations, it would seem that such a ledger would be more appropriately kept by its clerk. Section 15-237 generally imposes upon the clerk the duty of keeping the records of similar matters for the Board. It is my understanding that the Auditor of Public Accounts has prepared a form of appropriation distribution ledger for use by county clerks if such is desired.

BOARDS OF SUPERVISORS—No authority to adopt ordinances regulating hunting. F-33

August 17, 1949.

HONORABLE J. ALFRED TYLER,
Commonwealth’s Attorney for Charles City County.

This is in reply to your letter of August 8, in which you request my opinion as to the authority of the Board of Supervisors for the enactment of an ordinance containing the following provisions:

"That it shall be illegal for a person to have a loaded firearm on the public highway unless acting in defense of his person or property."

"That it shall be illegal for a person to take a game stand on the public highway whether or not he has a loaded or unloaded firearm in his possession."

Prior to 1930 Boards of Supervisors were by Section 2743 of the Code given the power “to prevent the destruction of game, fish, wild fowls, birds, and fur-bearing animals, and to limit still further than is provided by general law the time, manner and means by which they may be taken or killed * * *.” By Chapter 247 of the Acts of Assembly of 1930 this provision of Section 2743 was expressly repealed. In view of the fact that the power of Boards of Supervisors to regulate the hunting of wild game was expressly repealed, and this subject is now regulated by provisions of general law and the Commission of Game and Inland Fisheries (see Section 37 of the Game, Inland Fish and Dog Code, Section 3305(37) of Michie’s Code), it is my opinion that Boards of Supervisors no longer have the power to adopt ordinances regulating the hunting of wild game.

The effect of this ordinance would be a regulation of hunting, not authorized by the general power given to Boards of Supervisors to adopt measures for the health, safety and general welfare of the inhabitants of the county. The purpose of this ordinance may be for the protection of the safety of inhabitants of the county; however, the effect, as above mentioned, would be to regulate hunting, and I am of the opinion that the Board does not have this authority.
REPORT OF THE ATTORNEY GENERAL

BOARDS OF SUPERVISORS—No authority to bind future boards by accepting deed to property with contingent reimbursement clause. F-33

June 29, 1950.

HONORABLE S. PAGE HIGGINBOTTOM,
Commonwealth's Attorney for Orange County.

This is in reply to your letter of June 20 from which I quote as follows:

"The County of Orange is considering purchasing the property known as the Clore Memorial Hospital, consisting of approximately one acre of ground and a small hospital building located thereon, at a cost of approximately $30,000.00, and to be used by the Orange County Department of Health in the performance of its duties and functions. The County of Orange has agreed to pay $10,000.00 towards the cost of acquiring this property and the remainder of such purchase price would be paid for by private subscriptions. One such contemplated private subscription is in the amount of $10,000.00, and will be donated only on the condition that should said property cease to be used for health purposes, that the said County would refund to said donor that proportionate part of the value of said property at the time of discontinuance of such use as the said contemplated gift bears to the cost of said property.

"I can see no objection to such an arrangement since the title to the property would be vested in Orange County, subject to the County making certain reimbursements upon the happening of a certain event. I would like an opinion from your office as to the legality of such an arrangement."

This office has previously ruled that boards of supervisors may not bind their successors in office to make future appropriations. Report of the Attorney General, 1946-1947, page 17. Since the reimbursement agreement to which you refer could very conceivably have such an effect, it is my opinion that the Board of Supervisors has no authority to enter into this agreement.

A member of the local Department of Health requested this office by telephone to suggest a means for the County of Orange to acquire this hospital on the conditions outlined in your letter, if the above agreement was not considered proper. Therefore, I am taking the liberty of saying that, in my opinion, the property could be legally acquired by the County of Orange if some type of an agreement could be reached by which the private donor in question executes a deed, for his proportionate share of the property, containing a reversion clause to the effect that when the property ceased to be used for the purpose for which it was conveyed it would revert to the donor.

BOARDS OF SUPERVISORS—No authority to enter into agreement to furnish water to person living outside sanitary district. F-33

May 3, 1950.

HONORABLE W. O. FIFE,
Commonwealth's Attorney for Albemarle County.

This is in reply to your letter of April 25 in which you requested my opinion as to whether or not the Board of Supervisors of Albemarle County has the authority to enter into an agreement with persons living outside of the Crozet Sanitary District to supply them with water from the water supply system of such district.

You pointed out that the sanitary district in question was created under Chapter 2 of Title 21 of the Code, and that the water supply system was now serving all
but a few isolated sections of the district and that the expense of any extension of the system to residents outside the district would be borne by them.

Section 21-118 of the Code expressly enumerates the powers and duties of a governing body within a sanitary district, and it is noted that the enumerated powers are confined to the physical boundaries of the district created by the consistent appearance of such phrases as "within the sanitary district", "in such sanitary district" and "in such district." Therefore, it is my opinion that the Board of Supervisors may not enter into an agreement to furnish water from the system in question to persons living outside the Crozet Sanitary District.

The conclusion reached above is further predicated upon the fact that Section 21-116 of the Code specifically provides for the enlargement of sanitary districts, which would in reality be the effect of the agreement under consideration here. The pertinent part of that section is as follows:

"The circuit court, or the judge of such court in vacation, upon the petition of the governing body of the county and of twenty-five per centum of the qualified voters residing within the limits of the territory proposed to be added, may make an order extending the boundaries and enlarging any sanitary district created under the provisions of this article, which order shall prescribe the metes and bounds of the territory so added."

It can be seen, therefore, that persons who live outside of a sanitary district and wish to enjoy the benefits enjoyed by the residents of such district may do so by proceeding in accordance with the above-mentioned section.

BOARDS OF SUPERVISORS—No authority to insure securities placed in escrow by depositories receiving county funds. F-33

June 19, 1950.

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.

This is in reply to your request for my opinion as to the whether County Boards of Supervisors have the authority to pay the premiums on insurance policies for the protection of securities that depositories receiving county funds deposit in escrow with other banks as security for the county funds.

Section 58-944 and following of the Code of Virginia, formerly Section 350 of the Tax Code, provide that no money received by a county treasurer shall be deposited with any depository until such depository shall have given bond or shall have pledged and deposited in escrow with some bank or trust company in the State, other than the depository, securities for the protection of the county funds. Therefore, before acting as a depository for county funds, a bank must give the bond or pledge securities in escrow to protect the county. I find nothing in the statutes authorizing the county to bear the expense incident to the furnishing of such security.

Since the insurance referred to by you covers property of the depositories rather than of the county, it is my opinion that the Boards of Supervisors do not have the authority to pay the premiums for such insurance. The county is amply protected by the deposit of the securities themselves and, if for any reason they are lost or the amount of the same falls below the requirements of the statute, the depository bank can be called upon to deposit other securities until the amount provided by statute is held in escrow.
BOARDS OF SUPERVISORS—No authority to levy license tax on pool and billiard rooms in absence of statute. F-33

March 15, 1950.

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

This is in reply to your letter of March 2, in which you request my opinion as to whether the Board of Supervisors of a county has authority to levy a license tax upon pool and billiard rooms.

This office has consistently expressed the opinion that counties may not impose license taxes unless they are expressly authorized to do so by statute. As you point out, Section 58-266.1 allows cities and towns to require a local license on activities for which State licenses are required, but does not grant this power to counties. Also Sections 58-266.2 and 58-266.3 authorize certain counties to impose license taxes. Counties, generally, are authorized to impose license taxes upon certain types of activities. For example, see Section 58-283, dealing with carnivals and similar activities.

All of these provisions indicate that only those counties which have been expressly given the power to impose a license tax may do so and then only in the cases provided. Since counties have only the power which is expressly given by statute, I agree with your view that a county may only levy a tax in the various classifications of property and activities when it is specifically authorized to do so by statute. I know of no statute permitting counties, generally, to levy a license tax on pool and billiard rooms.

BOARDS OF SUPERVISORS—No authority to raise or lower salaries of officers whose salaries are fixed by Compensation Board. F-33

June 21, 1950.

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

This is in reply to your letter of June 15, in which you state that on December 1, 1949, the Compensation Board approved requests made by the Commissioner of the Revenue, the Treasurer, the Commonwealth's Attorney and the Sheriff for expenses and salaries in Norfolk County for the year 1950. You further state that on December 13, 1949, the Board of Supervisors approved the allowances of the Compensation Board, but at a meeting held on June 12, 1950, in adopting the budget, made certain changes in the salaries and allowances.

You ask whether the action taken by the Board of Supervisors on June 12 would change the original allowances made by the Compensation Board and, if not, what action should be taken to compel the Board of Supervisors to appropriate sufficient money to meet the original allowances for the balance of the calendar year. From the copies of the resolution attached to your letter it appears that the salaries and allowances for the Commissioner of the Revenue and the Treasurer were reduced and that the salary of the Sheriff was raised. Neither the original budget figure nor the amount actually allowed, which latter was less than the former, was nearly as much as the figure allowed by the Compensation Board in the case of the Sheriff's expenses.

Articles 7, 8 and 9 of Chapter 1 of Title 14 of the Code of Virginia vests in the State Compensation Board the power of fixing the salaries and expenses of County Treasurers, Commissioners of the Revenue, and Sheriffs, as well as certain other officers. Provision is made for the localities to object to and appeal from decisions of the Compensation Board if it is felt that the amounts allowed are not proper. If no objection is made or appeal taken, the action of the Com-
pensation Board is binding upon the locality which is required by statute to pay, in the case of Treasurers and Commissioners of the Revenue two thirds, and in the case of Sheriffs one-third of the salaries and expenses. Sections 14-76 and 14-91 provide that the salaries shall be paid in equal monthly installments and the expenses shall be paid monthly on the submission of satisfactory evidence that such expenses were actually incurred.

It is my opinion that the officers have a legal claim from the locality for that portion of their salaries and expenses payable by the County and, if the Board of Supervisors does not appropriate sufficient funds therefor, the same may be recovered from the County by appropriate legal action. I know of no authority for the Board of Supervisors either to raise or lower the compensation of the officers whose salaries are fixed by the Compensation Board.

BOARDS OF SUPERVISORS—No authority to reimburse sheriff for money spent in defending himself against action for false arrest. F-136


HONORABLE CHAS. H. WILSON,
Commonwealth's Attorney for Nottoway County.

This is in reply to your letter of March 22, in which you state that in 1949 the Sheriff of your County arrested and jailed an individual under a criminal warrant which had not been signed by the Justice of the Peace. You further state that a civil suit was instituted by the individual against the Sheriff and that the suit resulted in a judgment in favor of the plaintiff against the Sheriff in the amount of $250.

The Sheriff, who feels that he was discharging the duties of his office in good faith, has requested the County to reimburse him for the amount of the judgment and costs, including attorney's fees, incident thereto. You ask whether or not the Board of Supervisors of Nottoway County has a legal right to reimburse the Sheriff in the event that it feels that the circumstances of the case warrant such action.

Section 114 of the Constitution of Virginia expressly provides that counties shall not be made responsible for the acts of sheriffs. In view of this provision, no liability could attach upon the county in a case where the sheriff is sued for wrongful arrest. I know of no statute which authorizes the Board of Supervisors to reimburse the sheriff for the expenses incurred by him in defending a suit for wrongful arrest or to pay any judgment which may be rendered against him in such an action.

It is my opinion, therefore, that the Board of Supervisors of Nottoway County would have no authority to reimburse the Sheriff in the case discussed in your letter.

BOARDS OF SUPERVISORS—No authority to supplement salary of trial justice. F-33

June 26, 1950.

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

This is in reply to your letter of June 16, in which you ask if the Board of Supervisors of Fairfax County may supplement the salary of the Trial Justice of that County.

Article 5 of Chapter 1 of Title 14 of the Code, Sections 14-50 through 14-54,
provides that the salary of a Trial Justice shall be fixed by a committee of three Circuit Court Judges, and sets forth the general plan for fixing the salaries of Trial Justices. Section 14-53 provides that the State shall pay all of the salary of the Trial Justice. In my opinion this clearly provides that the salary of a Trial Justice as fixed by the committee of Circuit Court Judges was intended to be the entire compensation paid that officer. I find no statutory provision authorizing Boards of Supervisors to supplement the salaries of Trial Justices in their respective counties. It is my opinion, therefore, that the Board of Supervisors of Fairfax County has no authority to supplement the salary of the Trial Justice of that County.

In this connection I am enclosing a copy of an opinion rendered to Honorable L. McCarthy Downs on February 3, 1943, by the Honorable Abram P. Staples when he was Attorney General. While that opinion dealt particularly with the salary of a Trial Justice Court Clerk, it is my opinion that the same principle is applicable to the Trial Justice himself.

BOARDS OF SUPERVISORS—No authority to veto sheriff’s appointments to special police force. F-136e

March 17, 1950.

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

I am in receipt of your letter of March 15th. The facts stated therein, insofar as material, are as follows:

The Sheriff of Norfolk County appointed a special police force, “naming the officers so appointed, fixing the salary of each at $250.00 per month, subject to the approval of the Board” of Supervisors. The action of the Board was “that the police force * * be set up as recommended by Sheriff Hodges, except the appointment of Clarence E. Frost and J. R. Liles for whom no salary is set up.”

The Board has requested you to seek my opinion as to the legality of its action in approving the salary of the police force as recommended by the Sheriff but excepting by name therefrom two members of the police force.

As you point out, the law controlling this situation is found in House Bill No. 36 enacted by the General Assembly of 1950 as an emergency measure.

The authority of the Sheriff, under this statute, in the matter of the appointment of a special police force to consist of one or more suitable persons is exclusive. The appointment and naming of the personnel is the sole prerogative of the Sheriff and is not subject to the approval or disapproval of the Board of Supervisors. The law prescribes no maximum limit on the number of persons the Sheriff may appoint.

However, the final power over the amount to be expended as compensation to members of the police force is in the Board of Supervisors. The statute provides that the Sheriff may, subject to the approval of the governing body of the county, allow compensation to the members of the police force, not less than two hundred nor more than three hundred dollars a month.

The Sheriff’s power to allow compensation is thus limited by the Board’s power over the amount of public funds to be expended for this purpose. The Board could refuse to approve expenditures for salaries for more than a specified number of policemen at a given rate between the limits prescribed by the statute. However, I do not think they have the power to specify that any particular appointees selected by the Sheriff shall receive the compensation fixed since this would invade the authority vested in the Sheriff to name the policemen.

The Board has no authority to veto the appointment of any particular appointee. No appointee is subject to the approval of the Board. The amount appropriated by the Board for the payment of salaries may not be sufficient to enable the
Sheriff to allow compensation to all of his designated appointees but within the limits of the amount appropriated for compensation the Sheriff and not the Board determines the individual members of the police force.

BOARDS OF SUPERVISORS—Not authorized to adopt ordinances that parallel general criminal laws of the State. F-33

HONORABLE CHARLES G. STONE,
Commonwealth's Attorney for Fauquier County.

This is in reply to your letter of August 2, in which you request my opinion as to the right of the Board of Supervisors of Fauquier County to adopt an ordinance against riotous or disorderly behavior in a public place, paralleling Section 4533-a of the Code of Virginia.

It is true, as you point out, that under Section 2743 of the Code counties are given authority to adopt such measures as they may deem expedient to promote the general health, safety and welfare of their inhabitants. However, it is generally held that neither counties under the authority of this section nor towns under the general welfare clause usually contained in their charters have authority to parallel the general criminal laws of the State. While they may regulate problems peculiar to the locality and having a specific relation to their local and internal affairs, the general authority contained in such general welfare clauses has not been construed to authorize them to regulate offenses of a general nature which are crimes against the sovereign State and not against the locality.

Since riotous or disorderly behavior in a public place is a crime with which all of the people of the State are concerned and is not peculiar to a local problem, it is my opinion that Boards of Supervisors cannot parallel Section 4533-a of the Code. This conclusion is bolstered by the fact that this section contains specific authority for cities and towns to adopt ordinances prohibiting and punishing the acts therein mentioned, but does not give such authority to County Boards of Supervisors. That being true, it is my opinion that the Legislature did not intend to confer such power upon counties and did not construe the statutes authorizing counties, cities and towns to adopt measures for the general welfare as authorizing the enactment of an ordinance forbidding riotous or disorderly behavior.

BOARDS OF SUPERVISORS—Ordinances forbidding and defining nuisances. F-60a

HONORABLE HAROLD B. SINGLETON,
Member of House of Delegates.

This is in reply to your letter of January 25, from which I quote as follows:

"In 1938, the General Assembly amended the Acts of 1930, on page 18, to give the Boards of Supervisors the same power to abate nuisances in certain sanitary districts as is vested by law in councils of cities and towns.

"As I view the law, it seems to me that the Boards of Supervisors would have the power to make ordinances forbidding and defining nuisances in these sanitary districts. The Board of Supervisors of Amherst County claims that it does not have the power to pass any ordinance because this statute does not define what a nuisance is.

"Will you please advise me whether or not this statute should be amended to define nuisances?"
Section 3 of the Sanitary Districts Law, to which you refer, provides in part as follows:

“(i) The board of supervisors shall have the same power and authority for the abatement of nuisances in such sanitary district as is vested by law in councils of cities and towns for the abatement of nuisances therein, and it shall be the duty of the board to exercise such power when any such nuisance shall be shown to exist.”

By Section 15-5 of the Code of Virginia councils of cities and towns are authorized to adopt ordinances and prescribe fines or other punishment for violations thereof for the purpose of carrying into effect the enumerated powers conferred upon them. Among the enumerated powers is the authority to prevent injury or annoyance from anything dangerous, offensive or unhealthy, and to cause any nuisance to be abated. See paragraph 5 of Section 15-6 of the Code.

Under the provisions of the Code mentioned above, councils of cities and towns clearly have the authority to prohibit by ordinance activities and conditions which constitute a nuisance and to provide penalties for violations of such ordinances. Since this power is possessed by councils of cities and towns, the provision in the Sanitary Districts Law to which you refer confers similar power upon the Boards of Supervisors of the counties where the sanitary district is created.

I call your attention to the case of White v. Town of Culpeper, 172 Va. 630, in which the Court held that the council of a town could not by ordinance declare something to be a nuisance unless it in reality constituted a public nuisance. It would seem, however, that where the activity is injurious to the public safety, health or morals it could be declared a nuisance by the city or town council or by the Board of Supervisors governing the sanitary district, and any person maintaining such nuisance could be punished for violating the ordinance.

BOARDS OF SUPERVISORS—Power to expend funds to install sewer to connect with city sewers. F-33

EMINENT DOMAIN—Board of Supervisors may acquire right of way for sewer line by power of. F-33

May 2, 1950.

HONORABLE ROBERT BOLLING LAMBETH,
Attorney for the Commonwealth for Bedford County.

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

"Some years ago the Board of Supervisors of Bedford County secured some real estate just outside of Lynchburg and installed a septic tank to accommodate a few homes in that area. Since the septic tank has become overcrowded, the County has been negotiating with the City concerning the installation of a sewer line, and this contract between the County and the City for the construction of this sewer line seems to be the most practical and expedient solution to the problem.

"If the septic tank remains in its present condition, it will be a menace to the health of that section of the County and the City nearby, and a stream into which the septic tank overflows will be polluted.

"Section 15-738 of the Code of Virginia authorizes contracts between counties and cities for the construction of sewage works "to prevent the pollution of streams". If the County and the City enter into a contract on this subject, the County will expend approximately $1,000 and the City will take the sewage into its system for authorized purposes, including the prevention of the pollution of a stream which originates in Bedford County and flows through Lynchburg."
You ask whether the Board of Supervisors of Bedford County has the power to acquire title for the right of way for the sewer line by condemnation pursuant to Section 25-232 of the Code and under Section 15-738 or any other pertinent statute expend funds pursuant to a contract with the City for the disposition of the sewage to prevent the pollution of the stream.

As you point out, Section 15-738 authorizes counties and cities to enter into contracts and agreements for the acquisition, construction, maintenance and operation of sewers and other facilities to prevent the pollution of streams and other waters within and adjacent to such counties and cities and to expend funds for this purpose. Sections 15-720 through 15-722 authorize counties to establish and maintain public sewers along the public highways in any town, village, or suburb of any city and, with the consent of the council of the city, connect the same with the public sewerage system of the city, when such action is deemed necessary to protect the public health.

In view of the powers vested in the boards of supervisors of counties by the above statutory provisions to carry out the public purposes there set out, it is my opinion that the governing body of Bedford County may expend funds to carry out the project mentioned in your letter under a contractual arrangement with the city and, under the power given to counties by Section 25-232 to acquire property for any public purpose by the exercise of the power of eminent domain, may condemn the right of way for the sewer line if this be necessary.

BONDS—Elections; once court has ordered election it can not rescind or modify its order. F-151

October 20, 1949.

HONORABLE EMORY L. CARLTON,
Commonwealth’s Attorney for Essex County.

This is in reply to your letter of October 12, from which I quote as follows:

“The Judge of the Circuit Court of Essex County, called an election for Tuesday, November 8, 1949, as provided by Section 673, 2738, 2739, 2740 and 2741 of the Code. The order calling this election was entered on June 20, 1949.

“I desire to know whether or not the Judge of the Circuit Court may comply with the request of the School Board and Board of Supervisors and postpone the election until after the adjournment of the 1950 Session of the General Assembly of Virginia.”

Section 2738 of the Code authorizes the Judge of the Circuit Court to enter the order described above and gives him wide discretionary power in ascertaining the necessity of a bond issue before entering such an order. However, I am unable to find a statute or any authority upon which to be able to sustain his authority to rescind or amend the order at a later term of court upon the request of the School Board and the Board of Supervisors.

Some time ago a similar situation arose in the Sixteenth Judicial Circuit at which time it was decided by the Commonwealth’s Attorney and the Judge of the Circuit Court of Prince William County that the latter had no authority to enter an order of this nature at one term of court and rescind or modify it at a subsequent term.

While I feel that the question is not entirely free from doubt, it is my opinion that the Judge cannot at this term of court modify the order entered by him at the June term.
BONDS—Refunding bonds; no change in nature of the obligation by refunding. Delinquent taxes may be pledged for payment of only at time of refunding. F-33

March 6, 1950.

Mr. B. O. Carr, Member,
Board of Supervisors of Spotsylvania County.

This will acknowledge receipt of your letter dated February 28, 1950, which I quote as follows:

"On November 15, 1940, Spotsylvania County issued its bonds in the amount of $17,000.00 to refund a road indebtedness of Livingston District in said county, the bonds on their face purporting to be obligations of the county and not of the district. This refunding was done pursuant to Chap. 86, Acts of 1936, all of which appears on the face of the bond, a copy of which is attached.

"The questions I wish to ask are as follows:

"1. Has the Board of Supervisors the authority under the law to appropriate out of the county general fund sufficient money to retire this indebtedness?

"2. Has the Board of Supervisors the authority at this time to pledge taxes now delinquent or hereafter to become delinquent to the payment of principal and interest on this indebtedness in view of the language of Sec. 6, Chapt. 86 of the Acts of 1936? It is noted that the language used recites 'and such governing body may in the proceedings authorizing the bonds agree'. Does this permit the Board of Supervisors now to pledge delinquent taxes to payment of such bonds when this was not done in the original proceeding?"

You ask in a subsequent letter if these bonds as issued are a county obligation. The questions will be answered seriatim.

The bonds you refer to were refinanced under the provisions of Chapter 86 of the Acts of 1936. I am not advised of any statute which would prohibit the Board of Supervisors of your County from appropriating out of the County's general fund sufficient money to retire this indebtedness. The Chapter referred to, however, imposes the primary obligation for the payment of these bonds upon the Livingston Magisterial District and there is only a secondary obligation on behalf of the County. The applicable portion of Section 6 of said Chapter reads as follows:

"* * * Refunding bonds issued hereunder shall be of the same status as to primary obligor as are the bonds refunded thereby, and for the payment thereof taxes shall be levied on the territory of the same political subdivision which was subject to the levy of taxes for the bonds refunded thereby, whether the county as a whole or a lesser subdivision thereof, it being the intention hereof that no change in the nature of the obligation shall be effected by reason of the refunding thereof."

The Board of Supervisors, pursuant to the same section, is permitted to pledge taxes delinquent at the time of the refinancing or thereafter to become delinquent to the payment of principal or interest on the refunding bonds, provided this action is taken in the proceedings refinancing the bonds. I have examined the certified copy of the minutes of the Board of Supervisors of Spotsylvania County held on Tuesday, September 10, 1940, under which these bonds were refinanced and find that the Board did not at that time pledge delinquent taxes for the payment of these bonds. Since the statute only permits this when done at the time of the refinancing, I am of the opinion that the Board of Supervisors cannot now pledge delinquent taxes for the payment of these obligations.
In answer to your third inquiry, you are advised, as hereinbefore pointed out, that these bonds as issued are a secondary obligation of the County, the primary obligation for the payment thereof being upon the District for whose benefit they were issued. Your attention is called to the case of C. B. Godwin, Sr., et al. v. Board of Supervisors of Nansemond County et al. 161 Va. 494.

BONDS, Revenue—Elizabeth River Tunnel Commission. F-241a

HONORABLE JOHN S. BATTLE, Governor of Virginia.

You verbally request my opinion on Senate Bill No. 185 amending and re-enacting Chapter 130, Section 7, of the Acts of Assembly of 1942, approved March 9, 1942, known as the “Elizabeth River Tunnel Revenue Bond Act”.

This amendment in lines 13 and 14 omits in paragraph (g) of said section the words “by railroad companies” and adds in lieu thereof the words “in the name of the State Highway Commissioner”. You are aware that this change in the Act pertains to procedure in condemnation cases and would confer upon the Elizabeth River Tunnel Commission the same power as is now vested in the State Highway Commissioner to take possession of the property to be condemned when a certificate is filed in court and a sum deposited therewith which is estimated to be a fair value for the property taken and damages, if any, to the residue when a bona fide, but ineffectual, effort has been made to purchase the same from the owner. This procedure, however, does not vest title in the condemnor to the property taken until the award of the commissioners is paid into court.

The State Highway Commissioner is vested with the power of eminent domain pursuant to the provisions of Section 33-59 of the 1950 Code, which reads as follows:

“Proceedings for condemnation under this article shall be instituted and conducted in the name of the State Highway Commissioner and the procedure shall, except as altered by this article, be mutatis mutandis the same as is prescribed by law for railroad corporations. The rights of all persons affected shall be subject to the general laws of this State, insofar as the same may be applicable under the general purposes of this article, and except as altered or modified by this article.”

It will be seen from the foregoing that notwithstanding the omission of the words “by railroad companies” and the addition of the words “in the name of the State Highway Commissioner”, the commission will, nevertheless, be required in condemnation proceedings, except for the necessary change to conform to the Act, to follow the same procedure prescribed by law for railroad companies.

The change of the language makes it necessary to consider Section 15-774 of the Code and Section 124 of the Constitution of Virginia. These sections being substantially the same, I quote from the Constitution as follows:

“No street railway, gas, water, steam or electric heating, electric light or power, cold storage, compressed air, viaduct, conduit, telephone or bridge company, nor any corporation, association, person or partnership engaged in these or like enterprises, shall be permitted to use the streets, alleys or public grounds of a city or town without the previous consent of the corporate authorities of such city or town.”

If the original Act conferred upon the Commission only such powers as are possessed by the railroad companies, the amendment would make a material change in this respect, because railroad companies, pursuant to the foregoing section of the Constitution, are not permitted to use the streets, etc., of a city or town.
without the previous consent of the corporate authorities. This, however, is not the case because the Act expressly conferred upon the Commission powers in eminent domain proceedings not enjoyed by railroad companies which is evidenced by Sections 3(g) and 7(g) of the Act. The first mentioned section includes in its definition of "owner" "municipal corporations and political subdivisions of the State of Virginia" and section 7(g) provides that whenever the price cannot be agreed upon by the Commission and the owner condemnation proceedings are authorized. In view of the foregoing, I am of the opinion that the amendment does not enlarge the powers of the Commission in this respect but only affects the procedure when condemnation is necessary.

From an examination of Chapter 130 of the Acts of Assembly of 1942 and the pertinent statutes relating to the procedure in eminent domain cases by the State Highway Commissioner, I am unable to advise that Senate Bill No. 185 confers upon the Elizabeth River Tunnel Commission any additional powers except those to which you refer.

**BONDS—Toll Revenue Bonds; not proper security for State deposits.**

February 3, 1950.

Honorable Philip P. Burks,
Treasurer of Bedford County.

This is to acknowledge receipt of your letter dated January 30, 1950, which I quote as follows:

"Under the provisions of Section 350 of the Tax Code of Virginia, the Bank of Big Island, Inc. desires to place additional legal securities in escrow to protect funds on deposit in said bank belonging to Bedford County, Virginia.

"The said bank has offered to place in escrow, among other securities, the following:

"State of Virginia Toll Revenue 2½% Bonds due 9-1-59 $5,000.00
"State of Virginia Toll Revenue 2.70% Bonds due 9-1-73 5,000.00

"Are the above described bonds unconditionally guaranteed by the State of Virginia as to both principal and interest and does evidence of such guarantee appear on the face of said bonds? What is the market value of said bonds?"

"Before accepting said bonds I want to be sure that said bonds are legal securities and that the market value thereof equals the face value thereof."

I am advised that State Revenue Bonds are now selling for face value.

Section 33-237 of the 1950 Code of Virginia provides that revenue bonds issued under the provisions of this Article shall not be deemed to constitute a debt of the State of Virginia or a pledge of the faith and credit of the State, and further provides that such bonds shall state on their face that the State of Virginia is not obligated to pay the same or the interest thereon except from funds derived from tolls and revenues from the project.

Section 58-944 of the 1950 Code of Virginia (formerly Section 350 of the Tax Code) provides as follows.

"No money received by a county treasurer shall be deposited with any depository of the treasurer's county selected and approved as provided in
§58-943 until such depository shall have given bond with the same conditions as those required for bonds given by State depositories who elect to give bond to protect money deposited with them by the State Treasurer pursuant to the provisions of §§2-179 to 2-183 or until such depository shall have pledged and deposited in the manner and to the extent hereinafter provided and for the protection of the money deposited with it pursuant to the provisions of this section:

"(1) Securities of the character required to protect deposits made by the State Treasurer pursuant to the provisions of §§2-179 to 2-183;

"(2) Securities of the character described in §26-40 except those described in paragraph 7 thereof; * * *

Section 2-181, dealing with deposits in lieu of security bonds, provides, in part, as follows:

"Any such bank, however, may deposit with the State Treasurer, in lieu of such bond, registered or coupon bonds of the State of Virginia * * *"

The pertinent portion of Section 26-40 is as follows:

"(1) Obligations of the Commonwealth.—Stocks, bonds, notes, and other evidences of indebtedness of the State of Virginia, and those unconditionally guaranteed as to the payment of principal and interest by the State of Virginia."

In view of the language of Sections 33-237, 2-181 and 26-40, hereinbefore referred to, I am of the opinion that the State of Virginia Revenue Bonds, referred to in your letter offered to be furnished as deposit in lieu of a security bond by a depository bank, are not legal securities within the meaning of the statutes.

BONDS—Town—Special registration not necessary for special election.
F-100d

Mr. A. H. Hamilton, Registrar,
Drakes Branch, Virginia.

This is in reply to your letter of August 16 in which you ask whether a special registration must be held in case a town wishes to call a special election to vote on a bond issue.

Section 3086 of the Code provides that an election held for the purpose of voting on a bond issue shall be conducted in the same manner as regular elections. Therefore, I am of the opinion that a special registration is not necessary in the instant case.

CHILD LABOR LAWS—Newspaper carrier certificates.
F-56

Honorable Edmond M. Boggs, Commissioner,
Department of Labor and Industry.

This is in reply to your letter of November 15 in which you requested my opinion as to the interpretation of Section 15 of the Child Labor Laws, with particular reference to the procedure required by the law for the issuance of Newspaper Carrier Certificates.
Your specific question is whether or not, the procedure for the issuance of Newspaper Carrier Certificates, as outlined in paragraph 2 of Section 15, supersedes the procedural requirements of Sections 4 and 9 of the Child Labor Laws which provide, among other things, that a certificate of employment shall be issued only upon the application in person of the child desiring employment and only after such certificate is signed by the child in the presence of the person issuing it.

Prior to 1946, Section 15 of the Child Labor Laws classified newspaper carrier boys with children engaged in the occupation of peddling, soliciting and bootblackng, and such boys were required to procure and carry a badge. The badge was issued "by the same person authorized to issue an employment certificate, and upon compliance with all the requirements for the issuance of an employment certificate."

However, the General Assembly of 1946 amended Section 15 of the Child Labor Laws by adding a new paragraph as follows:

"Provided, however, that any boy between twelve and fourteen years of age may engage in the occupation of distributing newspapers on regularly established routes between the hours above specified; provided, further, any boy between fourteen and sixteen years of age may engage in said occupation between the hours of five o'clock ante meridian and seven o'clock post meridian; but in either case, excluding the time the public schools are actually in session. Such carrier boys shall not be required to procure or carry a badge, but in lieu thereof, the publisher of the newspaper which he delivers on such route shall report the names, ages, addresses, and the school attended, of such boys to the person authorized to issue employment certificates under the provisions of this act, and thereupon, if it appears that such boy is physically fit either from his school health record or from a certificate of physical fitness signed by a public health or school physician, a certificate shall be issued to such carrier boy and shall remain in effect so long as in the opinion of the division superintendent, his school record indicates that his school work is compatible with such occupation." (Para. 2 of Chapter 52, Acts of 1946) (Italics supplied).

The purpose of the above provision, in my opinion, was to take newspaper carrier boys out of the class of bootblacks, peddlers and the like, and to exempt them from the procedural requirements of Sections 4 and 9 of the Child Labor Laws concerning the issuance of employment certificates. To hold otherwise would, in effect, give no meaning to the 1946 amendment of Section 15, since it can be seen that the amendment fully outlines the procedure to be followed by the publisher and the issuing officer in lieu of the requirement that newspaper carrier boys procure a badge in accordance with all the requirements for the issuance of an employment certificate.

CHILD LABOR LAWS—Part time employment in theatre candy concession. F-278

HONORABLE JOSEPH A. MASSIE, JR.,
Commonwealth's Attorney of Frederick County.

This is in reply to your letter of October 12, 1949, from which I quote as follows:

"Is it possible for the Superintendent of Public Schools of Frederick County, Virginia, to issue a part-time employment certificate for the employment of a child between 14 and 18 years of age, only during school vacation periods or on days when school is not in session or outside of school
hours on school days for a child between said ages to work in a candy con-
cession in the lobby of a theater under Section 1808C of the Virginia Code
of 1942, amended 1948? Or does Section 1808M completely forbid such em-
ployment and if so is Section 1808M of the said Code in conflict with 1808C
of the said Code?"

Among other things, §1808c of the Code of Virginia provides that, with
certain exceptions, not pertinent to your question, no child under 18 years of age
shall be permitted to work in, about, or in connection with any gainful employ-
ment unless the employer of such child keep on file an employment certificate.
This section further provides for four types of certificates. The certificate about
which you inquire is provided for in these words under §1808c:

"* * * A vacation or part-time employment certificate shall permit the
employment of a child between fourteen and eighteen years of age only
during school vacation periods or on days when school is not in session, or
outside school hours on school days. * * *"

It appears from this that it is possible for a child of only 14 to receive such
a certificate. Section 1808m qualifies this, and provides, in part:

"* * * no boy under 16 and no girl under 18 years of age shall be em-
ployed, permitted, or suffered to work * * * in any theater * * *.”

Section 1808m is not, in my opinion, in conflict with §1808c. Section 1808m
merely prohibits, in certain types of employment, the participation of a child be-
low the age of 16 or 18, depending on whether it is a male or female child. One
of the prohibited types of employment is employment in any theater, except in
the presentation of a drama, play, etc.

Your letter does not state the age or sex of the child involved. It appears
that, if the child is below the ages set forth in §1808m (16 for boys, and 18
for girls) then, even though an employment certificate might issue for some types
of employment, since employment in a candy concession of a theater falls under
the light of occupations restricted by §1808m, a certificate for such employment
should not issue.

CHILD LABOR LAW—Soda fountain is restaurant within meaning of
Child Labor Law. F-56

Mr. J. R. Routten, Principal,
Creeds High School.

This is in reply to your letter of May 31, in which you ask if a soda fountain
and news stand combination, as is found in railway stations and drug stores, is
classified as a restaurant within the meaning of the Child Labor Act.

I assume that you have reference to Section 40-109 of the Code, which pro-
vides that no boy under sixteen and no girl under eighteen years of age shall be
employed in any restaurant. Webster's dictionary defines a restaurant as any
establishment where refreshment or meals may be procured by the public. Section
58-399 of the Code requires any person who cooks or otherwise furnishes for
compensation diet or refreshments of any kind, including soft drinks from a soda
fountain, for casual visitors, and does not furnish lodging, to secure a restaurant
license.

It is my opinion, therefore, that an establishment such as that described by
you is a "restaurant" and that the provisions of Section 40-109 are applicable
thereto.
CITIES, TOWNS AND COUNTIES—Abandonment of secondary highway.

HONORABLE W. ARCHER ROYALL,
Attorney for the Commonwealth of Tazewell County.

This will acknowledge receipt of your letter dated August 16, 1949, in which you inquire as follows:

"We would greatly appreciate it if we could obtain from your office an opinion with regard to the following point of law. This involves the closing and vacating of certain roads and streets which are a part of the Secondary Road System of the State of Virginia, the fee simple title to said roads being in the State of Virginia. ***

"The Board of Supervisors have not adopted regulations which would permit the using of Section 5225(a) and the following sections which appear in the cumulative Supplement. ***

"We would like very much to know under what authority roads can be closed in a situation such as that described above. We understand that the counties which do not have the ordinance required under Section 5225(a) still use Section 2039(9). ***

I do not see where Sections 5225(a) et seq. of the Supplement, all pertaining to "The Virginia Land Subdivision Law", have any application to the question you present concerning the vacating or abandonment of roads from the Secondary System. These sections appear only to be applicable before such roads are taken into the Secondary System or after they are taken out of the Secondary System and then only when certain regulations are adopted by the governing bodies of the municipalities and counties.

Abandonment proceedings for roads in the Secondary System are set forth in Chapter 415, Section 8, of the Acts of the General Assembly of 1932 and Chapter 237 of the Acts of 1940, carried in Michie's 1942 Code Sections 1975oo and 1975ww, respectively. The same subject matter is dealt with in Chapter 315, Section 9 of the Acts of 1938, carried in Michie's 1942 Code as Section 2039(9).

Abandonment of a portion of a road in the Secondary System when a new road is constructed to take its place is dealt with in Chapter 415, Section 8, of the Acts of 1932, Code Section 1975oo, which provides that

"** The jurisdiction and procedure for abandonment of roads in the Secondary System of State Highways, shall remain in the local road authorities as now provided by law; provided, however, that the State Highway Commissioner shall likewise be made a party to any such proceeding.

The law as existed prior to the Act of 1932 is covered by Chapter 315, Section 9, of the Acts of 1938, Code Section 2039(9), and provides that the board of supervisors may abandon a road to the extent of the alteration by a new road and no further by appointing viewers, etc.

Chapter 237, Acts of 1940, designated as Code Section 1975ww, also has reference to abandonment when a road has been or is altered and the new road serves the same citizens as the old road. Since section 2039(9) and section 1975ww deal with the same subject matter, I am of the opinion that the 1940 Act (1975ww) supersedes the former act.

It, therefore, follows that a secondary road may be abandoned when a new road is constructed to take its place and such new road has been approved by the State Highway Commissioner by resolution of the Board of Supervisors.

I am unable to find any statutory authority for complete abandonment of a highway in the Secondary System of highways, unless a new road has been constructed to take its place. It is, therefore, necessary to consider the general law
on the subject. The text book entitled "Roads and Streets", Vol. 1, Section 187, reads as follows:

"The public may abandon a highway when no private rights are involved, and, in a proper case, upon due proceedings and payment of compensation where such rights are affected and there may be instances in which an abandonment of a dedication by all parties interested may be implied."

I am of the opinion that to completely abandon any public road where a new road is not constructed to take its place proceedings in court would be necessary, and that all persons having an interest in said road should be made parties.

CITIES, TOWNS, AND COUNTIES—City charter not subject to the objection that it contains special legislation. F-100b

HONORABLE W. L. PRIEUR, JR.,
Clerk of Courts for Norfolk.

This is in reply to your letter of April 14, in which you requested my opinion as to the constitutionality of Sections 19 and 20 of the Norfolk City Charter, which deal with councilmanic elections.

You pointed out that the sections in question, which are found in the Acts of the General Assembly of 1918, pp. 42 and 43, require candidates in municipal elections, in order to have their names printed on the official ballot, to obtain the signatures of two hundred and fifty qualified voters, and provide that the petitions cannot be circulated more than fifty days prior to the election and that they must be filed with the Clerk of the Corporation Court not less than thirty days previous to the date of the election. Furthermore, the candidate must file his acceptance of his candidacy at least twenty days prior to the election.

Under the general election statutes governing municipal and other elections, more specifically Sections 24-131 and 24-133 of the Code, candidates are required to file not less than sixty days prior to the election at which they desire to be candidates and must obtain the signatures of only fifty qualified voters.

In view of the above general laws, you desire to know whether or not Sections 19 and 20 of the Norfolk City Charter are local or special legislation prohibited by Section 63 of the Constitution. The pertinent part is as follows:

"The General Assembly shall not enact any local, special or private law in the following cases:

11. For conducting elections or designating the places of voting."

While there may be some doubt as to whether legislation outlining the procedure for a candidate to qualify in order to have his name printed on an official ballot comes within the meaning of the constitutional provision quoted above, it is unnecessary to pass upon that question because of the conclusion reached in this opinion.

Article VIII of the Constitution provides for the organization and government of cities and towns and subsection (a) of Section 117 reads in part:

"General laws for the organization and government of cities and towns shall be enacted by the General Assembly, and no special act shall be passed in relation thereto, except in the manner provided in article four of this Constitution, and then only by a recorded vote of two-thirds of the members elected to each house."
It must be assumed, in the absence of evidence to the contrary, that the Norfolk City Charter was passed in the manner prescribed above for the enactment of special legislation. This being true, I am of the opinion that Sections 19 and 20 of the Charter are not unconstitutional and that Section 63 of the Constitution is not applicable thereto. The Supreme Court of Appeals has consistently held since the case of Miller v. Pulaski, 109 Va. 137, decided in 1909, that municipal charters, which contain local or special laws conferring rights and powers different from those conferred by general law, are authorized by Section 117 of the Constitution. See Ransone v. Craft, 161 Va. 332, in which an ordinance, passed under the authority of the City Charter, regulating barber and beauty shops, was under attack because no general law had been passed empowering municipalities to adopt such regulations, and Town of Narrows v. Giles County, 128 Va. 572, in which a town charter was alleged to be unconstitutional since the time for holding town elections differed from the time provided by general law.

The Supreme Court has also held that even when such special rights and powers fall within the classes of local or special legislation expressly prohibited by Section 63 of the Constitution they are not invalid, since Section 63 must be read in connection with Section 117 and is not applicable to the enactment of special charters for municipalities. Fallon Florist v. City of Roanoke, 190 Va. 564.

In the case of Portsmouth v. Weiss, 145 Va. 94, a provision of the City Charter, which required that a notice of an accident be filed within thirty days or an action against the city for negligence would be barred, was attacked on the ground that it contravened Section 63 of the Constitution, which specifically prohibited any special or local law “regulating the practice in, or the jurisdiction of, or changing the rules of evidence in any judicial proceedings or inquiry before the courts or other tribunals.” There, the Court said:

“* * * If section 63 of the Constitution, forbidding the passage of any local, special or private law regulating the practice in any judicial proceeding, is apparently in conflict with section 117, the conflict is more apparent than real. Section 63 must be held to apply to cases not otherwise specially provided for. It cannot be supposed that the convention intended to impose upon the legislature any other restraints in the enactment or amendment of charters of municipal corporations than those imposed by section 117. It was dealing with that specific subject, and threw around it all the safeguards it deemed necessary. If these were complied with, the power of the legislature in reference thereto was unrestrained. The language of section 63 is general, that of 117 is specific. The general must give way to the specific, and section 63 applied to cases not otherwise specifically provided for. In this way the two sections are made to harmonize, and the apparent repugnancy is avoided.” (pp. 107-8)

CITIES, TOWNS AND COUNTIES—County tax on slot machines applicable in towns. F-123

SLOT MACHINES—County tax on; applicable in towns. F-123

HONORABLE E. W. CHELF,
Commonwealth's Attorney for Roanoke County.

This is in reply to your letter of August 30 in which you asked whether or not an ordinance adopted by the Board of Supervisors of Roanoke County imposing a license tax on slot machines would be applicable in towns within the county which have also adopted such a license tax.
Section 198 of the Tax Code imposes a State license tax upon slot machines. Paragraph g of this section reads as follows:

“(g) In addition to the tax herein imposed, the governing body of any county, city or incorporated town may impose and collect a license tax upon slot machines.”

It is my opinion that the governing bodies of both the county and towns situated within the county may impose a license tax upon slot machines under the provision quoted above. The county license tax would be collected for county purposes, and the town license tax would be collected for town purposes. The county tax would be applicable in towns located within the county as well as elsewhere, although the town itself may have adopted such a license tax.

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CITY COUNCIL—Authority to pass ordinance relating to traffic signals.
F-60a
March 6, 1950.

HONORABLE STUART CARTER,
Member of House of Delegates.

This is in reply to your letter of February 27, in which you ask whether or not Sections 46-198 and 46-200 of the Code would authorize the City Council for the City of Bristol to pass an ordinance allowing right turns to be made at certain traffic lights when the light is red, in view of the provision of Section 46-203 of the Code, which reads as follows:

“§46-203. Signals by lights or semaphores.—Signals by lights or semaphores shall be as follows: Red indicates that traffic then moving shall stop and remain stopped as long as the red signal is shown. ** **”

Section 46-198 authorizes cities and towns to adopt ordinances regulating the operation of vehicles on the highways in such cities and towns not in conflict with the provisions of Title 46, of which Section 46-203 is a part.

In my opinion, an ordinance permitting a right turn on a red light would not be in conflict with the provisions of Section 46-203 if it contained a provision requiring appropriate signs or instructions to be placed at the intersections where this is to be permitted. Such signs or instructions would make it clear that the red light applied only to through traffic and traffic wishing to turn left and not to traffic turning right. In other words, the red light would only require that traffic to which it is directed to stop.

It is my understanding that ordinances permitting right turns at red lights where indicated by proper signs are not uncommon in cities and towns of the State, and I know of no case in which it has been contended that they violated Section 46-203. Even if such contention were made, it would seem that the cities and towns would have the authority to adopt such ordinances under that part of Section 46-200 which reads as follows:

“§ 46-200. Particular powers and limitations thereon.—Local authorities in cities or towns shall have no power to * * * enact or enforce any ordinance, rule or regulation contrary to the provisions of this chapter, except that such local authorities may provide by ordinance for the regulation of traffic by means of traffic officers or semaphores or other signalling devices on any portion of the highway where traffic is heavy or continuous or where in their judgment conditions may require * * *.” (Italics supplied)

You are, of course, aware of the fact that the same result has been accomplished in a number of localities by means of a green arrow in the place reserved for the
caution light, thus permitting traffic to turn to the right at the same time through traffic is stopped by a red light. In such cases the red light directs only through traffic and traffic desiring to turn left, and the green arrow directs the traffic desiring to turn right. I see no difference if the same result is secured by means of other signalling devices conveying the same information.

CIVIL AND POLICE JUSTICES—Ten days notice required in notice of motion. F-136c

Honorable W. H. W. Cassell, Member of House of Delegates.

This is in reply to your letter of June 9, which I quote in full:

"I am writing to pray your opinion as to the following question, which is most interesting and important, the same having arisen in our Civil and Police Court while I was sitting in the Civil Court division of same as Substitute Justice.

"The question is: Does the Virginia Law give authority to bring a Notice of Motion in the Civil and Police Court with only five days notice? That is, five days between date of service of the notice and the day of hearing (return day).

"A number of the attorneys in this City have been bringing notice of motion before the Civil and Police Court in lieu of warrants. Some have been giving ten days notice, but others contend the law gives authority to make the motion after only five days notice. Some have based their authority on Section 6046-a of the 1942 Code of Virginia, but the case cited in the note to that section, Shulman Co. v. Sawyer, 167 Va. 386, 189 S. E. 344, held that whole section was unconstitutional.

"Since the question was raised one able attorney contends that only five days notice is required because Code 1950, Title 16, Section 90, Subsection B, recites that a Civil and Police Court shall have jurisdiction in all matters cognizable by Trial Justices and Title 16, Section 75 dealing with notice of motion before Trial Justices allows five days notice. However, this refers to Trial Justices' jurisdiction under Title 16, Section 12, and it is doubtful whether the notice of motion could be included. Thanking you for your assistance in this matter and with kind personal regards, I am,"

The answer to your question is governed almost entirely by the definitions contained in the new Code of 1950.

First, I may say that you are correct in believing that what was formerly Section 6046-a has been declared unconstitutional. You will note from the table contained in Volume 10 of the new Code that this old section has been omitted. As to the matter of definitions, I refer you to page XXI of the Report of the Commission on Code Recodification found in Volume I, where it is stated:

"* * * The Commission has framed and inserted in Title 1, General Provisions, a definition of the term 'trial justice', which is designed to include any officer who has any of the trial powers of a justice of the peace, trial justice in the present sense, civil justice, police justice, civil and police justice or judge of a juvenile and domestic relations court. It is provided that this definition shall apply throughout the Code, except in Chapter 2 of Title 16, which deals with trial justices as now appointed for counties, cities and towns. * * *"

Following this plan paragraph (30) of Section 1-13 defines the term "trial justice" as including not only trial justices in counties, but also civil and police
justices, civil justices, etc. Section 16-41, the first section in Chapter 2 of Title 16, the chapter dealing with trial justices in counties, provides that, unless the context otherwise clearly indicates, the term “trial justice” used in that chapter shall not have the broad meaning given to it when used elsewhere in the Code as provided in Section 1-13, but shall mean only trial justices appointed under that chapter.

Therefore, when it is provided in Section 16-90 that civil and police justices mentioned in Chapter 3 of Title 16, that is to say civil and police justices for cities of over ten thousand and less than forty-five thousand inhabitants, shall have jurisdiction in all matters cognizable by trial justices under the provisions of Section 16-12, this is a reference to trial justices included in the broad definition and not the special meaning of trial justices used in Chapter 2 of Title 16 (Sections 16-41 through 16-83). Section 16-12 is taken from old Section 6015 which was contained in the chapter dealing with justices of the peace and their jurisdiction over small claims. It relates to jurisdiction over subject matter rather than procedure. The statute governing the procedure by notice of motion before trial justices embraced within the broad definition of Section 1-13 is Section 16-19, which reads as follows:

“Proceedings before a trial justice, other than a civil justice or a civil judge in a city containing thirty thousand inhabitants or more by the last United States census, in civil matters of which he may have jurisdiction, may also be by notice of motion. Such proceedings shall conform as nearly as may be practicable to proceedings under §§8-717 to 8-723, except that such notice shall be made returnable not more than thirty days from the date of service thereof, executed not less than ten days before the return day and returned to the trial justice before whom it is returnable not less than five days before the return day thereof. Any such notice shall be in writing and shall be signed by the attorney for the plaintiff.

“When the word ‘warrant’ is used in any section of the Code, or act of assembly, concerning proceedings before such trial justices in civil cases, it shall be construed to mean ‘warrant or notice’.”

It is my opinion, therefore, that in cases before civil and police justices brought by notice of motion, at least ten days notice must be given as provided by this section, and that the procedure prescribed by Section 16-75 allowing only five days notice is applicable only to trial justices appointed under Chapter 2 of Title 16. A study of the several statutes from which the corresponding provisions of the new Code were taken bears out this conclusion.

CLERKS—Docketing of “Commodity Chattel Mortgage”. F-221

RECORDATION—Commodity Chattel Mortgages. F-221

Honorable Robert H. Oldham,
Clerk of Circuit Court of Accomack County.

December 19, 1949.

This is in reply to your letter of December 9, in which you ask whether a certain “commodity chattel mortgage” prepared on a form issued by the U. S. Department of Agriculture should be docketed in the Agriculture Chattel Deed of Trust Book provided for by Chapter 178 of the Acts of Assembly of 1946.

The Act to which you refer deals with chattel deeds of trust upon livestock, poultry, farm machinery or equipment, and farm crops and products given to secure funds borrowed or to be borrowed by persons owning such property. While in
most of its provisions the Act refers to chattel deeds of trust and not to chattel mortgages, the following language is found in paragraph (h):

"Chattel deeds of trust executed pursuant to this act or any instrument intended to operate as such may be filed for docketing in the office of the clerk of the court in which deeds are recorded for each county or city in which the chattels or crops or any portion thereof are located at the time of such filing."

And also:

"* * * Any instrument affecting the lien of such chattel deed of trust or its ownership may be filed for docketing in such office in which the chattel mortgage is filed * * *

These two provisions indicate that the Act was intended to apply, not only to deeds of trust by which the security is conveyed to a third person as trustee, but also to chattel mortgages by which livestock, farm equipment or crops and farm products are conveyed directly to the lender as security for the loan.

Since the commodity chattel mortgage form which you have submitted to me covers the type of property dealt with by this statute, it is my opinion that, if requested so to do, you should docket such instruments in the "Agriculture Chattel Deed of Trust Book" provided for by the Act. For such service a fee of only $1.00 should be charged. See paragraph (i) of the statute.

If the person presenting the instrument for record feels that this statute is not applicable to chattel mortgages and wishes to have it recorded in the Miscellaneous Lien Book, the regular fees and taxes for the recordation of instruments in that manner should be charged. I think it is for the person offering the instrument for recordation or docketing to determine which method is required to give him full protection in his lien. It may be that he will determine it best to have the instrument both recorded in the Miscellaneous Lien Book and docketed in the Agricultural Chattel Deed of Trust Book.

However, since the Act seems to be designed to cover all conveyances of farm equipment and crops and livestock given to secure indebtedness, and since it repeals Section 5202a of the Code, which dealt with the docketing of agricultural chattel mortgages as well as agricultural chattel deeds of trust, I think agricultural chattel mortgages should be accepted by the clerk for docketing under the provisions of Chapter 178, Acts of 1946, if so requested.

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CLERKS—Duty to make records of certain regulations. F-233

FEES—No recording fee paid for filing regulation. F-233

June 29, 1950.

HONORABLE CHARLES J. ROSS,
Clerk of Circuit Court for Madison County.

This is in reply to your letter of June 16, 1950, which reads, in part, as follows:

"Several days ago, Miss. E. M. Paris, Executive Director of the Commission of Game and Inland Fisheries mailed me a number of regulations adopted at a meeting of the Commission on May 12, and requested that they be recorded. Miss Paris also requested that I sign a statement that I had recorded and posted the regulations in accordance with Section 33 of the Inland Fisheries and Dog Code."
“I shall appreciate you giving me your opinion on the following questions: (1) Of the nine regulations adopted on May 12, by the commission and which only one affects Madison County, is it necessary for me to record all nine or just the one that affects Madison County? (2) In what record book are these regulations required to be spread in the Clerk's Office? (3) Is the Clerk entitled to a fee of $1.50 chargeable to the Commission in accordance with Section 14-123 (5) for the recordation of these various regulations?”

In reply to your first question, Sections 29-125 through 29-128 of the Code of 1950 which is the codification of Section 33 of the Game, Inland Fish and Dog Code of Virginia read as follows:

“29-125. Power of the Commission.—Having a due regard for the distribution, abundance, economic value and breeding habits of wild birds, wild animals, and fish in inland waters, the Commission is hereby vested with the necessary power to determine when, to what extent, if at all, and by what means it is desirable to restrict, extend or prohibit in any degree the provisions of law obtaining in any county in this State for the hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage or export of any wild bird, wild animal, or fish from inland waters and may upon its own motion or upon written petition of one hundred licensed resident land owners of any county propose regulations for such purpose.” (Italics supplied)

§29-126. Publication of proposed regulations.—The full text of any regulations proposed shall be published ten days before the same may be acted upon and shall name the time and place that the matters mentioned therein will be taken up, at which time any interested citizen shall be heard. Such publication shall be made in a newspaper published in the county, and, if there be none such, in a newspaper in the adjoining county or section or in such other manner as may be convenient.” (Italics supplied)

“§29-127. Adoption of regulations.—If the Commission is satisfied that the proposed regulation, or any part thereof, is advisable, such regulation, or any part thereof, may be adopted and if so, it shall be published in the manner directed for proposing the same and shall name the date when it is to become effective.”

“§29-128. Posting regulations in front of courthouse.—A copy of any regulation adopted by the Commission shall be mailed to the clerk of the circuit court, who shall make a record thereof and cause the same to be posted in front of the courthouse of the county.” (italics supplied)

Reading these sections together, it is clear that the purpose of the notices provided by the sections is to give information to the interested citizens. It is, therefore, my opinion that the clerk need only be concerned with the copies of the regulations affecting his particular county.

As to your second question, it is my opinion that Section 29-128 does not require that the clerk copy the regulation into any of the various record books but merely that he keep a copy of the regulations on file in the clerk's office so that it will be available for public information. I have discussed this with some of the clerks and I am advised that the above is consistent with their practice. I am informed that some of the clerks attach a copy of the regulations in the book in which they make a record of the hunting licenses issued. Others have a separate loose leaf folder in which they keep the regulations.

In answer to your third question, since Section 29-128 requires only the keeping on file of the regulations, I am aware of no fee provided for such service, and I am advised by Miss Paris, Assistant Executive Director of the Game Commission, that none of the clerks has charged for such service in the past. I am returning herewith your enclosures as requested.
HONORABLE LEE N. WHITACRE,
Clerk of Circuit Court of Frederick County.

This will reply to your letter of February 11, requesting my opinion as to whether or not clerks are allowed to charge fees for certified copies of marriage licenses, decrees, etc. for Veterans who are non-residents and who need these copies for State Bonuses in other States.

Section 14-102 of the Code of Virginia reads as follows:

“The court clerks of the several counties and the Registrar of the Bureau of Vital Statistics, when requested so to do by any honorably discharged member of the military or naval forces of the United States, his dependents, authorized representatives in his behalf, the commissioner of pensions of the United States, the director of the United States veterans' bureau or the regional manager of any regional office of the United States veterans' bureau shall furnish without charge or fee therefor duly certified copies of any decree of divorce, marriage license, certificate of marriage, birth certificate, certificate of death, order appointing administrator or guardian, letters of administration or guardianship, bond of administrator or guardian, report of administrator or guardian, order discharging administrator or guardian, or other judgment, decree or document required by law or by any rule or regulation of the bureau of pensions or the United States veterans' bureau to be furnished as evidence to establish a claim on behalf of such honorably discharged member of the military or naval forces of the United States, or his dependents, for a pension, compensation, family allowance, bonus or other money or moneys claimed to be due and payable by or through such bureau of pensions or United States veterans' bureau.”

It is my opinion that this section is applicable only to the Federal Bureau of Pensions or United States Veterans Bureau and, therefore, the clerks have a legal right to charge the customary fees where the request pertains to a State bonus and not to a Federal bonus.

HONORABLE ROBERT D. HUFFMAN,
Clerk of Circuit Court of Page County.

This is in further reference to your letter of March 25, in which you state that the Trial Justice of Page County also acts as Trial Judge for two towns within the County in trials for violations of town ordinances, and that he refers all cases heard by him to the County Clerk's office where they are indexed and filed. You further state that you have been docketing judgment against the defendants in the Judgment Lien Docket in all Commonwealth cases of conviction where fines and costs were assessed, but have not been docketing judgment against defendants in favor of the respective towns where they have been convicted of violating town ordinances. You ask whether these last mentioned judgments should also be docketed.

I find no provision of law which would require the Clerk to docket in the Judgment Lien Docket judgments for fine and costs imposed in cases involving
violations of town ordinances. In my opinion it is a matter for the appropriate town officials to determine whether they desire such judgments docketed in order to bind the defendants' land by the lien of the judgment and that you would only be required to docket the judgment when requested to do so by them.

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CLERKS—Orders of publication and orders appointing guardians ad litem not to be spread in clerk's order book. F-116

HONORABLE CHARLES R. PURDY, Chairman,
Court Clerks Association Advisory Committee.

This is in reply to your letter of February 23, in which you ask if orders of publication and orders appointing guardians ad litem entered by clerks under the authority vested in them by §§8-71 and 8-78 of the Code may be spread in the Clerk's Order Book.

Section 17-28 of the Code reads as follows:

"There shall be kept in the office of the clerk of every circuit court, corporation court, court of law and chancery, and court of hustings, having both equity and common law jurisdiction, two order books, to be known as the common law order book and the chancery order book, in which shall be recorded, in the common law order book, all proceedings, orders and judgments of the court in all matters at common law, and in the chancery order book, all decrees and decretal orders of such court, in matters of equity and all matters pertaining to trusts, the appointment and qualification of trustees, committees, administrators, executors and guardians, except when the same are appointed by the clerk of such court, in which event the order appointing such administrators or executors, shall be made by the clerk and by him entered in a certain other book, to be known as the clerk's order book. In any proceeding brought for the condemnation of property, all proceedings, orders, judgments and decrees of the court shall be recorded in the chancery order book of the court. The recordation prior to June nineteenth, nineteen hundred and thirty-six of all proceedings, orders, judgments and decrees in such cases, whether entered in the common law order book or the chancery order book of any court, is hereby declared a valid and proper recordation of the same."

Other than the last part of the first sentence of the section quoted above, there appears to be but one other provision in the Code directing the clerk to make entries in the special order book known as the "Clerk's Order Book". That other provision is contained in Section 64-73, which authorizes clerks to probate wills, appoint and qualify executors, administrators and curators of decedents, and it provides that the clerk shall keep an order book, in which shall be entered all orders made by him, or his deputy, respecting such matters. In my opinion, the language used in these two sections is such as to limit the use of the Clerk's Order Book to matters pertaining to the appointment of trustees, committees, administrators, executors, guardians, and curators of decedents. Apparently this special treatment of these matters has its foundation in Section 101 of the Constitution, which authorizes the General Assembly to confer upon the clerks of courts having probate jurisdiction also jurisdiction of the probate of wills and of the appointment and qualification of such fiduciaries as are dealt with in the Code sections mentioned.

It is my opinion, therefore, that orders of publication and orders appointing guardians ad litem for the purpose of a particular suit or action should not be entered in the Clerk's Order Book. However, it is my opinion that such orders, when entered by the clerk, should not merely be filed with the
papers, but should be spread in the regular common law order book or regular chancery order book of the court, as the case may be.

Section 17-27 provides that the proceedings of every court shall be entered in the order book, and Section 17-28 provides that all proceedings, orders and judgments of the court in all matters at common law shall be entered in the common law order book and all decrees and decreal orders in matters of equity shall be entered in the chancery order book. Though these sections speak of proceedings, judgments and decrees of "courts", it is my opinion that the language is applicable to orders entered by the clerk in suits and cases pending in the court. In entering orders of publication and appointing guardians ad litem, the clerk is simply acting for the court pursuant to authority vested in the clerk by statute.

The fact that orders entered by the clerk would be entered in the common law order book and chancery order book is not, in my opinion, objectionable. There are other orders entered by the clerk in connection with cases in his court which are entered in the regular order books of the court. See Sections 8-355 and 8-356 dealing with judgments by confession and also Sections 17-29 and 17-30 regarding opening and closing of terms of court.

It would seem that all orders regarding suits or cases before the court are more properly entered in the appropriate order book of the court since this is where it would be expected that all orders concerning such cases and suits would be found. It is my opinion, therefore, that the types of orders to which you refer should be entered in the common law order book or the chancery order book of the court rather than in the Clerk's Order Book, which appears to be reserved for the special orders of the clerk in matters relating to his jurisdiction in fiduciary matters. The orders, of course, should show on their face that they were entered by the clerk and not by the judge.

CLERKS—Recordation—Conditional sales contract, when recorded. P-90a

HONORABLE THOMAS P. CHAPMAN, JR.,
Clerk of Circuit Court of Fairfax County.

Pursuant to your request, I am writing with regard to whether or not a certain lease agreement should be recorded as a conditional sales agreement or filed among miscellaneous liens.

It appears that the lessor has agreed to lease to the lessee certain equipment for a definite period of time upon the condition that the equipment remains the exclusive property of the lessor. Upon the termination of the agreement the lessee, if he has made the stipulated payments when due and has kept all the provisions of the agreement, has a five day option to purchase the equipment by paying the lessor the sum of $1.00 as and for the purchase price.

In determining the nature of an agreement the courts look to its substance and real purpose and have held that the name given to the transaction is immaterial. *Ellis, Etc. Co. v. Hubbard*, 123 Va. 481, 96 S. E. 754; *Arbuckle v. Gates*, 95 Va. 802, 30 S. E. 496.

While I have been unable to find a decision of our Supreme Court of Appeals construing the nature of the type of agreement in question, the great weight of authority in foreign jurisdictions has held that when a lessee contracts to pay as compensation a sum substantially equivalent to the value of the goods, and it is agreed that the lessee has the option of becoming the owner upon paying a nominal consideration, the contract is a conditional sale. 92 A. L. R. 305, 43 A. L. R. 1258, and 47 Am. Jur., Sales, §836, pp. 25 and 26.

Therefore, it is my opinion that the agreement under consideration is in fact a conditional sales contract and should be recorded as such.
REPORT OF THE ATTORNEY GENERAL

CLERK'S FEE AND WRIT TAX—Compromise settlement. F-146

HONORABLE J. ROBERT SWITZER,
Clerk of Circuit Court of Rockingham County.


This is in reply to your letter of December 10, from which I quote as follows:

“We are having a good many compromise settlements in our court, some of which are not brought on a fifteen-day notice, but come on a petition for compromise claims, usually growing out of automobile accidents, in which an answer is filed, a guardian ad litem appointed in cases of infants, etc., but without any notice, and upon hearing of evidence the court confirms the compromise, the actual defendants usually being insurance companies, though not of course named in any of the proceedings.”

You ask whether such proceedings should be considered an action at law for which the usual writ tax and clerk's fees chargeable on actions at law should be collected.

I assume that you have reference to the proceedings authorized by Section 5790-a of the Code, whereby the petition may be filed to secure the court's approval to a compromise settlement in any case of a personal injury to an infant, idiot or insane person caused by the wrongful act, neglect or default of another person. In my opinion, these legal proceedings instituted to secure the court's approval of the compromise settlement is an action at law upon which the usual writ tax and clerk's fees should be charged. It is, a special statutory proceeding in which the approval of the court may or may not be granted and is certainly an action at law.

CLERKS OF COURTS—No duty to demand surrender of driving permit of one convicted of failure to stop after accident. F-353

MOTOR VEHICLE CODE—Revocation of permit for failure to stop after accident; duty of clerk is to report violation to Commission. F-353

HONORABLE J. MOORMAN JOHNSON,
Clerk of Circuit Court of Bedford County.

May 19, 1950.

This is in reply to your letter of May 12, 1950, from which I quote as follows:

“Please advise me if upon a conviction of any person under Section 46-189 of the Code of Virginia of 1950 if there is any duty or obligation on the Clerk of the Circuit Court to demand that the person so convicted surrender his Operator's License at the conclusion of the trial in Circuit Court.”

As you pointed out in your letter, §46-416 of the Code provides, among other things, that the Commissioner of the Division of Motor Vehicles shall revoke the license of any person upon receiving a record of his conviction for failure to stop and disclose his identity at the scene of an accident in which he has been involved and which resulted in death or injury to another person.

The words underscored above are taken directly from the statute and would seem to indicate that the license is not revoked by the clerk of the court in which the conviction is had, but that the revocation is done by the Commissioner upon receipt of a record of such conviction. On October 8,
1947, in an opinion rendered to the Honorable Hubert D. Bennett, Trial Justice for Pittsylvania County, the late Honorable Harvey B. Apperson, former Attorney General, interpreted this section and ruled that the period of revocation would start on the date that the offender received the order of revocation of his license from the Commissioner, and that until that date such person was entitled to operate his vehicle. It is my opinion, therefore, that there is no duty upon the clerk to demand the surrender of an operator's license at the conclusion of the trial in which a person is convicted of such an offense. The duty imposed upon the clerk by the statute is that of reporting the conviction to the Commissioner.

CLINICAL PSYCHOLOGISTS, VIRGINIA EXAMINING BOARD—
Examination necessary before certificate can be issued. F-182

Honorable John N. Buck, Chairman,
Virginia Examining Board for Clinical Psychologists.

This is to acknowledge receipt of your letter of July 6, from which I quote in part:

"Recently the Virginia Examining Board for Clinical Psychologists has received application from several former holders of the Approved Mental Examiner's Certificate asking that they be granted a certificate as Certified Clinical Psychologist under the provisions of the so-called 'Grandfather's Clause' of Chapter 280, Acts of the General Assembly of 1946.

"I shall be most appreciative if you will give me your opinion concerning the present applicability of the Grandfather's Clause. To be specific, has it or has it not expired? And if it has expired, does that automatically bring about the expiration of the former Approved Mental Examiner's Certificate so that the individual who desires to be granted a certificate as Certified Clinical Psychologist must now submit to examination?"

Section 5, par. 4, of Chapter 280, Acts of the General Assembly of 1946, (Code reference §1639(f) par. 4) provides in part as follows:

"The Commissioner of Mental Hygiene and Hospitals may also issue a certificate as a certified clinical psychologist to any person who on the effective date of this act holds a certificate as Approved Mental Examiner, provided such person applies for such certificate, within one year after such date."

In my opinion the Act by its own limitation operated for only one year, and after the expiration of that year no certificate can legally be issued without the applicant taking the examinations as provided for in the Act.
REPORT OF THE ATTORNEY GENERAL

COLLEGES AND UNIVERSITIES—Advertising. F-268a

LONGWOOD COLLEGE—Advertising. F-268a

December 12, 1949.

DR. DABNEY S. LANCASTER, President,
Longwood College.

This is in reply to your request for my opinion as to the proper interpretation of Section 24 of the Appropriation Act of 1948. This section, which is found at page 1318 of the Acts of the General Assembly of 1948, reads as follows:

"24. It is hereby provided that no public funds or money shall be expended by any State institution of higher learning to which an appropriation is made by this act, for the purpose of paying for advertisements or advertising intended or designed to promote student attendance, at any such institution."

Your inquiry was prompted by the action of the Division of Purchase and Printing in refusing to print the bulletin of Longwood College. That Division conferred with this office before taking this action and was advised informally that the bulletin appeared to contain advertising material intended or designed to promote student attendance and that expenditure of public funds to have the same printed and distributed would be in violation of Section 24 of the Appropriation Act quoted above.

Since your request for my official opinion I have again examined the proposed bulletin. It consists of some thirty-four pages devoted almost exclusively to pictures of the buildings and activities at the College, including those of a social nature, with appropriate comments in writing designed to impress the readers with the advantages of the school. The bulletin contains statements suggesting that, if the readers are puzzled about the choice of a college, they should write to the Dean of the College for additional information. The application for authority to print the publication requests that 14,000 copies be printed for free distribution to high school graduates.

It seems clear that the publication and distribution of the proposed bulletin are designed for the purpose of promoting student attendance at the College. The General Assembly, by the statutory provision in question, has specifically stated that the institutions of higher learning should not expend public funds in an advertising campaign intended or designed for this purpose. Its object was apparently to prohibit such State institutions from expending public funds for the purpose of competing among themselves and with private institutions for student attendance.

You have suggested that the proper interpretation of this statute is that it prohibits only commercial advertisements in newspapers and magazines. I cannot agree with this conclusion. The language used is not specifically restricted to this type of advertising. You will note that it prohibits not only "advertisements", but also "advertising", by which is included any form of public announcement intended to aid directly or indirectly in the sale of a commodity, in securing employment, or in this case to promote student attendance.

I have not expressed, and do not mean to express, the view that use of pictures or photographs in a college catalogue is the thing that makes a publication objectionable. Persons who have indicated an interest in attending a State college and who request information concerning its curriculum, charges and facilities have a right to obtain information on these subjects from the college authorities. The publication of a college catalogue with informative matter including appropriate pictures reasonably portraying the facilities to be furnished and the distribution of the same to those requesting such information is a proper function of the institution. However, the printing and distribution, at public expense, of any college publication, whether
containing pictures or simply printed informative matter, when done for the purpose of promoting student attendance, is prohibited by the statute in question.

In your letter you have asked whether certain other activities, such as the employment of a public relations official, the payment of expenses of faculty or staff members to visit high schools and consult with prospective students, the contribution of funds to student publications and the like would constitute advertising prohibited by the statute. I do not think that I have sufficient factual information to express an opinion upon the various questions you ask.

Advertising, of course, may be carried on by oral as well as written presentations. The statute prohibits the expenditure of public funds when it is designed or intended to promote student attendance. There are many proper activities carried on for other purposes which may tend also to promote student attendance. Such activities would not necessarily be prohibited. There are also proper cases in which information may be furnished those desiring to attend the school without being designed to promote attendance. Undoubtedly, there are instances calling for the exercise of sound discretion by the college officials. I can only say that, where information concerning the school is distributed at public expense in any manner as a part of an advertising or promotional program designed or intended to secure student attendance, it is within the prohibition contained in the Appropriation Act and, when any question is presented as to any particular activity, those concerned in making the expenditure should be guided by the provisions of that Act.

COLLEGES AND UNIVERSITIES—Catholic University; payment of fees of students—basis for computing amount. F-228

HONORABLE G. TYLER MILLER,
Superintendent of Public Instruction.

I am returning herewith the file on the application of Alfreda L. Madison for a grant under the Act of the General Assembly providing equal educational facilities for certain persons denied admission to Virginia state colleges, universities and institutions of higher learning.

The Act referred to authorizes the State Board of Education to pay to such persons an amount equal to the amount by which the cost to such person to attend a college, university or institution not operated as an institution of the state, exceeds the amount it should have cost such person to attend the state institution to which admission was denied. If further provides that, in determining the comparative cost of attending said respective institutions, the State Board of Education shall take into consideration tuition charges, living expenses and cost of transportation.

The file shows that it has been the practice of those administering this Act to use the published costs shown by the catalogue of the University of Virginia in comparison with the costs published in the catalogue of the institution which the student attended and to pay only the difference although the student may have actually incurred higher costs because he was required to obtain board and room off the campus of the institution which he attended.

In my opinion, if the student is unable to obtain board and room on the campus at the cost published in the catalogue of the institution, he would be entitled to use as the basis in determining the grant to be made to him, the reasonable cost of obtaining those facilities off the campus. In the case of Alfreda L. Madison, the file contains a letter in which it is stated that the board and room on the campus at Catholic University are not available to
female students except nurses and nuns at the Summer session and that she was required to obtain board and room in a private home off the campus. If this be true, and the actual expense incurred is considered reasonable, it is my opinion that she would be entitled to be paid this added cost. The catalogue of Catholic University which was submitted with the file states, however, on page 19 that lay women desiring accommodations should apply to the Dean of Women for campus accommodations or suitable accommodations near the University. I would suggest that you contact Catholic University and determine whether or not campus accommodations were actually available for any except nuns and nurses.

COMMONWEALTH'S ATTORNEY—Duties of. F-69

HONORABLE C. G. QUESENBERY, Judge,
Corporation Court of Waynesboro.

February 10, 1950.

I have your letter of January 17, 1950, with reference to the duties of commonwealth's attorneys which reads, in part, as follows:

"Will you please advise me as to the responsibility of the Commonwealth's Attorney in prosecuting cases in the Civil and Police Justice's Court for violation of offenses where a State warrant is issued, and for violation of offenses under a city ordinance, regardless of whether or not such ordinance parallels a similar State law?"

It is my opinion that, unless it is so provided in the City Charter of Waynesboro, there is no duty on the Commonwealth's Attorney to prosecute every case involving a violation of city ordinances or every case involving a misdemeanor.

While the law on this subject seems to be somewhat confusing, I am aware of no statute which imposes any such duty on the Commonwealth's Attorney. This office has uniformly held that there is no duty on a Commonwealth's Attorney to prosecute all violations of town, county or city ordinances in the mayor's, trial justice or police courts. The Commonwealth's Attorney is not required to prosecute every violation of State law which amounts to a misdemeanor. As you know, many of the statutes expressly authorize or require him to prosecute violations thereunder. It would seem reasonable to assume that had the Legislature intended that the Commonwealth's Attorneys prosecute violations for all misdemeanors, they would not have made special provision for such action by him in some cases, for such a provision would add nothing if the Commonwealth's Attorneys were already under such a duty.

This reasoning is further supported by the language of Section 14-130, Code of Virginia of 1950, where the following appears:

"No attorney for the Commonwealth shall receive a fee for appearing in misdemeanor cases before a trial justice, except in those particular violations of the law when he is expressly required to appear by statutory enactment and provision is made for the taxing of his fees in the costs."

This would appear to be legislative recognition of the facts that Commonwealth's Attorneys are not required to appear in all misdemeanor cases before a trial justice.
REPORT OF THE ATTORNEY GENERAL

I have considered the provisions of Section 19-131 of the Code, (Section 4864, Code of 1942) which reads, in part, as follows:

"Every commissioner of the revenue, sheriff, constable or other officer shall give information of the violation of any penal law to the attorney for the commonwealth, who shall forthwith institute and prosecute all necessary and proper proceedings in such case, whether in the name of the Commonwealth or of a county or corporation. * * * ."

It is apparent that, by a strict interpretation of the words of this statute, it would be the duty of the officers named therein to give information to the Commonwealth's Attorney in every case of violation of penal law and the duty of the Commonwealth's Attorney to institute and prosecute proceedings. It is my opinion that such was not the intent of the Legislature. To place an interpretation on this statute which would require that information be given the Commonwealth's Attorney in every case of violation of any penal law, and that he in turn institute proceedings and prosecute every case would, in many instances, place an impossible burden on the Commonwealth's Attorney.

It is, therefore, my opinion that this statute was written in anticipation of a spirit of co-operation between the various officers and that where other officers feel that the presence of the Commonwealth's Attorney is required they shall so inform him and in a proper case he should appear, but it is not my opinion that his presence can be required in every case.

This problem has been considered by my predecessors to this office, and their opinions may be found in the following Annual Reports of the Attorney General: 1934-35, page 51; 1937-38, page 27; 1938-39, page 54; 1939-40, pages 49-51; 1941-42, pages 31-32. I am enclosing copies of these opinions for your consideration.

COMMONWEALTH'S ATTORNEYS—Duty to prosecute appeals from convictions in police justice courts for violations of city ordinance. F-69

February 15, 1950.

HONORABLE C. G. QUENSENBERY, Judge,
Corporation Court of Waynesboro.

This is in reply to your letter of February 11, 1950, in which you inquire whether, in my opinion, the Commonwealth's Attorney is charged with the duty to prosecute appeals from convictions in civil and police justice courts for violations of offenses where a State warrant is issued, and for violation of offenses under a city ordinance.

It is my opinion that in the case of appeals from convictions in civil and police justice courts, in the absence of a provision of the charter of the city involved imposing the duty to prosecute such appeals on some other officer, that this duty would fall upon the Commonwealth's Attorney if he is properly advised of the proceeding under the provisions of Section 19-131 of the Code of Virginia of 1950. This is the opinion which was held by the former Attorney General, Abram P. Staples, as expressed in his letter of December 27, 1937, to Messrs. Earman and Wharton of Harrisonburg, Virginia.
COMMONWEALTH'S ATTORNEY—No duty to bring suit to set aside fraudulent conveyance in order to collect fine. F-72

HONORABLE G. GARLAND WILSON,
Attorney for the Commonwealth for Radford.

This is in reply to your letter of March 17, 1950, from which I quote as follows:

"I should like an opinion whether or not the Commonwealth's Attorney for the City of Radford may maintain in the Corporation Court for the City of Radford, in the name of the Commonwealth, a Chancery suit to set aside a deed as a fraudulent conveyance, or whether same should be instituted by the Comptroller as provided in Section 8-758 of the 1950 Code, and whether the same shall be heard in the Circuit Court for the City of Richmond as provided in Section 8-759 of the 1950 Code.

"The defendants were tried and convicted in the Police Justice Court on an A. B. C. violation, and were duly fined and sentenced to jail terms. Pending an appeal to the Corporation Court the said defendants executed a deed purporting to convey real estate to their daughter, and I am desirous of instituting proceedings to have this conveyance set aside as fraudulent and void because on appeal the Police Justice was affirmed and the fines are unpaid."

Sections 8-758 and 8-759 provide that the Comptroller shall institute and prosecute all proper proceedings to enforce the payment of money due the Commonwealth, and such proceedings may be brought in the Circuit Court of the City of Richmond. Section 19-324 of the Code, reads as follows:

"The attorney for the Commonwealth in every court shall superintend the issuing of all executions or judgments in such court for fines going wholly or in part to the Commonwealth."

It is my opinion that this section does not contemplate any such action by the Commonwealth's Attorney as would be required to set aside a fraudulent conveyance in order to subject property to the payment of a fine. In the absence of any provision of the Code imposing such a duty on the Commonwealth Attorneys, it is my opinion that this matter should be brought to the attention of the State Comptroller, and he can, if he so desires, refer the matter to this office, for such action as this office deems proper for the enforcement of the claim.

COMMONWEALTH'S ATTORNEY—Presence at trial not a prerequisite to jurisdiction of the court. F-69

HONORABLE JULIUS GOODMAN,
Commonwealth's Attorney for Montgomery County.

This is in reply to your letter of August 24th from which I quote as follows:

"I write to ask your opinion as to the interpretation of Section 4675 (62), sub-section (d), which is as follows:

"'The attorneys for the Commonwealth are hereby directed to appear and represent the Commonwealth before the court, mayor or justice trying any person for any violation of this act in their respective jurisdictions, except for drinking in public; and no court, mayor or
justice shall hear such a case unless the respective attorney for the Commonwealth or his assistant is present or has been duly notified of such a case pending.'

"What I would like to know, would the Trial Justice have the right to try a case involving a charge of driving a motor vehicle under the influence of intoxicants, if the attorney for the Commonwealth were ill or otherwise prevented from being personally present at the trial and had any attorney of his choice to be present in his place, of course, realizing that the person would not be legally appointed attorney for the Commonwealth, but merely acting for me as a favor. As you know the attorneys for the Commonwealth in the counties do not have assistants as do the attorneys for the Commonwealth in the cities of the state.

"In other words, would the Trial Justice have the right to try the case as hereinabove set out if the attorney for the Commonwealth were not present, but had someone other than himself to merely bring out the evidence for the Commonwealth but who is not a legally appointed attorney for the Commonwealth. I hope I have made myself clear."

Driving a motor vehicle while under the influence of intoxicating beverages is a violation of Section 4722 (a) of the Code and not a violation of the Alcoholic Beverage Control Act, of which Section 4675 (62) is a part. Therefore, Section 4675 (62) has no application to the trial of such offenses.

With respect to offenses which are violations of the Alcoholic Beverage Control Act, it is my opinion that the purpose of the statutory provision quoted by you is only to insure that they are adequately prosecuted. Section 4675 (62) does not require the presence of the Commonwealth's Attorney as a jurisdictional prerequisite to the trial of the case. You will note that the statute provides that no such case shall be heard unless the Commonwealth's Attorney or his assistant is present or has been duly notified of such a case pending.

As you point out there are times when the Commonwealth's Attorney himself cannot be present and in most counties they do not have official assistants. In such case I think it would be perfectly proper for him to designate some attorney to act for him, even though this is not required. Whether this is done or not, the Trial Justice would have the right to proceed with the trial of the case. Otherwise, the trial of these violations may be unduly delayed, therefore defeating the object of the statute.

It is my opinion, however, that whenever the Commonwealth's Attorney himself can be present to handle the trial of the case, it is his duty to do so.

COMPATIBILITY OF OFFICES—Member of House of Delegates may be Commissioner of Accounts. F-249

October 6, 1949.

HONORABLE JOSEPH J. WILLIAMS, JR., Member of House of Delegates.

This is in reply to your letter of October 5, in which you ask whether or not a member of the House of Delegates is eligible for appointment as commissioner of accounts.

In my opinion, there is no statutory or constitutional provision which would prohibit a member of the General Assembly from being a commissioner of accounts. Section 44 of the Constitution provides that:

"** * * No person holding a salaried office under the State government and no judge of any court, attorney for the Commonwealth, sheriff,
CONFEDERATE MEMORIAL INSTITUTION—Disposition of non-inventory articles. F-191

HONORABLE WILLIAM A. WRIGHT, Director,
Department of Conservation and Development.


I am returning herewith the memorandum dated November 23 addressed to you by Mr. Randolph Odell, Commissioner of Parks, together with the related correspondence which you sent to me with your letter of December 7. In his memorandum to you Mr. Odell stated:

“When we took over the R. E. Lee Camp Confederate Memorial Park for maintenance there were around 25 old watches, most of them of the dollar type and not of a great deal of value, left in the safe. The Auditor of Public Accounts has us charged with these watches.

“These watches were accumulated over a number of years when old soldiers died and had no relatives. The Daughters of the Confederacy would like to have these watches, and since the safe belongs to them and we do not have any use for the watches, we would like to have permission to turn them over to the Daughters of the Confederacy along with the safe and if we can obtain this permission we will do so.”

You have requested my advice as to the action to be taken by you to get the articles referred to by Mr. Odell out of the inventory of your department.

The watches referred to legally belong to the estates of the deceased Confederate soldiers who died while residing at the old soldiers’ home located on the R. E. Lee Camp Confederate Memorial Park, and do not belong to the Commonwealth of Virginia and should not be carried as a part of your inventory. If the soldiers died without a will and leaving no heirs, the property would be derelict, but it seems to have such little value that proceedings to have the same sold and the proceeds paid to the State would not appear worth while.

The articles may have some historical or sentimental value and, since the Daughters of the Confederacy have stated that they would like to have the articles and have indicated a willingness to assume custody of the same, I think that it would be perfectly proper to turn them over to that organization. I find little authority dealing with the disposition of personal property left in the custody of the State by private individuals residing or being cared for on State property or in State institutions. Turning the articles, which were found in a safe belonging to the Daughters of the Confederacy which had been loaned to the State in connection with the operation of the Confederate Memorial Park, over to that organization would seem to be an appropriate disposition of the property, and I know of no legal objection to such action.
CONSTITUTION OF VIRGINIA—Proposed amendments of 1949; form of question on the ballot. F-1

HONORABLE ROBERT W. WHITEHEAD,
Member of House of Delegates.

This is in reply to your letter of September 12, in which you request my opinion regarding the effect of the form of the question by which the proposed amendments to the Constitution of Virginia dealing with the right of suffrage will be submitted to the voters.

Chapter 525 of the Acts of Assembly of Virginia of 1948 provides that it shall be the duty of the officers conducting the general election to be held on November 8, 1949, to take the sense of the qualified voters upon the ratification or rejection of the proposed amendments to the Constitution of Virginia contained in the joint resolution proposing the said amendments, which proposed amendments are set forth in extenso in said Act. The Schedule of this Act contains the following provision:

"At such election a ballot shall be furnished each voter which shall have printed thereon the following:

"Question: Shall Sections 18, 19, 20, 21, 22, 23, 25, 28, 31, 35, 38 and 173 of the Constitution of Virginia, which sections relate to the elective franchise, and, among other things, provide for the elimination of the poll tax as a prerequisite to voting, registration and renewal of registration of voters, the establishment of a State Board of Elections, and the levying of a school tax in lieu of the present capitation tax, be amended; and shall the Constitution be further amended by adding Section 31-a, providing for local boards of elections, and Section 38-a, prescribing the effective date of these amendments?

"☐ For
"☐ Against"

As you point out, the language "and, among other things, provide for the elimination of the poll tax as a prerequisite to voting" etc. is descriptive of the proposed amendments submitted for adoption and is not descriptive of the present provisions of the Constitution, though, as a grammatical matter, this language has been placed in the question directed to be printed upon the ballots so as to modify the language referring to the existing provisions. You ask whether the proposed amendments will be validly adopted so as to become a part of our Constitution if a majority of the votes cast are in favor of the proposition as submitted by this question.

Section 196 of the Constitution of Virginia deals with the method of amending the Constitution with which we are here concerned. This section reads as follows:

"Any amendment or amendments to the Constitution may be proposed in the Senate or House of Delegates, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the ayes and noes taken thereon, and referred to the General Assembly at its first regular session held after the next general election of members of the House of Delegates, and shall be published for three months previous to the time of such election. If, at such regular session or any subsequent extra session of that General Assembly the proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people, in such manner and at such time as it shall prescribe; and if the people shall approve and ratify such amend-
ment or amendments by a majority of the electors, qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall become part of the Constitution."

Pursuant to this provision the amendments in question were proposed and agreed to in 1946 by a majority of the members elected to each house of the General Assembly. See House Joint Resolution 22, found as Chapter 402 of the Acts of Assembly of 1946. This resolution, which set forth in extenso the present constitutional provisions and the amendments proposed, was duly published prior to the general election of members of the House of Delegates for the 1948 session. It was then agreed to by a majority of the members elected to the House and Senate at the 1948 session. See House Joint Resolution 16, found as Chapter 526 of the Acts of Assembly of 1948. Pursuant to the requirement that the proposed amendments be submitted to the people "in such manner and at such time" as the General Assembly shall prescribe, House Bill 555 was enacted into law and is found as Chapter 525 of the Acts of 1948. The Act contained the provision above set out prescribing the question to be printed on the ballot, and also contained the following provision:

"** The State Board of Elections shall cause to be sent to the clerk of each county and corporation, at least thirty days before the election, as many copies of this act as there are places of voting therein; and it shall be the duty of such clerks to forthwith deliver the same to the sheriffs of their respective counties and cities for distribution. Each such sheriff shall forthwith post a copy of such act at some public place in each election district at or near the usual voting place in the said district."

It appears, therefore, that the proposed amendments have been before two sessions of the Legislature for debate and consideration. The second time followed a general election of members of the House of Delegates held after publication of the proposed amendments. Moreover, the sense of the qualified voters will be taken after the complete Act showing the old and the proposed new provisions has been posted at some public place in each election district at or near the usual voting place in the district.

The above is recited merely to show that the machinery set up by the Constitution and Acts of the General Assembly for the adoption of amendments to the Constitution by the method specified in Section 196 thereof provides ample opportunity for the qualified voters to ascertain the manner in which the basic law of the Commonwealth will be changed if the proposed amendments are adopted. As you know, there has been much public discussion of the proposed amendments both in the press and otherwise, and there will undoubtedly be much more before the election is held, all of which will tend to inform the voters of the issue to be decided.

It is to be noted that Section 196 of the Constitution provides that the General Assembly shall submit the proposed amendments to the people "in such manner ** as it shall prescribe." It is well established that under such a provision it is not necessary to print the amendment in full, since it is presumed that every voter received the benefit of notice through publication of the proposed amendments in extenso. See 16 C. J. S., Constitutional Law, §9, pp. 42-43, and cases cited. The form of the submission is a matter for the Legislature to prescribe and may be in general terms referring to the constitutional amendment to be voted on. It is equally well established that the Legislature cannot propose one question and submit to the voters another, and the question presented should not be such as would mislead the voters. See authority cited above.

Relative to the question directed to be printed on the ballots with respect to the proposed amendments, the actual question is: "Shall Sections 18, 19, 20, 21, 22, 23, 25, 28, 31, 35, 38 and 173 of the Constitution of Virginia be amended?" Apparently, through an inadvertence which went unnoticed by the members of the Legislature, the language, intended to inform the voters of the general purpose
of the proposed amendments, was placed as a modifying clause to the clause referring to the existing constitutional provisions instead of being added at the end of the question following such language as "so as to provide".

The inquiry you present is in substance whether this error makes the question so misleading as to vitiate and render void the action of the voters should the majority of them vote in the affirmative. In my opinion, it does not.

I think it would be obvious to the voter that a mistake had been made and that the descriptive language was intended to refer to the new constitutional provisions proposed. No one voting at the election would be misled into believing that the descriptive language was really intended to refer to the existing provisions for, as you state, "obviously this is not true".

For instance, the descriptive language is "which sections * * * provide for the elimination of the poll tax as a prerequisite to voting." Any person who is eligible to vote at the election on this question will know that the present constitutional provision does not provide for the elimination of the poll tax as a prerequisite to voting, because he must have paid his poll tax in order to be eligible to vote. Also he would know that the present provisions do not provide for the "renewal of registration", because he would know that he did not have to renew his registration in order to vote. The clause in the descriptive language implying that the existing provisions provide for "the levy of a school tax in lieu of the present capitation tax" would clearly be recognized as a mistake because it is itself inconsistent. While grammatically it modifies the clause referring to the presently existing provisions, it describes them as providing something in lieu of the present capitation tax. The presently existing sections could not possibly provide something in lieu of a present capitation tax. This reference to the "present capitation tax" is also inconsistent with the other part of the descriptive language implying that the present sections provide for the elimination of the poll tax.

As pointed out above, the voter would know in fact that he had actually been required to pay a capitation tax before being permitted to vote on this very question. The very situation and the obviously inconsistent language of the question would suggest to the voter that the descriptive language was mistakenly used in reference to the existing provisions and that it should have been and was intended to be used in reference to the proposed amendments. The otherwise misleading effect of the form of the question is overwhelmed by the known and the obvious.

Under this method of adopting amendments to the Constitution, the function of the printed matter on the ballot is not to inform or advise the voter, but is simply the instrument provided for the voter's expression of his desire. It is conclusively presumed that every voter received the benefit of the notice contemplated through the publication of the amendment in extenso, Jones v. McDade, 75 So. 988, 200 Ala. 230 (1927); Mundell v. Swedlund, 58 Idaho 209, 71 P. (2d) 434 (1937); State v. Osborne, 57 P. (2d) 1083; 153 Or. 484 (1936). The language used on the ballot needs only to be a reference in general terms to the constitutional amendment to be voted on.

If the General Assembly had directed that the question be phrased thus:

"Question: Shall Sections 18, 19, 20, 21, 22, 23, 25, 28, 31, 35, 38 and 173 of the Constitution of Virginia, which sections relate to the elective franchise, be amended so as to provide, among other things, for the elimination of the poll tax as a prerequisite to voting, registration and renewal of registration of voters, the establishment of a State Board of Elections, and the levying of a school tax in lieu of the present capitation tax, * * *?"

and a majority of the voters had voted "For", there could be no doubt that the amendments would have been validly adopted.

Yet, in such cases the voters would not have been informed by the question alone as to all the detailed provisions of the amendment. If he is to vote intelligently, he will have to inform himself fully as to the provisions of the
amendments by reading the full provisions of the Resolutions or the Act adopted by the General Assembly and duly published. The same thing is true in the case as it actually is. If the voter does this, which he will be presumed to have done, he will not be misled by the form of the question.

In some cases it has been held that constitutional provisions have not been validly adopted, even though they received a majority vote, because the form of the question by which they were submitted was misleading. I think these cases are sound and should be followed when it can be said that it is clear that the form of the question could have deceived or misled the voter in voting for an amendment when he may have voted otherwise if the question had been properly phrased.

It is my opinion, however, that the form of the question under which the proposed amendments to the Virginia Constitution will be submitted does not mislead the voter as to the contents of the proposed new provisions. The question could not possibly lead the voters to think that they were adopting new constitutional provisions providing one thing while they, the new provisions, actually provide something else. Conceivably the voters could be misled as to the present provisions, but the question does not mislead them as to the new provisions. This is so even if the question is given its literal grammatical meaning, for then it simply proposes that the present sections be amended without stating how.

If a voter votes in favor of the change, it should be assumed that he knows what the new provisions contain, unless it can be said that he is misled on that point. As pointed out above, even the literal wording of the present question does not do this. It is but natural to assume that those who are against the change will vote "Against" and also that those who feel that the question does not sufficiently inform them what is proposed by the new sections will also vote "Against" or will not vote on the question at all. Certainly those who vote "For" will know what is contained in the new provisions and will thus signify that they favor the change. If a majority vote "For", it follows that a majority know what the proposed changes are and that they favor the same.

Courts do not lightly overthrow the action of the majority of the qualified voters in adopting new constitutional provisions. To say that the voters have been misled by the form of the question because the descriptive language has been placed in the wrong place, when the voter would recognize this as an inadvertent mistake in draftsmanship in view of the very language used and because of knowledge which the voter must have in order to be voting on the question, would simply negate the expressed desire of the voters. In my opinion, the descriptive language would clearly be recognized as intended to refer to the new provisions and that no grounds exist for saying that the voters would be misled. For these reasons it is my opinion that, if a majority vote "For" on the question as framed by the General Assembly for the submission of the proposed amendments dealing with the right of suffrage, such amendments will have been validly adopted.

In answer to your second question as to whether the sections of the Constitution, both existing and as proposed, should be printed on the ballot, or whether only the question plus the squares for the voting should be printed, it is my opinion that only the question and the squares should be printed. The Constitution, Section 196, provides that the proposed amendments shall be submitted to the people in such manner as the General Assembly shall prescribe. Since the General Assembly has specified what shall be printed on the ballot, it is my opinion that this directive must be followed and that only the question and the squares for voting either for or against the proposal should be printed on the ballot.
REPORT OF THE ATTORNEY GENERAL

CONTRACTORS—State license and local license. F-34


HONORABLE JOHN PAUL CAUSEY,
Commonwealth's Attorney for King William County.

This is in reply to your letter of December 7, in which you state that the Town of West Point, Virginia, has by ordinance imposed a license upon contractors doing business in the Town. You ask if a contractor who is a resident of King and Queen County and who has paid in that county the required State license can be required to pay for a license to work in the Town of West Point, where he has no place of business or office. You refer to that portion of Section 176 of the Tax Code which reads as follows:

"When a contractor, electrical contractor or a plumbing and steam fitting contractor shall have paid the aforesaid State license and local license required by the city or town, in which his principal office and any branch office or offices may be located, no further license shall be required by the State or other city or town for conducting any such business within the confines of this State," * * *

In my opinion, the quoted language would not exempt the contractor from the necessity of securing a license in the Town of West Point. You will note that this only provides an exemption where a contractor has secured the necessary State license and also has paid a local license required by the city or town in which he has an office. Since the party to whom you refer has paid no local license to a city or town, he can be required to secure a license from the Town of West Point, if the ordinance is so drawn as not to be predicated upon the establishment of an office within the town.

You will note from the second paragraph of Section 176 that the State tax is imposed upon all contractors doing business in Virginia, whether or not they maintain an office within the State. Section 296 of the Tax Code provides that, in addition to the State tax on any license, the Council of any 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 local license to be obtained therefor. Since the State tax is not predicated upon maintaining an office, it is not necessary that the local city or town license be based upon the maintenance of an office within the city or town.

Statutes providing an exemption from taxes are strictly construed and it is necessary for those claiming an exemption to bring themselves strictly within the terms of the statute providing the exemption. That portion of Section 176 exempting certain contractors from certain local licenses by its terms is limited to those who have paid the State tax and have also paid a city or town tax in the locality where they maintain an office. Since the statute does not fit the situation you describe, it is my opinion that the town tax may be required.

CONTRACTS—Officers interested in; member of local election board not an officer in this sense. F-33

March 16, 1950.

HONORABLE EDWIN LYNCH,
Member House of Delegates.

This is in reply to your letter of March 8 in which you requested my opinion as to whether or not a member of a local electoral board is prohibited by Section 15-504 of the Code from entering into contracts with the governing body of a county.
The pertinent part of Section 15-504 is as follows:

“No supervisor, superintendent of the poor, special policeman, 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 contracts, 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 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, or in the sale or furnishing of supplies or materials to such county, and shall not become interested, directly or indirectly, in any contract, or in the profits of any contract, made by or with any officer, agent, commissioner, trustee or overseer for working and keeping in repair the public roads in the county.” ((Italics supplied)

It can be seen from the above-quoted provision that a paid officer of the county is prohibited from entering into a contract with a board of supervisors. The term, county officer, is of vague and variant import, and its meaning necessarily varies with the connection in which it is used. Therefore, the question to be determined is whether or not a member of a local electoral board is a paid county officer within the meaning of Section 15-504.

Members of the local electoral boards are constitutional officers appointed by State courts for the purpose of performing certain duties in connection with elections. They exercise an important function of the State government, affecting not only the county in which their duties are performed, but the State as a whole. This is emphasized by the enactment of Section 24-25 of the Code by which the legislature imposed upon the State Board of Elections the duty of supervising and co-ordinating the work of the local electoral boards and empowered it to make such rules and regulations as are conducive to the proper functioning of such electoral boards. Furthermore, the State Board of Elections is authorized to institute proceedings for the removal of any member of an electoral board who fails to discharge his duty.

I am of the opinion, therefore, that since the maintenance of local electoral boards is a State function and its members are appointed for a statewide purpose, they must be considered State officers.

However, it might well be argued that members of the local electoral boards serve in a dual capacity and thus may be considered county or city officers as well as State officers, since they are paid by the localities and take the oath required of county and city officials. While this may well be true, the meaning of the term, county officer, for the purpose of this opinion, must be construed in connection with the intent of Section 15-504, wherein it is found.

It is noted that the Legislature did not see fit to specifically enumerate members of local electoral boards among those prohibited from entering into contracts with counties, though certain officers who may be considered to be both State and county officials were so named. It is further noted that the language which follows the enumeration does not contain the word, “other” but reads, “or any paid officer of the county.” To my mind this is significant, for it indicates that those officers so enumerated were not considered by the Legislature to be “county officers” since some of them perform both county and State duties.

Therefore, it is my opinion that the term, county officer, is not used in Section 15-504 in its broadest sense, but is used precisely and strictly to mean those officers who perform purely county functions such as a county manager or a county engineer.

Section 15-504 of the Code was enacted to carry out the sound public policy of prohibiting a governing body of a county from doing business with those officers who might be thought to have a part in the matter of contracts.
and official services of a county. The official functions of a member of a local electoral board leave him clearly without the spirit or purpose of such legislation. Therefore, I am of the opinion that the prohibition contained in Section 15-504 does not apply to members of local electoral boards.

The conclusion reached above is further substantiated by the fact that over a long period of time the section in question has never been construed as prohibiting local election officials from entering into contracts with the governing bodies of their counties. This administrative practice is entitled to serious consideration and should not be rejected, since such a result, as pointed out, is not necessary from the language of the statute.

CONTRACTS—Officers interested in; prohibition against this does not bar county officer who is appointed an attorney to represent indigent person from accepting the fee provided. F-130

HONORABLE G. M. WEEMS,
Treasurer of Hanover County.

This is in reply to your letter of October 3, from which I quote:

"In addition to my duties as county treasurer, I practice law and recently was appointed by Judge Bazile to defend a criminal, for which he allowed me a fee.

"The Board of Supervisors issued the check, but question has arisen as to whether or not I am prohibited by Section 2707 as amended in 1948 from accepting this. I am holding the check and I would appreciate your advising me whether or not I should accept it. Section 2707 seems to be quite broad, but it appears possible that it applies to contracts and not to instances where the Circuit Court appoints attorneys to defend an indigent person."

The purpose of section 2707 is to prohibit certain officers, among them the Commissioner of the Revenue, from being interested in any contract or the profits from any contract for the furnishing of supplies or services to his county. While this section is quite broad, I do not think it was intended to apply to instances where the Circuit Court appoints attorneys to defend an indigent person. Though the compensation of such attorneys is, under section 3518, paid out of the treasury of the locality, it is my opinion that this is not such a fee that the officers named in section 2707 are prohibited from accepting. Therefore, if any of them is named to represent an indigent defendant, he may accept the amount allowed by the Court for his services.

CONVICTS—Punishment of escapee from State Farm. F-75b

HONORABLE J. LUTHER GLASS,
Chief of Court Services and Placement.

I am in receipt of your letter of January 5, 1950, and I regret that the unusual amount of activity in this office has caused the delay in replying thereto. The question set forth in your letter is as follows:

In the event a felon serving a jail sentence at the Bland Correctional Farm should escape therefrom would he be subject to prosecution in the Circuit Court of Bland County and subject to a sentence of from one to five years in the Penitentiary?
Section 5058(1) of the Code (53-80 of the Code of 1950) reads as follows:

"Subject to the provisions hereinafter contained, there is hereby established a State prison farm for defective misdemeanants and other farm or farms for the detention and care of defective misdemeanants, including the tubercular, the venereal, the drug addicts, the inebriates, the psychopathic personalities and recidivists and other persons mentally or physically defective who cannot be worked on the road force, and any other misdemeanants and felons who may be committed thereto or transferred thereto as provided by law." (Italics supplied)

By act of the Legislature in 1944 the State Board of Corrections was given control of the government and direction of the State Farm for defective misdemeanants and other farm or farms established under the act. Section 5058(11) (53-91-53-97 of the Code of 1950) provides, among other things, that the State Board of Corrections may transfer any jail inmate within the Commonwealth to the State Farm for defective misdemeanants, or other farm, or farms, in a case of emergency or necessity.

The punishment for prisoners escaping from the State Farm for defective misdemeanants or other farms is set forth in Section 5058(14) (53-95 of the Code of 1950) where, among other things, it is provided:

"* * * Any prisoner who shall escape from the said State farm for defective misdemeanants, or other farm or farms, shall be guilty of a misdemeanor and may be sentenced by a justice of the peace, or court, upon conviction therefor, for an additional period of not less than thirty days nor more than six months. * * * ." (Note: The Code of 1950 substitutes the words trial justice for the words justice of the peace in this section).

It is my opinion that the term "other farm or farms" used in Section 5058(1) includes such institution as the Bland Correctional Farm. That being true, it would follow that Section 5058(14) would be applicable to a prisoner escaping from the Bland Correctional Farm and that the punishment for such escape would be not less than thirty days nor more than six months. The Circuit Court of Bland County would be a proper court in which to bring such prosecution.

CORONERS—Fees based on number of bodies examined. F-78

Dr. L. J. Roper,
State Health Commissioner.

I am in receipt of your letter of October 17, 1949, in which you enclosed a letter from Dr. Geoffrey T. Mann, asking for an interpretation of the following portion of §4806j:

"For each investigation under this chapter, including the making of the required reports, the coroner shall receive a fee of $10.00, this is to be paid by the county or city for which he is appointed."

Dr. Mann says he has interpreted this section to mean that the fee is to be paid on the basis of the number of investigations and not the number of deaths involved.

The words quoted in Dr. Mann's letter as §4806j are found in the Acts of Assembly of 1946, Chapter 355, and in the 1948 Supplement to the Code.
of Virginia as §4818(10). In order to arrive at an interpretation of these words, it is necessary to refer to §4818(9) which 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."

It appears that the statute contemplates the investigation of the death of the person and not the accident. It would seem that, since the investigation is directed to the death rather than the accident, the coroner is legally entitled to a $10.00 fee for each body examined.

COUNTIES—Authority to tax laundries. F-83

HONORABLE JULIAN H. RUTHERFOORD, JR.,
Member of the House of Delegates.

This is in reply to your letter of March 23 in which you ask whether or not a county may impose a license tax on a laundry located in an adjoining county which sends its trucks into the county to pick up laundry. I assume that the license tax to which you refer would be a revenue measure imposed for the privilege of engaging in the laundry business in a particular county.

Counties may not impose a license tax of this kind except by specific authority at law. Section 15-10 of the Code deals with the powers of boards of supervisors in certain counties, and the pertinent provision thereof reads as follows:

"The boards of supervisors of counties:

"(1) Adjoining and abutting any city, within or without this State, having a population of one hundred and twenty-five thousand or more; "

"(2) Adjoining any county which adjoins and abuts any such city and has a density of population of five hundred or more to the square mile; "

"(3) Having a density of population of four hundred and seventy-five or more to the square mile of highland, or

"(4) Having within their boundaries any United States Marine Corps Base.

"Are hereby vested with the same powers and authority as the councils of cities and towns by virtue of the Constitution of the State of Virginia or the acts of the General Assembly passed in pursuance thereof; * * * ."

I also call your attention to sections 58-266.2 and 58-266.3 of the Code which may be pertinent to the case which you have in mind. They provide:

"The governing body of any county in this State having a population of more than two thousand per square mile, according to the last preceding United States census, and of any county having an area of less than sixty square miles, is hereby authorized to levy and to provide for the assessment and collection of county license taxes on businesses,
trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein within the county, whether any license tax be imposed thereon by the State or not; provided, however, that no county license tax shall be levied in any case in which the levying of a local license tax is prohibited by any general law of this State."

"The governing body of any county which has adopted the county manager form of organization and government provided for by chapter 11 of Title 15, when anything for which a license is required by the State is to be done within the county, impose, when not otherwise prohibited by general law, a license tax for the privilege of doing the same, and require a license to be obtained therefor; and in any case in which it sees fit, require from the person licensed, bond, with surety, in such penalty and with such condition as it may deem proper. The ordinance imposing such tax shall provide for the time and manner of collection thereof and issuance of such license. Any license tax hereunder shall be in addition to any license tax imposed by the State or any town in such county."

"No such county shall require a license to be obtained for printing any newspaper."

I have found no statute authorizing counties generally to impose license taxes on laundries. Therefore, unless a county fits the classification set forth in one of the above quoted sections, it is my opinion that its governing body has no authority to impose such a tax.

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COUNTIES—Deposits; how secured. F-37

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.

May 22, 1950.

This is in reply to your letter of May 11, 1950, which reads, in part, as follows:

"One of our Virginia banks which serves as paying agent for maturing county bonds and bond coupons has raised the question with one of our counties as to whether monies deposited with the bank for the aforesaid purpose are required to be secured by the bank in the manner prescribed by old Section 350 of the Tax Code, now embodied in Sections 58-938 to 58-952 of the Virginia Code of 1950. This bank contends that funds deposited with them for the payment of maturing bonds and bond coupons represent money held in trust and, therefore, are protected in the manner prescribed under old Section 4149 (69), but now shown in the Virginia Code of 1950 as Section 6-99."

Section 58-944 of the Code of 1950 reads, in part, as follows:

"No money received by a county treasurer shall be deposited with any depository of the treasurer's county selected and approved as provided in §§58-943 until such depository shall have given bond with the same conditions as those required for bonds given by State depositories who elect to give bond to protect money deposited with them by the State Treasurer pursuant to the provisions of §§2-170 to 2-183 or until such depository shall have pledged and deposited in the manner and to the extent hereinafter provided and for the protection of the money deposited with it pursuant to the provisions of this section: * * * ." (Italics supplied)
Section 58-945 of the Code provides:

"All securities pledged by any depository to protect money deposited with it under the provisions of this article shall be deposited in escrow with some bank or trust company in this Commonwealth, other than the depository, which shall be acceptable to and approved by the depository and the county finance board and shall be accompanied by powers of attorney authorizing such bank or trust company, in event of any default by the depository, to deliver the securities to the county finance board and empowering such board to sell, transfer and deliver all or any part of such securities in such manner as it may elect for the satisfaction of any claim that may arise from such default." (Italics supplied)

This office in an opinion rendered to the Honorable L. McCarthy Downs by the former Attorney General, the Honorable Abram P. Staples, on August 19, 1936, has previously ruled that funds deposited with banks in this manner are required to be protected in the manner provided by §58-938 to §58-952 of the Code, and I am of the opinion that the conclusion of the former Attorney General is a correct one.

I notice that the trust officer of the banking institution which has presented this question is of the opinion that should the bank be required to protect county funds in the manner indicated above, that the provision of §6-99 of the Code, dealing with funds deposited in a trust department of a banking institution would also be applicable to those funds with the result that the bank would be required to provide a duplication of security for the same funds. It is my opinion that, when the funds are secured in the manner prescribed for securing county deposits, it is not contemplated that they must also be secured as are ordinary trust funds which are transferred to the commercial department of the institution and that, therefore, no duplication of security is necessary. I am returning your file as requested.

COUNTIES—No duty to furnish stamped envelopes to Commissioner of Accounts. F-70

COMMISSIONER OF ACCOUNTS—Not entitled to be furnished stamped envelopes. F-70

April 19, 1950.

Miss Pauline Bourne,
Commissioner of Accounts for Grayson County.

This is in reply to your letter of March 31, 1950, which reads, in part, as follows:

"Please advise if the county is supposed to furnish stamped envelopes for the Commissioner of Accounts?"

Section 26-22, Virginia Code of 1950, provides that the clerk of each court shall furnish to the commissioner of accounts of such court a record book and such other books and stationery as may from time to time be needed. However, I am advised of no provision which requires that a commissioner of accounts be furnished stamped envelopes.
COUNTIES—Ordinance cannot incorporate specifications of Health Department by reference. F-60a

August 23, 1949.

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

This is in reply to your letter of August 5 in which you enclosed a copy of a proposed sewage disposal ordinance which, in effect, provides that no one shall install a septic tank system in the County of Fairfax without first obtaining a permit from the County Department of Health, and further, that no one shall use such system until inspected and approved by the said Department. You specifically refer to the language used in paragraph 2 of §2 of the ordinance which reads as follows: "The terms 'properly installed', 'approved', and 'standard' as used in this ordinance shall be construed to mean 'in accordance with the specifications set forth in the current septic tank or pit privy bulletin of the State Health Department.'"

The question raised in your letter is whether or not it is lawful to adopt an ordinance that refers to a bulletin of the State Health Department which is changed from time to time. You state that it occurs to you that, in order for the ordinance to be valid, the bulletin to which it refers would have to be published along with the ordinance, and that from time to time, if there are changes in the bulletin, the ordinance would have to be amended accordingly.

It is my opinion that if the County of Fairfax desires to adopt by ordinance the specifications set forth in the current septic tank bulletin of the State Health Department it would be necessary to publish the essential parts of such specifications with the ordinance. Furthermore, I agree with your conclusion that the ordinance would have to be amended if it is deemed expedient to change the specifications adopted by the ordinance each time there is a change in the specifications set forth in the bulletin published by the State Health Department.

COUNTIES—Ordinances of; effective in towns. F-60a

July 6, 1949.

HONORABLE LITTLETON H. MEARS,
Commonwealth’s Attorney for Northampton County.

This is in reply to your letter of June 29, in which you ask my opinion as to whether the provisions of a Northampton County ordinance relating to the installation and inspection of septic tanks may be enforced within the corporate limits of the Town of Exmore. Exmore, located in Northampton County, was not incorporated when the county ordinance was originally approved, and since its incorporation has not, according to your information, adopted any ordinance pertaining to septic tanks.

Section 2743 of the Code empowers the board of supervisors to adopt such measures and regulations as it may deem expedient to promote the health, safety and general welfare of the inhabitants of the county, and to prevent the spread of disease among persons or animals. I think this section would support the passage of a reasonable county ordinance relative to the installation and inspection of septic tanks.

A town, whether it be incorporated or not, is a part of the county in which it is located, and county ordinances are effective throughout the county, in the absence of some provision to the contrary. Certain code sections authorizing action by boards of supervisors in specific matters expressly exempt incorporated towns within the counties from the application of the county law. See §2743a in the
1948 Supplement, and §2743f in the 1942 Code. I find nothing in §2743 which would limit the effectiveness of acts taken by the board of supervisors under that section.

Chapter 116 of the Code contains those sections pertaining to the incorporation of towns by courts. I find nothing in these sections which would prevent the enforcement in an incorporated town of a county ordinance designed to protect the health and well-being of the county at large.

It is my opinion that the ordinance of Northampton County relating to the installation and inspection of septic tanks can be enforced in the Town of Exmore.

COURTHOUSES—Use of Courthouse square. F-233
COUNTIES—Authority to lease Courthouse square. F-233

June 26, 1950.

HONORABLE EMORY L. CARLTON,
Commonwealth's Attorney for Essex County.

This is in reply to your letter of June 15, 1950, in which you ask whether, in my opinion, the Board of Supervisors of Essex County can enter into a certain lease with a private individual. Under the terms of the proposed lease the lessee on a lot owned by the County would construct a law office at his own expense. This office would be similar in design to the County Office Building, which is on an adjoining lot. After the lessee has occupied the premises for a term sufficient to amortize his investment at a reasonable annual rent, the County would own the building in its entirety.

The difficulty which presents itself is that the lot on which it is proposed to build this law office adjoins the Courthouse grounds. The lot in question is bounded on the north and south by property belonging to persons other than the County, and on the west by Church Street. It is on the east that the lot adjoins the Courthouse grounds, and on that side the County Office Building forms a partial physical barrier between the lot in question and the Courthouse grounds proper. This lot was purchased in 1946 and the resolution of the Board of Supervisors did not recite for what purpose it was being purchased.

Whether this lot is a part of the Courthouse grounds is a question I do not feel this office can properly attempt to rule upon. If the lot is properly considered a part of the Courthouse grounds, then the situation is governed by County of Alleghany v. Parrish, 93 Va. 615, in which it was held that the provisions of §2854 of the Code of 1919 (§15-686 of the Code of 1950) are mandatory, and that, to the extent of two acres, the Courthouse grounds must be used for the courthouse, clerk's office and jail and any land not needed for these purposes must be planted in trees and kept as a place for the people to meet and confer together. As I compute the acreage from your drawing, Essex County does not own two acres at the Courthouse site, even when the lot in question is included.

If it can be found that the lot in question is, as a matter of fact, not really part of the Courthouse grounds and that its physical location is such that it will not be used as a meeting place by the people, then I think that the prohibitions imposed by §15-686 would not be applicable.
CRIMINAL LAW—Adultery and Fornication; punishment therefor. F-75b

August 24, 1949.

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

This is in reply to your letter of August 19 in which you ask the following two questions:

"(1) What is the maximum fine that can be imposed in a conviction for adultery or fornication?
(2) Can a jail sentence be imposed upon conviction for fornication or adultery?"

Section 4543 of the Code provides as follows:

"If any person commit adultery or fornication, he shall be fined not less than twenty dollars. And if he commit adultery or fornication with any person, whom he is forbidden by law to marry, he shall be deemed guilty of a misdemeanor; provided however that if he commit adultery or fornication with his daughter or his granddaughter he shall be confined in the penitentiary not less than one nor more than ten years or in the discretion of the court or jury trying the case, confined in jail not exceeding twelve months and by fine not exceeding five hundred dollars, either or both."

Section 4758 provides that all affenses which are not felonies are misdemeanors, and §4782 provides as follows:

"A misdemeanor, for which no punishment or no maximum punishment is prescribed by statute, shall be punished by fine not exceeding five hundred dollars or confinement in jail not exceeding twelve months, or both, in the discretion of the jury or of the justice, or of the court trying the case without a jury."

I agree with you that, since §4543 provides no maximum punishment for simple fornication or adultery, a literal interpretation would make §4782 applicable and would authorize a maximum fine of $500 or a jail sentence not exceeding twelve months or both. However, in my opinion the statutes should not be so construed.

It is clear that, prior to the Code revision in 1919, only a fine could be imposed for simple fornication or adultery. At that time §3786 of the Code of 1887 (superseded by §4543) read as follows:

"If any person commit adultery or fornication, he shall be fined not less than twenty dollars. And if he commit adultery or fornication with any person, whom he is forbidden by §2224 or §2225 [of the former Code] to marry, he shall be confined in jail not exceeding six months, or fined not exceeding five hundred dollars in the discretion of the jury."

It is clear from this that the legislature intended to make a distinction between simple fornication or adultery and such offenses when committed with a person with whom the offender was forbidden to marry. The legislature apparently considered simple fornication or adultery the lesser offense to be punished by a fine only, while the graver offense of committing the act with a person whom the offender is forbidden to marry could be punished by confinement in jail. At that time §3902 of the Code (now §4782) read as follows:

"A misdemeanor for which no punishment is prescribed by statute shall be punished by fine or confinement in jail, or both, in the discretion of the jury, or of the court trying the case without a jury."
No maximum was provided by law, this being left to the discretion of the jury or the court by former §3904 (now 4784), which, incidentally at that time made it clear that only a fine was to be imposed when that punishment alone was prescribed.

The subsequent amendments to the statutes do not indicate an intention on the part of the legislature to make simple fornication or adultery punishable by the more severe penalty of a jail sentence. In 1919 the second sentence of what is now 4543 was amended so as to state simply that fornication or adultery with a person with whom marriage is forbidden by law is a misdemeanor. In 1938 the proviso was added to make the offense a felony punishable by ten years in the penitentiary if committed with the person's daughter or granddaughter. Both of these amendments increased the punishment when the offense was committed with a person with whom the accused was forbidden to marry, but in neither case was the first sentence changed.

It is true that in 1919, what is now §4782 was changed so as to refer to misdemeanors for which no maximum punishment is prescribed and under its terms either a jail sentence or fine or both may be imposed. However, it should be remembered that prior to 1919 the jury was not limited by any maximum whenever no punishment or no maximum punishment was specifically provided. The revisors in their note state that they were of the opinion that jail sentences of more than a year should not be permitted. Since this section was being amended to impose a limit, it was necessary to refer to cases where no maximum was provided. Since the purpose of the amendment was to reduce punishments by fixing a maximum, I do not think it should be construed as authorizing the additional penalty of a jail sentence where none had been previously imposed.

In view of the fact that criminal statutes are strictly construed against the Commonwealth, it is my opinion, for the reasons stated above, that a jail sentence cannot be imposed upon conviction of simple fornication or adultery, and that §4782 should be limited in its application to fixing a maximum fine of $500.

I call your attention to the fact that in Johnson v. Commonwealth, 152 Va. 955, the Supreme Court in dealing with a related question stated "Simple adultery and fornication are not common law offenses in Virginia, and are punishable only as prescribed by the Virginia Code 1924, Section 4543". While this statement is dictum, I think it is highly indicative of the view that would be taken by the Court on this question.

CRIMINAL LAW—Bribery; no forfeiture of money offered as bribe. F-210a

FORFEITURES—Traveler's checks offered as bribe not forfeited. F-210a

HONORABLE J. WILTON HOPE, JR.,
Commonwealth's Attorney for Elizabeth City County.

April 18, 1950.

This is in reply to your letter of March 23, 1950, from which I quote as follows:

"A bribery case was tried in the Circuit Court of Elizabeth City County, Virginia, under section 18-240 of the 1950 Code. The defendant was found guilty and sentenced to 15 months in the State Penitentiary. The state of facts, or so much that is pertinent to the question involved, is as follows:

"The defendant, when apprehended for the possession of illegal and untaxed whiskey offered and gave to the Alcoholic Beverage Control Investigator, who made the arrest, $190.00 in unsigned traveler's checks, and, at the time the bribe was offered and given, he stated that he would sign same so that he would receive the money for them. The Commonwealth intro-
duced the $190.00 worth of unsigned traveler's checks in evidence, and at this time they are still being held by the Court as part of the evidence. The defendant's attorney is desirous of obtaining these traveler's checks and is not contemplating any Court action for them, but, on behalf of the Commonwealth, I am reluctant to request the Court to return these traveler's checks because they were given to the officer in the furtherance of a bribe, and it does not appear that the evidence, referring to the traveler's checks, used in furtherance of the crime should be permitted to be returned to the defendant, as he was divested of ownership by giving the traveler's checks out-right to the officer, which in turn were given in evidence to the Court. There is no provision under the law whereby the traveler's checks can be forfeited to the Commonwealth where a bribe charge is sustained.

"The question is: Can the Court retain or destroy this evidence when it has been given by the defendant in a bribery case when he, for all intents and purposes, has divested himself of ownership, and is it proper evidence to be retained as a part of the record in the trial of the case?"

I am of the opinion that while the defendant apparently attempted to divest himself of ownership of these checks he failed to do so because the officer could not have accepted the checks with the intention of making them his own property without being himself guilty of a crime. Apparently the officer took the checks for the purpose of using them as evidence; hence, the title remained with the defendant, the officer taking merely possession.

As you indicate in your letter there is no provision under the Virginia law whereby money or other property used as a bribe can be forfeited to the Commonwealth and it is my opinion that should the court retain or destroy this evidence it would have, for all intents and purposes, imposed a forfeiture on the defendant just as effectively as though the money were paid over to the Commonwealth under some forfeiture statute.

This office has previously ruled on several occasions that since the Legislature has seen fit to provide specifically for forfeitures in some cases, it would seem that where no forfeiture is so provided there is no authority therefor. It is therefore my opinion that after these traveler's checks have served their purpose in the case and are no longer needed, they should be returned to the defendant.

CRIMINAL LAW—Having Alienist to testify for Commonwealth; payment out of appropriations for criminal charges. F-85b

October 19, 1949.

Honorable E. Almer Ames, Jr.,
Commonwealth's Attorney for Accomack County.

This is in reply to your letter of October 11 from which I quote:

"At the present term of our Circuit Court I am trying a murder case in which the defense is insanity. Defense counsel secured the services of an alienist and I deemed it wise to secure an alienist to testify for the Commonwealth. Should his bill for services be paid solely by the County or should this be listed on my salary and expense request and paid one-half by the County and one-half by the State?"

I call your attention to that provision of Section 4960 of the Code which reads as follows:

"* * * When in a criminal case an officer or any person renders any other service in the State of Virginia for which no specific compensation is provided, the court in which such case is, may allow therefor what it deems
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reasonable, and such allowance shall be paid out of the treasury from the appropriation for criminal charges on the certificate of the court stating the nature of the service." (Italics supplied)

This office has frequently held that this provision is broad enough to permit the employment of a person, such as a fingerprint expert or a physician, to give expert testimony in a criminal case, and to authorize the payment for their services out of the State treasury.

CRIMINAL LAW—Permitting livestock to run at large. F-75b

HONORABLE CHARLES H. FUNK,
Commonwealth's Attorney for Smyth County.

This is in reply to your letter of September 12, in which you ask whether permitting livestock to run at large in prohibited areas is punishable as a crime. You state that the only statute you have found on this subject states that it shall be unlawful to permit livestock to run at large, but does not specifically state that such an offense is a misdemeanor and does not prescribe any punishment.

I assume you have reference to Section 3548 of the Code, which reads as follows:

"It shall be unlawful for the owner or manager of any horse, mule, cattle, hog, sheep, or goat, to permit any such animal, as to which the boundaries of lots or tracts of land have been or may be constituted a lawful fence, to run at large beyond the limits of his own lands within the county, magisterial district, or portion of such county wherein the said boundaries have been constituted and shall be, a lawful fence on the day before this Code takes effect, or may be hereafter so constituted."

Code Section 4758 provides that "Offenses are either felonies or misdemeanors. Such offenses as are punishable with death or confinement in the penitentiary are felonies; all other offenses are misdemeanors." Section 4782 of the Code provides a punishment for misdemeanors, for which no punishment is otherwise specifically provided.

While as a general proposition no conviction can be had for the violation of a statute for which no penalty is provided, one statute may create the offense and another provide for its punishment. 22 C. J. S., pages 77, 78. In the case at hand, Section 4782 of the Virginia Code provides the punishment if it can be said that Section 3548 creates a criminal offense.

The doctrine appears to be well established that, where a statute either makes an act unlawful or imposes a penalty, this is sufficient to make the act a crime without an express declaration to that effect or an express declaration that the act specified is a misdemeanor. See 22 C. J. S., Criminal Law, Section 24, at page 77, and cases cited. Since Section 3548 expressly declares the acts there set forth to be unlawful and Section 4782 provides the punishment for all offenses for which no punishment is otherwise specifically provided, it is my opinion that a violation of Section 3548 is a misdemeanor punishable as provided by Section 4782.

There are some statutes which declare that certain things shall or shall not be done which should be considered directory only or as providing a course of conduct which would govern civil rights between private individuals. Such statutes would probably not be considered criminal statutes unless their context so required. Here, however, another provision, Section
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3541, deals with civil liability when animals are permitted to run at large. Section 3548, expressly declaring the acts set forth therein to be unlawful, should, in my opinion, be construed as a criminal statute.

Your attention is called to Sections 3549 and 3550, under which circuit courts may fix boundaries of villages or unincorporated communities and prevent certain animals from running at large within such boundaries. This section specifically provides a punishment for a violation of its provisions, so it is not necessary to invoke Section 4782 if a prosecution is had thereunder.


HONORABLE I. R. DOVEL,
Commonwealth's Attorney for Page County.

This is in reply to your letter of September 14, in which you ask the following question:

"If one accused of a crime should go to a witness for the Commonwealth and attempt to persuade the witness to come to court and under oath give a false statement of the facts, the said witness thereby committing perjury, would the accused who tampered with the witness be guilty of obstructing justice under the statute?"

The statute on obstructing justice is Section 4525, which makes it a misdemeanor for any person by threats or force to attempt to intimidate or impede a judge, justice, juror, witness, etc., in the discharge of his duty, or to obstruct or impede the administration of justice in any court. An essential ingredient of this offense is the use of threats or force, and the facts stated by you would not constitute a violation of this section.

However, the accused is guilty of the crime of subornation of perjury if he was successful in persuading the witness to give perjured testimony. He is guilty of an attempt to commit this crime if he was not successful. Subornation of perjury is punishable under Section 4494 of the Code, which reads as follows:

"If any person commit or procure another person to commit perjury, he shall be confined in the penitentiary not less than one nor more than ten years; or, in the discretion of the jury, be confined in jail not exceeding one year, or fined not exceeding one thousand dollars, or both."


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

This is in reply to your letter of February 9, 1950, which reads, in part, as follows:

"As you know, the $2.50 fee for Commonwealth's Attorneys taxed as part of the cost in criminal cases before the Trial Justice is allowable only in cases where it is the specific duty for the Commonwealth's Attorney to appear and prosecute."
"In that connection I would appreciate your opinion as to the proper interpretation of Title 19, Section 131 of the Code of 1950. It provides in part:

"'Every Commissioner of the Revenue, Sheriff, Constable or other officer shall give information of the violation of any penal law to the Attorney for the Commonwealth, who shall forthwith institute and prosecute all necessary and proper proceedings in such case ..."

"I think it has been the rule of your predecessors that the $2.50 fee is properly taxable where the information for the prosecution comes from the officers enumerated in the above statute. I am wondering whether or not the words 'other officer' would be broad enough to include cases in which the information came from county police appointed under Title 15, Section 562, and succeeding statutes. In this county we have eight such police and they are very active in criminal matters, especially in the urban areas surrounding Danville.

"I would also like your opinion as to whether or not the words 'other officer' would include members of the Virginia State Police. There are nine of them stationed in the Danville-Pittsylvania area and likewise they are quite active in criminal matters involving motor vehicles."

It is my opinion that the term other officer as used in this section should be construed to include officers charged with the enforcement of criminal laws within the area which the commonwealth's attorney serves. Since the two categories about which you inquire include officers charged with such duty, it is my opinion that they are properly within the provisions of the statute.

CRIMINAL PROSECUTIONS—Prisoner's hospital bill payable only if statutory procedure followed. F-75

HONORABLE T. WILSON CARPER,
Clerk of Franklin County Circuit Court.

This is in reply to your letter of June 16 in which you state that a young man received a severe blow on the head when he recently broke into another person's home. Upon being brought to the jail, the jail physician made X-rays of the young man's head and sent him in an ambulance to a hospital in Roanoke. You desire my opinion as to whether the State should pay this expense or whether it should be paid by the young man or the person responsible for his debts.

Under the facts as presented in your letter it is my opinion that the young man to whom you refer, or the person responsible for his debts, should bear the expense of the hospital bill in question. However, I call your attention to §19-291 of the Code, the pertinent part of which provides that, when in a criminal case a person renders a service for which no specific compensation is provided, the court may, in its discretion, allow them what it deems reasonable, and such allowance shall be paid out of the State Treasury from the appropriation for criminal charges, on the certificate of the court stating the nature of the service.

This office has previously ruled that the above-mentioned section is applicable in a case of this kind if the provisions of §19-286 are followed. These provisions are as follows:

"No compensation shall be allowed hospitals for the treatment of prisoners unless application shall have been made to the superintendent of the penitentiary, or to the superintendent of the State farm, for the admission of prisoners to the hospital wards of such institutions and such application shall have been refused, unless the disease, wound or accident, from
which the prisoner is suffering is of such an emergency kind that immediate
treatment in the hospital is necessary, and then only such amounts shall be
allowed to the hospitals as shall have been incurred before it is practicable
to remove the prisoner from the hospital to one of the institutions above
mentioned."

DEAD BODIES—Animals; duty of sheriff or designated officer to dispose
of if owner fails to do so. F-224

HONORABLE GEORGE D. CONRAD,
Commonwealth's Attorney for Rockingham County.

May 24, 1950.

This is in reply to your letter of May 23, in which you ask whether it is
the duty of the local health officer or the sheriff to enforce the provisions of
Section 32-70 of the Code of Virginia, which has been made applicable to Rocking-
ham County by an ordinance adopted by the governing body thereof. This section
reads as follows:

"The owner of any animal or grown fowl, which has died, when he
knows of such death, shall forthwith have its body cremated or buried, and
if he fails to do so any justice of the peace, after notice to the owner, if
he can be ascertained, shall cause any such dead animal or fowl to be
cremated or buried by an officer, or other person designated for the purpose,
and the officer or other person shall be entitled to recover of the owner
of every such animal so cremated or buried, a fee of five dollars, and of
the owner of every such fowl so cremated or buried a fee of one dollar,
to be recovered in the same manner as officers' fees are recovered, free
from all exemptions in favor of such owner. Any person violating the
provisions of this section shall be subject to a fine not exceeding twenty
dollars for each offense.

"This section shall not apply to any county until the governing body
thereof shall adopt the same."

Since a violation of this section is made a misdemeanor for which a fine is
imposed, it is my opinion that it is primarily the duty of the sheriff, as the law
enforcement officer of the county, to enforce its provisions. The officer who
would be directed by the justice of the peace to cause the dead animal or fowl
to be cremated or buried is the law enforcement officer to whom the justice of
the peace would normally direct his process. Of course, if the Board of Super-
visors in its resolution adopting this statute for the county designated some other
person as the one to bury or cremate the dead animals or fowls, the justice of
the peace would direct his order to such person.

While I find no statute imposing a specific duty upon the health officer to
enforce the provisions of this particular statute, it is my opinion that, since his
duties involve generally the control of communicable diseases, he would certainly
have authority to institute proceedings under this section in order to see that its
provisions are properly enforced. In this respect he would have concurrent au-
thority with the sheriff and other law enforcement officers.
DEAD BODIES—Disposition of where unclaimed. F-91a

Honorable Charles H. Funk,
Commonwealth's Attorney for Smyth County.

This is in reply to your letter of January 26 regarding payment of the burial expenses incurred for the burial of a man found at a still in Smyth County, who was killed in a fight with the officers who raided the still and who left no estate from which the burial expenses can be paid.

This matter is governed by Section 19-27 of the Code, which is a part of the Chapter dealing with the investigation of the death of persons who die from violence. This section reads as follows:

"After the investigation has been completed, including an autopsy if one is made, the dead body shall be delivered to the relatives or friends of the deceased person for burial. If no person claims the body it shall be turned over to the sheriff of the county or the sergeant or other like law enforcement officer of the city where death occurred for proper disposition. The expenses incurred by such officer in the disposal of the dead body shall be borne by the county or city where death occurred if the deceased person had no known place of residence within the State, but if the deceased person was a resident of Virginia at the time of death such expenses shall be paid by the county or city of residence. No such expenses shall be paid until allowed by the court of such officer's county or city. If the deceased person has estate out of which burial expenses can be paid, either in whole or in part, such estate shall be taken for such purpose before any expense under this section is imposed upon the county or city."

You will note that this section requires the approval of the court before the burial expenses can be paid by the county or city concerned.

DEATH CERTIFICATE—By whom signed. F-78

Dr. L. J. Roper,
State Health Commissioner.

This is in reply to your letter of December 8, in which you state that you have been informed by the County Health Officer of Arlington County that the Coroner of that County takes the position that death certificates signed by District of Columbia physicians who are not licensed to practice medicine in Virginia should not be accepted even though the patients may have been under the regular care of those physicians in the District. The Coroner takes the position that he is the only proper person to sign the death certificate when the decedent dies in Virginia. You request my opinion upon the following question:

"May a duly qualified physician not practicing the healing arts in Virginia, nor registered in Virginia, sign the death certificate of a decedent who has been his patient in an area where the said physician is duly licensed, even though the decedent dies in Virginia and the certificate is required for Virginia registration?"

Section 1567 of the Code provides that a death certificate shall be made and signed by the physician last in attendance on the deceased or by the coroner. It does not require that the physician be one duly licensed to practice medicine in
Virginia, even though the death occurred in this State and the certificate is furnished for Virginia registration.

While Section 1622 of the Code, which is contained in the chapter regulating the practice of the healing arts, provides that the signing of a death certificate shall be prima facie evidence that the person signing the same is practicing the healing arts or some branch thereof within the meaning of that chapter, this fact is not conclusive on this question. If a physician actually practiced his profession in the District of Columbia and the patient went to him in the District for attention, he would not be violating the statute regulating the practice in this State simply because he signed the death certificate. It is my opinion, therefore, that it is legal for a physician in another jurisdiction who was the last attending physician of the deceased to sign the death certificate even though he is not licensed to practice medicine in this State. He is a proper person to sign such certificate under the provisions of Section 1567.

DEED OF TRUST—To be indexed in name of person assuming payment. F-90a

HONORABLE ROBERT D. HUFFMAN, Clerk of Circuit Court of Page County.

This is in reply to your request for my opinion as to whether the assumption of an existing deed of trust by the purchaser as a part of the consideration in a deed of conveyance is required to be indexed in the names of the persons assuming the payment.

I find no statute requiring a grantee's agreement to assume an existing deed of trust to be indexed separately from the normal indexing of the conveyance to him as grantee. Section 17-79 of the Code requires a deed in which a vendor's lien is reserved to be doubly indexed to show the reservation of the lien as if it were a grant from the grantee to the grantor by a separate instrument, and in some states the assumption of an existing debt creates an implied vendor's lien. However, under Section 55-53 of the Code, there can be no implied vendor's lien in Virginia. It is my opinion, therefore, that Section 17-79 requiring double indexing in the case of a vendor's lien is not applicable unless such a lien is expressly reserved in addition to requiring the assumption of the debt.

DEPOSITS—County; Bank may pledge municipal bonds of Virginia cities and counties to secure county deposits; such bonds are valued at 100% of market value. F-37

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

I have your letter of February 9, 1950, which reads as follows:

"Planters Bank & Trust Company of Chatham is an official depository for county funds, selected by the County Treasurer and approved by the County Finance Board.

"The bank has pledged as security U. S. Government bonds but is desirous of substituting municipal bonds since the latter apparently have a higher interest yield. In this connection an issue has arisen as to how the securities shall be valued. Paragraph (1) of Title 58, Section 947 of the Code provides that securities in Title 2, Section 181 and those
in paragraphs (1), (2), (3) and (4) of Title 26, Section 40, shall be valued at market value. Included in Title 2, Section 181 is the following:

"... Registered or coupon bonds of any municipality, county, or sub-division thereof of the Commonwealth of Virginia, issued in compliance with the statutes authorizing the same ..."

"Included in Title 26, Section 40, are 'stocks, bonds, notes and other evidences of indebtedness of any county, city, town or district in the State of Virginia upon which there is no default'. Paragraph (3), Title 58, Section 947, provides that short-term notes or other obligations of municipalities or towns shall be valued at 80% of par. I would, therefore, like to have your legal opinion as to whether or not municipal bonds of Virginia Municipalities shall be valued at 100% or 80% of their market value. Paragraphs (1) and (2) of Title 58, Section 947, would indicate that such obligations should be 100% of the market value. However, paragraph (3) provides the 80% rule if the words 'other obligations' are sufficient to include municipal bonds.

"Since municipal bonds are specifically dealt with in paragraphs (1) and (2), I am inclined to believe that the 100% valuation rule is the correct one, but the matter is one of tremendous importance both to the County and the banking institutions and I would, therefore, appreciate any information that you could give under the circumstances."

I have studied the statutes set forth in your letter and other statutes relating to the subject, and it is my opinion that the conclusion which you have reached is correct. Since the municipal bonds of Virginia cities and counties are specifically dealt with by the statutes and are designated to be valued at 100% of market value, it is my opinion that the words "other obligations" in paragraph (3) of Section 947 of Title 58 is intended to deal with other short-term obligations and does not include all coupon bonds of the character described in Title 2, Section 181.

DEPOSITS—Securities pledged to protect county deposit can not be held in Federal Reserve Bank. F-113

HONORABLE J. GORDON BENNETT, Auditor of Public Accounts.

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

"Several days ago representatives of the Federal Reserve Bank conferred with me relative to that Bank's holding certain securities pledged by a depository for the protection of funds held by the depository for a Virginia county.

"Attached hereto are certain correspondence and data filed with me by the Federal Reserve Bank of Richmond in connection with their proposal to hold the securities. Under the provisions of Sections 58-938 through 58-952 (old Tax Code Section 350), funds of a county may be deposited in Bank A, provided Bank A deposits certain securities in escrow with Bank B to be held on behalf of the county for the protection of the county's funds on deposit in Bank A.

"Under the procedure proposed by the Federal Reserve Bank, Bank B, the escrow agent, will deposit with the Federal Reserve Bank for safekeeping the securities pledged by Bank A. The Federal Reserve officers advised me that they can not be a party to any escrow agreement, but that such securities as may be pledged by Bank B will be
received by them in the name of the treasurer of the county depositing the funds with Bank A. Attached hereto is a card showing the agreement of the public official or the public body and the signature of its designated official with the Federal Reserve Bank. You will notice that this agreement indicates that the securities are being held for the account of the public official rather than for the escrow agent, Bank B.

"We should appreciate it if you would review Sections 58-938 through 58-952, and specifically Section 58-945, and give us your advice as to whether an arrangement such as that proposed by the Federal Reserve Bank would be in conformity with Section 58-945 and any of the other sections quoted above which may be pertinent thereto."

I have examined the data submitted with your letter, which included the form of agreement which will have to be signed by county treasurers if this arrangement with the escrow banks and the Federal Reserve Bank is put into effect. This agreement provides in part that the public official acknowledges receipt of Operating Circular No. 16 of the Federal Reserve Bank and that he accepts the terms and conditions thereof.

The circular expressly provides that the Federal Reserve Bank acts solely as custodian or bailee of the securities and "in no event will undertake to act as an escrow agent." It contains provisions limiting the liability of the Federal Reserve Bank for losses occurring in shipment and in certain other particulars.

Section 58-945 of the Code provides that "all securities pledged by any depository to protect money deposited with it under the provisions of this article shall be deposited in escrow with some bank or trust company in this Commonwealth, other than the depository, which shall be acceptable to and approved by the depository and the county finance board."

The arrangement under which the Federal Reserve Bank will accept custody of the securities seems applicable only where securities are deposited or pledged with the public official himself and not when they are deposited in escrow with a second bank. This appears so from the fact that the Federal Reserve Bank's agreement is between the depository bank, the public official and itself, not between the escrow bank, the public official and the Federal Reserve Bank. However, since the agreement on the part of the Federal Reserve Bank expressly negatives the fact that it will act as an escrow agent, I do not think that county treasurers can enter into the proposed agreement, since the law expressly requires the securities to be deposited in escrow with some bank or trust company. For the treasurer to authorize the escrow bank to use the facilities of the Federal Reserve Bank under an agreement signed by the treasurer whereby the Federal Reserve Bank expressly limits its liabilities in certain respects would in effect be a waiver by the treasurer of the obligations of the escrow bank under the escrow agreement in return for the lesser responsibilities assumed by the Federal Reserve Bank.

For these reasons, it is my opinion that the proposed arrangement would not be in conformity with the statutory requirements.

DEPOSITS—Securities pledged to secure county funds must be held by bank within this state. F-130

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.

This is in reply to your letter of September 8 in which you quote the following paragraph from a letter you have received from Mr. Sidney S. Kellam, Treasurer of Princess Anne County, Princess Anne, Virginia.
"As you know, all the banks which are designated as depositories for County funds, we require them to put up securities to be held in escrow by another bank. I would appreciate it if you would advise me whether or not, in your opinion, one of our local banks can designate a New York Bank to hold for it bonds to be held in escrow for the protection of the deposits of Princess Anne County, if the proper agreement has been duly executed by the local bank, the New York Bank and the Finance Board and the Treasurer."

You request my opinion upon this question as to whether a county finance board has the right to accept as an escrow agent a bank not within the State of Virginia.

Paragraph E of §350 of the Tax Code, which deals with depositories for county funds, provides that "All securities pledged by any depository to protect money deposited with it under the provisions of this section shall be deposited in escrow with some bank or trust company in this Commonwealth." This provision makes it clear that a bank located without the State of Virginia cannot be accepted as an escrow agent to hold the securities pledged by the depository.

DIVISION OF PURCHASE AND PRINTING—Authority to reject all bids and negotiate contract. F-227

CONTRACTS—Division of Purchasing and Printing, authority to reject all bids and negotiate contract. F-227

October 24, 1949.

HONORABLE A. B. GATHRIGT, Director, Division of Purchase and Printing.

This is in reply to your letter of October 19, 1949, in which you ask if, in certain situations, the Division of Purchase and Printing may negotiate a contract on the best terms and conditions possible to secure, instead of awarding the contract on the basis of competitive bids. The situations you set forth are as follows:

1. Invitations to bid are sent to suppliers and no bids are received.
2. Invitations to bid are sent to suppliers and only one bid is received which bid is not acceptable to the Division and is, therefore, rejected.
3. Invitations to bid are sent to suppliers and two or more bids are received, none of which is acceptable to the Division and all are, therefore, rejected.

Your letter indicates that the policy of the Division is to "give effect, to the fullest extent possible, to the requirement with respect to the securing of competitive bids." Toward that end you state that where only one bid is received and it is not acceptable to the Division, or where several bids are received, all of which are not acceptable, "it has been customary for the Division to readvertise."

Your letter then goes on to state:

"It would appear, from a practical standpoint, when a reasonable effort has been made by the Division to comply strictly with the intent of the law with respect to the securing of competitive bids and no bids are received, or, no acceptable bids are received, that this requirement of the law has been satisfied and thereafter the Division could lawfully negotiate a contract to contain the best terms and conditions possible to secure."

In my opinion your conclusions are entirely sound. As you know, the requirements for competitive bidding are set forth in §§2-220 and 2-251 of the Reorganization Provisions of the Code of Virginia. These provisions read as follows:
"The Director of the Department of Accounts and Purchases shall have done all the printing, binding, ruling, lithographing, and engraving required by any department, division, institution, officer or agency of the State, and authorized by law to be done, or required in the execution of any law, and the work shall be executed upon competitive bids if practicable. Awards shall be made to the lowest responsible bidder, having due regard to the facilities and experience possessed by such bidder."

"The Director shall, when the amount of materials, equipment and supplies needed exceeds one thousand dollars, and in all other cases may, if practicable to secure competitive bids, advertise for bids on State purchases in such manner and for such lengths of time as he may determine. When purchases are made through competitive bidding, the contract shall be let to the lowest responsible bidder, taking into consideration the qualities of the articles proposed to be supplied, their conformity with specifications, the purposes for which required, and the times of delivery. Bids shall be received only in accordance with standards and standard specifications, if any, adopted by the Director. All bids may be rejected. Each bid with the name of the bidder shall be entered of record, and each record, with the successful bid indicated, shall, after the letting of the contract, be open to public inspection."

The object of the legislature in requiring that State purchases be made through a system of competitive bidding where practicable, was to benefit the taxpayers of the Commonwealth by securing the services, materials, equipment and supplies required by the agencies of the State government at the lowest possible cost. The legislature apparently anticipated just such situations as those about which you inquire, for it was provided that in any case the State, acting through the director might reject all bids. This provision is found in §§2-221 and 2-251. It was also foreseen that in some instances it would be impracticable to readvertise for bids since it was not made mandatory that all purchases be made on the basis of competitive bids. The statutes provide that purchase be made on this basis only if practicable. (See §§2-220 and 2-251 above).

In my opinion the statutes contemplate readvertising for bids where it is practicable. If it is impracticable to do so, the Director of the Division of Purchase and Printing may, in a proper case, negotiate a contract without first readvertising.

After a reasonable effort has been made to comply strictly with the intent of the law with respect to securing competitive bids and this effort has resulted in no bids being received, or no acceptable bids being received, if the Division of Purchase and Printing find that a further effort to secure satisfactory bids would be fruitless or impracticable due to limitation of time or other conditions, or that the Commonwealth can obtain a better contract by direct negotiation, it is in my opinion proper to reject all bids and proceed to negotiate a contract on the terms most advantageous to the Commonwealth possible to obtain.

DOG CODE—Compensation for unassessed livestock killed by dogs. F-95

December 14, 1949.

HONORABLE R. V. SNEAD,
Commonwealth's Attorney for Rappahannock County.

This is in reply to your letter of December 8, in which you request my opinion as to the legality of the payment of a claim by your Board of Supervisors for a resident taxpayer's hogs killed by dogs other than his own, where the hogs were littered after January 1, 1949, and, therefore, were not assessed as provided in Section 3305(75) of the Code of Virginia.
While Section 3305(75) of the Code does not seem to provide expressly for payment to the owner of livestock killed by a dog, where such stock has not been assessed, except in case of lambs or poultry, nevertheless, it would seem to be the intention of the statute, in cases where the owner of livestock has followed an invariable custom of listing his livestock for taxation and reporting same to the Commissioner of the Revenue, to allow compensation in such a case as would be allowed for lambs or poultry. I am, therefore, of the opinion that the claim in question should be allowed.

DOG LAW—Compensation—Game chickens killed by stray dogs. F-95

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

I have your letter of December 20, 1949, from which I quote as follows:

"A resident of Norfolk County filed a claim with the Board of Supervisors of Norfolk County for compensation for game chickens killed by stray dogs under the provisions of Section 29-202, Code of 1950. The Game Warden made an investigation and recommended payment on the basis of the fair value of ordinary poultry. The owner contends that fair value of game chickens is in excess of the fair value of ordinary poultry, since his chickens are sold out of the State and bring fancy prices. I will appreciate your opinion in the matter."

Section 29-202 of the Code of 1950, which reads the same as Section 3305(75) of Michie's Code of 1942, is as follows:

"Any person taxed by the State, who has any livestock or poultry killed or injured by any dog not his own shall be entitled to receive compensation therefor at the assessed value of such livestock and fair value of unassessed lambs or poultry, and in addition thereto may recover from the owner or custodian of such dog, in an appropriate action at law, the difference between the assessed value and the full value of such livestock or poultry; but in no case shall any such person receive or recover for any livestock or poultry so killed more than the then fair value thereof regardless of what the assessed value may be. Nothing herein shall be construed as limiting the common law liability of an owner of a dog for damages committed by it. Claimants for damages shall furnish evidence under oath of quantity and value to the governing body of the county or of any city within ninety days after sustaining such damage."

You will note that the last sentence of this Code section provides that the claimant must furnish evidence of value to the governing body. In my opinion if the claimant can prove that the chickens which have been killed were game chickens and that, as such, their value was greater than that of ordinary chickens, then it would be proper for the Board of Supervisors to consider this factor in arriving at a determination of the fair value.
DRY CLEANERS ACT—Punishment for violation of same. F-232

HONORABLE R. W. BILLINGSLEY, Secretary, State Dry Cleaners Board.

You request my opinion on the following situation:

An individual was charged with a violation of the penal provisions of the State Dry Cleaners Act (Sections 1702 J Michie's Code 1942; 54-214 Virginia Code 1950).

Judgment of conviction and fine was imposed under a warrant naming the individual as President, "Main Clothiers, Incorporated, a corporation trading as Bingo Lockers." The defendant refuses to pay the fine and continues in violation as a result of which a subsequent warrant has been issued. You state that the condition of the business and assets of the corporation are such that civil procedure to collect the fine would prove of no avail.

When judgment for a fine is rendered, the court may commit the defendant to jail until the fine and costs are paid. Virginia Code Sections 2529; 19-320 Code 1950.

In lieu of committing to jail, the Judge, in his discretion, may take security for the payment of fine and costs to be paid within thirty days from date of trial. If the security is not given, the defendant may be committed to jail.

The fact that the warrant names the defendant as president of the offending corporation should not necessarily occasion difficulty.

The law seems well settled that where a corporation through its officers and agents engages in a business or pursues a course of conduct in violation of law, all who participate therein are criminally liable. (Crall, et al v. Commonwealth, 103 Va. 855).

If the officer participates in the criminal act, a series of such acts or pursues a course of criminal conduct, it is no defense to his liability that he acted in his official capacity as an officer of the corporation.

You desire to know what steps might be taken to stop continued violations.

Each day a violation continues shall be deemed a separate offense. The penal provisions of the law could be constantly applied to successive offenses.

I do not believe that resort to injunction to restrain future violations of the statute could be sustained in the instant matter.

DRY CLEANERS BOARD—Dry cleaners cannot withdraw from the Board's control after submitting to it. F-232

HONORABLE STUART CARTER, Member of the House of Delegates.

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

"Some of the dry-cleaners in the City of Bristol, Virginia, have indicated that they are not satisfied with the manner in which the State Dry-Cleaners Board has administered its duties as set forth in Section 54-208 of the Code of Virginia. Section 54-216 provides that when two-thirds of the dry-cleaners desire to come under the jurisdiction of the State Dry-Cleaners Board, they may do so. The Dry-cleaners in Bristol desire to know whether or not they can, by a similar vote, withdraw from the provisions of this law."
As you indicated, §54-216 of the Code provides when the chapter concerning Dry Cleaners shall be effective. However, I find no provision whereby those persons actually engaged in the cleaning business can withdraw from the control of the State Dry Cleaner’s Board, thereby no longer being affected by the chapter in question. A law which becomes effective upon the happening of a contingency or a future event, in my opinion, is in the same category as any other law when such contingency has taken place. In other words, after the dry cleaners in the City of Bristol expressed their desire to come under the control of the State Dry Cleaner’s Board, they must continue to be governed by the provisions of this law until it is repealed by the General Assembly.

EDUCATION—Superintendent of Public Instruction; bonds required of clerks. F-228

June 23, 1950.

HONORABLE DOWELL J. HOWARD,
Superintendent of Public Instruction.

This is in reply to your letter of June 16, in which you ask for my interpretation of the word “clerks” as used in Section 2-7 of the Code of Virginia, which provides that the penalty of the bond of the Superintendent of Public Instruction shall be ten thousand dollars and “of each of his clerks, two thousand dollars.”

While Section 22-26 of the Code provides for the appointment by the Superintendent of Public Instruction of such employees as may be necessary for doing the work in his office, I find no statutory reference to “clerks” of the Superintendent. The word “clerks” was obviously not intended to cover all employees and it is impossible to give any specific definition to the term as used in Section 2-7.

You state that, in your Department, the provisions of Section 85 of the Constitution of Virginia, which requires that all deputies, assistants, or employees of State officers charged with the collection, custody, handling or disbursement of public funds be bonded, are complied with. It is my opinion that this is a sufficient compliance with Section 2-7. I believe that the word “clerks” as there used should be taken to mean the type of deputies, assistants or employees referred to in Section 85 of the Constitution and that Section 2-7 should be considered as merely fixing the amount of the bonds of such individuals.

ELECTIONS—Ballots; convicted felon not entitled to have name thereon. F-100b

May 1, 1950.

HONORABLE EUGENE W. CHELF,
Commonwealth’s Attorney for Roanoke County.

This is in reply to your letter of April 26 in which you ask whether or not it is the duty of the local electoral board to refuse to have the name of a candidate printed upon the official ballot, since he was convicted of a felony in 1931 and has not had his political disabilities removed by the Governor.

Section 23 of the Constitution expressly provides that a person convicted of a felony shall be excluded from registering and voting, and Section 24-132 of the Code, which is applicable to councilmanic elections, provides that no
person who is not qualified to vote in the election in which he offers shall have his name printed on the official ballot.

Therefore, it is clear, in my opinion, that the candidate to whom you refer is not entitled to have his name printed on the official ballot as a candidate for member of the council of the town of Salem.

This office has previously ruled that it is the duty of the electoral board to determine the qualifications of a candidate and, for your information, I am enclosing a copy of an opinion rendered by the former Attorney General, the Honorable Abram P. Staples to the Honorable Thos. W. Blackstone, Secretary of the Electoral Board, Accomac, Virginia, on April 18, 1936, in which is outlined the procedure to be followed when the qualifications of candidates are doubtful.

ELECTIONS—Ballots; instructions for marking. F-100a

Honorable Wilmer L. O'Flaherty, Secretary,
City Electoral Board for Richmond.

This is in reply to your letter of April 25, 1950, from which I quote as follows:

"Section 3.01 of the Richmond City Charter, Acts of General Assembly 1948, page 188, provides that the City Council shall consist of nine members elected at large. In the printing of the ballot it has been customary heretofore to put the following words after the office to be voted for, as for example,

"FOR COUNCIL

"(Vote for Nine)

"My attention has been called to Title 24-217 of the Code of Virginia 1950 which reads as follows:

"'To indicate number of candidates to be voted for.—It shall be the duty of the electoral boards, in preparing the ballots for general, special and primary elections, to cause to be printed in small type, immediately below the title of any officer for which there appear on the ballots the names of more than one candidate, a note stating the number of candidates who may be voted for for that office.'

"Likewise, I have been referred to Section 3.03 of the Richmond City Charter, Acts of General Assembly 1948, which reads in part as follows:

"'* * * Each qualified voter shall be entitled to cast one vote for each of as many as nine persons and no more.'

"It has been suggested that the language ' (Vote for Nine)' , supra, is misleading in that it might be construed to direct the voter to vote for as many as nine; and that the following language, for example, should be used instead:

"

"(Vote for not more than nine).

"As secretary of the Richmond City Electoral Board, I am requesting that you advise me whether or not the following wording on the ballot would be legal for the coming June councilmanic election in the City of Richmond:

"FOR COUNCIL

"(Vote for not more than nine)."
It is my opinion that the duty imposed upon the electoral boards by §24-217 of the Code "to cause to be printed in small type, immediately below the title of any officer for which there appear on the ballots the names of more than one candidate, a note stating the number of candidates who may be voted for for that office" includes the duty to so phrase the note as to be conducive to intelligent voting. Since it appears that the language now used on the ballots might be misleading to the voters and the suggested language would be less likely to be misconstrued, the suggested change is entirely legal, in my opinion.

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**ELECTIONS—Candidates**; candidates for local offices and candidates nominated by convention or mass meeting not required to file notice of candidacy with State Board of Elections. F-100b

August 26, 1949.

**Honorable E. S. Ashby,**
City Treasurer for Harrisonburg.

This is in reply to your two letters of August 23rd regarding certain matters pertaining to the election laws.

You asked if the candidates for City Treasurer and City Commissioner of Revenue, who have not been nominated by a convention, in a primary or by a mass meeting, must file a copy of their notice of candidacy and accompanying petition of fifty qualified voters with the State Board of Elections or other state authority as well as the local clerk. Section 154 of the Code provides that candidates for such local offices shall file their notices and petitions with county clerk or the clerk of the Corporation Court of the city whose electors vote for such office but does not require a copy of the same to be sent to the State Board of Elections or other state agency. During the existence of the War Voters Act it was required to file a copy with the State Board of Elections but this Act expired on July 1, 1948.

You also asked if candidates for the House of Delegates who are nominated by a mass meeting have to file or if this can be done by the Chairman of the party and in such cases with whom does the candidate's name have to be filed. Section 154 provides that the name of any candidate for office who has been nominated by his party, either by convention or primary, shall be certified by the Chairman of the party to the State Board of Elections or the clerk or clerks of the proper court or courts as the case may be and no further notice of candidacy or petition shall be required. Since the notices have to be filed for such offices with the county clerk or clerks of the county or counties and with the clerk or clerks of the corporation courts of the city or cities whose electors vote for such office, the names of candidates nominated by convention or mass meeting should be certified to such clerks by the Chairman of the party. It is not necessary that a copy be filed with the State Board of Elections.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—Candidate—Eligibility of, must be qualified voter.  F-100b

Honorable Archie C. Berkeley, Chairman,
City Democratic Committee of Richmond.

This is in reply to your letter of June 30, in which you ask the following question:

"May a candidate's name be printed upon a primary ballot for the Democratic Primary August 2, 1949, if said candidate has qualified in all respects except that his name does not appear in the 'State Poll Tax List' as prepared and certified to the Clerk of the Hustings Court of the City of Richmond by the City Treasurer, and said candidate's name does not further appear in the 'Supplementary State Poll Tax List' also certified by said Treasurer for said primary and general election to be held on November 8, 1949, and said candidate has not furnished any evidence of said payment of poll tax for one (1) of the last three (3) tax years for which the said Treasurer has said candidate charged with as due and unpaid?"

I call your attention to Section 229 of the Code, which provides:

"The name of no candidate shall be printed upon any official ballot used at any primary unless such person is legally qualified to hold the office for which he is a candidate, and unless he is eligible to vote in the primary in which he seeks to be a candidate, * * *"

If the person to whom you refer was assessable with poll taxes for each of the three years preceding 1949 and has failed to pay the tax for one of said years, he would not be eligible to vote in the primary and, in view of the above provision, his name should not be placed upon the ballot to be used at the Primary.

Since your first question is answered in the negative, it is unnecessary to deal with your second question relating to the general election.

ELECTIONS—Candidates; eligibility of—Payment of poll taxes—Residence.  F-100b

Mr. Vincent Hollis, Chairman,
Winchester Board of Elections.

This is in reply to your letter of February 14, in which you request my opinion as to whether a certain person is eligible to be a candidate for election to the Common Council of the City of Winchester in the primary to be held on April 4th of this year.

It appears that while the candidate has resided in Winchester for twenty-two years, he had always voted in West Virginia and had kept his domicile there until June of last year, at which time it was his intention to give up his domicile in West Virginia and become domiciled in this State. It further appears that this candidate paid his 1949 poll tax on or before December 1, 1949, but has not paid his poll tax for the years 1947 and 1948. Therefore, the question to be decided is whether or not he has paid, in accordance with the requirements of Section 21 of the Constitution, all State poll taxes legally assessed or assessable against him for the three years next preceding that in which the election is to be held, since, of course, he must be a qualified voter in order to be a candidate for the local office in question.

Sections 58-49 and 58-51 of the Code provide, with certain exceptions not pertinent here, that a state poll tax is levied on every "resident" of this State,
and Section 58-5 of the Code defines a resident for tax purposes in the following language:

"Every person domiciled in the Commonwealth of Virginia on the first day of any tax year, and every other person who has had his place of abode in this State for the longer portion of the twelve months next preceding the first day of January in each year shall be deemed a resident of this State for the purpose of taxation, * * *." (Italics supplied).

Therefore, in view of the above quoted section, I am of the opinion that the word, resident, as used in Sections 58-49 and 58-51 of the Code, means a person who has his place of abode in this State for a period of more than six months, regardless of whether or not such person has adopted Virginia as his legal domicile.

I might add that it has always been the administrative practice of the Department of Taxation to construe the word, resident, in this manner.

Since it appears then that the poll tax was legally assessable against this candidate for the years 1947 and 1948 by virtue of his residence in the City of Winchester during those years, and since it appears that this candidate has not paid such taxes within the time required for voting in the forthcoming council-manic elections, it is my opinion that he is not a legally qualified candidate.

ELECTIONS—Candidate for general election must qualify sixty days prior thereto. F-100b

HONORABLE STUART CARTER,
Member of House of Delegates.

This is in reply to your letter of July 8, in which you refer to an opinion of Attorney General Staples dated August 20, 1947, addressed to Honorable Joseph Whitehead, Jr., of Chatham, Virginia, wherein it was stated that notice of candidacy and qualification of candidates had to be filed within seven days after the first Tuesday in August in order for such candidate to have his name printed on the ballot for the November voting. You ask whether or not this deadline still prevails.

The opinion expressed by Attorney General Staples in 1947 was based upon Section 3 of Chapter 2 of the Acts of the Extra Session of 1945 as amended by Chapter 1 of the Acts of 1946. This 1945 Act expired on July 1, 1948, by virtue of an express limitation contained therein. The time for filing notices of candidacy is, therefore, now governed by Section 154 of the Code, which provides that any person who intends to be a candidate for any office, State or National, to be elected by the electors of the State at large or of a congressional district shall file his notice at least thirty days before the general election, and that any person who intends to be a candidate for any other office shall give notice at least sixty days before the general election. A candidate for the General Assembly must, therefore, qualify at least sixty days before the November election.
ELECTIONS—Candidate; one who has not qualified to vote by payment of poll taxes can not have name printed on ballot. F-100b

September 30, 1949.

HONORABLE W. O. FIFE,
Commonwealth’s Attorney for Albemarle County.

I am in receipt of your letter of September 29 reading, in part, as follows:

“Mr. William S. Downing, a resident of Albemarle County, has been certified by the Republican Legislative District Committee to the Clerk of the Circuit Court of Albemarle County as a candidate for election in the November General Election to Membership in the House of Delegates of Virginia from the Counties of Albemarle and Greene and the City of Charlottesville. The records in the office of the Department of Finance of Albemarle County show that Mr. Downing paid his capitation tax for the year on July 13th, 1949.”

You ask whether or not, under these circumstances, Mr. Downing is a qualified candidate in the coming election for the office mentioned, and if not, whether his name should be printed on the ballot.

Section 21 of the Constitution of Virginia provides as a prerequisite to the right to vote that a person shall “personally pay, at least six months prior to the election, all State poll taxes assessed or assessable against him, under this Constitution, during the three years next preceding that in which he offers to vote.” There are, of course, exceptions to this requirement, however, they are not pertinent to the present question. Since Mr. Downing paid his taxes for the year 1948 on July 13, 1949, he has not complied with the requirement of §21 of the Constitution, and is, therefore, ineligible to vote in the November general election.

Section 44 of the Constitution of Virginia reads, in part, as follows:

“* * * and any person may be elected a member of the House of Delegates who, at the time of the election, is actually a resident of the house district and qualified to vote for members of the General Assembly.” (Italics supplied).

Since at the time of the election Mr. Downing will not be qualified to vote, it follows that he is not qualified to be elected a member of the House of Delegates.

Section 154 of the Code of Virginia says, among other things,

“* * * no person not announcing his candidacy as above, or who is not qualified to vote in the election in which he offers as a candidate, shall have his name printed on the ballot provided for the election unless he be a party primary nominee; * * *.” (Italics supplied).

You will thus see that where a party is ineligible to vote he cannot have his name printed upon the official ballot.

ELECTIONS—Capitation Tax—Members of Coast Guard not liable. F-100c

March 6, 1950.

HONORABLE LEVIN NOCK DAVIS, Secretary,
State Board of Elections.

This is in reply to your letter of March 3, 1950, in which you request my opinion as to whether a person serving in the Coast Guard at the
present time is exempt from paying poll taxes as a prerequisite to voting, since the Coast Guard has been transferred to the Treasury Department. Article XVII, Section 1 of the Constitution of Virginia reads as follows:

"Certain members of armed forces exempt from payment of poll tax and from registering as condition of right to vote.—No member of the armed forces of the United States, while in active service in time of war shall be required to pay a poll tax or to register as a prerequisite to the right to vote in any and all elections, including legalized primary elections."

In the United States Code Annotated, under Title 14, Coast Guard, Section 1, the following language appears:

"The Coast Guard as established January 18, 1915, shall be a military service and a branch of the armed forces of the United States at all times. The Coast Guard shall be a service in the Treasury Department, except when operating as a service in the Navy." (Italics added).

It would appear from the United States Code section cited that it is contemplated that the Coast Guard shall constitute a part of the armed forces, even while a service of the Treasury Department, and since, for the purposes of Article XVII of the Constitution of Virginia, World War II has not yet been terminated, it follows that one who is on active duty in the Coast Guard is not required to pay poll taxes as a prerequisite to voting.

ELECTIONS—Capitation Tax—Naturalized citizen. F-100c

HONORABLE J. E. COX,
Treasurer of Fauquier County.


This is in reply to your letter of December 20, in which you state that a European War Bride came to the United States in March, 1947, and has resided in the State of Virginia since that date. She became a naturalized citizen of the United States on December 7, 1949.

You ask for what years is she required to pay a poll tax in order to qualify to vote in the August primary and November general elections to be held in 1950.

It is not necessary for a person to be a citizen of the United States in order for such person to be liable for the capitation tax. If the person is a resident of Virginia, the tax is assessable against her. Since she became a resident of Virginia in 1947, she was assessable for the capitation tax in 1947, 1948 and 1949. You will recall that Section 22 of the Tax Code was amended in 1942 to impose a capitation tax upon new residents of Virginia for the year in which they became residents, even though they may not have moved into the State until after January 1 of that year.

To be eligible to vote in the elections to be held in 1950, a person must have paid all capitation taxes assessable against him for the three years next preceding 1950, so in the case you present the individual must pay her capitation taxes for the years 1947, 1948 and 1949 to be qualified to vote in the elections held in 1950.
ELECTIONS—County officers must be elected on regular November election day and General Assembly can not change date. F-83

March 7, 1950.

HONORABLE CHARLES R. FENWICK,
State Senator.

This is in reply to your request for my opinion as to whether or not the General Assembly may provide that, in those counties operating under the county manager form of government provided for in Chapter 12 of Title 15 of the Code of Virginia, the members of the county board and other officers shall be elected in May instead of in November.

Article VII, Section 112, of the Constitution of Virginia reads as follows:

“§112. Elections for county and district officers, when held; terms of officers.—Regular elections for county and district officers shall be held on Tuesday after the first Monday in November, and such officers shall enter upon the duties of their offices on the first day of January next succeeding their election, and shall hold their respective offices for the term of four years, except that the county clerks shall hold office for eight years.”

While in Article VII, Section 110, it is provided that “Notwithstanding the provisions of this article, the General Assembly may, by general law, provide for complete forms of county organization and government different from that provided for in this article,” this does not, in my opinion, authorize the General Assembly to provide that county officers shall be elected at a different time from that specifically fixed by Section 112. The time of election of county officials does not, in my opinion, affect the form of county organization and government.

Whatever may be the particular form of organization and government of a county, the regular election for the county officers to be elected under that particular form is required by Section 112 of the Constitution to be held on Tuesday after the first Monday in November. It is my opinion that any law changing the date of the election of county officers would violate this constitutional provision.

ELECTIONS—Eligibility of candidates; for two offices at same election; local board has no authority to pass on eligibility of candidate; must be resident, registered and qualified to vote. F-100b

May 11, 1950.

HONORABLE W. H. LINESWEAVER, Secretary,
Electoral Board of Rockingham County.

This is in reply to your letter of May 3, in which you requested my opinion on the following questions with regard to the forthcoming town elections to be held on June 13:

1. May a person who has qualified for the offices of town sergeant and town councilman have his name printed on the official ballot as a candidate for both such offices at the same election?

2. May a registrar who has qualified for the office of town councilman have his name printed on the official ballot?

3. May a candidate who has filed for the office of town councilman but resides outside the present corporate limits have his name printed on the official town ballot in view of the fact that on May 18 he may reside within the corporate limits, due to annexation proceedings?
In answer to your first question, I know of no constitutional or statutory provision that would prohibit a person from being a candidate for two offices at the same election and, since you have stated that the candidate has duly qualified for both offices, it is my opinion that it is the duty of the local electoral board to have his name printed on the official ballot as a candidate for both such offices.

As you know, Section 24-66 of the Code prohibits a registrar from holding an elective office under certain circumstances. However, regardless of whether the registrar in question comes within the prohibition of this section, it is my opinion that it is not controlling in answer to your second inquiry, for Section 24-132 of the Code sets forth the conditions with regard to the printing of the names of candidates on the official ballot. It is as follows:

"No person not announcing his candidacy as above, or who is not qualified to vote in the election in which he offers as a candidate, shall have his name printed on the ballots provided for the election, unless he be a party primary nominee."

It can be seen from the above quoted section that if a person has announced his candidacy as required by law and is qualified to vote in the election in which he offers, it is mandatory that his name be printed on the official ballot. Therefore, I am of the opinion that a local electoral board has no authority to pass upon the question of the eligibility of a candidate for the office which he seeks, and such would be the result in this case if the electoral board refused to have the name of the candidate, who has apparently met the requirements of Section 24-132, printed on the official ballot. The answer to your second question, then, is in the affirmative.

It is my opinion that the local electoral board should not print the name of the candidate, referred to in your third question, on the official ballot unless it is shown to the satisfaction of the board that he will in fact be a legal resident of the town on June 13, and will be properly registered and qualified to vote in the town at that time.

ELECTIONS—Eligibility of voter becoming twenty-one years of age in 1949
—Payment of capitation tax. F-100c

December 19, 1949.

Miss Hazelthine M. Settle,
General Registrar for Roanoke.

This is in reply to your letter of December 14, regarding the eligibility of a person who became twenty-one years of age in 1949 and who registers during that year to vote in 1950 without the payment of a capitation tax for the year 1950.

It is my opinion that, if such person became of age after January 1, 1949, he may vote in 1950 without the payment of any capitation tax because no capitation tax was assessable against him for 1949 or any of the other three years preceding 1950, the year in which he offers to vote.

This matter is covered by the bulletin issued by the State Board of Elections, a copy of which you enclosed with your letter. That bulletin is a copy of the opinion rendered by the Honorable Abram P. Staples on November 4, 1946, while he was Attorney General, to the Honorable E. S. Ashby, City Treasurer of Harrisonburg. You will note that in the first paragraph of the quoted opinion Mr. Staples stated that a person becoming of age in 1945, after January 1, may register during 1945 without the payment of any capitation tax and may thereafter vote in the November, 1946, election without paying any such tax.
If the person becoming of age during 1949 does not register until 1950, he will have to pay his capitation tax for 1950 in order to register. This is so since Section 20 of the Constitution, which deals with registration, provides that, if a person becomes of age at such time that no poll tax is assessable against him for the year preceding that in which he offers to register, he must pay the first year's capitation tax which is assessable against him. That would be for the year 1950. If he had offered to register in 1949, the 1950 tax would not have been then assessable against him and might never become assessable because of death or removal from the State. For that reason he would be entitled to register during 1949 without the payment of any tax. If he waits until 1950 to register, the 1950 tax will have become assessable against him and will have to be paid as required by Section 20.

However, as pointed out above, if he registers in 1949, at which time no tax is required, he may vote in 1950 without paying any tax. This result follows because the requirement for voting is different from that for registering. To vote, one must only be registered and have paid all capitation taxes assessable against him for the three years preceding that in which he offers to vote, while to register, he must have paid such taxes and also, under the circumstances mentioned above, the first year's capitation tax assessable against him.

With respect to those who moved into Virginia during 1949 who wish to register and vote in 1950, they are required to pay the 1949 tax because of the amendment of Section 22 of the Tax Code in 1942. That amendment provided that the capitation tax shall be assessed against new residents for the year they become residents, whether or not this be after January 1 of that year. Since the tax was assessable for 1949, which is one of the three years preceding 1950, the year in which the new resident offers to register and vote, the tax for 1949 must be paid to entitle him to register and vote.

ELECTIONS—Eligibility to vote; resident of first class city not eligible to vote in adjoining county elections. F-100b

ELECTIONS—Candidates; not eligible unless qualified voter. F-100b

HONORABLE J. ROBERT SWITZER, Clerk of Circuit Court of Rockingham County.

This is in reply to your letter of December 7, in which you state that the next census may show the City of Harrisonburg to have sufficient population to become a city of the first class. You ask, if the city becomes a city of the first class, may a person residing therein become a candidate for office in the County of Rockingham, since the Court House for the County is located within the City.

Section 154 of the Code provides how candidates may declare for public office and states that “No person not announcing his candidacy as above, or who is not qualified to vote in the election in which he offers as a candidate, shall have his name printed on the ballots provided for the election, unless he be a party primary nominee; * * *.” Since a resident of a city of the first class cannot vote in elections held in an adjoining county for the purpose of selecting county officers, this provision would prohibit such person from becoming a candidate and having his name printed upon the ballot.

It is true, as you point out, that Section 2703 provides that “Every county officer shall, at the time of his election or appointment, have resided one year next preceding his election or appointment, either in the county for which he is elected or appointed, or in the city wherein the court house
of said county is, * * *.” However, this provision, coupled with the provi-
sion in Section 2704 dealing with the vacation of the office by removal from
the locality, simply enables a person to hold a county office while residing
in the city wherein the court house of the county is located, but does not
control the requirements that must be met by persons becoming an official
candidate in order to have his name placed upon the official ballot.

This matter is governed by Section 154 of the election laws, which was
amended in 1924 to provide that no person who is not qualified to vote in
the election in which he offers as a candidate shall have his name printed
upon the ballot. It is my opinion, therefore, that, if the City of Harrisonburg
becomes a city of the first class, persons residing in the City cannot become
a candidate for election to a County office.

You also ask if a primary includes a convention or mass meeting. It is
my opinion that the word “primary” as used in Section 154 refers only to a
primary election held under the provisions of Chapter 15 of the Code. I have
previously expressed the opinion, however, that even a party primary nominee
must be qualified to vote in the general election in which he seeks to be a
candidate in order to have his name printed upon the ballot. The phrase
“unless he be a party primary nominee” is not intended to mean that a party
nominee does not have to be qualified to vote in the election, but only that
he does not have to file his petition and notice of candidacy as required of
independent candidates. You will note that Section 229 requires a person to
be eligible to vote in the primary in which he seeks to be a candidate before
he can have his name printed upon the ballot to be used in the primary.

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ELECTIONS—Expenses of candidate based upon greatest number of votes
cast for any candidate in last gubernatorial election. F-100b

Honorable E. Griffith Dodson, Jr.,
Member House of Delegates.

This is in reply to your recent request regarding my interpretation of §234
of the Code, from which I quote 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; * * *.” (Italics supplied).

Your first question is whether or not the words, “gubernatorial election”
refer only to the number of votes cast for the office of governor or whether it
has reference to the largest number of votes cast for any candidate of a party,
regardless of the nature of the particular office, i.e., state or local.

It is my opinion that the words, “gubernatorial election” are used in §234
of the Code simply as a means of identifying the general election which the General
Assembly has seen fit to choose in connection with limiting the expenses of a
candidate for office, and that such words are not intended to limit a candidate
to the number of votes cast for the office of Governor. To hold otherwise
would be to disregard the words, “receiving the largest vote” and give them
no meaning.

Therefore, it is my conclusion that a candidate for office in the City of Roa-
noke at the past primary could have legally spent an amount equal to fifteen
cents for every vote cast for the candidate of his party receiving the largest
number of votes in the November election of 1945 within the territory repre-
sented by him, regardless of whether the person was a candidate for a local or state office.

As to your second inquiry, you state that the City of Roanoke has annexed considerable territory since 1945 and desire my opinion as to whether the votes cast in such territory at the 1945 November election may be counted by a candidate running for office in the City of Roanoke at the primary just past.

As can be seen from §234, quoted above, a candidate, in calculating the amount he may legally expend in a primary, is limited to the vote "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."

The qualified voters in the annexed territory to which you refer certainly had the right to vote for a candidate in the City of Roanoke in the past primary. Therefore, it is my opinion that such votes may be counted if, of course, they can be properly identified. It would appear, however, that this could not be done unless the annexed territory included a complete precinct.

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ELECTIONS—Judges and Clerks of; under proposed constitutional amendment two largest political parties are represented on board which selects judges and clerks. F-100g

HONORABLE JOE W. PARSONS,
Clerk of Circuit Court of Grayson County.

This is in reply to your letter of October 13, in which you ask if, under the new section 31-a proposed to be added to the Constitution of Virginia by the amendments to be submitted to the voters this November, it is mandatory for the local boards of elections to give the minority party representation in the appointment of judges and clerks of election.

The pertinent portion of this section reads as follows:

"There shall be in each county and city a local board of elections, composed of three members appointed in such manner as may be prescribed by law for terms of three years. In the appointment of these boards representation shall be given as far as practicable to the two political parties having the highest and next highest number of adherents in this State. The duly authorized officials of such political parties may submit to the appointing authority a list of five names of qualified voters for each appointment to be made, whether such appointment is an original one or to fill a vacancy, and the appointment shall be made from such lists unless the appointing authority certified that in its opinion none of the persons whose names are on such lists are competent or suitable persons to be appointed.

"Each local board of elections shall appoint within its jurisdiction the judges and clerks of election, shall conduct all registrations and renewals of registrations, canvass the election returns, and perform such other duties and have such other powers as may be prescribed by law."

As you will see, the two political parties having the highest and next highest number of adherents in this State shall be given representation as far as practicable on the local boards of elections in each county and city. This is the board which will appoint judges and clerks of elections. While this section does not require that members of both parties be selected as judges and clerks of elections, each party is represented as far as practicable upon the board which makes the appointment.
ELECTIONS—Polls; Hours of opening and closing. F-100


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

This is in reply to your letter of July 22, in which you request my opinion as to what hour the polls should be opened and closed in the primary election to be held in Fairfax County on August 2, 1949.

Section 152 of the Code of Virginia provides that in all elections held between the thirty-first day of May and the first day of October in any year the polls shall be opened at 6:30 o'clock A. M., Eastern Standard Time, and closed at 7:30 o'clock P. M., Eastern Standard Time, of the same day. However, by Chapter 115 of the Acts of Assembly of Virginia of 1948 the governing bodies of certain counties, including Fairfax County, are authorized, with the approval in writing of the Governor first obtained, to provide by ordinance for Daylight Saving Time in their respective counties. This Act provides that when such time is adopted it shall govern the conduct of all businesses and elections in the county adopting it.

You state that the Board of Supervisors of Fairfax County, acting under authority of Chapter 115 of the Acts of 1948, has adopted Daylight Saving Time for the period between May 15, 1949 and September 25, 1949. I judge from this statement of yours that the approval of the Governor in writing was first obtained before this ordinance became effective. If this is so, the polls should be opened at 6:30 o'clock A. M., Daylight Saving Time, and should be closed at 7:30 o'clock P. M., Daylight Saving Time, at the primary election to be held in Fairfax County on August 2, 1949.

ELECTIONS—Polls; unlawful for crowds to gather within 100 feet of. F-100g

ELECTIONS—Sample ballots; names may be arranged thereon as on official ballot. F-100g

October 21, 1949.

MR. A. G. CORBELL,
Secretary of the Electoral Board for Gloucester County.

I am in receipt of your letter of October 17, 1949, in which you ask the following questions:

1. Does the Secretary of the Electoral Board have a right to call on an officer to move crowds that gather within 100 feet of the polls?

2. Should the names on "sample ballots" be arranged the same as they are on the official ballots?

Your attention is directed to §167 of the Code of Virginia, which is set forth on page 59 of the booklet on Virginia Election Laws. This section reads as follows:

"It shall not be lawful, upon the day of election, for persons to congregate and crowd upon the public highway within one hundred feet of any of the voting places, and any person violating the provisions of this section shall, upon conviction thereof, pay a fine of twenty-five dollars or be confined in jail not exceeding ten days. Any member of the electoral board, the printer who shall print the official ballots provided for by this chapter, any judge of election, or any person who shall sell or give to any person whomsoever except where it is distinctly provided by this chapter, an official ballot or copy, or any facsimile of the same, or shall counterfeit,
the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined five hundred dollars and imprisoned in jail six months. It shall be the duty of the judges of election to see that the provisions of this section are strictly carried out.

"Nothing contained in this section shall be construed to prohibit: (a) the printing and circulation of 'informative ballots', provided such 'informative ballots' are not printed on white paper, and (b) the publication in newspapers of 'informative ballots'."

As to the second question, I know of no prohibition against the names on "sample ballots" being arranged in the same way as those on the official ballots. The statutes merely prohibit the sample or informative ballots being printed on white paper.

ELECTIONS—Poll tax lists; satisfactory way of preparing. F-100c

April 24, 1950.

Honorable T. S. Dunaway, Jr.,
Director of Finance for Warwick County.

This is in reply to your letter of April 20, in which you ask several questions concerning the preparation by treasurers of the poll tax lists which they are required to furnish to the clerks of the counties annually. In your letter you state:

"Assuming a person whose age and length of residence in the State, county and precinct to be unknown to the treasurer, should such a person be shown on the paid up list—

1. If he paid 1947 poll tax only?
2. If he paid 1947 and 1948 poll tax only?
3. If he paid 1949 poll tax only?
4. If he paid 1948 and 1949 poll tax only?

In the event a person were to produce a receipt from another city or county covering payment of one or more of the three years and had paid the remainder of the one or two years in my county, should he then be shown on my paid up list, bearing in mind that he has paid in my county for one year and in Elizabeth City County for the previous two years?

Do the statutes provide that the address of the person in question be shown on the paid up poll tax list?

"I find that many treasurers simply show the name of the person on their list. Other treasurers will show the name of the person and designate exactly which year's tax this person paid by means of having three columns in the book, one for each year in question, and inserting in the respective columns the word 'paid' for each year paid. The result is that this type of poll tax list would consist of many people who have paid one year, many who have paid two years, and also those who have paid the required three years. Some treasurers contend that this is the proper manner, others contend that no name should appear in the poll tax paid up list except those who have paid the three required years.'

Section 38 of the Constitution and Section 24-120 of the Code require the treasurer of each county and city, at least five months before each regular election, to file with the clerk of the circuit court of his county or of the corporation court of his city a list of all persons in his county or city who have paid not later than six months prior to such election the State poll
taxes required by the Constitution during the three years next preceding that in which such election is held. These provisions were construed in Zigler v. Sprinkel, 131 Va. 408, as not confining the list to those who paid the poll taxes for three years, but as requiring the list to include a person who is only assessable for a poll tax for one or two of such years and who has paid the taxes for the years required. This would include such people as minors becoming of age and chargeable with only one or two years' taxes, or persons changing their residence and who have paid the taxes required for the years in which they were residents. It would also now include veterans who may be assessable for one or more of the years.

Since there may be cases in which the treasurer would not have complete information showing whether or not the individual concerned was assessable for each of the three years, it is my opinion that the practice of having three columns in the book, one for each year in question, and inserting in the respective columns the word "pd." or "paid" for each of the years for which the taxes have actually been paid, is the most satisfactory way of preparing the list. If a person has paid taxes for each of the three years, this would appear affirmatively on the list; if he has paid taxes for only one or two years, that fact would appear, and if he can satisfy the election officials that he was not assessable for the years not paid, he would be entitled to vote.

Where a person produces a receipt from another county or city covering payment for one or more of the three years and has paid the remainder in your jurisdiction, it is my opinion that he should be shown on the list as having paid all three years' taxes. The statutes do not require that the address of the person in question be shown on the poll tax list.

ELECTIONS—Primaries; must be in conformance with governing statutes.

F-100

June 8, 1950.

HONORABLE LEVIN NOCK DAVIS, Secretary,
State Board of Elections.

This is in reply to your letter of May 31 in which you request my opinion as to whether a primary election can be held by a political party for the nomination of county and district officers under rules and regulations promulgated by the political party, which rules are contrary to the laws governing primary elections in this State.

Chapter 14 of Title 24 of the Code of 1950 governs primary elections, and §24-347 thereof specifically provides that primaries must be conducted in accordance with the provisions of Chapter 14. See also, Commonwealth v. Wilcox, 111 Va. 849, 859, in which the Supreme Court of Appeals stated that the Primary when adopted by a political party becomes an inseparable part of the election machinery.

Therefore, it is clear, in my opinion, that a political party holding a Primary for the nomination of candidates for office must be governed by the provisions of Chapter 14.
ELECTIONS—Qualifications of naturalized citizen to vote. F-100d

HONORABLE B. S. POWERS, JR.,
Commissioner of the Revenue for Dickenson County.

November 1, 1949.

This is in reply to your letter of October 28, in which you ask what other qualifications are required to be met by a foreign-born person who becomes a naturalized citizen of the United States before he is qualified to vote. You also ask how many years poll taxes should be paid by him.

Section 18 of the Constitution provides that every citizen of the United States twenty-one years of age who has been a resident of the State one year, of the county, city or town six months, and of the precinct in which he offers to vote thirty days, next preceding the election in which he offers to vote, has been registered and has paid his State poll taxes shall be entitled to vote. The qualifications for a naturalized citizen are, therefore, the same as those for any other citizen. If such a person who has become naturalized has lived in Virginia the three preceding years, he would occupy the same status as any other citizen of Virginia and, in order to vote, would be required to pay the three years capitation taxes which were assessable against him. It is not necessary for a person to be a citizen of the United States for him to be liable to the capitation tax. If he has been a resident of Virginia, the tax was assessable against him. Of course, if he was not a resident of Virginia for each of the three years next preceding the year in which he offers to vote, he would only have to pay a tax for those years in which he resided therein, those being the only capitation taxes assessable against him.

ELECTIONS—Qualifications of voters for special election. F-100c

HONORABLE CLIFTON C. SIMMS,
Treasurer of Grayson County.

December 19, 1949.

This is in reply to your letter of December 14.

This office has previously ruled that December 13 is the last day for the payment of capitation taxes to render a person eligible to vote in the regular elections to be held on June 13, 1950.

Your second question regarding the qualifications of voters for a special election to be held in February, 1950, is governed by Section 83 of the Code, which reads in part as follows:

"The qualification of voters at any special election shall be such as are hereinbefore prescribed for voters at general election, but at any such special election, held before the second Tuesday in June in any year, any person shall be qualified to vote who was so qualified at the last preceding regular November election, or who is otherwise qualified to vote, and has personally paid, at least six months prior to the second Tuesday in June of that year, all State poll taxes assessed or assessable against him during the three years next preceding that in which such special election is held. * * *

Therefore, anyone who was qualified to vote in the election held in November, 1949, or who is otherwise qualified and has paid his capitation taxes by December 13, 1949, would be eligible to vote in a special election held in February, 1950."
ELECTIONS—Referendum for New Form of County Government is a Special Election. F-100b

July 15, 1949.

HONORABLE STANLEY A. OWENS,
Attorney for the Commonwealth for Prince William County.

This is in reply to your letter regarding a possible referendum which may be held in Prince William County under Section 2773(25) of the Code (Michie, 1942), which deals with certain optional forms of county government.

You state that at this date a referendum could not be held under the statute except at a time that would fall within sixty days of the November election, at which time a new Board of Supervisors would have to be elected under the provisions of paragraph c of Section 2773(25). You ask whether prospective candidates would be able to have their names placed upon the ballot in view of the provisions of Section 154 which require candidates for local offices to be elected at a general election to qualify at least sixty days before the election.

If the election of the new Board of Supervisors for the new county government were considered a general election, the prospective candidates could not qualify and the election would have to be decided by a write-in vote. However, it is my opinion that the election of the new Board of County Supervisors should be considered a special election and not a general election, although they would be elected at the regular November election, which is the general election for certain officers.

Section 141 of the Code defines a special election as one which is "held in pursuance of a special law, and also such as are held to supply vacancies in any office" and it provides that "the same may be held at such time as may be designated by such special law." This office has previously held that a special election may be set for the same day as a general election.

This year is not the year for holding the regular general election for members of County Boards of Supervisors. Section 2773(25) is a special law dealing with the selection of a special form of county government. If a new form of government is adopted, the election of a new Board of Supervisors, though held at the same time as the general election, would be a special election to elect supervisors to hold office until the next regular election provided by general law. See Section 2773(27).

Since Section 154 permits candidates at a special election to qualify at least thirty days before such special election, the prospective candidates could qualify and have their names printed on the ballot. You will note that Section 2773(25) provides that no referendum election on the question of a change in government shall be held within thirty days of any general election. This ties in with the provision of Section 154 for a thirty day qualification for candidates at a special election, since the new Board of Supervisors is required to be elected at a special election to be held on the same date as the next regular November election for other offices.

ELECTIONS—Registrar’s fee; only one fee for making registration list regardless of number of copies. F-100d

September 20, 1949.

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

This will reply to your letter of September 12, advising that you have been asked by the Electoral Board of Norfolk County whether the registrars are entitled to pay for just one list or to be paid for each copy they are required to make and do make, as provided by Section 98 of the Code.

The question raised by you appears to be a new one. However, in the case of Martz v. Rockingham, 111 Va. 445, a similar question was decided by the
Supreme Court: The question in that case was what compensation the clerk of the court would receive for copying and certifying a poll tax list submitted by the Treasurer, as provided by an Act of Assembly approved March 3, 1908 (Acts 1908, page 162). In the statute involved in that case provision was made for compensation for the first copy, and it then provided: "and one half cent for each ten words for all other copies required to be made." The clerk's contention was that he was entitled to receive a half cent for every ten words of each additional copy. The Board of Supervisors contended that the clerk was entitled only to one half cent for each ten words of the list as compensation for the whole number of additional copies. The Court held that the Board was right in its position and that the clerk should receive one-half cent for each ten words of the list as compensation for all copies required and not compensation for each copy at the rate of one half cent for each ten words.

Section 98 provides "for making and certifying such lists the registrars shall be allowed three cents for each ten words, counting initials as words." It is noted that there is no provision in Section 98 for compensation for each of such lists, but merely for making and certifying such lists.

Therefore, I am of the opinion that the rule in the Martz Case, as above outlined, is applicable to the question raised by you, and that compensation should be paid for each separate list. From a practical standpoint, I would like to call your attention to that part of Section 98 which provides: "It shall be the duty of the registrar within five days after each sitting to have posted at three or more public places, etc." The number of lists to be posted is not limited, but the number over three appears to be in the discretion of the registrar. If the registrar were paid for each list posted, he could increase without limit the cost of this service.

ELECTIONS—Registration; Card system optional in certain cities. F-100d

Mr. Robert M. Rainey, Chairman,
Electoral Board of Petersburg.

I have your letter of January 16, 1950, in which you set forth the following facts:

On January 1, 1945, the City of Petersburg legally annexed 2.30 square miles of adjoining county thereby increasing the population of the City by an estimated 1,500, which addition brings the present total population of the City to 32,131. The 1940 census credits the City of Petersburg as having a population of 30,631.

You wish to know whether under that set of facts it will be possible for the City of Petersburg to put into effect the card system for registration of local voters to replace the use of registration books. Section 108b of the Election Laws makes this card system optional with cities of over 165,000 inhabitants or with cities having populations of more than 31,000 but less than 37,000 "* * * All according to the last preceding United States census * * *." This act was amended to make the provision for cities having population between 31,000 and 37,000 on March 26, 1946. You will note that this amendment came more than a year after the City of Petersburg annexed the area referred to above.

In my opinion the General Assembly did not intend that the population gained by this annexation should be counted by the City of Petersburg for this purpose, since the amendment expressly refers to the last preceding census in spite of the fact that annexation proceedings had been had since that census. We must
assume that the Legislature was aware of this annexation by Petersburg and, since the Legislature did not provide that this added population be counted for this purpose, it is my opinion that the City of Petersburg cannot put into effect the card system at this time.

ELECTION—Reregistration of voters. F-100d

December 29, 1949.

Mr. H. W. McKensie, Jr.,
Chairman of Electoral Board of Portsmouth.

This is in reply to your letter of December 17, which was forwarded to me by Mr. Levin Nock Davis, Secretary of the State Board of Elections, with his letter of December 20.

You state that the Electoral Board of the City of Portsmouth has ordered a re-registration of the voters for the City beginning in January, 1950. You ask whether you are to be guided by the provisions of Chapter 531 of the Acts of Assembly of 1926 in conducting this registration and, if so, are the provisions of Section 90 of the election laws applicable.

To answer your question I would have to know under which statute the Electoral Board acted in ordering the re-registration. Section 90 of the Code is the section which authorizes the Board to order a new registration of voters for any election district in its county or city whenever the registration books have been destroyed by fire or otherwise. It provides the procedure by which and information upon which the registrar may place the names of the voters upon the new books. Unless the new registration is ordered under this section, its provisions are not applicable.

Chapter 531 of the Acts of Assembly of 1926 is the statute under which a new registration of voters may be required in certain cities whenever the Electoral Board deems it advisable or necessary to simplify or facilitate the conduct of elections. This statute reads as follows:

"In cities having not less than forty thousand inhabitants, nor more than one hundred and sixty thousand inhabitants, according to the last preceding United States census, the electoral board of such city shall provide for a new registration of voters for any election district, or districts, precinct or precincts, in their respective cities, whenever the said board shall deem it advisable or necessary in order to simplify or facilitate the conduct of elections, but such new registration shall not be ordered more frequently than once in every ten years.

"Whenever an order is made by the electoral board for such new registration of voters in any election district or precinct it shall be the duty of the registrar of said precinct to give notice of the time and place of said registration by printed or written hand bills posted at not less than five places in the election district, at least thirty days before the day of registration, and shall sit as long as directed by the electoral board for the purpose of registering all voters who may be entitled to register under existing laws, and who may apply therefor; provided, however, that if such new registration be ordered by the electoral board for any reason other than the destruction by fire, or otherwise, as provided in section ninety of the Code of Virginia, of the registration books, then in such new registration no qualified voter who has registered prior to the first day of January nineteen hundred and four or (as to the first new registration) subsequent to August twenty-sixth, nineteen hundred and twenty, shall again be required to register as a prerequisite to a right to vote; and provided, further, that in such said cities, in addition to the posting of notices, as aforesaid, any such new
registration shall be advertised, not less than fifteen days, in one or more daily papers, published in such city, as may be directed by the electoral board."

It will be noted that, unlike Section 90, this statute does not contain provisions authorizing the registrar to enter the names of the voters on the new books on the basis of anything less than is required for an original registration. Nor are the provisions of Section 90 incorporated by reference.

It is my opinion, therefore, that, if a new registration is ordered under Chapter 531 of the Acts of 1926, all voters of the city other than those expressly excepted by the Act will have to meet all the requirements prescribed for persons desiring to register for the first time and will have to comply with the procedure required of new registrants. As to those excepted by the statute, their names could be transferred from the old books to the new without those voters being required to register again.

If it is not desired to have a new registration of all voters, Section 107 prescribes the method by which the registration books may be purged and Section 91 provides a method for copying mutilated or defaced registration books.

ELECTIONS—Registration; purging of books every six years mandatory.

F-100d

HONORABLE LIGON L. JONES,
Attorney for the Commonwealth for Hopewell.

This is in reply to your letter of April 28, in which you ask if the provisions of Section 24-106 of the Code are mandatory in so far as it provides that the registrar’s books must be purged every six years. You point out that the City of Hopewell is involved in an annexation proceeding and that, if Section 24-106 is mandatory, the registrar will be compelled to purge the books before the annexation proceedings have been completed.

Section 24-106 reads as follows:

“The electoral board of any county or city in which there is a general registrar may direct from time to time that the registration books of any precinct therein be purged whenever they deem it proper, regardless of the regular registration days as provided in §24-74, and they shall direct such purging of the registration books of every precinct once in every six years.”

Since this section provides that the electoral board shall direct such purging of the books once in every six years, it is my opinion that this requirement is mandatory and cannot be dispensed with even though the city is engaged in annexation proceedings. The outcome of the proceedings cannot be determined until they are completed and the purging of the books should not be delayed just because new territory may be added to the city. Moreover, it is to be assumed that the registration books of the county, including the area that may be annexed, would have been purged as required by law sometime during the preceding six years. However, if the Electoral Board of the City feels that the lists of those residing in the annexed areas contain names that should be purged, it can under the discretion vested in it by the first part of Section 24-106 order the purging completed as to them after the names of those residing in the annexed area have been transferred to the city books upon conclusion of the annexation proceedings.
ELECTIONS—Registration—Questions asked in connection therewith not to serve as literacy test. F-100d

HONORABLE ROBERT F. BALDWIN, JR.,
State Senator.

This is in reply to your letter of February 21st.
Your letter reads in part as follows:

"Section 20 of the Virginia Constitution, 3rd provision, states that an applicant to register shall answer on oath any and all questions affecting his qualifications as an elector. I am under the impression that the Supreme Court has held that this applies only to his age, residence, etc., and that this provision cannot be used as a literacy test for the propounding of questions as to the literacy or education of the applicant. "Would you please advise me if this is the case, or if this Section could be used for propounding questions as to literacy and educational attainments?"

It is my opinion that the conclusion which you have reached is correct. The case to which you are apparently referring is that of Davis v. Allen, 157 Va. 84, in which the court said:

"The Constitution has prescribed as a qualification for an elector no test of knowledge or understanding or educational requirement other than that the applicant shall be able to make in his own handwriting, without aid, suggestion or memorandum, the required application and answer in writing 'questions affecting his qualification as an elector' which may be submitted to him by the registrar." (157 Va. 89).

The language of the court in this case is very clear and it would seem that there would be no question but that the only questions which the elector may be required to answer are those with reference to his qualifications as set forth in the Constitution.

ELECTIONS—Registration; transfer of when town annexes part of county. F-100d

HONORABLE WILLIAM J. PHILLIPS,
Commonwealth's Attorney for Warren County.

This is in reply to your letter of April 17, 1950, in which you request my opinion on two questions. The questions, as set forth in your letter, are as follows:

"In the coming election in the Town of Front Royal on June 13, 1950, the question has been raised as to whether or not it is necessary for persons now living in the area recently annexed to the Town of Front Royal, formerly in the Front Royal Magisterial District of Warren County, to transfer their registration from the Front Royal Magisterial District to the Town of Front Royal in order to be eligible to vote in the said election. The effective date of the annexed territory was January 1, 1949.

"In construing Section 15-144 of the Code of Virginia of 1950 in conjunction with Sections 24-89 and 24-85, it appears to me that voters in the newly annexed territory must, in order to become qualified voters in the Town of Front Royal, transfer their registration from the Front Royal Magisterial District to the Town of Front Royal. This, it ap-
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pears, would be true even though the registrar in the Town is the same person as the registrar of the Front Royal Magisterial District. Also it would appear that persons transferring from a county precinct into a town of the population of twenty-five hundred or more must complete such transfers at least thirty days prior to the town election on June 13th, namely May 13, 1950. * * *

"Also we should like a ruling on the question as to whether a candidate for office must be a qualified voter at the time of filing his notice of candidacy. If not, is it sufficient if he becomes a qualified voter in the corporation by transferring his registration into the corporation at least thirty days prior to the election on June 13th?"

I am enclosing a copy of an opinion rendered on October 26, 1949, to Mr. Henry H. Elswick, Registrar of Richlands, Virginia, in which the view was expressed that when the town registrar is the same person as the registrar for the annexed county district he may place on the town list the names of persons who have previously registered in the county in an area which has been annexed to the town. This transfer may be made by the registrar automatically where the place of residence is sufficiently well known to enable such action and, where the place of residence is not so known, the registrar may require the production of reasonable evidence of residence before making the transfer.

I also enclose a copy of an opinion rendered on February 19, 1937, by the former Attorney General, the Honorable Abram P. Staples, to John D. Crowle, Jr., Chairman of the Electoral Board of Staunton, Virginia. That opinion covers a situation in which territory is annexed and the registrar of the annexed territory is a different person from the registrar in the annexing territory. The proper procedure in such case is for the registrar or registrars of the annexed territory to certify and deliver to the registrar of the annexing territory a list of registered voters residing in the annexed territory. The registrar to whom such list or lists are certified shall enter upon his books the names contained thereon, and these persons so transferred shall at once acquire the right to vote in the district to which they were transferred.

As to your second question, it is not required that a person be qualified to vote on the day on which he files his notice of candidacy. If the notice of candidacy is filed in accordance with law, and the party is a qualified voter on the day of election, he is entitled to hold office under the laws of the Commonwealth.

ELECTIONS—Registration; transfer to special town registration book.

F-100d

Mr. E. S. Bishop,
Secretary of Montgomery County Electoral Board.

This is in reply to your letter of May 20, requesting my interpretation of former Sections 98 and 2995 of the Code of Virginia in regard to the date for the closing of the registration books prior to an election.

Former Section 98 is found as Sections 24-74 through 24-82.1 of the Code of 1950. Section 24-74 provides that each registrar in the counties, cities and towns shall complete the registration of voters thirty days before the election. Section 24-82 provides that no additional persons shall be registered until after the day on which the election is held. These are the sections that deal with the new registration of voters and they require that the books be closed for this purpose thirty days before the election.

Section 2995, now Section 24-56, has nothing to do with the registration
of new voters. It merely deals with the preparation of the special list of voters for the purpose of town elections. It provides:

"The electoral board of the county within which such town or the greater part thereof is situated, shall, not less than fifteen days before any town election therein, appoint one registrar and three judges of election for each voting precinct, which judges shall also act as commissioners of election. The registrars shall, before any election in the town, register all voters who are residents of the respective precincts of such town, and who shall have previously registered as voters in the county, or either of them in which the town is situated, and none others."

Only those persons previously registered as voters in the county are entitled to be entered on the town registration books under this section. They would, of course, have had to be registered in the county before the books were closed for that purpose. However, if they have been so registered, they may be transferred to the town book at any time before the town election.

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ELECTIONS—Registration; transfer to special town registration book. F-100d

June 8, 1950.

HONORABLE L. C. HARRELL, JR., Commonwealth’s Attorney for Greensville County.

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

"The question has arisen concerning the right of a person to vote in the town election on June 13, in Jarratt, Virginia, who is registered with the County Registrar in the Sussex County Precinct, in which a portion of the Town of Jarratt lies. This person moved his place of residence from the Sussex side of the Town of Jarratt to the Greensville County side of the Town of Jarratt, and has not transferred his registration from the Sussex County Precinct to the Greensville County Precinct. He has paid the poll taxes due for three years by payment to Sussex County for one year and to the Treasurer of Greensville County for the last two years.

"In accordance with Virginia Code Section 24-82, the registration books are closed for thirty days prior to the town election, and Section 24-85 provides for the transfer of a voter to another election district in the same county or city without providing for transfer in towns containing less than twenty-five hundred inhabitants. Virginia Code Section 24-86 provides for only transfer of a voter to another county or city and limits the transfer ‘up to and including the regular days of registration’.

"Then upon examination of Virginia Code Section 24-56, it is found as follows: ‘the registrars shall, before any election in the town, register all voters who are residents of the respective precincts of such town, and who shall have previously registered as voters in the county, or either of them in which the town is situated, and none others.’ It would appear, therefore, that under said Section 24-56, the registrar appointed for the town could register a person who had moved from Sussex County to Greensville County a year or more ago, but who had been and still is residing within the town limits of the Town of Jarratt, thereby creating a situation, if that be true, wherein the voter could be eligible to vote in the town election of the Town of Jarratt, but who could not vote in a county election were it to be held at the same time."
"It will be appreciated if you will advise me your opinion with reference to the eligibility of this voter to vote in the town election of the Town of Jarratt, to be held on June 13, 1950."

As you point out, Section 24-82 provides that the registration books are closed for the purpose of new registration for thirty days prior to an election. Since Section 24-86 provides for a transfer of a voter to another county or city only up to and including the regular days of registration, the party to whom you refer could not be transferred from the Sussex County Precinct registration books to the Greensville County Precinct registration books at this time under the provisions of this section.

However, as you point out, Section 24-56, which deals with the preparation of the special registration books for town elections, provides that the town registrar shall before any election in the town register all voters who are residents of the respective precincts of the town and who shall have previously registered as voters in the county, or either of them, in which the town is situated, and none others. This office has previously ruled that the preparation of this special town registration list has nothing to do with new registration, and that voters previously registered on the county books may be transferred to the town book at any time up to the day of the election. Since the party to whom you refer was registered in one of the counties in which the Town of Jarratt lies, it is my opinion that he may be registered upon the town books and permitted to vote in the town election under the provisions of this section. In this connection, I am sending you a copy of an opinion which I rendered on May 23 to Mr. E. S. Bishop, Secretary of the Montgomery County Electoral Board.

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ELECTIONS—Residence for voting; intent. F-100e

October 19, 1949.

Honorable E. A. Christian,
Judge of Electoral Board of Louisa County.

This is in reply to your letter of October 12th in which you ask "whether or not it is proper for a voter who resides in one magisterial district and pays his capitation taxes in that district to vote in another district just because he happens to be in business in that district and is registered there."

A person should vote in the precinct of which he is a legal resident. Section 82 of the Code provides that every citizen of the United States, 21 years of age, who has been a resident of the State one year, of the county, city or town, six months, and of the precinct in which he offers to vote, thirty days preceding the election, in which he offers to vote, and is otherwise qualified shall be eligible to vote, but that removal from one precinct to another in the same county, city or town, shall not deprive any person of his right to vote in the precinct from which he removed until the expiration of thirty days from such removal.

Whether or not any person is a resident of any particular precinct is a question which must be determined by the facts of each particular case and is one depending largely upon the intention of the individual. If he has in fact changed his legal residence, he should secure a transfer as provided in Section 100 of the Code. Merely having a business in one precinct would not constitute residence there or entitle him to vote in that precinct.
ELECTIONS—Special elections; No duty on clerk to furnish certified list of those who had paid poll taxes six months prior to date of special election. F-100d

HONORABLE J. A. GARDNER,
Clerk of Circuit Court of Wise County.

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

"On the second Tuesday in June of this year the Town of Norton in Wise County will hold their regular election for members of the Town Council and at the same time the same election officials will hold an election on the question of authorizing a bond issue for the said Town in the sum of $350,000.00. This office will, of course, furnish the election officials a copy of the certified list of voters who have paid their poll taxes at least six months prior to the second Tuesday in June, to be used in the election for Town Councilmen.

"My question is shall the election officials also be furnished with a certified list of voters who have paid their poll taxes at least six months prior to November 7, 1950, to be used to ascertain the qualified voters upon the question of the bond issue. After reading Sections No. 15-624 and 24-22, I am not sure as to what procedure to follow."

Section 24-22 provides that at a special election held on or after the second Tuesday in June in any year, any person shall be qualified to vote who is or was qualified to vote at the regular November election of that year. This means that, if the referendum on the bond issue is a special election within the meaning of this section, persons who have paid their poll taxes six months prior to November 7, 1950, would be eligible to vote. If it is not a special election, only those who have paid their poll taxes six months prior to the second Tuesday in June would be eligible.

It could be argued that the statutes providing for a referendum upon a bond issue are special statutes dealing with that subject and that, since Section 24-22 recognizes that a special election may be held on the second Tuesday in June, the date of a regular general election, the referendum in question should be regarded as a special election. On the other hand, Section 15-596, which deals with the calling of a bond election in a city or town, provides that the court shall direct that the question shall be submitted to the voters, "either at the next succeeding election, or at a special election." This seems to imply that the referendum should not be considered a special election unless it is called for some date other than that fixed for a general election.

Since this is a matter involving a bond issue by a town and the manner in which the election is conducted may affect the validity of the bonds which may be issued, I think the question of those eligible to vote in the referendum should be submitted to the town attorney and possibly to the bond attorneys who will be called upon to pass upon the bonds. Since this is a matter which will affect only the town, I do not think this office should pass upon it, particularly since it does not directly affect your duties.

In so far as your responsibility to furnish a special certified list of those who have paid their poll taxes six months prior to November 7, 1950, is concerned, I may say that, even if the referendum is to be regarded as a special election, it is my opinion that there is no requirement that such a list be furnished. The statutes do not require the treasurer to make up such a list or the clerk to furnish copies thereof in connection with the special elections. This office has previously ruled that, while they would be authorized to make up such a list, they are not required to do so as a matter of law. In this connection I am enclosing a copy of an opinion rendered to the Honorable J. William Dance, Treasurer of Chesterfield County, on April 8, 1938, in which the view was expressed that
such a list would be only prima facie evidence of those qualified and would not be conclusive.

It is my opinion, therefore, that, while it would be proper for you to furnish such a list for use if the referendum be considered a special election, you are not required to do so as a matter of law.

ELECTIONS—Special elections; persons eligible to vote in. F-100

Honorable Levin Nock Davis, Secretary, State Board of Elections.

I am in receipt of your letter of March 23rd. You desire my opinion as to those who are qualified to vote in the special election to be held in the First Congressional District of Virginia on May 2, 1950.

Section 24-22, Code of 1950, provides in part as follows:

"* * * at any such special election, held before the second Tuesday in June in any year, any person shall be qualified to vote who was so qualified at the last preceding regular November election, or who is otherwise qualified to vote, and has personally paid, at least six months prior to the second Tuesday in June of that year, all State poll taxes assessed or assessable against him during the three years next preceding that in which such special election is held. * * *"

It will be seen therefore that all persons who were qualified to vote in the general election held in November 1949 are qualified to vote in the special election to be held on May 2, 1950.

Those persons who were not qualified to vote in the November election of 1949 but who are otherwise qualified and have personally paid at least six months prior to the second Tuesday in June 1950 all state poll taxes assessed or assessable against them during the three years next preceding 1950 are entitled to vote in the special election to be held on May 2, 1950.

ELECTIONS—Special elections; persons eligible to vote in. F-100

Honorable Hugh B. Marsh, Commonwealth's Attorney for Fairfax County.

This is in reply to your letter of May 18, in which you state that in your county a special election has been called for May 31, 1950, in which the voters will pass upon the issuance of certain school bonds. You ask who will be qualified to vote in this special election.

Section 24-22 of the Code of Virginia, 1950 (Section 83 of the former Code) provides as follows:

"The qualifications 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 before the second Tuesday in June in any year, any person shall be qualified to vote who was so qualified at the last preceding regular November election, or who is otherwise qualified to vote, and has personally paid, at least six months prior to the second Tuesday in June of that year, all State poll taxes assessed or assessable against him during the three years next preceding that in which such
special election is held, and at any such special election, held on or after
the second Tuesday in June in 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. * * * "

Since the special election mentioned by you will be held before the
second Tuesday in June, all persons who were qualified to vote in the gen-
eral election held in November, 1949, and any person who is otherwise
qualified to vote and has personally paid, at least six months prior to the
second Tuesday in June, 1950, all State poll taxes assessable against him dur-
ing the three years next preceding 1950 will be eligible to vote in the special
election. Since the second Tuesday in June of this year falls on June 13,
persons who paid the required poll taxes by December 13, 1949, will be
eligible to vote if they are otherwise qualified. Since persons who became
of age after January 1, 1949, and prior to May 31, 1950, are not assessable
with any poll taxes for the years 1947, 1948 or 1949, they may vote in the
special election without being required to pay any poll tax.

ELECTIONS—Special elections; requirements for candidacy for state or
national office to be elected by electors of a congressional district. P-100

HONORABLE CHARLES K. HUTCHENS,
Member, House of Delegates.

March 16, 1950.

This is in reply to your letter of March 14th in which you request certain
information regarding the special election to be held on May 2, 1950, to fill
the vacancy in Congress for the First Congressional District.

Section 24-130 of the Code provides that any person who intends to be
a candidate for any office, State or national, to be elected by the electors of
a congressional district, shall at least thirty days before the election, if it be
a special election (not to be held less than thirty-five days after the issuance
of the writ) notify the State Board of Elections, in writing, attested by two
witnesses, of his intention designating the office for which he is a candidate.

Under this section the notice of candidacy would have to be filed thirty
days before the special election to be held on May 2nd or by April 2nd.
Since April 2nd falls on Sunday it would be advisable to file notices of candi-
dacy by Saturday, April 1st, but it is my opinion that if they are actually
delivered by April 2nd, they would be filed in time.

It is only necessary that the notices of candidacy be filed with the State
Board of Elections in the case of an election for an office to be elected by
the electors of a congressional district. In such cases the notices do not
have to be filed with the county clerks and corporation court clerks. Section
24-133 of the Code provides that a candidate for the House of Representatives
shall file along with his notice a petition signed by two hundred and fifty
qualified voters of his congressional district. There is no requirement that
the voters signing the petition be taken from each of the several political
subdivisions of the district, it only being necessary that they be voters of the
congressional district. No filing fee is required.
ELECTIONS—Special elections; time for payment of poll taxes.  F-100c

June 8, 1950.

HONORABLE JOHN W. FLETCHER,
Member, House of Delegates.

This is in reply to your letter of May 31st, in which you state that there will be one or more special elections held in your county this summer. You ask when a person's poll taxes should be paid in order to qualify him to vote in such elections.

This matter is covered by Section 24-22 of the Code which provides as follows:

"The qualifications 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 before the second Tuesday in June in any year, any person shall be qualified to vote who was so qualified at the last preceding regular November election, or who is otherwise qualified to vote, and has personally paid, at least six months prior to the second Tuesday in June of that year, all State poll taxes assessed or assessable against him during the three years next preceding that in which such special election is held, and at any such special election, held on or after the second Tuesday in June in 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."

As you will see, in the case of special elections held before the second Tuesday in June, those who were qualified to vote at the last preceding November election and those otherwise qualified who have paid their poll taxes six months prior to the second Tuesday in June will be eligible to vote. In the case of an election held on or after the second Tuesday in June, those who have paid their poll taxes in time to be qualified to vote in the November election of this year will be eligible to vote.

You also ask if the Treasurer is required to prepare a special list of those who have paid their poll taxes by the required time for use at a special election. This office has previously ruled that he is not required to prepare such a list as a matter of law. He would be authorized to do so if he desires and the judges of election should receive it as prima facie evidence that the persons listed are entitled to vote. Since no statutory method is prescribed by which persons whose names are inadvertently omitted can appeal to the court to have their names included, such list, if prepared, would not be conclusive. Others who produce their tax receipts showing compliance with the statutory requirement would be entitled to vote.

ELECTIONS—Voting; proposed amendment regarding registration.  F-100d

October 17, 1949.

HONORABLE CHAS. W. CROWDER,
State Senator.

This is in reply to your letter of October 8, in which you request my opinion upon the meaning of the words "currently registered" in sections 18 and 19 of the proposed amendments to the Constitution of Virginia. You ask what would be the status of those persons who have registered since 1903 should the proposed amendments be adopted. You wish to know whether such voters would have to reregister if the amendments were adopted.

If the proposed amendments are adopted, sections 18 and 19 of the Constitution will read as follows:
REPORT OF THE ATTORNEY GENERAL

§18. Qualifications of voters.—Every citizen of the United States, twenty-one years of age, who has been a resident of the State one year, and of the county, city, or town, six months, next preceding the election in which he offers to vote, is a resident of the precinct in which he offers to vote, was registered under the general registration of voters during the years nineteen hundred and two and nineteen hundred and three, or has registered since the year nineteen hundred and three and is currently registered, shall be entitled to vote for members of the General Assembly and all officers elective by the people; but removal from one precinct to another, in the same county, city or town shall not deprive any person of his right to vote in the precinct from which he has moved, until the expiration of one hundred and twenty days after such removal.

“The right of citizens to vote shall not be denied or abridged on account of sex.

“No person shall at any time be required to pay any tax, assessment or fee as a prerequisite to the right to register, renew his registration, or vote.

§19. Registration of voters; those registered prior to nineteen hundred and four.—Persons registered under the general registration of voters during the years nineteen hundred and two and nineteen hundred and three, whose names were required to be certified by the officers of registration for filing, record and preservation in the clerks' offices of the several circuit and corporation courts, shall be currently registered and shall not be required to register again, unless they have ceased to be residents of the State, or become disqualified by section twenty-three.”

As you will note, section 19 applies only to persons registered under the general registration of voters during the years 1902 and 1903. Its effect is to declare that such persons, whose names were required to be certified by the officers of registration for filing, record and preservation in the clerks' offices of the several circuit and corporation courts, shall be deemed currently registered without being required to register again unless they have ceased to be residents of the State or have become disqualified by section 23. Section 23 is the one dealing with idiots, insane persons, paupers, and persons convicted of certain offenses. Section 19 has no application to persons who have registered since 1903 and, therefore, has no application to your question.

Section 18 provides that those who have registered since 1903 must be "currently registered" to be qualified to vote. This has reference to the provision of the new section 21 which states that any person registered since 1903 whose registration "is current" shall have the right to vote, and to the provision of the new section 22 which states that every person registered since the year 1903 "shall renew such registration annually in such manner as may be provided by law." The registration of a person registered since 1903 will not be "current" within the meaning of the proposed new sections 18 and 21 if such person fails to renew such registration annually "in such manner as may be provided by law" in accordance with the provisions of the proposed new section 22. Under the proposed new section 25, the General Assembly is directed to provide by law for the registration of voters under section 20 and for the renewal of registration under section 22.

A person who has registered since 1903 and whose name has not been purged from the registration books for one of the reasons specified in the statutes is, of course, currently registered at the present time and, in so far as the requirement for registration is concerned, is now entitled to vote. His registration will remain current until the General Assembly provides by law a method of annual renewal and he fails to comply with such method. Since the proposed amendments do not become effective until July 1, 1950, unless the General Assembly specifies an earlier designated date, it seems unlikely that a method of annual renewal applicable to the year 1950 will be provided.
In conclusion, the proposed amendments do not require a "reregistration", as such, for voters presently registered or for those who register in the future. They do provide that all voters registered since 1903 will have to keep their registration current by annual renewal in such manner as may be provided by law. Until the General Assembly provides by law for a method for annual renewal of registration and there has been a failure to comply with such requirements, voters who have once registered will be "currently registered".

ELECTIONS—Write-in candidate in primary can qualify in general election. F-100b

HONORABLE LEVIN NOCK DAVIS, Secretary, State Board of Elections.

This is in reply to your letter of July 26, in which you request my opinion upon a matter set forth in a letter you have received from Mr. Robert H. Woods, of Pearisburg, Virginia, from which you quote as follows:

"It is highly probable that there will be a write-in candidate for the office of Attorney General of Virginia in the Republican Primary if this will qualify said candidate to have his name appear on the official ballot in November without going through the detail of having a petition signed."

Section 224 of the Code of Virginia provides that all of the provisions and requirements of the statutes of this State in relation to the holding of elections, the counting of ballots, the making and certifying of returns and all kindred subjects shall apply to all primaries in so far as they are consistent with the laws relating to primary elections. Section 162 of the Code, which relates to general elections, makes it lawful for any voter to place on the official ballot in writing the name of any person for any office for which he may desire to vote and mark the same with the appropriate mark. In view of the provisions of Section 224 referred to above, this provision for write-in votes is incorporated into the laws relating to the holding of primaries.

I am informed that the Republican Party has officially selected the primary method of nominating a candidate for Attorney General. Therefore, it is my opinion that it would be proper for Republican voters to write in the name of the person they wish to nominate for this office, and that under Section 225 the person receiving a plurality of the votes cast by his party for this office would be the Republican nominee for Attorney General. Such person would, in my opinion, have the right to have his name printed upon the official ballot for the November general election as a Republican nominee without filing a notice of candidacy or petition, provided, however, he meets the other legal requirements for a candidate for this office. Section 154 provides that no notice of candidacy or petition is required for a party nominee, certification by the Chairman of the party to the State Board of Elections being all that is required.

EMINENT DOMAIN—Public Park Condemnation Act. F-21

HONORABLE WILLIAM A. WRIGHT, Director, Department of Conservation and Development.

This will acknowledge receipt of your two letters dated August 23rd, and August 29, 1949, respectively. You enclose letter dated August 18, 1949, to
you from Honorable George P. Cridlin, and copy of petition and notice which he has prepared in reference to certain condemnation proceedings proposed to be conducted under the "Public Park Condemnation Act." Judge Cridlin states in his letter that he desires the opinion of this office as to the sufficiency of the mentioned papers and also wishes to be informed if arrangements can be made by which this office can assist in the condemnation proceedings. The papers referred to have been carefully examined and they seem to comply with the applicable statutes governing condemnation proceedings under the "Public Park Condemnation Act."

I am very sorry to advise that arrangements cannot be made for my office to actively assist in the trial of these cases. We can only act in an advisory capacity because the present staff is small in comparison with the heavy duties imposed upon us.

In addition to the foregoing, Judge Cridlin inquires:

"1. Under the reorganization code effective July 1, 1948, Title 10, Chapter 1, Section 10-16 (2) you, as director, are empowered to institute and prosecute proceedings in the exercise of eminent domain, under Chapter 1, Title 25 of the new code which does not go into effect until February 1, 1950. Chapter 1, Title 25 of the new code is the 'railroad or general' condemnation act, while the Park Condemnation Act of 1928 is contained in Chapter 4, Title 25 of the old code. The public park condemnation act under this new code and also under the code of 1942 provides that condemnation proceedings for park purposes shall be instituted under its provisions, any existing statutes to the contrary notwithstanding. (See new code Section 25-122; Code of 1942, Section 4388 (3)). From the foregoing you will note, there seems to be a conflict as to which statute to follow. Under the reorganization act now in effect, it seems we are required to follow the railroad condemnation act. The new code which is not in effect until February of next year and the Park Condemnation Act of 1928 which is now in effect required that we follow proceedings under its provisions, any existing statute to the contrary notwithstanding.

"2. Is it necessary to appoint a viewer under Section 4388 (8) when the owner or claimant does not request it?

"3. Is it necessary for the petitioner to request the appointment of a board of appraisal commissioners under Section 4388 (28) when the owner or claimant does not do so?

"4. In the case of Rudacille v. State Commission (155 Va., 808) it is indicated that it is necessary for the Trial Court to make valuation of the land being condemned, and it is our thought that the valuation by the jury alone under Section 4388 (15) would meet the requirements of that decision when the owner or claimant does not require the Trial Court to take additional steps provided for in the Act."

The inquiries will be dealt with in the order submitted.

The first inquiry involves two acts concerning your authority as Director of the Department of Conservation and Development to exercise the power of eminent domain. Judge Cridlin points out that there is an apparent conflict because under the re-organization code which became effective July 1, 1948, Title 10, Chapter 1, Section 10-16 (2), you are empowered to institute and conduct such proceedings under Chapter 1, Title 25 of the new code. The new code does not become effective until February 1, 1950, and the title referred to is known as the railroad or general condemnation act, the Public Park Condemnation Act of 1928 being designated in the new code as Chapter 4, Title 25, which act is carried in Michie's 1942 Code of Virginia as Chapter 176, Sections 4388 (1) to 4388(43), inclusive. The new code has been adopted by the General Assembly of Virginia but only that portion known as the "Re-Organization Code" is now effective. This, however, does not, in my opinion, mean that the provisions carried in the
1942 Code, such as in this case, are repealed. Insofar as I have been able to ascertain, Chapter 4, Title 25 of the new code is the same language as the Park Act of 1928, which is clear evidence of legislative intent not to repeal said act. It would have, of course, been plainer if Chapter 1, Section 10-16 (2) of the Re-Organization Code had provided for proceedings under either Chapter 1, Title 25 or Chapter 4, Title 25, which ever may be found to be applicable. However, this oversight should not, and does not in my opinion, affect the operative terms of the Public Condemnation Act of 1928. The 1928 Act, Section 4388 (3) as carried in Michie's 1942 Code of Virginia provides as follows:

"* * * the condemnation proceedings shall be instituted, conducted, and maintained under the provisions of this act, anything contained in any existing statute, law, or rule or procedure to the contrary notwithstanding."

In view of the foregoing, I am of the opinion that the condemnation proceedings should be instituted and conducted by you as Director of the Department of Conservation and Development pursuant to Chapter 410 of the Acts of Assembly of 1928 [Sections 4388 (1)-4388 (43) of Michie's 1942 Code] cited as "Public Park Condemnation Act."

In reference to the second inquiry, your attention is called to Section 4388 (8) of this Act which deals with appointment by the court of special investigators and defines their duties. This section provides, in part, as follows:

"At any time after the filing of the petition, * * * the court or the judge thereof, may, and upon the application of the petitioner, shall appoint not more than five special investigators, * * * ."

It is seen that this section confers upon the court a discretion as to appointment of special investigators unless such application is made by the petitioner. This section further provides:

"* * * and no such finding of fact shall be held to be an ascertainment and determination thereof over the objection of the petitioner or of any person having an interest in such finding who has entered his appearance and filed his answer or other pleadings in the case as provided in Section 7 hereof * * * ."

I am of the opinion that this section imposes no duty upon the court to limit itself to appointment of special investigators (viewers) when the owner or claimant does not request it unless a request is made by the petitioner. If such request is not made by the petitioner, one of the other methods provided in the act for ascertaining and determining value may be employed by the court.

Your third inquiry seems to be covered by the terms of Section 4388 (28) of the Act which provides, insofar as here material, as follows:

"* * * the court or the judge thereof may, and, upon the demand of the petitioner or any person owning or claiming any right, title, estate, or interest in the land sought to be condemned, * * * the court or judge thereof shall submit * * * the fact of the value of the land; * * * to one or more boards of appraisal commissioners appointed and constituted as hereinafter set forth; * * * ."

I am of the opinion that this section imposes no duty upon the petitioner to limit his request to the appointment of a board of appraisal commissioners when the owner or claimant does not do so. If the petitioner does not choose to select this method for determination of the value of the property and there is no demand by any person owning or claiming any right, title, estate or interest in the land sought to be condemned, one of the other methods provided for by the act may be followed by the court. It should be noted, however, in this connection that Section 4388 (13) of the Act does impose a duty upon the court to ascertain and
determine the value of the land or interest to be condemned before entering judgment, the material portion of this section is as follows:

"Upon the value of the land or the estate or interest therein, or of any part thereof, which is sought to be condemned, being ascertained or determined, in accordance with the provisions or any of the provisions of this act, judgment as in rem shall be entered by the court, condemning the land, * * *.”

I am further of the opinion that before the court can enter judgment, one of the methods provided for in the act must be employed to ascertain or determine the value of the land or the interest to be condemned. This conclusion is supported by the case of Rudacille v. State Commission, 155 Va. 808.

In reference to the fourth inquiry, it should be pointed out that Section 4388 (15) of the Act deals with distribution of the funds awarded. The jury here referred to is to determine the rights and claims of the persons entitled to the funds or any part thereof. This section presupposes that the value of the land or interest to be condemned has already been fixed. Therefore, it does not seem that the jury referred to in this section could meet the requirements laid down in the case of Rudacille v. State Commission, supra, namely that it is necessary for the trial court to make valuation of the land being condemned.

To summarize, I am of the opinion the act contemplates that the value of the land, or interest to be condemned, is to be determined by the court with the assistance of either commissioners or viewers as provided in Section 4388 (8); a jury as provided in Section 4388 (12) on special investigators or the board of appraisal commissioners as provided in Section 4388 (28) before final judgment.

FEES—Clerk, in appeal of civil case from trial justice. F-116

HONORABLE LEE N. WHITACRE,
Clerk of Circuit Court of Frederick County.

This is in reply to your letter of July 29th in which you requested my opinion upon the proper clerk's fee to be charged on an appeal of a civil suit from the Trial Justice Court.

Section 3484 of the Code of Virginia was amended in 1948 and the following paragraph was added:

"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 action, this fee to be in lieu of any other fee allowed by this section, except in actions involving not more than five hundred ($500.00) dollars the fee shall be five ($5.00) dollars in lieu of any other fee."

The purpose of this amendment was to provide a flat fee in civil cases in lieu of the fees for specific services provided by the clerk in such cases. The reason for adopting such a provision in connection with cases originally instituted in the Circuit Court is equally applicable to cases appealed or removed from the Trial Justice Court. It is my information that in actual practice this provision has been held applicable to such appeals and removals and that the party appealing the case and having the same removed to the Circuit Court has been required to pay the flat fee specified in this paragraph.

While the language used in the statute is not expressly applicable to appeals or removals in view of the purpose of the statute and the practical administrative construction which has been given to it by both clerks and
litigants, it is my opinion that the statute should be so construed. In view of the wording of the provision this is not entirely free from doubt and it may be that an appropriate amendment by the Legislature would be advisable in order to clarify the intention of the General Assembly. I think, however, you would be justified in applying the flat fee specified to cases appealed from the Trial Justice Court.

FEES—Separate offenses tried at same time; two fees for Clerk, Commonwealth’s Attorney, and Trial Justice. F-116

HONORABLE LEWIS CRAWLEY,
Clerk of Courts of Cumberland County.

This is in reply to your letter of June 10, 1950. In your letter you state that George Hill appealed from four convictions for misdemeanor in the Trial Justice Court. These appeals were heard in the Circuit Court, all at one instance with only one jury. On two charges Hill was found guilty in the Circuit Court. These two verdicts of guilty were on the warrant dated January 23, 1950, which was originally tried in the Trial Justice Court on February 18, 1950, and on the warrant dated February 18, 1950, which was originally tried in the Trial Justice Court on March 4, 1950. You desire my opinion as to whether you should tax in the costs two attorney’s fees, two clerk’s fees and two trial justice’s fees.

It seems clear that, while the appeals were heard by the same jury, the two charges on which Hill was found guilty were completely different cases, the warrants having been issued at different times and the cases heard at different times in the Trial Justice Court. I am, therefore, of the opinion that it is proper to tax two attorney’s fees, two clerk’s fees and two trial justice’s fees in this instance.

FEES—Sheriffs—Committal fees; where person convicted in one locality and committed in another court in former locality should collect committal fee and pay it to treasurer in the locality of committal. F-136

HONORABLE J. GORDON BENNETT,
State Auditor of Public Accounts.

This is in reply to your request for my opinion as to whether the Sheriff of Norfolk County should charge the Cities of South Norfolk and Portsmouth, which cities use the jail of Norfolk County for certain prisoners, the committal fees provided by Section 53-162.1 for prisoners committed to the county jail from those localities on violations of their city ordinances, and whether the courts of those cities should assess the committal fees against individuals tried and convicted by them and sentenced to the Norfolk County jail.

You refer to Section 14-82 of the Code, which provides that every sheriff shall continue to collect all fees provided by law other than such as would be payable by the Commonwealth or by the county or city for which he is elected, and you suggest that a sheriff should continue to collect committal fees for receiving prisoners of localities other than that for which he is elected or appointed. Section 14-82 provides also, however, that sheriffs shall no longer collect fees and mileage allowances for services in connection with the prosecution of any criminal matter. This office has previously ruled that,
under the sheriff's salary Act of 1942, of which this section was a part, it was no longer contemplated that a sheriff would charge other localities for services rendered for them in criminal matters. See Report of the Attorney General, 1942-43, page 232 and pages 245-246). It is my opinion, therefore, that the Sheriff of Norfolk County should not charge the Cities of Portsmouth and South Norfolk committal fees for prisoners committed to the county jail from those localities on violations of their city ordinances.

However, as you point out, Section 14-82 provides that such fees and mileage allowances accruing in connection with any criminal matter shall be collected by the clerk of the court in which the prosecution is had and paid into the treasury of the county or city for which the sheriff, on account of whose services such fees are collected, is elected or appointed. Such fees are then divided between such locality and the Commonwealth on the basis of one-third to the locality and two-thirds to the State. This follows the plan of having all fees formerly collected by the sheriff still paid by the private individuals against whom they were formerly charged, but having them paid to the county and State to help defray the expense of the sheriff's salary.

Section 19-296 provides that in every criminal case the clerk shall make up a statement of "all the expenses incident to the prosecution" and issue execution therefor. Under this section, the fifty cent fee formerly due the sheriff either as a committal fee under Section 53-162.1, which dealt with fees payable to jailors from the State treasury in Commonwealth cases or as the committal and release fees chargeable by sheriffs generally under Section 14-116, has normally been considered as a cost incident to the prosecution (See Report of the Attorney General, 1942-43, page 55, 56) and an item still to be charged as a part of the costs and, when collected from the defendant, to be paid into the terasury of the sheriff's locality for division between the State and the locality.

It is my opinion, therefore, that the courts of the Cities of South Norfolk and Portsmouth should assess the committal fees both in State cases and in local ordinance cases as a part of the costs and, when collected from defendants who are sent to the Norfolk County jail, should pay them to the treasurer of that County for division between the County and the State.

FEES—Sheriff; service in bad check case. F-136

HONORABLE S. PAGE HIGGINbothAM,
Commonwealth's Attorney for Orange County.

This is in reply to your letter of March 30, 1950, from which I quote, in part, as follows:

"Bad checks are frequently referred to me for criminal prosecution, but before proceeding I always give 5 days notice required by the statute to make out a prima facie case of intent to defraud. The question has arisen as to whether the Sheriff should serve such a notice free of charge as a Commonwealth's notice, or whether there should be a charge of $0.75. If, upon giving notice, the check is made good, no criminal proceedings are instituted. If, however, the check is not paid, upon giving notice, a criminal warrant is usually sworn out and the above mentioned notice is used in evidence against the defendant.

"Please advise as to whether the Sheriff should serve such a notice without charge or whether he should be paid a $0.75 fee."

As you know, there is no requirement that the Commonwealth must give the drawer of a check any notice of dishonor, but may prove intent to defraud by other means. It would seem then that the giving of notice is ac-
tually a means of attempting to collect the amount due on the check and only incidentally beneficial to the Commonwealth by establishing a prima facie case of intent to defraud.

It is, therefore, my opinion that where such notice is served by the sheriff it should not be considered as a Commonwealth's notice.

FEES—Sheriffs; Service of civil process. F-136

HONORABLE M. M. MYERS,
Sheriff of Orange County.

This is in reply to your letter of March 29, 1950, from which I quote as follows:

"I wish you would give a ruling on the service of civil processes served under the new returns and subpoena in chancery.

"In the past a fee of 75c has been charged for a subpoena in chancery and 75c for a bill of complaint or a notice of motion, which would be $1.50 for the two papers served on the same person. The bill of complaint is attached to the new subpoena in chancery and the wording on the return is as follows:

"'Executed on the 29th day of March, 1950 in the County of Orange, Virginia, by delivering a true copy of the above mentioned papers attached to each other, to John Doe, in person.'

"My contention is the fee should be $1.50 instead of 75c. Please advise.

Rule 2:5 of the new rules of the Supreme Court of Appeals of Virginia deals with proof of service of subpoenas in chancery and bills of complaint. The rule reads, in part, as follows:

"The subpoena with copy of the bill attached shall constitute and be served as one paper."

It is my opinion that since the rules require service of the subpoena and bill as one paper, only one fee should be charged for such service.

FIDUCIARY RETURNS—Destruction of old returns. F-17

HONORABLE JOE W. PARSONS,
Clerk of Circuit Court of Grayson County.

This is in reply to your letter of December 30, from which I quote as follows:

"We have a large number of vouchers of fiduciaries filed before the Commissioner of Accounts that are filed in this office, some of them more than thirty years old. Also, the settlements made by the Commissioner of Accounts, which have been recorded. These original settlements and vouchers take up right much space and I cannot see any need for keeping them, especially after they are more than twenty years old, but I do not find any provision about destroying them.

"I would appreciate it if you will advise me whether or not there is any provision about destroying records of this kind."
I find no statutory provision authorizing the clerk to destroy the records to which you refer. However, I call your attention to Section 26-37 of the Code of Virginia, which reads as follows:

"All vouchers or other evidence filed with commissioner, the court or the clerk at the time of confirmation of an account, and not required as evidence of any further matter of inquiry pending before the court or the commissioner shall upon request be returned by the commissioner or by the clerk of the court to the person who filed the same."

It is clear from this section that the vouchers need not be retained in the clerk's office. I suggest that in those cases where it is possible the vouchers be returned to the person who filed the same as provided in this section. The unnecessary use of space could be relieved at least to that extent. Future accumulations could be prevented by such return as soon as the papers are no longer needed.

FORFEITURES—Pecuniary forfeiture for destroying pine tree is recoverable as a fine.  F-85

February 21, 1950.

HONORABLE CHARLES H. WILSON,
Attorney for the Commonwealth for Nottoway County.

This is in reply to your letter of February 16, 1950, in which you request my advice on the proper procedure to be followed in enforcing a forfeiture for violation of Article 6 of Title 10 of the Code of 1950, which deals with the conservation of pine trees. The forfeiture is provided for in Section 10-79 of the Code. Chapter 13 of Title 19 of the Code deals with the recovery of fines and under that chapter, Section 19-298 provides:

"Whenever the word 'fine' is used in this chapter it shall be construed to include pecuniary forfeiture, penalty and amercement."

Since the word "fine" is construed to include a pecuniary forfeiture, it is my opinion that the proper procedure to be followed in this case is set forth in Section 19-299 and Section 19-300 of the Code.

FORFEITURES—Rights of innocent lienor in proceeds of sale of car sold for violation of A. B. C. Law.  F-210a

February 13, 1950.

HONORABLE WM. ARCHER ROYALL,
Commonwealth's Attorney for Tazewell County.

This is in reply to your letter of February 2 in which you state that the Circuit Court has ordered the sale of an automobile under the provisions of Section 4-56 of the Code (Section 4675(38a) of Michie's 1942 Code), and that such sale did not fully satisfy the rights of the innocent lienor. You desire to know whether the sheriff should pay the lien holder the entire sale price and, if so, the manner in which the costs of such proceeding should be collected.

As you pointed out, paragraph (i) of Section 4-56 provides that "** * * out of the proceeds of which sale shall be paid, first, the lien, and second, the costs; ** * *." Therefore, in the instant case, I am of the opinion that the lien holder
is entitled to the entire sale price. The costs should be presented to the Circuit Court in order that an allowance may be made. The Circuit Court may then certify such allowance to the office of the Comptroller on form 4 provided therefor.

FORFEITURES—Under A. B. C. Law Commonwealth does not recover innocent lienor's interest in automobile seized. F-210a

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

This is in reply to your letter of April 6, in which you request my opinion upon the following question:

"A purchases a second-hand motor vehicle for $1,000, one-fourth of which is paid in cash and the balance of $750 secured by a conditional sales contract shown on the title, which contract is discontinued by the vendor at B Bank. The monthly payments are $75 and after A has made three payments, leaving an outstanding balance of $525, the vehicle is seized for transportation of alcoholic beverages illegally acquired in amounts in excess of one quart. The vehicle is promptly appraised by the Sheriff who sets its present cash value at $750, after which A gives a bond for that amount with approved security and secures possession of the vehicle. Forfeiture proceedings are duly instituted with both parties A and B as defendants. When the matter comes on for hearing the amount still owing on the car is $525 and the Court enters judgment against A. Under those circumstances, should judgment be entered against A for the face amount of the bond, $750, or merely the value of his equity, $225? * * *

Subsection (e) of Section 4-56 of the Code of Virginia provides in part as follows:

" * * * the owner or lienor may give a bond payable to the Commonwealth, in a penalty of the amount equal to the appraised value of the conveyance or vehicle plus the court costs which may accrue, with security to be approved by the clerk, and conditioned for the performance of the final judgment of the court, on the trial of the information, and with a further condition to the effect that, if upon the hearing on the information, the judgment of the court be that such property, or any part thereof, or such interest and equity as the owner or lienor may have therein, be forfeited, judgment may thereupon be entered against the obligors on such bond for the penalty thereof, without further or other proceedings against them thereon, to be discharged by the payment of the appraised value of the property so seized and forfeited and costs, upon which judgment execution may issue, on which the clerk shall endorse 'no security to be taken'." (Italics supplied)

While the quoted language of the statute is susceptible to the construction that the judgment should be for the full penalty of the bond even where only the equity of the owner is declared forfeited, it is my opinion that it should not be so construed. In my opinion, the important words of the statutes are those which I have underscored. You will note that the statute states that judgment may be for the full penalty of the bond, not shall be. This apparently was to enable the judgment to be for that amount when the entire property, including the lienor's interest, is declared forfeited. The statute does not require this when the lienor is found innocent and only the owner's equity is forfeited. The statute further provides that the judgment is to be discharged
by the payment of the appraised value of the property so seized "and forfeited". Since, when the lienor is innocent, only the owner's equity is declared "forfeited", it would seem that the judgment could be satisfied by payment of the value of the owner's equity, the interest forfeited.

If the judgment were for the full penalty of the bond where the lienor is found innocent and his lien established, that portion of the recovery equal to the amount of the lien would apparently have to be paid to the lienor, since it would only be proper for the Commonwealth to keep the interest of the guilty party which is declared forfeited. This is expressly made the case by subsection (i) of the statute when no bond is given and the vehicle is sold. The fact that the statute so provides in the case of a sale of the vehicle, but does not prescribe a similar procedure as to the disposition of the proceeds of the recovery on a bond, indicates that the judgment and resultant recovery of the Commonwealth should be only for the value of the interest forfeited. The lienor and the owner are thus left in status quo with respect to their rights and obligations as to the indebtedness secured by the lien. The Commonwealth, in such case, receives all it is entitled to and is not put to the unnecessary burden of collecting the amount of the lien and paying the same to the lienor.

GAMBLING—Pari-mutuel betting. F-123

January 10, 1950.

HONORABLE ANDREW W. CLARKE,
State Senator.

This is in reply to your request for my opinion as to whether or not pari-mutuel betting is in violation of Section 60 of the Constitution of Virginia.

This section of the Constitution provides as follows:

"No lottery shall hereafter be authorized by law; and the buying, selling or transferring of tickets or chances in any lottery shall be prohibited."

Our Supreme Court of Appeals has not passed upon whether or not pari-mutuel betting is a lottery, but, as you know, the Court has given a very broad definition of the term lottery, stating that any scheme involving the three elements of prize, chance and consideration is a lottery. See Maughs v. Porter, 157 Va. 415, 161 S. E. 242; Abdella v. Commonwealth, 174 Va. 750, 5 S. E. (2d) 495; Motley v. Commonwealth, 177 Va. 306, 14 S. E. (2d) 28.

On June 23, 1945, while he was Attorney General, the Honorable Abram P. Staples, in an opinion to William McL. Ferguson, member of the House of Delegates, pointed out that in a majority of jurisdictions the courts do not consider pari-mutuel betting to constitute a lottery. He cited the following cases so holding: Commonwealth v. Kentucky Jockey Club, 238 Ky. 739, 38 S. E. (2d) 987, 994; Panas v. Texas Ass'n, 80 S. W. (2d) 1020, 1024 (Tex. Civ. App.); Multnomah County Fair Ass'n v. Langley, 140 Ore. 172, 13 P. (2d) 354, 358; People v. Monroe, 349 Ill. 270, 182 N. E. 439; Engle v. State, 53 Ariz. 458, 90 P. (2d) 988, 992-3.

He pointed out, however, that in a majority of jurisdictions a contrary result has been reached. State v. Ak-Sar-Ben Exposition Co., 121 Neb. 248, 236 N. W. 736, 738; Streeper v. Auditorium Kennel Club, 13 N. J. Misc. 584, 180 Atl. 212.

Since 1945 at least two other jurisdictions have held pari-mutuel betting not to be a lottery; Rohan v. Detroit, Racing Ass'n, 314 Mich. 326, 22 N. W. (2d) 433; Longstreth v. Cook, 220 S. W. (2d) 433 (Arkansas), while at least one has
held otherwise; *Opinion of The Justices*, 249 Ala. 516, 31 So. (2d) 753. You also indicate that in Kansas pari-mutuel betting has been held not to be a lottery.

While the majority of jurisdictions hold that this form of betting is not a lottery, yet, in view of the conflict of authority in the decisions in other States and of the extremely broad interpretation of what constitutes a lottery given by our Court of Appeals, I agree with the views expressed by the Honorable Abram P. Staples when he was Attorney General. His conclusion, in which I concur, was that no authoritative opinion as to the applicability of Section 60 of the Virginia Constitution to this form of betting can be expressed until this matter has been passed upon by the Virginia Supreme Court of Appeals and that, until this is done, no conclusion can be reached other than that the validity of an act permitting pari-mutuel betting would be subject to grave doubt.

GAME, INLAND FISH AND DOG CODE—Authority to close season on doe. F-233

HONORABLE I. T. QUINN, Executive Director, Commission of Game and Inland Fisheries.

November 2, 1949.

I have your letter of October 20, 1949, in which you state that the citizens of Middlesex County, acting through the Commonwealth's Attorney, have requested the Game Commission to close the season on doe deer for the coming season. As you point out in your letter, the General Assembly, in 1948, provided that both sexes of deer might be killed during the open hunting season in Middlesex County. This Act further repealed all regulations of the Game Commission and other statutes inconsistent therewith.

Section 3305(35) of the Code of Virginia (1942) provides:

"Whenever extreme weather threatens the welfare of wild birds, wild animals or fish or whenever such wild birds, wild animals or fish have been seriously affected by adverse weather conditions or when investigation of said commission shows that there is an unusual scarcity of any species thereof, or when there is substantial demand from any section or county, the commission may close or shorten the open season in the section or county affected and give notice thereof immediately by publishing such action in one or more newspapers having a general circulation in the section or county, which notice shall be published at least three days before such action shall become effective. (Italics supplied).

In your letter you ask whether in my opinion the Commission of Game and Inland Fisheries has the power under the above quoted section to close the hunting season on doe deer during the coming season in spite of the Act of the General Assembly in 1948. The purpose of legislation regarding game and fish is the preservation and propagation of wild life of the State. I do not believe that the General Assembly intended, by the Act of 1948, to bar the door to emergency measures by the Game Commission in Middlesex County should such conditions arise. I am, therefore, of the opinion that, acting under the authority granted by §3305(35) of the Code, the Game Commission may act on the request of the citizens of Middlesex County, if such request amounts to a "substantial demand" or if investigation by the Commission shows that there is an unusual scarcity of doe deer in that county.
GAME, INLAND FISH AND DOG CODE—Defendant should be required to pay replacement cost of elk killed in violation of law.  F-233

May 22, 1950.

HONORABLE J. S. ANDREWS,
Trial Justice for Giles County.

This is in reply to your letter of May 2, in which you ask if, upon conviction of a person for killing elk in violation of Section 29-162 of the Code, the approximate replacement value of the elk should be ascertained and assessed against the defendant.

Prior to the adoption of the Code of 1950, what are now Sections 29-161, 29-162, 29-163 and 29-164 were all a part of Section 47 of the Game, Inland Fish and Dog Code and were found in Michie's Code of Virginia as Section 3305(48). This former section not only made it illegal to kill certain elk, but also imposed a fine for taking any other game or any fish during the closed season or in excess of the bag limit. It also contained the following sentence:

"The trial justice, or court, upon convicting any person of a violation of this section, involving the unlawful killing of any animal, or bird, or the exceeding of a bag limit as to animals, or birds or fish, or the taking of the same during the closed season, shall, in addition to the imposition of the punishment hereinbefore prescribed, ascertain the approximate replacement value of such animals, birds or fish and shall assess such value against the person so convicted. * * * *"

In the preparation of the Code of 1950, this original section was divided and that part dealing with the killing of elk was separated from that part dealing with the taking of other game or fish during the closed season or in excess of the bag limit. The sentence relating to the assessment of the replacement value against the defendant, which is quoted above, is now found only in Section 29-163, which contains the language relating to the killing of other game and fish.

While there is no reference to the killing of elk in Section 29-163, and, if taken literally, the sentence relating to the assessment of the replacement value against the person convicted would not be applicable to the killing of elk, there does not appear any intention to change the law as it previously existed. In fact, as appears from the Report of the Commission on Code Recodification which is found in Volume One of the new Code, the General Assembly by Chapter 400 of the Acts of 1946 created the Commission to re-arrange, reclassify, renumber and index the existing general laws of the Commonwealth, but did not authorize the Commission to perform any work of revision. In this report, at page XXII, it is stated that for convenience of reference and to simplify amendment, excessively long sections have consistently been divided into a number of shorter sections, but that "care has been exercised to make no changes in meaning or application."

While there were some revisions of the previously existing statutes as the result of the enactment of the plan of reorganization of State government in 1948, which was accomplished by the amendment of certain sections of the new Code during the passage of the bill providing for its adoption, the sections here under consideration were not involved in the reorganization amendments. It is clear, therefore, that there was no intent to change the existing law by subdividing Section 47 of the former Game, Inland Fish and Dog Code.

The settled rule in construing a Code is that the old law was not intended to be altered unless such an intention plainly appears. See Norfolk and Portsmouth Bar Association v. Drewry, 161 Va. 833, and other cases cited in the note to Section 1-13 of the Code. In view of the obvious lack of intention to change the existing law and the principle of statutory construction just cited, it is my opinion that, while the question is not free of all doubt, the sentence relating...
to the assessment of the replacement value of animals killed should be held applicable to violations of Section 29-162. Although the sentence is now contained in Section 29-163 and refers to violations of "this section", the matter contained in Section 29-162 was but a part of the original "section" referred to in this sentence dealing with the assessment of the replacement value.

This conclusion is bolstered by the language of the sentence itself. It refers to violations involving one of three things: the unlawful killing of any animal or bird, the exceeding of a bag limit, or the taking of animals, birds, or fish during the closed season. This made it inapplicable to those violations of what were the first and last sentences of the original section (now Sections 29-161 and 29-162) that did not involve one of these three things, and made it applicable to all other violations. Since only the last two types of violations are now mentioned in Section 29-163 and since the same descriptive language is used, it is clear that the sentence is still intended to apply to all types of violations mentioned in Sections 29-161, 29-162 and 29-163 which were previously covered thereby.

GAME, INLAND FISH AND DOG CODE—Farmer who is privileged to kill deer for damaging his crops may hire another to kill for him. F-233

HONORABLE I. T. QUINN, Executive Secretary,
Commission of Game and Inland Fisheries.

June 16, 1950.

This will reply to your letter of June 9, which I quote in full as follows:

"In a number of areas of the State deer have increased at such rate and the population has become so great many of them are depredating upon the crops and orchards of the farmers and orchardists of Virginia.

"At the general session of the 1948 General Assembly an Act was passed providing for a certain amount of relief to the crop or orchard owner. Section 1 of said Act provides as follows:

"'Whenever it is found that deer are damaging fruit trees or crops in the State, the owner or lessee of the lands on which such damage is done shall immediately report such fact to the local game warden for investigation. If after investigation the game warden finds that deer have so injured the fruit trees or crops of such owner or lessee as to cause substantial damage, he shall authorize the owner or lessee to kill such deer when they are found upon his premises and in the act of further injuring such trees or crops.'"

"As a general rule, deer do most of their feeding at night. A good many farmers are complaining that after working in the fields all day they cannot sit up at night and wait for the deer to come into their fields and feed, and have asked me if they could employ someone in their place to kill the offending animals.

"Your attention is especially called to the above section, which provides specifically that the owner or lessee when issued a permit by the game warden may kill 'such deer when they are found upon his premises and in the act of further injuring such trees or crops'.

"Should the Commission of Game and Inland Fisheries place a strict construction on the above mentioned provision, or may it be liberally construed so as to authorize the owner or lessee to have someone else kill the offending animal?

"Your opinion in this matter would be greatly appreciated."
The Supreme Court of Appeals has held consistently over the years that in interpreting an Act of the General Assembly the entire Act must be considered, and that the intention of the Legislature controls. In considering the purpose of the Legislature in passing this Act, the second section, which was not quoted by you, is most important. This section reads as follows:

"The carcass of every deer so killed shall be delivered by the owner or lessee to the game warden of the county, who shall deliver it to such charitable institution or hospital as designated by the Commission of Game and Inland Fisheries."

Although this statute is carried under Title 29, Game, Inland Fisheries and Dogs (Section 29-145.1) of the Recodified Code of Virginia, it is not for the purpose of conserving game, but for the purpose of permitting a farmer to kill deer, outside of the hunting season. Therefore, the strict interpretation of the statute that is provided for in the Acts concerning game would not be applicable to this Act. The purpose of the Act is most clear in that it is to give a farmer relief from the damage caused his fruit trees or crops by the deer eating them. As the Act provides that the carcass of the deer be delivered to the game warden, there can be no profit to the farmer in killing the deer. As a matter of fact, he might benefit during the hunting season if the deer were allowed to live.

For the proper administration of the Act the killing of the deer seems to be incidental, as the main purpose of the Act is to grant relief to a farmer under certain circumstances. If the requirements of obtaining authority from the game warden, and delivering the carcass to him are complied with, then who actually kills the deer appears immaterial, as there has been no violation of the authorization to dispose of the nuisance.

As a strict construction of the killing provision appears to work an undue hardship on the farmer and would certainly do so in cases of sickness or necessary absence from the farm by the farmer or lessee, after authority for killing had been obtained, and for the reasons as above mentioned, I am of opinion that the Act should be liberally construed so as to authorize the farmer or lessee to have someone else kill the offending animal.

GAME, INLAND FISH, AND DOG CODE—Game warden may search private automobiles without warrant. F-233

WARRANTS—Not needed by game warden to search private automobiles: F-233

June 23, 1950.

HONORABLE I. R. DOVEL,
Commonwealth's Attorney for Page County.

This is in reply to your letter of June 15, in which you ask if a game warden or other officer enforcing the game laws has the right to search a private automobile without a search warrant under the last paragraph of Section 19-33 of the Code of Virginia.

The statute to which you refer expressly provides as follows:

"Provided, however, that any officer empowered to enforce the game laws may without a search warrant enter for the purposes of police inspection any freight yard or room, passenger depot, baggage room or warehouse, storage room or warehouse, train, baggage car, passenger car, express car, Pullman car or freight car of any common carrier, or any boat, automobile or other vehicle; but nothing in this proviso contained shall be construed to permit
a search of any occupied berth or compartment on any passenger car or boat or of any baggage, bag, trunk, box or other closed container without a search warrant."

While the first part of this provision deals with certain property of common carriers, that portion dealing with boats, automobiles or other vehicles is not limited to those operated by common carrier. It is my opinion, therefore, that it is applicable to private automobiles and that officers enforcing the game laws may search the same without a search warrant.

GAME, INLAND FISH, AND DOG CODE—Hunting license; frogs are wild animals. F-233

HONORABLE R. S. WRIGHT, JR.,
Trial Justice for Shenandoah County.

This is in reply to your letter of June 16 in which you requested my opinion as to whether or not the taking of bullfrogs on the land of another requires a State hunting license.

Section 29-51 of the Code makes it unlawful to hunt on the lands or inland waters of this State without first obtaining a license, subject to certain exceptions not pertinent here, and Section 29-131 of the Code makes it clear that the prohibition contained in Section 29-51 refers to the hunting of "wild animals."

As you pointed out, the frog species is classified as an amphibian, and an amphibian is defined as an animal accustomed to living both on land and in water. Since the term, "wild animal," is used to denote an animal of a species that is not usually domesticated, it is my opinion that a frog is a "wild animal" within the meaning of Section 29-131, referred to above.

Section 29-132 of the Code does not classify the bullfrog as a game or fur-bearing animal, but, in my opinion, it is included in subsection (e) thereof, where predatory animals are defined as "weasel, wildcat and all other wild animals not otherwise classed as game or furbearing animals." (Italics supplied). It is also to be noted that Section 29-52 of the Code lists the persons exempt from license requirements but does not refer to the type of animal to be hunted, though it does provide that a license is not required to trap for rabbits with box traps.

Therefore, I am of the opinion that it was the intent of the Legislature to exclude no wild animals from the hunting provisions of the Game Code, and since a bullfrog must be considered a wild animal within the accepted definition of that term, it must also be included. I base this conclusion not only on the provisions contained in Section 29-52, but also on Section 29-133 of the Code which permits a continuous open season for the killing of predatory wild animals, of which species, as pointed out above, the bullfrog is a member. This clearly indicates that the Game Code was enacted not only to protect the desirable species, but also to produce revenue by requiring all persons who wish to hunt undesirable species to obtain a license therefor. That the Legislature intended to give the term "wild animal" this all-inclusive meaning is further indicated by the fact that the enforcement of the Game Code would become exceedingly difficult if an individual could hunt certain animals without first obtaining a license.

The Supreme Court of Appeals, in the case of Commonwealth v. Bailey, 124 Va. 800, 802, adopted the definition of hunting found in 1 Bouvier's Law Dictionary, p. 967. It is "The act of pursuing and taking wild animals.” Applying such a definition in answer to your specific question, it can be seen that whether or not a person is required to have a license to take bullfrogs would depend upon whether the particular individual in question was in fact "hunting" as that word has been defined by the Supreme Court of Appeals.
Therefore, in my opinion, the question to be asked in determining the necessity of obtaining a hunting license, not only from a strictly legal standpoint but also from the practical standpoint of law enforcement, is not what type of wild animals a person is hunting but how he is hunting such animals. Applying this test, I am of the opinion that the usual methods of taking bullfrogs, i.e., gigging from a boat or while standing on the edge of a pond, or using a rifle from such places, would be considered "hunting" as that term is defined herein, thus making it unlawful to take bullfrogs from the land of another without first obtaining a State hunting license.

GAME, INLAND FISH AND DOG CODE—Hunting Sunday—Between opening and closing of general hunting season. F-233

Honorable Valentine W. Southall,
Commonwealth’s Attorney for Amelia County.

This is in reply to your letter of November 30, from which I quote as follows:

"In the second paragraph on page 71 of the 1948 Hunting Laws and Regulations, published by our Game Commission, it is stated that 'It shall be unlawful to have both shotgun, or rifle, and dog in the daytime in the fields, forest or waters of the counties of * * * and in counties east of the Blue Ridge Mountains, except in Patrick, during the general closed hunting season * * *.'"

"On the opening day of hunting season of this year, November 20, 1949, which was a Sunday (and consequently a rest day as provided by the first paragraph on page 70 of said Regulations) a gentleman was apprehended in the field with his dogs and loaded rifle. I would appreciate it very much if you would give me an opinion if that Sunday, November 20, 1949, was a part of the ‘general closed hunting season’ or simply a ‘rest day’ as provided on page 70 of the said Regulations."

In my opinion, the Regulation of the Game Commission quoted by you, making it unlawful to have both shotgun or rifle and dog in the fields during the general closed hunting season, should be construed to apply to any time that the hunting or killing of wild birds or animals is generally prohibited, that is, when the killing of all birds or animals other than predatory or undesirable species is prohibited. Therefore, since Section 35 of the Game, Inland Fish and Dog Code (Section 3305(36) of Michie’s Code) makes it unlawful to hunt or kill any wild bird or animal with a gun or other firearm on Sunday, the hunting season should be regarded as closed on every Sunday, even those falling between the opening and closing dates of the general hunting season.

You will note that Section 36 of the Game Code (Section 3305(37) of Michie’s Code) provides that there shall be a continuous open season for killing predatory or undesirable species. However, this provision must be read together with Section 35, which makes it unlawful to kill any wild bird or animal, including predatory or undesirable species, with a gun on Sunday. Thus the season is closed on Sunday even as to predatory and undesirable species. Likewise the rest of Section 36, fixing the outside dates of open seasons for other birds and animals, and also Section 33a, authorizing the Commission to prescribe the seasons for hunting within such outside limits, should be read in the light of Section 35 prohibiting the killing of wild birds and animals on Sunday. The result is that Sunday should not be considered an open date for hunting, whether it falls within or without the outside dates of open seasons.
GAME, INLAND FISH AND DOG CODE—License needed to hunt groundhogs or pigeons. F-233
HUNTING—License needed to hunt groundhogs or pigeons. F-233

September 13, 1949.

HONORABLE EDWARD McC. WILLIAMS,
Commonwealth's Attorney for Clarke County.

This is in reply to your letter of August 29, which I quote in full:

"Please be kind enough to advise the undersigned whether or not Section 3305 of Michie's Virginia Code of 1942, as amended by the Acts of 1948, permits the hunting and shooting of groundhogs without a license.

"I would also appreciate being advised as to whether or not the same section permits the hunting and shooting of pigeons without a license."

While the 1948 amendments rewrote a portion of Section 3305(19), the first sentence of this section was not changed. It reads as follows:

"It shall be unlawful to hunt, trap or fish in or on the lands or inland waters of this State without first obtaining a license, subject to the following exceptions:"

As the hunting of groundhogs and pigeons is not included in the exceptions, it is my opinion that they come within the provisions of this section and cannot legally be hunted without a license.

With particular reference to pigeons, I call your attention to Section 4446(1) which prohibits the killing of homing pigeons.

GAME, INLAND FISH AND DOG CODE—License to fish in private pond. F-233

December 28, 1949.

HONORABLE ROBERT Y. BUTTON,
State Senator.

This will reply to your letter of December 22, which I quote in full:

"Many residents of this County have and are constructing on their properties ponds. These are usually furnished water by a very small stream or drainage water. In no cases that I know of would there be a stream of any size. These ponds are constructed at the cost of the owner other than the engineering service, which is furnished by the Soil Conservation officers.

"The ponds after being constructed are frequently stocked with fish, the original stock being secured from the Federal Government. The question has arisen as to whether or not such a pond is an inland water that is referred to in Michie's Code 3305(19). Of course, the further question is whether or not a guest of the owner, who is not a member of the owner's family, has to have a license to fish in such private pond.

"I would appreciate very much if you would give me your opinion as to whether or not such a pond is an inland water that would require a license for fishing."

Section 3305(8) of the Code provides for the administrative duties and powers of the Chairman of the Commission of Game and Inland Fisheries. It also defines "inland waters" as follows: "which waters shall be construed to mean and
include all waters above tidewater and the brackish and fresh water streams, creeks, bays, including Back Bay, inlets, and ponds in the tidewater counties."

I am of the opinion that this definition of "inland waters" is applicable to the ponds in question, and that a license for fishing would be required.

GAME, INLAND FISH, AND DOG CODE—One who at time for purchase of hunting license is entitled thereto does not lose license because population change makes him no longer eligible to purchase license. F-233

June 27, 1950.

HONORABLE J. M. BLACKBURN,
Clerk of Circuit Court of Augusta County.

This is in reply to your letter of June 14, 1950, which reads as follows:

"Your opinion on the following question will be greatly appreciated:

"The population of the City of Staunton having heretofore been less than 15,000, the residents thereof have been entitled to, and those applying therefor, issued Augusta County Hunting and Fishing Licenses, in accordance with Section 29-57(f) of the 1950 Code.

"The Acting Director of the United States Census for this district recently announced in a preliminary report that the population of this City was now more than 19,000, the exact figure I do not recall. I presume that, until there is an official announcement to this effect by the Census Bureau, persons living within the city are still entitled to county licenses.

"The question has now been asked if, after the sportsman residing in the city has procured a county license, the Census Bureau officially announces the population to be more than 15,000, can he continue to hunt and fish on his county license, to which he is no longer entitled under the above-mentioned Section of the Code."

I call your attention to Chapter 285 of the Acts of Assembly of 1950, which reads, in part, as follows:

"In order to avoid uncertainty and provide for the uniform application of the results of the Census of nineteen hundred fifty, this act shall apply in all cases except as hereinafter specified.

"As used in the Acts of Assembly and Code of Virginia, the term population shall mean population as of the last preceding United States Census; provided that as to the Census required for nineteen hundred fifty, the populations which shall be shown therein shall not apply to any such act or section of the Code until June thirty, nineteen hundred fifty-two or until the Keeper of the Rolls certifies such population classifications to the governing bodies of the several counties, cities and towns, whichever first occurs."

From the provisions of this Act you will see that the official announcement by the Census Bureau of the population of the City of Staunton will have no effect on the question presented. However, in the event that the Keeper of the Rolls certifies the population figure to the governing body of the City, and the official figure is in excess of fifteen thousand, you would then be confronted with the problem which you anticipate. Section 29-66 of the Code of 1950, which deals with the expiration of county licenses to hunt, trap or fish, provides.

"Licenses shall run and be valid from July first of each year to June thirtieth of the following year, unless revoked in the manner hereinafter provided, and shall be valid from such date of purchase as may be on or
succeeding July first until the expiration date of such license, but only within the regulations and restrictions provided by law.”

It is my opinion that a person entitled to the county license on the date the license is issued, would be entitled to the privilege granted by the license until the license expired, under the provisions of this section.

GARNISHMENTS—Employer may pay to judgment creditor of employee the amount of the judgment without garnishment. F-72

HONORABLE C. H. COMBS,
Trial Justice for Buchanan County.

This is in reply to your letter of May 29 in which you requested my opinion as to whether a collection attorney must institute garnishment proceedings for a judgment creditor after judgment is obtained against a debtor and notice of lien of a writ of fieri facias has been served on the debtor’s employer, or whether the employer, after such notice, may be directed to withhold the amount of the judgment against his employee and forward it to the collection attorney. I quote as follows from your letter:

“As I interpret these sections the judgment creditor definitely has a lien, but this does not justify him in ordering the employer to pay this money direct to the attorney. Considered along with Section 8-441 of the Code it appears to me that a garnishment should be issued, thus giving the Commonwealth its cost, and giving the judgment debtor a chance to appear in court and answer the garnishment and plead payment or any other defense he might have.”

Section 8-432 of the Code provides, in effect, that an employer shall not make a payment to a judgment debtor after notice of the lien has been served upon him. However, I find no statute that prohibits the employer from paying the amount of the judgment to the judgment creditor if he so desires. Of course, if the judgment debtor had a good defense, his remedy would be against his employer who has wrongly paid his employee’s wages to a person who is not, in fact, a creditor of the employee.

Section 8-441 of the Code, to which you refer, is not mandatory and provides only that a judgment creditor may institute garnishment proceedings at which time the employer would pay the judgment debtor’s wages into court and the debtor would be given the opportunity to plead payment or any other defense he might have.

As to the necessity of garnishment proceedings in order to collect costs it would appear under the facts presented in your letter that the costs would have been paid by the judgment creditor at the time he obtained judgment against the debtor, which costs would then have been included in the amount of the judgment against the debtor.

It is my opinion, therefore, that garnishment proceedings are not necessary and that while a collection attorney, after due notice of lien, cannot compel an employer to pay the amount of the judgment direct to him as attorney for a judgment creditor, the employer may do so if he wishes.
GUNSTON HALL—Concerning management thereof. F-240

MRS. HERBERT A. CLAIBORNE,
Member, Board of Regents of Gunston Hall.

This is in reply to your request for advice as to the administrative authority of the Board of Regents of Gunston Hall with respect to several matters arising in the management of that memorial to George Mason.

This property was conveyed to the Commonwealth of Virginia by deed of gift from Louis Hertle, which deed provided that the property was to be managed by a board to be known as "The Board of Regents of Gunston Hall" and consisting of members appointed by the Governor upon nomination of the National Society of the Colonial Dames of America. As authorized by the deed of gift, this Board was incorporated by Chapter 175 of the Acts of Assembly of 1948, Section 3 of which Act provides as follows:

"The corporation hereby created shall manage, control, maintain and operate on behalf of the Commonwealth of Virginia the estate in Fairfax County, Virginia, known as 'Gunston Hall', together with the buildings, contents, furnishings and grounds thereof and any additions thereto, may accept, execute and administer any trust in which it may have an interest under the terms of the instrument creating the trust, and may accept and administer gifts of real and personal property made for the benefit of Gunston Hall. The powers conferred upon the Board of Regents under the deed of gift from Louis Hertle, and on the corporation by this act, may be exercised free of any supervision and control by the Art Commission."

By the deed Louis Hertle retained a life estate in the property. Upon his recent death he left, by his will, all of the furnishings and other personal property to the Commonwealth for the use and benefit of Gunston Hall. As this office has previously advised you orally, the Act of the General Assembly accepting the deed and Section 3 of Chapter 175 of the Acts of 1948, quoted above, gave general management and control of the real estate and the personal property to the Board of Regents. Since some of the personal property was not suitable for use in connection with the memorial, the Board deemed it advisable to dispose of the articles in this category and use the proceeds to purchase other furnishings considered more appropriate. The Board has been advised by the attorneys representing the executors of Mr. Hertle's estate that this was permissible under the terms of the will. It has also secured the approval of the Division of Purchase and Printing for the disposal of the surplus articles considered unsuitable.

Since the General Assembly constituted the Board of Regents a corporation and designated it as the agency to accept such gifts of personal property made for the benefit of Gunston Hall and to administer any trusts set up in its behalf, it is my opinion that it has full administrative control in the premises.

While paragraph (c) of Section 10 of Chapter 33 of the Acts of Assembly, Extra Session 1927 (Michie's Code, Section 585(69)), as amended, requires every State department, officer or other agency receiving moneys belonging to or for the use of the State or any State agency to pay the same into the State treasury, it excepts endowment funds or gifts to institutions owned or controlled by the State. For this reason it is my opinion that the proceeds of the gift of the personal property in question, accepted by the Board for the benefit of Gunston Hall under the authority given it by the General Assembly, may be administered by the Board directly for the purposes for which the gift was made without being paid into the State treasury. The same thing would be true of other gifts made for the purpose of operating Gunston Hall which the Board may receive from time to time.
However, moneys collected in the form of admission charges would be revenue derived from the operation of State-owned property and would have to be paid into the State treasury in accordance with the Act referred to above, unless the General Assembly provides otherwise. Under the terms of the deed of gift from Louis Hertle such moneys would, of course, have to be segregated and made available to the Board of Regents for use in connection with the operation of Gunston Hall.

All funds used for the management of the memorial, whether consisting of appropriations made by the General Assembly, which along with the revenue received from operations would be handled through the offices of the State Comptroller and the State Treasurer, or whether consisting of gifts controlled directly by the Board, would be subject to audit by the Auditor of Public Accounts, since the property is State-owned and controlled and the Board of Regents is merely the agency designated to operate it. I suggest, therefore, that you confer with Mr. J. Gordon Bennett, the State Auditor, for such suggestions and assistance as he may give you in reference to setting up a proper system of accounts and control.

HIGHWAY COMMISSION—Contractors engaged in construction by the State Highway Commission exempt from certain provisions of law. F-144 February 8, 1950.

Mr. Charles P. Bigger, Secretary,
State Registration Board for Contractors.

I am in receipt of your letter dated January 26, 1950, which I quote as follows:

"I am requested by this Board to ask your interpretation of Section 4359(118) of Chapter 175 E, Code of Virginia. At the time of the enactment of this Act by the 1938 General Assembly of Virginia it was the intention of the sponsors of the legislation and the General Assembly to exempt from its provisions construction under the control and supervision of the State Highway Commission and the section referred to was drawn by the attorney for the Commission and accepted by the sponsors of the law with that end in view.

"This Board has construed the law as exempting this class of construction. Certain interests representing the road building industry have questioned the ruling of the Board and claim that the law only exempts that construction undertaking by the State Highway Commission in the role of a contractor; that is the purchase of material, the employment of labor and the actual operation of a project.

"Your opinion on this question will be greatly appreciated."

The Code section to which you refer is now cited in the 1950 Code under Title 54, Chapter 7, Section 54-141, titled "Exemptions from Chapter". The first section in this chapter, i.e., Section 54-113(2) provides, in part, as follows:

"'General contractor' or 'subcontractor' shall mean any person, firm, association or corporation that for a fixed price, commission, fee or percentage, undertakes to bid upon, or to construct or superintend the construction of, any building, highway, bridge, railway, sewer, pipe line, grading, or any improvement, or structure or part thereof, when the cost of the undertaking or a subcontract thereunder is twenty thousand dollars or more; * * * " (Italics supplied)
It is made unlawful, pursuant to the provisions of Section 54-128, for any person to engage in, or offer to engage in, general contracting or subcontracting in this State, unless he has been duly licensed and issued a certificate of registration. In this connection, it should be pointed out that this office in a letter to you dated February 13, 1942, ruled that the title to the Act was not broad enough to include subcontractors.

The only general contractors' exemption from the provisions of the foregoing section are those mentioned in Section 54-141 which I quote:

"The provisions of this chapter shall not apply to the practice of general contracting or subcontracting as defined in Section 54-113 by any authorized representative or representatives of the United States of America or any of its instrumentalities or agencies, the Commonwealth of Virginia or of its instrumentalities, agencies or institutions, or of any county, city, town or other political subdivision of, or any district, zone, local subdivision or area in, the State of Virginia, or the construction, reconstruction, repair, or improvement of any highway or bridge, constructed, reconstructed or repaired by the State Highway Commission."

You state in your letter that your Board has construed this law as exempting this class of construction. When a statute has been administered for many years, great weight should be given to its administrative construction. [Sutherland, Statutory Construction §5107]

The exemption under the provisions of Section 54-141 are divided into two classes: first, duly authorized representatives of a governmental agency who construct or superintend construction as defined in Section 54-113(2); and, second, contractors engaged in the construction, reconstruction, repair, or improvement of any highway or bridge, constructed, reconstructed or repaired by the State Highway Commission. It is clear that general contractors are not exempt under the first classification.

To construe the latter part of this section so as not to exempt contractors engaged in such work would give no meaning to this language since authorized representatives of the Highway Commission, it being a governmental agency, are clearly exempt from the provisions of this act by its other language. It is well settled that statutes should be construed to give meaning to their language. [Sutherland, Statutory Construction §4815]

In view of the foregoing reasons, I am of the opinion that a general contractor engaged in the construction, reconstruction, repair, or improvement of any highway or bridge, constructed, reconstructed, or repaired by the State Highway Commission is exempt from the operations of this Act.

INSANE, EPILEPTICS, ETC.—Temporary commitment for observation. F-85

September 26, 1949.

Dr. Joseph E. Barrett, Commissioner of Department of Mental Hygiene and Hospitals.

I am returning herewith the copy of the order entered by the Honorable W. E. Edwards as Trial Justice and Judge of the Juvenile and Domestic Relations Court of Frederick County in the case of Commonwealth of Virginia v. Orndorff, together with the copy of the opinion rendered to Dr. H. C. Henry by this office on March 13, 1949.

In that previous opinion it was held that Section 4909 of the Code applied only to courts of record and, therefore, was not applicable to trial justice courts. Since juvenile and domestic relations courts are not courts of record either, Section 4909 is also inapplicable to those courts.
However, Section 1085, which by its terms is applicable to juvenile courts and trial justice courts, prescribes an additional method by which courts may commit individuals to the department for the criminal insane at the appropriate State institution or to a State colony for the feeble-minded for observation. The first part of this section, though, provides that, if it appears to the court or justice that the individual is feeble-minded, an officer of the court or some other appropriate person shall be directed to file a regular petition for commitment under Chapter 46 of the Code. The provision permitting immediate commitment to a State institution follows language authorizing the court to order the person detained in a proper place of safety or placed under the guardianship of some suitable person, pending the preparation, filing and hearing of such petition. Moreover, the statute provides that the commitment is for observation pending the determination of the mental condition of the person involved.

It seems clear, therefore, that a preliminary commitment under Section 1085 is only a temporary one for observation, following which a report should be made to the court as to the mental condition of the person committed. Even if, upon observation of the person, it is found that he is feeble-minded or insane, it is my opinion that he should be returned to the court or justice for regular commitment proceedings under Chapter 46 of the Code. I do not think that the preliminary order of commitment for observation, without more, would justify permanent detention of the individual. In this respect Section 1085 differs from Section 4909. Under a commitment pursuant to this last mentioned section, the individual may be held in the institution until he is restored to sanity, then to be returned for trial on the criminal charge against him.

It is my opinion that the order in question should be treated as having been made under Section 1085, and that upon completion of the examination of the individual a report should be made to the court of the findings in order that further appropriate action can be taken.

INSANE, EPILEPTICS, ETC.—Veteran found insane at time of commission of offense and time of trial and committed to hospital at Marion may be transferred to veteran's hospital. F-248c

April 14, 1950.

Dr. Joseph E. Barrett,
Commissioner of Department of Mental Hygiene and Hospitals.

This is in reply to your letter of April 4, 1950, regarding John S. Conner, who was committed to the Criminal Insane Department of the Southwestern State Hospital by the Corporation Court of the City of Alexandria.

From the enclosures submitted with your letter it appears that Mr. Conner was indicted for murder and at his trial entered a plea of insanity. An examining commission was appointed and found that he was insane both at the time of his trial and at the time of the alleged offense. The court entered an order declaring that he was insane and "legally not responsible for the alleged criminal acts of December 7, 1949, for which he stands indicted by the Corporation Court of the City of Alexandria, Virginia." It was ordered "that the defendant be removed to the Department of the Criminal Insane at Southwestern State Hospital at Marion, Virginia, there to be detained until he is restored to sanity."

The question has arisen as to whether this man, who is a veteran, can be transferred to a Veterans Hospital. The effect of the order of the Corporation Court was to discharge the defendant from all legal responsibility to answer in criminal proceedings for the crime with which he was charged and to commit him to the State mental hospital for care and treatment on account of his mental condition. This man is, therefore, being held, not to be returned to the court
for trial or further judicial action, but to be treated for his mental condition. The action to be taken with respect to him is the responsibility of the hospital authorities acting under the appropriate statutes.

The order of the court directing the man to be held until he is restored to sanity follows the directions of the statute under which the court acted, Sections 19-202 through 19-205, formerly Section 4909, of the Code. Section 19-205 provides that, in such cases as this, the person shall be ordered removed "to the Department of the Criminal Insane there to be detained until he is restored to sanity." The court's order, therefore, should not be construed as a direction forbidding the transfer of the patient to a Veterans Hospital if the statute itself should not be so construed.

Section 37-93 of the Code, which also deals with this question, provides in part as follows:

"* * * When any person charged with or indicted for any offense which may be punishable by death has been adjudged insane, both at the time of the offense and at the time when, but for such insanity, he would have been tried, and has been ordered by the court to be committed to the department for the criminal insane at the proper hospital, such person shall not be discharged therefrom until the superintendent of that hospital and the superintendents of two of the other hospitals or colonies, designated by the State Hospital Board, shall be satisfied, after thorough examination, that such person has been restored to sanity and may be discharged without danger to others, and provided that such discharge is given upon the consent and advice of the State Hospital Board; * * *"

While both Section 37-93 and Section 19-204, if read literally, could be construed as meaning that persons indicted for crime and committed to a State hospital because of insanity at the time of the offense should be held in the State hospital until restored to sanity, I do not think they should be so construed in view of Section 37-73, which authorizes transfers of veterans to a Veterans Administration Facility. I think, rather, that they should be construed in the light of their purpose and as meaning that the person should simply be held for treatment until he is restored to sanity.

Sections 37-73 and 37-74, providing for the transfer of veterans adjudged insane to a Veterans Facility, with the consent of the Manager of the Facility, who is thereupon vested with the same powers authorized by law to be exercised by the Superintendent of the State Hospital with reference to retention, custody and discharge of the veteran so transferred, were designed to enable veterans to take advantage of any treatment that might be available to them at such facilities. I do not think that these advantages should be denied because, while insane, he may have committed an offense for which he is not legally accountable. While Sections 37-73 and 37-74 follow the statutes dealing with regular commitments, it is my opinion that they are applicable to commitments incident to criminal proceedings where the individual is no longer held for trial and is not to be returned to court upon becoming sane. If, therefore, the Superintendent of the Hospital and the State Hospital Board are of the opinion that it would be for the best interest of the incompetent, it is my opinion that the transfer to a Veterans Facility may be made.
JAILS—Lodging of transients for Red Cross. F-75a

December 28, 1949.

MR. J. ABRAM BRUBAKER,
Sheriff of Page County.

This will reply to your letter of December 19, 1949, advising that the Chairman of the Home Service Committee of the Page County Chapter of the American Red Cross, has requested that you as Sheriff allow male transients who arrive in Luray at night en route elsewhere to spend the night in the county jail. You request my opinion as to whether you have authority to accede to this request, and further advise that the Chairman stated that he understood that this was the custom in various counties of the State, and that the funds of the local Red Cross Chapter could be conserved if such custom was inaugurated.

Section 2858 of the Code of Virginia (Michie, 1942) provides as follows:

"It shall be unlawful for any person other than the officers of the law in charge of the prisoners, the counsel of the prisoner, or such other persons as may be authorized by the court in whose custody said prisoner may be, to hold any communication, by word, sign, or writing, with said prisoner or prisoners confined in any jail in the Commonwealth of Virginia except in the presence of the sheriff or his deputies or of the jailor regularly in charge of said prisoner or prisoners, and any person violating or attempting to violate this section, or any sheriff, deputy or other person in charge of said prisoner or prisoners knowingly allowing any violation of the same shall be guilty of a misdemeanor, and upon conviction thereof be fined not less than five nor more than fifty dollars."

This section would, of course, be applicable if there were any prisoners in the jail the nights that the transients desired to be given free lodging. In any event, I find no statute giving you authority to grant the request of the Chairman.

JUDGES—Jurisdiction of circuit judge over trial justice's sentence. F-151

May 12, 1950.

HONORABLE J. R. H. ALEXANDER, Judge,
Twenty-sixth Judicial Circuit.

I have your letter of May 10, from which I quote as follows:

"Section 53-272 of the Code carries the following language. ‘In case the prisoner has been sentenced for a misdemeanor and committed, the Court, or the Judge of such Court in vacation may at any time before the sentence has been completely served, suspend the unserved portion of such sentence.’

“In your opinion does the foregoing language confer upon the Circuit Judge authority to suspend the Trial Justice’s sentence, no appeal having been taken?”

It is my opinion that the language quoted from Section 53-272 of the Code should be read in conjunction with the preceding provisions of that same section, and upon a reading of the whole statute, I conclude that the court referred to in the quoted portion of the statute is the court which originally imposed the sentence, and I am, therefore, of the opinion that, where the trial justice has imposed a sentence and no appeal was taken from his judgment, the circuit court judge has no authority to suspend the sentence. This office has previously ruled that a trial justice does have authority, under the provisions of Section 53-272, to suspend sentences, and it would appear that when no appeal is taken from his judgment, no other court would have such authority.
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JUDGMENTS—Fee for service of motion for judgment and Clerk's notice.  
F-72

HONORABLE EDGAR L. WINSTEAD,  
City Sergeant for the City of Roanoke.

February 22, 1950.

I have your letter of February 16, 1950, which reads, in part, as follows:

"Under our rules of procedure in serving a Notice of Motion for Judgment we have to serve a notice issued by the Clerk's Office, with the copy of Notice of Motion for Judgment. It is my interpretation that there should be a fee charged for each service in the same manner that we charged fees when serving a Chancery Subpoena, a deposition notice and a notice for suit money, attorneys fee and temporary alimony under the old procedure, and under the old procedure of course, we charged a fee for the service of each paper."

I am enclosing a copy of an opinion of the former Attorney General, the Honorable Abram P. Staples, rendered on June 24, 1943 to Mr. Lee F. Lawler, City Sergeant of Norfolk, Virginia. You will observe that in that opinion it was held that where two papers are closely related and served together only one fee should be charged for the service.

In the case you present I would be inclined to follow the same reasoning applied by Mr. Justice Staples if it were required, but it is my opinion that the new Rules of the Supreme Court of Appeals, which became effective on February 1, 1950, expressly govern the case which you present.

Rule 3:3(a) provides that an action shall be commenced by filing in the clerk's office a motion for judgment. Subsection (c) of this Rule provides the form of the notice to be given the motion for judgment and further provides:

"The clerk shall issue the notice and attach it to a copy of the motion for judgment, and the combined papers shall constitute the notice of motion for judgment to be served as a single paper."

It is, therefore, my opinion that only one fee should be charged for the service of the motion for judgment and the clerk's notice.

JUDGMENTS—Issuance of execution.  F-72

HONORABLE G. T. TURNER,  
Sheriff of Northampton County.

February 15, 1950.

I have your letter of February 7, 1950, in which you request my opinion on two questions concerning executions and levies.

Your first question is:

"What is the duty of the Trial Justice regarding the issuing of an execution after judgment when no instructions whatsoever are given the Trial Justice about any execution?"

In answer to a similar inquiry from the Honorable D. W. McNeil, Trial Justice, Lexington, Virginia, dated June 25, 1940, the former Attorney General, the Honorable Abram P. Staples, said:

"The Trial Justice Act itself makes no specific provision in this respect, but your attention is called to subsection 8 of Code section 4987-f (16-80, Code of 1950) which provides that the laws governing
procedure, appeals, etc., in connection with civil and police justices shall apply to trial justices.

"Code section 3105 (16-92, Code of 1950) provides that

"* * The civil and police justice rendering any judgment may immediately issue a writ of fieri facias thereon, and shall as a matter of course issue a writ of fieri facias thereon, after ten days from the rendition thereof, if there be not a new trial granted, nor an appeal allowed, nor a stay of execution; * * * ."

"It is my opinion, therefore, that the trial justice should of his own motion issue execution on every judgment rendered by him after ten days from the entry of judgment, subject to the exceptions mentioned in the statute."

Your second question is:

"What is the duty of the Sheriff when execution is issued to him by the Trial Justice but he gets no instructions whatsoever as to whether he should make any levy or not?"

It is my opinion that when an execution is placed in the hands of the sheriff it is, in effect, an order to "make out of the property of the defendant the amount due the plaintiff" and no further instructions from the court are required.

JUDGMENTS—Life of judgment by trial justice.  F-72

HONORABLE ROBERT D. HUFFMAN, Clerk, Circuit Court of Page County.

This is in reply to your letter of August 17th in which you ask the following two questions:

"Will you please advise me the time within which a judgment rendered by the Trial Justice is enforceable where execution has been issued by the Trial Justice and has not been docketed in the County Clerk's Office in the Judgment Lien Docket. It is our understanding that such a judgment which has not been docketed is not enforceable after one year where no execution has been issued and after ten years when execution has been issued. Is this correct?

"We understand that the Trial Justice is authorized by law to issue upon request an abstract of judgment rendered in his Court for two years after judgment which abstract may be docketed and execution is issued by the Clerk of the Circuit Court. After the expiration of two years how and when could the judgment be docketed if and when requested without an abstract by the Trial Justice, the original papers being filed in the County Clerk's Office."

The life of a judgment, whether rendered by a Trial Justice or otherwise, is governed by the right to issue execution or to revive the judgment by writ of *scire facias* under the provisions of Sections 6477 and 6478 of the Code. Section 6477, as amended in 1948, provides that execution may be issued and a *scire facias* or an action may be brought within twenty years after the date of the judgment. If the judgment is revived by *scire facias* within the twenty year period, the right to have further executions is extended for twenty years from the date of judgment on the *scire facias*, and so on indefinitely as long as the judgment is kept alive in such manner.

Docketing has nothing to do with the life of the judgment, the purpose of docketing merely being to give record notice of the lien of judgment to
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purchasers of real estate. Section 6470 provides that no judgment shall be a lien on real estate as against a purchaser for value without notice until and except from the time it is duly docketed. Section 6474 provides that no suit to enforce the lien of any judgment upon which the right to issue execution or to bring a scire facias is barred by Sections 6477 and 6478.

As you point out, in discussing your second question, the Trial Justice may only issue abstracts of judgment and executions for a period of two years from the date of judgment. Section 4987 (j) provides that after an abstract of judgment has been docketed in the office of the clerk of the circuit or corporation court, such clerk may thereafter issue further executions. This would authorize such clerk to issue executions at any time after the judgment had been docketed whether this be during the six month period that the papers are required to be kept in the Trial Justice's office or thereafter. This office has previously ruled that since, after a certain period of time (now six months), all of the papers in a case before a Trial Justice, including the judgment itself, are required to be returned to the clerk's office, such clerk may thereafter issue executions and abstracts of judgment for docketing. His right to do this after receiving the original papers does not depend upon whether or not an abstract of judgment had been issued by the Trial Justice during the two year period and docketed in the clerk's office.

JURY SERVICE—All public officers are not exempt therefrom. F-166


Mr. H. E. McSwain, Assistant Director,
V. P. I. Extension Service.

This is in reply to your letter of July 20, with which you enclosed correspondence of County Agent E. C. Grigsby to County Judge Alfred D. Barksdale concerning exemption of county agents from jury service in the United States District Court. You ask whether such officers are also exempt from jury service in the Circuit Court of the State.

While the Federal statutes provide for an exemption from jury service for all public officers, no similar provision is contained in the State law. Section 5985 of the Code of Virginia does exempt certain public officers, but no exemption is provided for county agents.

JUSTICE OF THE PEACE—Fee for serving on lunacy commission. F-136b

June 2, 1950.

Honorable James O. Kirk,
Justice of the Peace.

This is in reply to your letter of May 26th in which you stated that you, as Justice of the Peace, recently served on a lunacy commission in the City of Richmond and that the persons adjudicated insane at that time were legal residents of a city of less than forty thousand population. My opinion is desired on whether or not the city of less than forty thousand population should be required to pay a fee of Five Dollars under the provisions of Section 37-75 of the Code of 1950.

The pertinent part of Section 37-75, which deals with the fees and expenses of commitment, is as follows:
"The two physicians shall receive a fee of five dollars each for their services. The justice of the peace shall receive a fee of two dollars for his services; provided, however, that in cities having a population of more than forty thousand according to the last official United States census, the fee of the justice of the peace shall be five dollars. ** All expenses incurred, whether such person be committed to any State hospital or colony or not, including the fees, attendance and mileage aforesaid, shall be paid by the county or city of which such person was a legal resident at the time of such commitment; **"** (Italics supplied.)

Chapter 316 of the Acts of Assembly of 1948 amended Section 37-75 by adding the proviso underscored above, thereby increasing the fee of a Justice of the Peace in cities of more than forty thousand. The provision to the effect that the fees shall be paid by the county or city of which the person committed is a legal resident was not amended.

It is my opinion that the fee to be charged by a Justice of the Peace in this connection is controlled solely by where the commission is held, the legal residence of the person committed being immaterial. Therefore, it is proper for you, as Justice of the Peace, to charge a fee of Five Dollars when serving on a lunacy commission held in the City of Richmond, even though the legal residence of the committed person may be in a city of less than forty thousand population.

JUVENILE AND DOMESTIC RELATIONS—Adoption; court must have jurisdiction over the person seeking adoption of child, the child, and under certain circumstances over the child’s parents. F-175

October 4, 1949.

MR. J. LUTHER GLASS,
Department of Welfare and Institutions.

Relative to your request for an opinion from this office, I recite the material facts as related by you.

A Canadian national in the employ of his country’s Embassy at Washington, is at present living with his wife in Alexandria. It is the intention of these parties to make their home in Virginia for the next four years. They desire to institute proceedings in Virginia for the adoption of a Canadian child.

Section 5333 (b) of the Code of Virginia confers jurisdiction in proceedings for adoption on any court of record having chancery jurisdiction “in the county or city in which the petitioner resides.” It is also provided that the petition may be filed by “any natural person who is a resident of the State of Virginia.”

It think it clear that the fact of alien domicile would not of itself prevent the filing of a petition for the adoption of a child. If the petitioner is an actual, though temporary, resident of the State of Virginia, he has a right to file such a petition.

However, there are other jurisdictional considerations prerequisite to the entry of a valid final order of adoption. There must be the written consent of the child, if fourteen years of age or older and the written consent of the parent or parents under the circumstances detailed in Section 5333 (d). To give a decree of adoption full force and effect, the court must have jurisdiction over the person seeking to adopt the child; over the child and, under certain circumstances, over the parents of the child.

I believe that the child, of necessity, has to be within the jurisdiction of the court in which the petition is filed. A Canadian child residing in Canada would have to be brought within the jurisdiction of the court before the court could enter a valid and binding decree of adoption.
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It is my opinion that if the child is brought within the jurisdiction of the court and the consent provisions of Section 5333 (d) are complied with, the Virginia court could entertain the petition and proceed to a final valid order of adoption. The law contemplates that after the entry of the interlocutory order, the child must be in the home of the petitioner for purposes of visitation.

JUVENILE AND DOMESTIC RELATIONS—Child may be placed on probation under supervision of regular probation officer. F-84

HONORABLE L. BROOKS SMITH, Judge,
Juvenile and Domestic Relations Court for Accomack County.

October 18, 1949.

I have your letter of October 7, 1949, in which you ask whether or not the juvenile court of a county where there is no separate juvenile court can refer a child from 16 to 18 years of age to the regular probation and parole officer of said county, or whether such a case, when probation is desired, must be referred to the local Department of Public Welfare for supervision by the child welfare worker.

Section 1905 of the Code of Virginia says, among other things, that the juvenile and domestic relations court in cities and counties shall have the power to make and enter such judgments or orders for the 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. Section 1910 of the Code provides, in part, that the Judge may make such order or judgment as will best conserve the welfare of such child and carry out the objects of this chapter. While this language is very general, it indicates that the purpose of this chapter is to serve the best interest of the child and, therefore, the exercise of discretion toward that end is desirable. This section further provides as follows:

"After such hearing and adjudication the court may place the child under the care and control of a probation officer, and may allow such child to remain in its home, subject to the visitation of a probation officer, to be returned to the court by the parent or probation officer when ordered to do so by the judge for further proceedings whenever such action may appear to said court or judge necessary; or the court may order the child to be placed in a suitable family home, subject to the friendly visitation and supervision of a probation officer or of an agent of the State board of public welfare, and subject to the further order of the court; or it may authorize the child to be boarded out in some suitable family home, school or institution (approved by the State board of public welfare); or the court may commit such child to the State board of public welfare or to any society, association or institution incorporated under the laws of Virginia approved by said State board of public welfare, or the court may make such other order or judgment as the court may deem for the best interest of the child and for the proper protection of the public interest; provided, that all delinquent children intended to be placed in a State institution shall be committed to the State board of public welfare—it being the purpose of this chapter to make said board the sole agency for the guardianship of delinquent children committed to the State. * * * ."

It would seem that, under the provisions of §1910, if the child is to be committed to a State institution he must be turned over to the State Board of Public Welfare, but where probation is desired, he may be placed under the supervision of a probation officer. Section 1915, which you called to my
attention, permits a special probation officer for children for cases arising under §§1922a and 1922b, however, it would seem that nothing in this section prohibits the regular parole officer from supervising cases involving juveniles.

The final paragraph of §4788g relieves the regular probation officer of the duty of supervising juveniles, that is to say, it would seem he cannot be required to act in such cases, however, if his other duties are not so great as to prevent his acting and he is willing to do so it would seem from the sections referred to that when probation is desired it would be proper for the Court to refer such a case to the regular probation and parole officer.

**JUVENILE AND DOMESTIC RELATIONS—City of Portsmouth—Police justice and juvenile judge may be same person. F-136c**

HONORABLE J. ALDEN OAST,
Commonwealth's Attorney for City of Portsmouth.

June 23, 1950.

This is in reply to your letter from which I quote as follows:

"I would appreciate it if you would, at your earliest convenience, give me a ruling on the following set of facts. It is provided on page 667, chapter 383, Acts of Assembly 1950, approved April 5, 1950, in part as follows: In cities of less than 50,000 population the Police Justice, Civil Justice or Civil and Police Justice of such city if otherwise qualified, shall be eligible for appointment as Judge of the Juvenile and Domestic Relations Court; and on page 1155, Acts of Assembly 1950, approved April 7, 1950, amending the charter of the City of Portsmouth, it is said in part: The council of the City may designate the Civil and Police Justice to act as Judge of the Juvenile and Domestic Relations Court of the City. The census now being taken, known as the 1950 census has reported unofficially that the population of the City of Portsmouth will be 70,000 people. As presently constituted, the Civil and Police Justice in Portsmouth, by reason of appointment of the City Council, now serves as Judge of the Juvenile and Domestic Relations Court of this city and I am informed by City Manager Vass that it was the thought of the Government to have one man serve in the capacity of Civil and Police Justice and Juvenile Judge.

"I would appreciate it if you would let me know, under the law pertaining to the subject, if the Judge of the Civil and Police Court can be elected and serve as Judge of the Juvenile and Domestic Relations Court also."

Section 81 of Chapter 383 of the Acts of Assembly of 1950, to which you refer, is as follows:

"The provisions of this law shall supersede and repeal any provision of any charter of any city, or any State law to the contrary or in conflict herewith. Provided, however, that such repeal shall not affect in any way the provisions of Chapter sixty-eight, Acts of the General Assembly of Virginia of nineteen hundred and forty-four, amending the charter of the town of Franklin, in Southampton County."

As you know, the approval of the Governor, with a certain exception not pertinent here, is necessary to fulfill the requirements of the Constitution of Virginia before a bill has the force and effect of law. Therefore, the date of passage of any bill is the date of the Governor's approval thereof. Also, it is well established that where a later statute adopted for a particular locality conflicts with a general law of state-wide application,
the special or local law will supersede the general enactment. *Commonwealth v. Rose*, 160 Va. 177.

Therefore, it is my opinion that, since the statute amending the charter of the City of Portsmouth was passed two days after the general law providing a state-wide system of juvenile and domestic relations courts, it is controlling and exists as an exception to the terms of the general law, as if expressly mentioned as such in §81 of the general law quoted above.

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**JUVENILE AND DOMESTIC RELATIONS—Responsibility of stepfather for support of juvenile. F-239**

Miss Annie Redd Carter, Clerk and Chief Probation Officer for Danville.

January 12, 1950.

This will reply to your letter of January 4, from which I quote in full:

"Judge W. W. Moore, Jr., of the Juvenile and Domestic Relations Court of this City, has asked that I write and ask you for a ruling in regard to non-support of children by parents. The Code does not state whether or not a stepfather is responsible for his wife's children by a former marriage; it simply says father or mother. Under the law, who is responsible for the support of children whose mother has remarried and whose stepfather refuses to support them. Would you say that under the law 'father' includes stepfather as well as the natural father?"

I assume that your reference to the Code is to Section 1936 (20-61) which provides for the penalty for desertion or non-support of wife or children in destitute circumstances. You will note that the first sentence of this section is in part as follows:

"Any husband who without just cause deserts or willfully neglects or refuses or fails to provide for the support and maintenance of his wife, and any parent who fails, etc."

As a stepfather is not a parent of the children of the first marriage, I am of the opinion that this section is not applicable to a stepfather. The mother of the children would be responsible for their support, as provided in Section 1936 (20-61 of 1950 Code).

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**JUVENILE AND DOMESTIC RELATIONS—Support of illegitimate child by father. F-383**

Honoroble L. Brooks Smith, Trial Justice for Accomack County.

May 8, 1950.

This is in reply to your letter of April 25, from which I quote as follows:

"Will you be so kind as to give me an opinion as to whether or not the words 'any parent who deserts or willfully neglects or refuses or fails to provide for the support and maintenance of his or her child, etc.,' in section 20-61 of the Virginia Code is sufficient to require an unmarried father to support children which he has admitted openly in the community as being his and yet has not complied with section 64-6 of the Code by marrying the mother of said child or children, etc.?"
In the case of *Brown v. Brown*, 183 Va. 353, the Supreme Court of Appeals declared that there was no legal duty on the part of the father of an illegitimate child to support such child. Therefore, it is my opinion that the word "parent" as used in Section 64-60 of the Code does not refer to an unmarried father, since such section is a penal statute and must be strictly construed.

**JUVENILE AND DOMESTIC RELATIONS—Support of mother by married children.** F-383

October 26, 1949.

Honorable James Hoge Ricks, Judge,
Honorable James H. Montgomery, Jr., Associate Judge,
Juvenile and Domestic Relations Court for Richmond.

I have your letter of October 20, 1949, in which you ask whether, in my opinion, the married daughters of an elderly woman may be made to contribute to her financial support under the following set of facts:

"The mother is 81 years of age, quite infirm and has no income of her own. She has five children, three sons and two daughters. One son is financially able to pay for the care of the mother in a nursing home, but refuses to do so unless there is equal contribution by the other four children. The married daughters are not employed, but are married to men of rather substantial means. They have refused to contribute any money towards the support of the mother stating that they would have to obtain such financial support from their husbands. It has been alleged that each of the daughters has a bank account from money supplied to them by the respective husbands. The daughters maintain that each of the children should maintain the mother in their respective homes for a certain period of the year."

As you well know, the opening sentence of §1944a of the Virginia Code reads as follows:

"It shall be the duty of all persons sixteen years of age or over, of sufficient earning capacity or income, after reasonably providing for his own immediate family, to provide or assist in providing for the support and maintenance of his or her mother or aged or infirm father, he or she being then and there in destitute circumstances." (Italics supplied)

It is my opinion that the married daughters may not be required to contribute to the support of their mother in this case, since, even though their husbands are men of rather substantial means, it does not appear that the daughters have an independent income. Indeed, the facts state that they are not employed. I do not believe that money supplied a wife by her husband is such income as the statute contemplates, since the husband could restrict the purpose for which such money could be used to anything he saw fit. In other words, the husband, if he wished, could give his wife money only on condition that she not turn any of it over to her mother.

Cases of this nature are indeed unfortunate, and while I feel that we should do everything in our power to alleviate the suffering of elderly parents, I do not believe in the present case the statute permits that the married daughters be required to contribute to the support of their mother.
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JUVENILE AND DOMESTIC RELATIONS COURT—Trial justice in county to serve as judge if otherwise qualified—Commencement of term under Act of 1950. F-239

June 28, 1950.

HONORABLE W. V. BIRCHFIELD,
Trial Justice for Smyth County.

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

"Under the Acts of the Assembly of 1950, chapter 383 approved April 5, 1950, there is created a state wide system of Juvenile and Domestic Relations Courts.

"Under Section 5 near the bottom of the page 667 of the Acts appears the following:

"'All judges elected or appointed under this law shall enter upon the discharge of their duties the first day of January next succeeding their election, or appointment, provided that every judge holding office on the effective date of this law shall continue in office under provisions of this law and exercise the powers and jurisdiction herein prescribed until his term of office shall expire.'

* * * * * *

"While this provision seems to be connected with city appointments, it is rather broad; and your opinion as to the construction or meaning of this sentence and whether or not it affects juvenile courts in the respective counties will be appreciated."

It will be noted that Section 4 of the Act provides, among other things, that a trial justice in a county shall also be the judge of the county's juvenile and domestic relations court if such justice is otherwise qualified.

It is my opinion that this provision in Section 4 renders inapplicable the provision of Section 5, quoted above, when the trial justice is qualified to serve as judge of the juvenile and domestic relations court. In such cases he would be appointed as judge of the juvenile and domestic relations court because of his appointment as trial justice and his term as juvenile judge would be coextensive with his term as trial justice.

Therefore, I am of the opinion that where a trial justice is appointed or re-appointed for a term beginning July 1, 1950, and is also appointed judge of the juvenile and domestic relations court he would enter upon the discharge of his duties in the latter capacity on July 1, 1950, with full authority to perform the duties and powers conferred by Chapter 383 of the Acts of 1950.

LABOR—Authority of Commissioner or his agent to go on employer's premises and question worker. F-143

November 2, 1949.

HONORABLE EDMOND M. BoggS,
Commissioner of Department of Labor and Industry.

This is in answer to your letter of October 28, 1949, in which you ask:

"Does the Commissioner of Labor or his designated agents have the right to interrogate any person during working hours on company property as outlined in Section 1799 of the Labor Laws of Virginia?"

As you know §1799 of the Code of Virginia provides, in part, as follows:

"The commissioner of labor shall have power to take and preserve testimony, examine witnesses, administer oaths, and under proper restriction
enter any public institution of the State, and any factory, store, workshop, laundry, or mine, and interrogate any person employed therein or connected therewith, or the proper officer of a corporation, or file a written or printed list of interrogatories and require full and complete answers to the same, to be returned under oath within thirty days of the receipt of said list of questions."

It is my opinion that the power to enter on company property and "interrogate any person employed therein or connected therewith" necessarily implies the power to question those persons during working hours. Any other interpretation of these words would make them practically meaningless, since one would hardly expect to find employees on the company premises before or after working hours for any considerable period of time.

It is true that under the wording of the statute this power may only be exercised "under proper restriction" but, in my opinion, this means only that the Commissioner of Labor or his agent will be expected to observe safety regulations and other reasonable regulations in force on the premises. I do not believe this limitation will permit denial of a reasonable request to question an employee.

LABOR LAWS—Woman switchboard operator in hospital subject to provisions of law. F-120

HONORABLE EDMOND M. BOGGS,
Commissioner of Department of Labor and Industry.

This will reply to your letter of October 4, from which I quote as follows:

"This letter requests your opinion and interpretation of the statute known as the Hours Law for Women with particular reference to PBX and switchboard operators. I refer to Section 1808 (Chap. 409, Acts of 1938) as per attached copy.

"All major offices employing PBX and switchboard operators have recognized this provision of the law as being one that they must abide by. We have classified this type of work as being workshop duty.

"A question has arisen as to whether such employees in hospitals are subject to the regulation. We are also confronted with the controversial problem as to whether a woman employed in a hotel as a switchboard operator and assistant desk clerk would be subject to this provision of the law."

This office has taken the position that switchboard operators who operate PBX switchboards come under the provisions of this section as set forth in your letter. The fact that the switchboard is located in a hospital rather than in a telephone exchange is, in my opinion, immaterial. Therefore, I am of the opinion that operators of a PBX switchboard in a hospital come under the provisions of section 1808 as set forth in the first sentence of the section, which begins as follows: "No female shall be employed" etc.

The section provides in part as follows: "But nothing in this section shall be construed to apply to females whose full time is employed" and then lists certain exceptions. The wording is very clear that to come under the exceptions the full time of the female must be put to those particular services listed. Therefore, it would appear that, if a part of the female's time is to be devoted to workshop duty, then she could not come within the exceptions, but would come under the first sentence of the section.
This is in reply to your request for the proper interpretation of Section 41-8 of the Code which deals with the issuance of land grants. The pertinent part of the section in question provides that the State Librarian may issue a grant upon a survey if there is endorsed on the survey an affidavit of the surveyor and the person applying for the grant to the effect that they believe the land embraced in the survey is unappropriated land, but no grant issued shall be valid which embraces "* * * interest in any islands created in the navigable waters of the State through the instrumentality of dredging operations conducted by the United States between parallel or concentric lines fifteen hundred feet on either side of the channel axis, but every such grant for any such lands, islands, bed, rock, or shoal shall be absolutely void; * * *"

It can be seen that you, as State Librarian, may issue a land grant which embraces an island created by dredging operations and located within fifteen hundred feet of either side of the channel axis of a navigable stream, but that such a grant would pass no estate or interest to the grantee. Therefore, as a practical matter, you should require from the surveyor and the person applying for a grant to an island situated in navigable waters an affidavit to the effect that such island was not created by the method described above.

As to the proper interpretation of the word "created" it is my opinion that it should be given its usual and well understood meaning. Whether or not the island might be so small before being built up by dredging operations as to be considered to have been "created" by such operations is a question to be determined by the courts upon proper proceeding brought to test the validity of the grant. This office could not attempt to predict whether a court under a certain set of facts would consider an island so small before dredging operations began as to apply the rule of de minimis, i. e., the law does not notice trifling matters.

This is in reply to your letter of June 13, in which you point out that Section 47 of Chapter 578 of the Acts of Assembly of 1950, the Appropriation Act for the coming biennium, provides for the supervision of expenditures and budget estimates of agencies not owned and controlled by the State. You ask whether the obligation of seeing that the prescribed conditions are met rest with the Comptroller and the Budget Director or with the State Librarian, who is given responsibility in connection with several of these agencies.

Section 47 of the Appropriation Act provides as follows:

"No disbursement shall be made from any funds appropriated in this act to any society, institution, board, association, or agency, not
owned or controlled by the State of Virginia, except with the consent and approval of the head or governing board of the supervisory department or agency herein designated. The payrolls or bills presented to the Comptroller for said expenditures shall be itemized and classified, in accordance with the budget classification adopted by the Governor, and shall be countersigned by the head or executive officer of the designated State department or institution, and lump sum transfers of appropriations to the aforesaid organizations are hereby prohibited. It shall be the duty of each of said organizations to submit its biennial budget estimates to the head or executive officer of the designated State department or institution for examination and approval of the form of submission and for transmission of the same to the Director of the Division of the Budget with such recommendations as may be considered necessary or advisable. The accounts of each of the said organizations shall be subject to audit by the Auditor of Public Accounts at the direction of the Governor.”

Following the general provisions quoted above there are listed in one column a number of societies and other agencies for which appropriations are made and in the adjoining column are designated the State departments or agencies which are to supervise the disbursements of the appropriations to the respective societies and agencies not owned by the State.

It is clear from the language quoted above that the general duty of supervising the expenditures rests upon the supervisory department or agency designated by this section, the head of which is required to countersign all payrolls and bills presented to the Comptroller for payment. While the Comptroller is required to exercise the duties imposed upon him by law with respect to these appropriations, just as in the case of all other appropriations made to State departments and agencies, it is my opinion that this section of the Appropriation Act imposes independent duties upon the State Librarian with respect to those non-State agencies whose appropriations he is directed to supervise. He must approve all bills to be presented for payment, just as he must first approve budget estimates before they are submitted to the Director of the Budget, who, of course, is then required to exercise the powers and duties imposed upon him by statute.

LICENCES—When may city of first class require contractor to obtain. F-34

HONORABLE J. E. DRUMHELLER,
Commissioner of the Revenue for Waynesboro.

This is in reply to your letter of May 2, from which I quote as follows:

“I would like your opinion upon the following matters in connection with Section 58-299 of the Code of Virginia. May a city of the first class require a contractor to obtain a license who; (1) has his only office in an adjoining county, has procured the State license required, has not procured any other city or town license and has not procured any license from the county, since such county does not require a license. (2) Has his only office in a city or town which does not require a license, but has the State license required, and does not have a license from any other city or town. (3) Has his principal office in another city and has purchased the license required by such city, has the State license required, but also maintains a branch office in said city of the first class.”
Section 58-299 of the Code reads as follows:

“When a contractor, electrical contractor or a plumbing and steam fitting contractor shall have paid the aforesaid State license and any local license required by the city or town in which his principal office and any branch office or offices may be located, no further license shall be required by the State or other city or town for conducting any such business within the confines of this State, except that qualification under §32-61 may be required of contractors doing plumbing.”

On December 22, 1949, I rendered an opinion to the Honorable John Paul Causey, Commonwealth's Attorney for King William County, on the effect of this statutory provision, which was then contained in Section 176 of the Tax Code, upon the situation described in the first example set forth in your letter. A copy of this opinion is enclosed. You will note that it is the opinion of this office that since this statute affords an exemption from taxation it is to be strictly construed. For this reason, the contractor in the first situation described by you, having paid no local license to a city or town in which he maintains an office, does not come within the language of the exemption and can be required to pay a local license to any other city or town in which he does business.

The second situation described by you presents a more difficult question, since the contractor does maintain an office in a locality which could have required him to pay a license and he could contend that he has paid all licenses which are required of him. However, since the purpose of the statute was to prevent a duplication of local license taxes when the contractor has paid a license to the locality in which he maintains his office, it is my opinion that, if that locality does not require a license, he may be required to take out a license by another locality where he conducts business. In such a case the contractor has not paid a local license to the city or town where he maintains an office. The fact that he has not done so is not altered just because none was required. It would certainly be unjust to permit him to do business in another locality free of tax while at the same time denying this privilege to a person whose office was situated within a county. The purpose of the statute is no more applicable to the one situation than to the other.

In the third situation described by you it is clear that the contractor may be required to obtain the city license. The exemption applies only where the contractor has paid all local licenses to the city or town in which any of his branch offices is located as well as to the city or town in which his principal office is situated.

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LOTTERY—Element of chance present, scheme is unlawful. F-123


HONORABLE DABNEY W. WATTS,
Commonwealth's Attorney for City of Winchester.

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

“I have deemed it advisable to request a written opinion from your office concerning the violation of Section 4693 of the Code of Virginia (Michie’s) of 1942 or other sections of Chapter 185 of the Code by the means of a ‘grab-box’ sale, ‘grab-bag’ sale or ‘surprise package’ sale sponsored by a retail merchant.

“I am enclosing an ad which this place of business ran in the newspaper, publicizing such a sale, the subject of this inquiry. There was also extensive radio advertising. The packages were placed in a huge box on the counter
in the place of business, and the public paid their dollar, selected a package
from the box and opened it in the store. The boxes were not all of the same
size. The merchant sponsoring this sale brought it to an end upon being
informed of the likelihood that it was in violation of the law."

As you know, a lottery consists of three elements, namely, prize, consideration
and chance and the existence of all three in any particular scheme is necessary to
constitute a violation of the lottery laws.

There appears to be no question of the fact that the elements of prize and
consideration are present in the above described scheme. As to the element
of chance, it appears from the newspaper advertisement enclosed in your letter
that for a consideration of only one dollar a participant may receive a prize
valued at fifty dollars. In other words, a participant is taking a chance with
the hope of receiving fifty dollars in exchange for one dollar.

Therefore, it is my opinion that the element of chance is definitely present
in this type of scheme, thereby violating the lottery laws of this State.

LOTTERY—Elements of; Advertising value is consideration. F-123

HONORABLE BRADLEY ROBERTS,
Commonwealth's Attorney for the City of Bristol.

This is in reply to your letter of October 11, in which you ask my opinion
as to whether the following scheme would constitute a violation of our lottery
statute:

"1. The merchants will pay for screen and lobby display as well as
buying the bicycles for this program as a means of advertising for them.
"2. With each purchase of merchandise or equivalent the customer
will be given tickets at no extra cost over and above the regular merchandise
cost. These coupons may be dropped in a box in the theatre lobby during
the regular attendance of the show and each Thursday a lucky number
will be selected from the box on the theatre stage designating the person
the bicycle will go to. He or she will pick up their bicycle at which ever
store the lucky ticket came from.
"3. The person selected however must be present at the time of the
drawing or have registered at the show sometime on that date in order
to receive the bicycle. If the person with the selected number is not present
or has not registered on that date a second number etc., will be taken until
a qualifying number is selected.
"There is absolutely nothing to buy extra in order to receive a coupon
or to attend the show."

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.

Since it is necessary in order to win under this plan that a purchase be
made in order to secure a ticket, and that the participant either be present at
the theater on the night of the drawing or have registered at the theater during
the day, it would seem that both the merchants and the theater are receiving
advertising value which, under the rule of Maughs v. Porter, 157 Va. 415, 161
S. E. 242, is sufficient to constitute consideration.

Neither the Virginia Constitution nor its statutes define a lottery. The reason
for this is apparent. Those who devise such schemes would employ boundless
genius to circumvent a precise definition. There is no end to the variety of schemes which may constitute a lottery. The 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 remediable 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 gambling statutes of Virginia.

For the foregoing reasons I am of the opinion that the plan submitted constitutes a lottery in violation of §4693 of the Code of Virginia.

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MARY WASHINGTON COLLEGE—Liability for negligent injury to student. F-268c

Mr. Edgar E. Woodward, Treasurer, October 10, 1949, Mary Washington College.

I have received your letter of September 30, 1949, from which I quote as follows:

"One of our students, Miss Jacquelyn Hobbs, was standing in front of a dresser in her dormitory room when a light bulb in a bracket light at the side of the dresser exploded. Pieces of the glass struck her in the eye, necessitating medical attention to have them removed. I understand that the injury left no complications and her eyesight is not impaired.

"The parents of the student were notified and naturally they became quite concerned. Circumstances prevented them from making a special trip to the college, which necessitated numerous long distance telephone calls.

"The expenses incurred consist of a doctor bill of $9.00 and telephone bills amounting to $15.00, making a total of $24.00.

"The parents of the student take the position that the college is liable for the expenses incurred. We do not know what our legal position is in this respect. We are not concerned with the amount involved but we are vitally concerned with establishing a precedent should we make an improper payment without legal counsel."

There is no reason given for this accident. No negligence on the part of any employee of the institution is alleged. Even had an employee caused the accident, Mary Washington College is a State institution or agency and is, therefore, in legal contemplation a part of the State. We have frequently expressed the opinion that neither the State nor any of its governmental agencies, such as Mary Washington College, is liable for any negligent injury to any person or for any tort committed by any of the employees of any such institution or agency. It follows, therefore, that it would not be proper to make payment in this case.
MEDICAL COLLEGE OF VIRGINIA—Authority to sell securities purchased with endowment funds. F-268d

April 5, 1950.

MR. W. F. TOMPKINS, Comptroller,
Medical College of Virginia.

This is in reply to your letter of April 3, 1950, in which you ask my opinion as to whether the Board of Visitors and Executive Committee of the Medical College of Virginia have the power to authorize the sale of corporate stock owned by the college and acquired with funds other than those appropriated by the State of Virginia.

You enclosed in your letter a copy of a resolution adopted by the Board of Visitors directing the Executive Committee to sell certain shares of stock in the Life Insurance Company of Virginia held by the college.

It is my opinion that the Board of Visitors acting through the Executive Committee has authority to sell stocks or other investment securities held by the corporation and acquired with funds other than State funds, subject of course to the limitation that if the property was acquired through a will or other instrument, the terms of which forbid or restrict such disposal, the property so held could not be disposed of in violation of those terms.

It is my opinion that Section 23-50 (9) of the Code of Virginia, 1950, not only gives the Board of Visitors this power but in fact places a duty on them to so manage the property of the college so as to protect its best interest. This Section reads as follows:

"The board of visitors shall manage the affairs of the corporation, care for its property, conduct its business, control its finances and shape its policy."

It is my opinion that the term "control the finances" when considered in conjunction with the duty to "care for its property" includes the power to sell stock or other investment securities held in the endowment fund of the college when the Board of Visitors, in its discretion, deems it wise to do so.

MINES AND MINING LAWS—Authority of State Mine Inspector to make rules and regulations. F-226

March 4, 1950.

HONORABLE EDMOND M. BOGGS, Commissioner,
Department of Labor and Industry.

I am in receipt of your letter of March 1, 1950.

You desire my opinion as to the authority of the State Mine Inspector to make a rule or regulation prohibiting the use of black grain or pellet powder by the operator of mines operating in the Cary or Lower Banner seam.

The Chief Mine Inspector states that "the very nature of this seam tends to create an explosion hazard, the dust is very explosive and every mining operation seems to cause more fine coal dust than it does in other nearby coal measures."

Section 45-8, Code of 1950 (1887Q, Michie Code 1942) provides that:

"The State Mine Inspector shall have authority to make rules and regulations, in writing, not inconsistent with the provisions of this title, to take care of hazardous conditions, if and when the need arises, not covered by the specific provisions of this title."

I am of the opinion that the State Mine Inspector is clothed with ample authority to make rules and regulations to safeguard against conditions devel-
oping in any class of mines, which conditions he deems to be hazardous to
the safety of the operation. The rule or regulation, however, must be in
writing.

The finding of fact, as stated by the Inspector, is sufficient upon which
to predicate a rule or regulation to prohibit the use of black grain or pellet
powder in mines operating in the seam described.

MOTOR VEHICLE CODE—School buses—Stopping for. F-353

HONORABLE S. PAGE HIGGINBOTHAM,
Commonwealth's Attorney for Orange County.

This is in reply to your letter of November 7 in which you request my
opinion as to the proper interpretation of paragraph 5 of §2154(108) of
Michie's Code which provides that any person who shall "fail to stop at a
school bus while taking on or discharging school children, whether going in
the same or the opposite direction, and remain stopped until all school chil-
dren are clear of the Highway" shall be guilty of reckless driving.

I concur with your opinion that failure to stop at a school bus which
has stopped for the purpose of "taking on or discharging school children"
constitutes a crime under the above section. I further agree with you that
it is not necessary that the child actually be in the process of going down or
coming up the steps of the school bus or actually be on the highway.

In other words, it is my opinion that a person violates the above section if
he drives his vehicle past a stopped bus, even though a school child has not
been discharged, but is merely walking down the aisle of the bus for the
purpose of being discharged.

MOTOR VEHICLE LAWS—Aiding and abetting drunken driver; loss of
permit. F-353

HONORABLE FRANK NAT WATKINS,
Commonwealth's Attorney for Prince Edward County.

This is in reply to your letter of September 26 in which you state that you
desire my opinion on the following facts:

The owner of an automobile was intoxicated and riding in the car at
the time of the arrest of the driver, who was also intoxicated, and who was
arrested for operating a car under the influence of whiskey.

The facts in the case appear further that the owner furnished the
whiskey to the driver and had the driver to drive him from place to place.
Can the owner be tried as an aider and abettor, and if so, would his
license be revoked, if convicted the same as the driver?

Upon consideration of your first question, "a principal in the second degree,
or an aider and abettor, as he is sometimes termed, is one who is present, actually
or constructively, aiding and abetting the principal actor in the commission of
the crime." See; Michie's Digest of Virginia and West Virginia Reports, Vol.
1, p. 40, and cases cited therein.

In the case of James v Commonwealth, 178 Va. 28, 16 S. E. (2d) 296, the
Supreme Court of Appeals held that the trial court committed no error in holding
REPORT OF THE ATTORNEY GENERAL

the defendant guilty as a principal in the second degree upon an indictment charging him with aiding and abetting and commission of the offense of "hit and run." Hudgins, J., now Chief Justice, delivered the opinion of the Court, and said:

"* * * The accused was not drunk. He knew that Bertha May Smith was drunk. Nevertheless, he permitted her to drive, sat by her side, actually saw his automobile strike a man, and, in silence, allowed the driver to take him in his own automobile from the scene of the accident.

"The accused contends that this evidence proves that the crimes were committed in his presence and nothing more. The fallacy of this contention is that it ignores the fact that the owner of the automobile is entitled to control its operation. Such owner, riding with a driver to whom he has temporarily surrendered the operation of the car, may or may not be criminally responsible for a single act of recklessness resulting in injury or death to a third party. An accident may happen in a split second, too quickly for the owner to exercise this right of control. The offenses in question were committed after the injuries had been inflicted upon the pedestrians. The accused, with full knowledge of at least two collisions, permitted the driver to leave the scene without protest. It was his duty to control the operation of the car. Failure to perform this duty made the owner a participant in the offenses proven to have been committed.

The Supreme Judicial Court of Massachusetts held, in Commonwealth v. Sherman, 191 Mass. 439, 78 N. E. 98, that the owner of an automobile was criminally responsible where the evidence showed that he was riding in the car and knew that it was being operated by another at an illegal rate of speed. The same court held in Commonwealth v. Saltman, 289 Mass. 554, 194 N. E. 703, that the owner retained control of the operation of an automobile, notwithstanding the fact that his chauffeur was the medium through which that control was exercised. When such owner was seated beside the driver, failure to exercise such control and prevent, so far as he was able, any conduct of his driver in violation of the criminal laws made him criminally responsible."

(178 Va. 34-35)

See also, Adkins v. Commonwealth, 175 Va. 590, 9 S. E. (2d) 349.
While the cases cited above deal with aiding and abetting the commissions of felonies, the principles pronounced therein are equally applicable to misdemeanors. See, Brown v. Commonwealth, 130 Va. 733, 107 S. E. 809, in which the Court said:

"'Every person who is present at the commission of a trespass, encouraging or inciting the same by words, gestures, looks or signs, or who in any way or by any means, countenances or approves the same, is, in law, assumed to be an aider and abettor, and is liable as principal.' * * *" (130 Va. 736)

Also, Hitt v. Commonwealth, 131 Va. 752, 760, 109 S. E. 597, in which it was held, upon a conviction for a misdemeanor, that the defendant, if guilty at all, was guilty as a principal in the second degree upon the theory that being present he aided and abetted the act.

Since the facts presented in your letter are quite analogous to those considered in James v. Commonwealth, supra, it seems clear that the owner in question may be prosecuted for aiding and abetting the commission of the crime of driving while intoxicated. Furthermore, I am of the opinion that the evidence would be sufficient to sustain a conviction of such offense.

There are no accessories in misdemeanor cases and all concerned are principals. Hodge v. Winchester, 153 Va. 904, 908, 150 S. E. 392; Watt's Case, 99 Va. 872, 880, 39 S. E. 706.

In the case of Foster v. Commonwealth, 179 Va. 96, 18 S. E. (2d) 314, the
defendant was charged with a misdemeanor (keeping a house of ill fame, etc.) and found guilty by a jury. The Court, in sustaining the conviction, said:

“A jury might have believed that he was a principal or one of them; it might have believed that he was an accessory, and it might have believed that he was an aider or an abettor.

“In a misdemeanor like that in judgment this is a matter of no importance. The punishment in each instance is the same. * * *.” (179 Va. 96)

Section 4722a of Michie’s Code, as amended, provides for the punishment of a person driving an automobile while intoxicated; and a conviction for a violation thereof operates of itself to deprive the person convicted of his right to drive an automobile.

Therefore, in answer to your second question, it is my opinion that if the owner of the automobile is convicted under the above section as an aider and abettor, his driver’s permit would be automatically revoked, since he, as a principal, has violated the statute.

MOTOR VEHICLE LAWS—Reckless driving; continuous trip through county and town may constitute offense in both jurisdictions. F-353

HONORABLE WILLIAM D. PRINCE,
Trial Justice for Sussex County.

This is in reply to your letter of May 4, 1950, in which you ask whether, in my opinion, a person driving an automobile in a reckless manner through the Town of Stony Creek and continuing this reckless trip through the County of Sussex may be tried for reckless driving in violation of a town ordinance in Stony Creek and also tried in Sussex County for violation of the provision of the State Code, with reference to reckless driving. You are no doubt aware of the provisions of Section 19-232 of the Code of 1950, which provides, among other things, that if the same act be a violation of one or more statutes and also one or more ordinances, conviction under one such statute or ordinance shall bar a proceeding under the other or others.

It is my opinion that the answer to this question depends upon whether that which has been done by the person amounts to one act of reckless driving or a series of such acts. If the driver of the vehicle did acts in Stony Creek which amounted to reckless driving, and did other acts in the County which amounted to reckless driving, it is my opinion that he could be prosecuted in both jurisdictions. This would seem to be a necessary result from the venue statutes, for certainly one could not be convicted for reckless driving in violation of the town ordinance on proof of a reckless act done outside the town limits. Such a conviction would have to be based on reckless acts done within the town. A prosecution for violation of the town ordinance then would not and could not be based on acts done in the County outside the town. Hence, if the driver has done reckless acts in both jurisdictions, two convictions may be had.

It is conceivable that a person driving through a town or county in this State might on one trip be guilty of two instances of reckless driving and subjected to two convictions in the same jurisdiction because he had committed two acts. As to this question I reserve judgment.
November 29, 1949.

HONORABLE ROBERT C. GOAD,
Commonwealth’s Attorney for Nelson County.

This is to acknowledge receipt of your letter of November 9 in which you say, in part:

“A citizen of this County owns a large truck, which he uses principally for the transportation of lumber and fruit. The vehicle has an empty weight of 8,500 pounds, and he has paid $127.60 for the 1949-50 license plates based on a gross weight of 28,500 pounds. This truck was stopped on the highway and weighed by State Police Officers, who determined at the time that the gross weight was only 27,500 pounds, but that the weight on the rear axle was 23,500 pounds, or 5,500 pounds over the maximum rear axle weight of 18,000 pounds. When the truck was so weighed, the load of lumber was shifted as far as possible to the front of the vehicle.

“My question is whether or not the owner of the truck is entitled to a refund of a part of the amount paid for the license plates, which refund will be the difference between the original amount paid, based on the gross weight of 28,500 pounds, and the amount which would be due on a gross weight of 22,000 pounds, which appears to be the maximum weight allowable under the rear axle limit.”

Your attention is invited to section 2154(74a) of Michie's Code, which is the only section in the Motor Vehicle laws which deals with the question of refunds of fees paid for license plates:

"* * * Any person holding a current registration certificate and license plate who disposes of the vehicle for which it was issued and does not purchase another vehicle may surrender the license plates and registration certificate to the Commissioner with a statement that the vehicle for which the license plate was issued has been sold and request a refund for the unused portion of the fee paid. * * *”

You will notice that the owner must dispose of the vehicle before his application for refund can be acted upon.

From what you stated in your letter, it appears that this particular individual has operated his vehicle with a gross weight amounting to 27,500 pounds; hence, I do not see how he could now ask for a reduction in gross weight to 22,000 pounds during this license year. The Circuit Court of the City of Richmond has ruled in a case involving the licensing of trucks and trailers under the provisions of section 2154(82a) of Michie’s Code, that the owner of a vehicle is civilly liable for the tax or fee to the extent of the maximum gross load carried, even if he operated the vehicle so loaded only on one occasion.

Furthermore, I know of no statute that will permit an individual to diminish the amount of the load for which his vehicle is licensed and receive a refund of part of the license fee paid at the beginning of the current license year.

It is, therefore, my opinion that the truck owner who has heretofore licensed his vehicle for a certain gross weight cannot secure a refund of part of the fee paid therefor by diminishing the amount of load, to be carried during the latter part of the license year.
MOTOR VEHICLE LAWS—Stopping of school buses on traveled portion of highway. F-353

HONORABLE BOLLING LAMBERTH,
Attorney for the Commonwealth for Bedford County.

This is in reply to your letter of November 23 in which you state that a prosecution is now pending before the Trial Justice Court of Bedford County wherein a driver of a school bus has been charged with the unlawful stopping of a school bus on the traveled portion of the highway, in violation of subsection (b) of section 86 of the Motor Vehicle Code of Virginia (section 2154 (133) of Michie's Code of 1942). In your subsequent letter, dated November 29, you stated that you were aware that the policy of this office was not to render opinions concerning questions of fact pending before a local court, but that you would appreciate my opinion as to the proper interpretation of section 86 of the Motor Vehicle Code.

The pertinent part of section 86 of the Motor Vehicle Code is as follows:

"(a) No vehicle shall be stopped in such a manner as to impede or render dangerous the use of the highway by others, except in the case of emergency as the result of an accident or mechanical breakdown, when the vehicle shall be removed from the highway as soon as possible, and such removal may be ordered by a police officer at the expense of the owner if the disabled vehicle creates a traffic hazard.

"(b) No truck or bus or part thereof shall be stopped on the traveled portion of any highway for the purpose of taking on or discharging cargo or passengers unless the operator cannot leave the traveled portion of the highway with safety."

I am of the opinion that subsection (b) must be literally construed, thus permitting a bus to be stopped on the traveled portion of a highway when it cannot be safely driven off the hard surface. However, it is also my opinion that the so-called "reasonable man" test must be applied. In other words, I do not believe that this literal construction would permit a driver to arbitrarily stop on the traveled portion of a highway at a point within a reasonable distance of a wide shoulder upon which he could safely stop.

Furthermore, except in the case of an emergency, if a bus is stopped on the traveled portion of a highway "in such a manner as to impede or render dangerous the use of the highway by others" the driver would be in violation of subsection (a), quoted above. For example, it is my opinion that a bus cannot be stopped on the traveled portion of a highway upon or approaching a hill or a curve where the view along the highway is obstructed, even though the bus could not be safely driven off the traveled portion.

To hold that a school board is limited by subsection (b) of section 86 of the Motor Vehicle Code to designating school stops only at points where it is possible for the school bus to safely leave the traveled portion of a highway might very conceivably, in some instances, render the Compulsory School Attendance Law ineffectual, since that law provides that compulsory school distances are sometimes to be measured from the nearest school bus stop. Therefore, in the final analysis, it would appear that the school board should confer with the local law enforcement officers before designating a point on a highway for the loading and discharging of pupils, with not only consideration being given to the topography of the area through which the highway runs, but also consideration being given for the safety and welfare of the school children involved.
REPORT OF THE ATTORNEY GENERAL

HONORABLE B. M. MILLER,
Trial Justice for Rappahannock County.

This is to acknowledge receipt of your letter of July 1st, asking my interpretation of several sections of the Motor Vehicle Code. I shall answer your questions seriatim:

1. Question: Whether or not you construe Section 2154 (60a) as meaning to permit a motor vehicle, trailer or semi-trailer, as defined in said Code and used exclusively for agricultural and horticultural purposes, to travel over the public highways of the State from one point of the owner's land to another point owned or leased by him, though the tracts may not adjoin and may in some instances be in different counties

Answer: In Chapter 281, Acts of 1948, found in Michie's Code as Section 2154 (60a), we find:

"No person shall be required to obtain the annual registration certificate and license plates, or to pay the fee prescribed therefor, pursuant to the provisions of the Motor Vehicle Code of Virginia, for any truck upon which is securely attached a machine for spraying fruit trees and plants of the owner or lessee of said truck or for any motor vehicle, trailer or semi-trailer, as those terms are defined in the said Code, which is used exclusively for agricultural or horticultural purposes on lands owned or leased by the owner thereof and which is not operated on or over any public highway of this State for any purpose other than for the purpose of operating it across a highway or along a highway from one point of the said owner's land to another part thereof, or for the purpose of taking it or other fixtures thereto attached, to and from a repair shop for repairs. * * *" (Italics supplied).

It is my opinion that the property of the owner referred to is the land which is in the same tract or contiguous tracts. Where the tracts do not adjoin, the motor vehicle equipment would have to be licensed before it could be lawfully operated between these tracts.

2. Question: Whether or not said section authorizes a motor vehicle, as defined in the Code, to travel over the public highways to a packing or storage house of the owner, and if so, would this apply to a packing or storage house jointly owned or owned cooperatively? I particularly wish your opinion as to whether the packing or storage house could properly be construed as a part of the owner's land?

You will note that the section in question permits a farm trailer to move farm produce and livestock a distance not to exceed five miles to a storage house or packing plant; however, it has been argued that this applied to a private business and that if the packing house or cold storage was owned in whole or part by the farmer, that it should be considered as a part of his land and that the five mile limitation would not be applicable.

Answer: I am of the opinion that the five-mile limitation would apply in the instances where the farmer was a part owner of the packing house—or even if he owned it entirely and the same was located on a tract of land which was not contiguous to his farm. However, if the storage house was on his farm (the same tract), the
farmer could lawfully operate his farm trailer without license between his farm and packing house, notwithstanding the fact that the distance between the farm and packing house may be greater than five miles.

3. Question: The question presented relative to 2154 (172) is whether or not one who has no operator's or chauffeur's license or whose license has been suspended or revoked can operate a farm tractor over the highway, * * *

Answer: Section 3 of the *Virginia Operators' and Chauffeurs' License Act*, Section 2154 (172) of Michie's Code, reads in part as follows:

“What persons are exempt from license.—(a) No person shall be required to obtain an operator's or chauffeur's license for the purpose of driving or operating a road roller, road machinery, or any farm tractor or implement of husbandry temporarily drawn, moved or propelled on the highways. * * * ”

Section 1 (d) of the same Act, *supra*, reads as follows:

“'Farm tractor' every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines and other implements of husbandry.”

Section 1 (f) of the same Act, *supra*, reads as follows:

“'Motor vehicles:' every self-propelled vehicle in, upon or by means of which, any person or property may be transported or drawn upon a public highway.”

This question is not free from doubt, as it would seem from the definition of “farm tractor” and the definition of “motor vehicles” that if a person used a farm tractor to carry commodities or for the purpose of transporting himself upon the highways, then the farm tractor would become a motor vehicle and the operator would have to be licensed. It is my opinion that so long as the farm tractor is being used to draw implements of husbandry, the driver of the farm tractor is not required to have an operator's license or chauffeur's license before he can lawfully drive the same upon the highways of Virginia.

Question: * * * and in addition the question has been presented as to whether or not motor vehicles exempt from registration, as set forth in 2154 (60a), should be defined as implements of husbandry, so as to permit any operator or chauffeur who could operate a farm tractor, as set forth in Section 2154 (172) to drive the vehicles mentioned in section 2154 (60a) over the highways.

Answer: I think the foregoing answers the question raised here. The definition of “farm tractor”, *supra*, is controlling. The operators of motor vehicles must be properly licensed, by procuring an operator's or chauffeur's license, before they can lawfully operate; and I do not think the exemption from registration provisions, as set forth in 2154 (60a), relieves a person driving a motor vehicle from being properly licensed under the provisions of the *Virginia Operators' and Chauffeurs' License Act*, *supra*. 
NATIONAL PARKS—Shenandoah, State jurisdiction within. F-136

August 8, 1949.

MR. J. ABRAM BRUBAKER, Sheriff for Page County.

This is in reply to your letter of July 30, in which you state that you desire my opinion as to whether you, as Sheriff of Page County, have jurisdiction in civil and criminal matters in that part of Page County which is within the boundary of the Shenandoah National Park.

I find that your inquiry is answered fully by Chapter 414 of the Acts of Assembly of 1942 (Section 585(58)a of Michie's Code of 1942), from which I quote as follows:

"* * * the respective jurisdiction and powers of the Commonwealth of Virginia and the United States of America over all lands within the Shenandoah National Park as it is now constituted or may hereafter be extended shall be as follows:

"(a) The United States shall have exclusive jurisdiction, legislative, executive and judicial, with respect to the commission of crimes, and the arrest, trial, and punishment therefor, and exclusive general police jurisdiction thereover.

"(c) The Commonwealth of Virginia shall have jurisdiction to serve civil process within the limits of said park in any suits properly instituted in any of the courts of the Commonwealth of Virginia, and to serve criminal process within said limits in any suits or prosecutions for or on account of crimes committed in said Commonwealth but outside of said park.

"(g) The courts of the Commonwealth of Virginia shall have concurrent jurisdiction with the courts of the United States of all civil causes of action arising on said lands to the same extent as if the cause of action had arisen in the county or city in which the land lies outside the park area, and the State officers shall have jurisdiction to enforce on said lands the judgments of said State courts and the collection of taxes by appropriate process.

"(h) * * * All fugitives from justice taking refuge in the park shall be subject to the same laws as refugees from justice found in the Commonwealth of Virginia."

The United States accepted the above provisions in 50 Stat. 700, as amended by the 77th Congress, 2nd Session.

NOTARIES PUBLIC—Acknowledgment of signature must be in person and not over telephone. F-246

August 8, 1949.

MR. M. F. STEELMAN, Notary Public.

This is in reply to your letter of July 29, in which you state that you have had several requests to call a person and let him acknowledge his signature over the telephone. You desire my opinion as to whether or not a notary public should follow such procedure and acknowledge a signature over the telephone.

The pertinent part of Section 5205 of the Code provides that a court or clerk thereof shall admit a writing to record as to any person whose name is signed thereto under the certificate of a notary public—
"* * * that such writing had been acknowledged before him by such person, which certificate shall be written upon or annexed to said writing substantially to the following effect, to-wit:

"I, --------------------------, clerk (or deputy clerk, or a commissioner in chancery) of the ------------------------ court (or justice of the peace, or a notary public) for the county (or corporation) aforesaid, in the State (or territory, or district) of ------------------------, do certify that E. F. or E. F. and G. H., and so forth, whose name (or names) is (or are) signed to the writing above (or hereto annexed) bearing date on the ------- day of ------------------------, has (or have) acknowledged the same before me in my county (or corporation) aforesaid.

"Given under my hand this ------ day of ---------------"  (Italics supplied)

Therefore, I concur in your view that a person should appear before you in person and acknowledge his signature if it is desired to record the writing in a court of the State.

As to the conclusiveness of an acknowledgment with regard to impeachment, it was held in the case of Iaeger Coal Land Co. v. Supher (W. Va.), 186 Fed. 644, 660, that "it is always admissible to show that parties never appeared before the officer and acknowledged a deed." See also Webb v. Trent's Executors, 162 Va. 500, 507, 508.

NOTARY PUBLIC—Authority to carry concealed weapon. F-246

Mrs. Thelma Y. Gordon,
Secretary of the Commonwealth.

This is in reply to your letter of October 31, in which you requested my opinion as to whether or not a notary public is authorized to carry concealed weapons by virtue of his appointment.

In the case of Withers v. Commonwealth, 109 Va. 837, (1909) the Supreme Court of Appeals held that a notary could not be convicted of carrying a concealed weapon, even though he was not at the time performing the duties of his office. However, in the more recent case of Hall v. Commonwealth, 179 Va. 652 (1942), the Supreme Court said, at page 657—

"We think it is plain that it was never intended that all the Notaries Public in the State could go about at all times armed."

Therefore, in view of the apparent conflict in the cases cited above, I am of the opinion that a notary public should apply to the proper court if he feels that it is necessary for him to carry a concealed weapon.
HONORABLE ROBERT BOLLING LAMBETH,
Commonwealth's Attorney for Bedford County.

I have your letter of May 10, 1950, which reads, in part, as follows:

"Enclosed is an inquiry directed to our local Public Welfare Department, which is self-explanatory.

* * * * * *

They pose the following questions: Whether or not residents of the Elks National Home gain residence in Virginia while they are inmates of the home? Whether or not a man living in the home is eligible for old age security from the State of Virginia?

"Section 63-115 specifies eligibility for old age assistance. I would appreciate your opinion particularly with reference to the use of the phrase 'continuously resided' in Virginia. Does this mean domicile or merely residence? Also in paragraph (d) of the same section they use the phrase 'national institution'. Does this mean such an institution as the Elks Home, or does it mean a federal institution?"

I am of the opinion that a person living in the Elks National Home becomes a resident of Virginia within the meaning of §63-115 of the Code. The term "continuously residing" as used in this section indicates, in my opinion, that the Legislature intended that a person should have been physically in the State as a resident for the required period of time, so that even though a person may have retained a "domicile" in Virginia, that alone would be insufficient under the Act.

As to your second question, it is my opinion that the term National Institution which appears in paragraph (d) of §63-115 means an institution maintained with public funds. Paragraph (d) reads as follows:

"Is not an inmate of or being maintained by any county, municipal, state, or national institution at the time of receiving such assistance; such an inmate may however make application for old age assistance, but such assistance, if granted shall not begin until after he ceases to be such inmate; provided that in the event the Federal Social Security Act or other appropriate federal statutes are so amended as to permit funds appropriated by Congress to be used for assistance to aged persons who are inmates of public institutions, then being an inmate of any such institution shall not disqualify any such person for assistance;" (Italics supplied)

It is my opinion that the underscored words indicate the type of institutions referred to in the earlier portions of the section. If the words, national institution, are construed to include private institutions maintained by nation-wide organizations, it would seem that the terms county, municipal and state institutions would have to be construed to include private institutions maintained by county-wide, city-wide or state-wide organizations. Such an interpretation would, of course, mean that no resident of any institution would be entitled to such assistance.

It is, therefore, my opinion that one who has been continuously a resident of the Elks National Home in Bedford for the required period of time, and who is otherwise eligible for assistance, is entitled to such assistance.
ORDINANCES—Publication; state law adopted by resolution of board of supervisors becomes effective without publication as required for ordinance. F-220

HONORABLE VALENTINE W. SOUTHALL,
Commonwealth's Attorney for Amelia County.

This is in reply to your letter of October 5, in which you state that the Board of Supervisors of Amelia County is contemplating making Section 549-a-1 applicable in Amelia County. You ask whether it is necessary for the Board of Supervisors to follow the procedure set out in the last paragraph of Section 2743 for the adoption of ordinances before it can take such action.

Section 549-a-1, dealing with pine trees which must be left uncut for reseeding purposes, is a general State law, but contains the following provision:

"This section shall not apply in any county unless and until the board of supervisors of such county has, by resolution adopted by a majority vote, declared it to be effective in such county, and the State Forester has received a certified copy of such resolution duly attested by the clerk of the circuit court of such county; * * *"

In my opinion, when this action has been taken, the law will become effective in the county.

The provisions of Section 2743 requiring publication in connection with the adoption of ordinances or by-laws by a County Board of Supervisors are applicable to ordinances of the county itself and, in my opinion, do not apply to the adoption of the State law by resolution as authorized by Section 549-a-1.

PAROLE AND PROBATION OFFICERS—Authority to arrest out of state parolee. F-84

MR. CHARLES P. CHEW, Executive Secretary,
Parole Board.

This is in reply to your letter of May 5, 1950, from which I quote as follows:

"The question which our officer is posing is that of whether or not a parole officer has the authority to take into custody and hold a parolee being supervised in Virginia for another state, pending receipt of a warrant or other disposition from the other state. The functions, powers and duties of Probation and Parole Officers seem clearly set forth in 53-250 of the 1950 Code of Virginia. Paragraph Number 4 of this section seems to cover this matter in so far as Virginia parolees or probationers are concerned. This section of the Code coupled with that covering out-of-state parolee supervision, Sections 53-288 through 53-290, would appear to give our officers the authority to arrest and commt but it is felt that some definite ruling in this regard should be available to our officers."

It is my opinion that the conclusion which you have reached is a correct one. Section 53-250 of the Code of 1950 places upon probation and parole officers certain duties with respect to probationers or parolees under their supervision. Among these is the duty to

"Arrest, and recommit to the place of confinement from which he was released, or in which he would have been confined but for the suspension of his sentence, or of its imposition, for violation of the terms of probation
or parole, any probationer or parolee under his supervision, * * *.” (Italics supplied).

Section 53-288 of the Code authorizes the Governor to execute compacts with other states for the supervision of probationers and parolees, and Section 53-289 provides the form of the compact. Paragraph (2) of this latter section reads as follows:

“That each receiving State will assume the duties of visitation of and supervision over probationers or parolees of any sending State and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.”

It is my opinion that when Virginia has undertaken a compact with another state, this paragraph imposes upon her probation and parole officers the duty to exercise the same method of supervision over parolees from sister states returned to Virginia as is exercised over Virginia parolees and probationers. Since one of the methods of supervising such persons in Virginia is to arrest and recommit such persons where necessary, it is my opinion that this same method must be employed in supervising parolees and probationers from other states.

PENITENTIARY—May establish binding shop and operate for benefit of local governments. F-75d

HONORABLE CHARLES J. DUKE, JR.,
Chief-of-Staff, Governor's Office.

October 19, 1949.

This is in reply to your letter of October 17th from which I quote as follows:

“Our reorganization studies have indicated that in order to provide needed rehabilitation programs for the inmates of the Penitentiary and to effect economies, the establishment of a bindery at the Penitentiary would be desirable. If such a bindery were established, it would be operated as a unit separate from the printing shop.

"Section 53-64 of the new Code of Virginia prohibits the sale of products of the printing shop to offices or agencies of the counties, cities, and towns. We would appreciate your ruling as to whether the bindery could be regarded as outside the limitations of this Section, and could be operated for the benefit of local governments as well as for State agencies. If such a bindery is not deemed to be within the limitations of this Section, such facilities would provide local governments an opportunity to obtain their bindery requirements of school books, etc., at a cost considerably less than they are now paying, and allow for more efficient operation of the bindery.”

Section 53-61 provides that convicts or misdemeanants actually confined in the penitentiary at Richmond, or at the State Farms shall be used, as far as possible, in the making of articles required by State agencies. Section 53-63 provides that any surplus and articles so manufactured or produced, not required by State agencies, may be disposed of by sale to municipal and county agencies. As you point out, however, Section 53-64 restricts the sale of products of the State-use printing shop at the penitentiary to State agencies.

In your letter you indicate that at present there is no bindery at the penitentiary and that if one is established, it will be operated as a unit separate from the printing shop. I am informed that a bindery is not an essential
of a printing shop and that such a unit is often operated entirely separate from printing activities. In view of these facts, it is my opinion that the sale of products from the bindery would not be subject to the restriction contained in Section 53-64. Therefore, its facilities could be operated for the benefit of the local governments under Section 53-63 if they were not needed entirely by the State agencies.

PERJURY—Jurisdiction of court of city in which perjurious testimony given. F-85

HONORABLE STERLING M. HARRISON,
Commonwealth’s Attorney for Loudoun County.

January 6, 1950.

I have your letter of January 5, 1950, which reads, in part, as follows:

“A suit for a divorce was instituted in the Circuit Court for Loudoun County, Virginia; the depositions therein were taken in the City of Alexandria before a notary public authorized to administer the proper oath in that city. The depositions of two of the witnesses are apparently perjurious.

“What court would have jurisdiction upon a prosecution for perjury in this instance?”

Section 18-237, Code of Virginia of 1950 provides:

“If any person to whom an oath is lawfully administered on any occasion wilfully swear falsely on such occasion touching any material matter or thing, or if a person falsely make oath that any other person is twenty-one years of age in order to obtain a marriage license for such other person, he shall be guilty of perjury.”

The general rule with regard to perjury is that the offense is complete the moment the accused has signed and sworn to an instrument with the intent that it shall be uttered or published as true, and it is immaterial, ordinarily, that the instrument is never used for the purpose intended. Authority for this statement can be found in 41 Am. Jur., page 17, under the title Perjury. It follows from this that the two witnesses in the case presented by your letter have apparently committed the crime of perjury within the City of Alexandria and that the appropriate court in that City would have jurisdiction. This conclusion is further borne out by the statement in 22 Corpus Juris Secundum, Criminal Law, §185, page 294:

“The venue of a prosecution for perjury or subornation of perjury is in the county where the false swearing was done.”

POLICE—Jurisdiction of town police in ball park adjoining town. F-136e

HONORABLE RIPLEY S. WALKER,
Commonwealth’s Attorney for Shenandoah County.

September 13, 1949.

In my previous letter of August 8 I advised you that there was no mandatory duty upon the sheriff of the county or the police officers of the Town of Woodstock to patrol or police this ball park. You state that you are now advised by the chief of the police force of Woodstock that the
town police are now willing to police these grounds if they have jurisdiction
to do so.

I call your attention to Section 3005 of the Code, which provides that
when the uniformed police of any city are in attendance at any ball park
situated without the corporate limits of the city they shall, if requested so to
do by the management of the ball park, assist in the preservation of order
and make arrests. While this section mentions only cities, it is included
in the chapter of the Code setting forth the general provisions relating to
both cities and towns and it is possible that the police force of the Town of
Woodstock would be held to have jurisdiction under this statute.

Section 3005 applies to any ball park wherever located. If it was held
that this section was not applicable to the police force of a town, it would,
nevertheless, be my opinion that the Police Department of the Town of
Woodstock would have jurisdiction to police the particular ball park in ques-
tion since it adjoins the corporate limits of the Town of Woodstock. Section
3006 provides that the jurisdiction of the corporate authorities of each town
or city in criminal matters shall extend one mile beyond the corporate limits
of the town or city. Section 3026 also provides that sergeants of towns shall
have the same powers and discharge the same duties as constables within the
corporate limits of the town and to a distance of one mile beyond the same.
In my opinion, these last two sections make it clear that the officers and
privates constituting the police force of a town under Section 2991 of the
Code would have the authority to police the ball park referred to by you.

POLLUTION—Authority of Water Control Board to regulate same. F-378

HONORABLE A. H. PAESSLER, Executive Secretary,
State Water Control Board.

This is in reply to your letter in which you requested my opinion as to
whether the State Water Control Board has the authority to issue a general
regulation or a special order directed against a specific class of owners who
discharge industrial wastes into the waters of this State.

The pertinent part of Section 62-23 of the Code, which deals with the
powers and duties of the Board, is as follows:

“(3) To establish such standards of quality for any waters in
relation to the reasonable and necessary use thereof as it deems to be in
public interest, and such general policies relating to existing or proposed
future pollution as it deems necessary to accomplish the purposes of this
chapter, to modify, amend or cancel any such standards or policies estab-
lished and to take all appropriate steps to prevent pollution contrary
to the public interest or to standards and policies thus established.”
(Italics supplied).

Under the authority of the above quoted provision, it is my opinion that
the Board could issue a general regulation, applicable to a specific class of
owners, setting forth the minimum standards to be met by such owners in
order to reduce pollution in State waters, to become effective after it has been
filed with the Secretary of the Commonwealth for at least thirty days, in
accordance with Section 62-20 of the Code. However, such a regulation
would be directive only and could not have the legal sanction of subjecting
the owners in question to criminal or civil proceedings for the violation
thereof.

Paragraph (8) of Section 62-23 of the Code permits the Board to issue
a special order “directing any particular owner or owners” to secure such
operating results as are reasonable for the attainment toward the control, abatement and prevention of pollution of State waters. Such an order may be entered only after a proper hearing, and a violation thereof would subject such person to prosecution. I know of no reason why one special order could not be directed against a specific class of owners, but, of course, notice of a hearing and service of the order would have to be given to and served on each individual affected thereby.

POLLUTION—Establishment discharging industrial wastes into State waters which closes for six months regardless of cause must install treatment works. F-93

April 14, 1950.

MR. A. H. PAESSLER, Executive Secretary,
State Water Control Board.

This is in reply to your letter of April 4, in which you state that the Buena Vista mill of the Columbia Paper Company, which had been in operation on July 1, 1946, and which had been certified by the Water Control Board under the provisions of Section 1514b17 of the Water Control Law, now Section 62-26 of the Code, was closed down during the first week of July, 1949, for an indefinite period.

You state that the company would like to resume operation of this mill and you ask whether the provisions of Section 62-25 of the Code, formerly Section 1514b19 of the Water Control Law, are now applicable.

Section 62-25 provides that no person shall, after July 1, 1946, erect, construct or open, reopen and operate any establishment which results in the discharge of industrial wastes into State waters and causes pollution unless adequate treatment works are provided. Paragraph (6) states that the provisions of that section are not applicable to establishments existing on July 1, 1946, which may thereafter be "temporarily closed for a period not exceeding six months."

Wherever the plant is closed for more than six months, as appears to be the case in the instance you mention, it thereupon comes under the provisions of Section 62-25 if it is later reopened by the owner. The fact that it may have been closed because of adverse business conditions, as you suggest, would not exempt the plant from this provision. Neither the fact that the corporation continued in business for certain purposes, but without operation of the manufacturing establishment, nor the fact that there is a change in ownership of the mill, as appears to be the case from your letter of April 12, would change the views expressed above.

POTOMAC RIVER—Certain acts not effective until Maryland enacts similar provisions. F-233

September 21, 1949.

HONORABLE FERDINAND F. CHANDLER,
Commonwealth's Attorney for Westmoreland County.

This is in reply to your letter of September 2, in which you ask if Section 3174 of the Code of Virginia can be invoked against a citizen of Virginia who fishes his haul seine within the waters, bounds and berth of a regularly hauled fishing landing in the Potomac River belonging to another citizen of Westmoreland County.

Section 3174 is found in Chapter 127 of the Code, and you refer to Section 3299, which is found in Chapter 129 and which provides that the sec-
tions contained in the two preceding chapters shall apply to the taking of fish, oysters and crabs in the Potomac River so far, and only so far, as they are not in conflict or inconsistent with the Act dealing with the enactment of concurrent legislation by Virginia and Maryland regarding the fish and shellfish industry in the Potomac River.

The Act regarding concurrent legislation, which is set forth in Section 3299, was made necessary by the compact entered into between the States of Maryland and Virginia, which provides that all laws and regulations which may be necessary for the preservation of fish in the Potomac River shall be made with the mutual consent and approbation of both States. See Section 14 of the Code. Whether or not Section 3174, which prohibits fishing any seine within the bounds of a regularly hauled fishing landing, is inconsistent with the provisions of the Act set forth in Section 3299 is immaterial unless there is concurrent legislation on the subject by the State of Maryland, since the compact requires that any legislation on the subject by one State must be with the approval of the other State. The language referred to in Section 3299, regarding the applicability of Sections contained in Chapters 127 and 128 of the Code, could only apply to those sections which permit acts not forbidden by Section 3299. Prohibitions contained in Chapters 128 and 129 would not be applicable unless there was concurrent legislation by Maryland.

This conclusion is bolstered by the fact that Section 3301 specifically deals with the fishing within a regularly hauled fishing landing, the same subject which is dealt with in Section 3174. It is noted that Section 3301 expressly provides that its provisions shall be in force during the existence of a similar law in the State of Maryland, the implication being clear that this prohibition by Virginia is not to be in effect unless there is also a prohibition by the State of Maryland.

PRISONER—Liability for wounds sustained during arrest. F-85

Mr. C. H. Earnest, Credit Manager,
Medical College of Virginia.

November 18, 1949.

This is in reply to your recent letter concerning a patient who was admitted to St. Philip Hospital after being shot by the Richmond police while resisting arrest at the scene of a robbery.

It appears that the prisoner was admitted to the hospital prior to his confinement in the City Jail, and that upon his release from St. Philip Hospital, he was duly tried and sentenced to three years in the penitentiary. You desire my advice as to the procedure to be followed in order to collect his hospital bill.

Section 4960 of the Code provides, in part, as follows:

"*** When in a criminal case an officer or any person renders any other service in the State of Virginia for which no specific compensation is provided, the court in which such case is, may allow therefor what it deems reasonable, and such allowance shall be paid out of the treasury from the appropriation for criminal charges on the certificate of the court stating the nature of the service. ***"

This office has previously ruled that services of the nature described in your letter may be properly paid for out of the State Treasury under the above section. See Report of the Attorney General 1945-46, page 95. The fact that the prisoner has been sentenced and final judgment has been en-
PRISONERS—One having contagious or communicable disease may be retained after expiration of sentence.  F-75

HONORABLE RICHARD W. COPELAND, Director,
Department of Welfare and Institutions.

This is in reply to your letter of April 21, 1950, in which you enclosed a letter of Dr. William J. West, Medical Officer, State Farm, Virginia. The question upon which you desire my opinion is whether the medical officer of the State Farm is authorized to require prisoners at that institution who have dangerous communicable or contagious diseases to be held at the institution after their terms of sentence have expired when their release would endanger the public health.

Section 53-94 of the Code of 1950 reads as follows:

"It shall be the general purpose of the State prison farm for defective misdemeanants, and other farm or farms, to provide proper employment, medical and mental care and treatment, discipline and control of prisoners committed, or transferred thereto, and all prisoners infected with dangerous communicable or contagious diseases shall not be discharged until the period of contagion has passed, regardless of the length of sentence, provided that no one shall be held for a period longer than a year on the original commitment, except by an order of the State Department of Health, as provided under the health laws."

It is my opinion that a prisoner at the State Farm afflicted with a communicable or contagious disease should be held on an order of the medical officer of the institution after the expiration of his sentence, but not beyond the period of one year on the original indictment. When it develops that a prisoner suffering from such disease will at the expiration of a year still be in such condition that there is danger of his spreading infection, it would appear from the statute that this should be brought to the attention of the Board of Health and if the prisoner is unable to satisfy that body that he can and will take adequate quarantine measures, then, in my opinion, it would be proper for the Board of Health to continue his quarantine at the State Farm.

PRISONERS AND JAILS—Officer of the court is responsible to transfer prisoners to and from courts or elsewhere.  F-75

HONORABLE WILLIAM H. OAST, Judge,
Juvenile and Domestic Relations Court,
and Civil and Police Court of Portsmouth.

This is in reply to your request for my opinion concerning the responsibility for delivering prisoners from jail to the Juvenile and Domestic Relations Court of the City of Portsmouth for trial or to the Clerk's Office for the purpose of executing bail bonds for appeal or to the Health Department's Clinic when medical examination is ordered for a prisoner suspected of having a venereal disease.
You state that the Norfolk County Jail has been designated as the jail for female offenders, while male prisoners are committed to the custody and control of the City Sergeant. Both the Sheriff of Norfolk County and the Sergeant of the City of Portsmouth take the position that they are not responsible for the transfer of the prisoners under their control for the purposes set out above.

I find no statute which in express terms deals with the questions presented by you. However, there are several general statutes which I think are controlling. Section 2868 of the Code provides that the sheriff of each county and the sergeant of each city shall be the keeper of the jail thereof. It also provides that the jail of each county and city shall be the jail of every court established therein by law. Under Section 2869, the jailor of every court is amenable to the authority of such court and is required to obey its orders.

Since the Juvenile and Domestic Relations Court of Portsmouth was established by law, it is my opinion that the City Sergeant is required to perform at your direction the type of services mentioned by you. The fact that the Juvenile and Domestic Relations Court is not a court of record is immaterial.

In addition to the above statutes, I call your attention to the provisions of Section 1951-c of the Code. This section makes it the duty of every official of the city to render such assistance and cooperation to the Juvenile and Domestic Relations Courts as may be needed in order to carry out the matters within the jurisdiction of such court. Under the authority of this section the Juvenile and Domestic Relations Judge could call upon the regular police officers and probation officers in the City of Portsmouth as well as the City Sergeant to perform the type of services mentioned by you.

It is my opinion that the City Sergeant or some other appropriate officer of the City is the proper officer to comply with the orders of the Juvenile and Domestic Relations Court of the City with respect to the transportation of the female prisoners confined in the Norfolk County Jail. While the Sheriff of the County is required to receive and hold prisoners from Portsmouth duly committed to his care and delivered to him, I do not think that he should be required to transport the prisoners back and forth at the direction of the Portsmouth courts. This should be done by the officers of such courts who are directly responsible to them.

The views expressed above are based upon the assumption that neither the City Charter nor the agreement with the county authorities dealing with the confinement of female prisoners in the County Jail requires the duties in question to be performed by some other officer.

PUBLIC HEALTH—Interference with Health Officer in performance of his duty unlawful. F-88

HONORABLE BERNARD MAHON,
Commonwealth's Attorney for Caroline County.

This will reply to your letter of June 20, from which I quote in full:

"Under the provisions of the State law, Caroline and Hanover Counties have a health unit known as 'The Caroline-Hanover Health District.' On June 20, 1950, the sanitation officer in Caroline County attempted to make a routine inspection in a restaurant in Bowling Green, Virginia, under the provisions of Code of Virginia 1950, Section 35-25 et seq. Before the inspection was completed the owner and his wife interfered with and obstructed the sanitation officer in the performance of his duties, pushing him towards the door, and he was not permitted to complete the inspection.
"We have had trouble before with these operators, and I am very anxious to be sure that I have a warrant issued for this violation, if any, under the proper provisions of the Code.

"In my opinion, it is doubtful whether this violation is covered by the provisions of the above mentioned Section 35-25 et seq. When the duties similar to those prescribed under the above mentioned sections were performed by the Department of Agriculture, Section 3-337 appears to have covered such a violation. Likewise, Section 32-15 covers certain violations under the health law. However, I do not see a similar section covering the instant violation, unless VC 35-41 is broad enough. Please advise."

Section 35-30 of the Code of Virginia is as follows:

"Access to restaurants.—The Commissioner and his assistants shall have police power to enter any restaurant at reasonable hours to determine whether the provisions of this chapter and the rules and regulations promulgated hereunder are being complied with."

The purpose of this section is most clear and in my opinion the owner of the restaurant and his wife were in violation of it when they prevented an assistant of the Commissioner from performing his duty as provided by the statute. As it is a "provision of the chapter" as provided for in Section 35-41, I am of the opinion that Section 35-41 is sufficiently broad to cover the instant violation.

In view of the fact that police power is conferred upon the Commissioner and his assistants by the above quoted section, I call your attention to Section 18-272 of the Code. Perhaps you would prefer to proceed under that section rather than 35-41, as the penalties are greater.

PUBLIC OFFICERS—Compatibility: Soil Conservation District Supervisor may serve as member of the House of Delegates. F-249

Mr. E. W. Mundie, Administrative Officer, State Soil Conservation Committee.

This is in reply to your letter of July 22, in which you ask if a person holding the position of Soil Conservation District Supervisor who offers himself as a candidate to the Virginia House of Delegates and is elected to that position may continue to hold his position as Soil Conservation District Supervisor.

Section 44 of the Constitution provides that no person holding a salaried office under the State government and no judge of any court, attorney for the Commonwealth, sheriff, sergeant, treasurer, assessor of taxes, or clerk of any court shall be a member of either House of the General Assembly during his continuance in office, and the election of any such person to either House of the General Assembly and his qualification as a member thereof shall vacate any such office held by him. Since the office of Soil Conservation District Supervisor is not one of those specifically mentioned by the Constitution as being prohibited from serving in the General Assembly, and since Section 1289(19) of the Code of Virginia provides that soil conservation district supervisors shall receive no compensation for their services as such, it is my opinion that the person you mention may continue to hold his position as District Supervisor if elected to the General Assembly.
This is in reply to your letter of August 10, in which you ask whether or not the funds appropriated for the payment of criminal costs may be used to pay the board of children after they have been declared delinquent by the Juvenile and Domestic Relations Court. You state that two localities have adopted the practice of bringing children into court, committing them to the State Board of Welfare and Institutions, and then suspending the commitment, placing the children on probation and in foster homes and billing the Department for the board of the children in the homes.

Section 1914 of the Code, which provides for the temporary detention of children in a detention home or parental school to be conducted as an agency of the city or county, or in a private home while awaiting trial or disposition under the statute dealing with delinquent, dependent and destitute children, contains the following paragraph:

"In case the court shall arrange for the boarding of children temporarily detained in private homes or with any incorporated institution, society or association, or in detention homes conducted by another city or county, the cost of maintaining such children held awaiting trial or disposition under the juvenile laws of the State in boarding homes or other institutions shall be paid monthly, according to schedules prepared and adopted by the State Board of Public Welfare, by the State Treasurer out of funds appropriated in the general appropriations act for criminal costs, on warrants of the Comptroller, issued upon vouchers approved by the State Commissioner of Public Welfare, or such other person as may be designated by said Commissioner."

In my opinion, the authority contained in this section for the boarding of children temporarily in private homes at the cost of the State Board of Public Welfare while the children are awaiting trial or disposition does not authorize the procedure described in your letter. The procedure authorized by this statute applies only to temporary care of the children pending a hearing and disposition and not to the permanent care of the children after their cases have been heard and they have been placed on probation.

It is true that a child placed on probation may later be called before the court and some other disposition made, but the action of the court in placing the child on probation in the first instance was a disposition of the case then before the court. Any further proceedings in the case would be a reopening of the matter for determination upon the facts as later presented to the court.

Section 1902-k of the Code authorizes the State Department of Welfare and Institutions, itself, to board children committed to it in private homes and to pay certain costs of maintaining the children out of the appropriation for criminal expenses. This section, however, authorizes the payment of such expenses only after the State Department of Welfare and Institutions, itself, has placed the children in private homes, and does not authorize the payment of such expenses when the court places the children on probation and directs that they be placed in foster homes. The court may, of course, provide for the keeping of children in foster homes at the expense of the children's parents in those cases in which the court does not wish to formally commit the children to the State Department of Welfare and Institutions and desires that they be placed on probation under the supervision of the court. In my opinion, the statute does not provide for the payment by the State Board of Welfare and Institutions of the cost of maintaining the children in such cases.
PUBLIC WELFARE—Re-allocation of unused funds. F-231

January 13, 1950.

HONORABLE RICHARD W. COPELAND, Director,
Department of Welfare and Institutions.

This will reply to your letter of December 29, requesting an interpretation of Section 2 of Chapter 538 of the 1948 Acts of Assembly (Section 32-292 of the 1950 Code) as to the re-allocation of unused funds as therein provided. I quote from your letter in part:

"We would like to be advised as to whether or not it is necessary to adhere to the population basis in the re-allocation of funds at the end of each six-months period as provided in the last sentence of the above quoted section of Chapter 538 of the 1948 Acts of Assembly. If the State Board of Welfare and Institutions has the authority to allocate the funds unused at the end of each six-months period on a basis commensurate with the requirements of the individual counties and cities, it is believed that the State appropriations for this program will be used to much better advantage."

The first sentence of Section 2 quoted in your letter provides that the Board shall allocate semiannually on the basis of population. In the last sentence of Section 2 provision is made for "re-allocation" of unused funds. It would appear that, if the Legislature had intended to make the "re-allocation" on any other basis than that provided for in the first sentence of the section, it would have done so by definite language. In the absence of any such language, it is my opinion that the re-allocation should be made on the same population basis as provided for in the first sentence of this section.

PUBLIC WELFARE—Recovery from estate of recipient of benefits. F-231

November 17, 1949.

HONORABLE BYRUM P. GOAD,
Commonwealth's Attorney for Carroll County.

I have your letter of November 15, 1949, in which you state that the Local Board of Public Welfare is desirous of enforcing a lien to recover from the estate of a recipient of benefits. You inquire whether in my opinion the Local Board of Public Welfare has the right to bring a chancery suit to subject the land to the payment of a claim, and in what name the suit should be brought.

I can find no express authority for the Local Board to maintain such suit to enforce the claim provided for in §1904(18). The section expressly provides:

"No claim shall be enforced against any real estate of the estate of the recipient, however, while such real estate is occupied by the surviving spouse of the recipient so long as such spouse remains unmarried, or is occupied by any dependent infant child or children of the recipient."

Since express provision is made that the claim shall not be enforced in certain specific cases, it may reasonably be inferred that in all other cases the Local Board may take the necessary action to enforce the claim. This office has previously expressed the opinion that such suits should be brought in the name of the individual members of the Local Board of Public Welfare as such Board.
Honorabe J. Luther Glass,  
Chief of Court Services and Placement,  
Department of Welfare and Institutions.

This is in answer to your letter and enclosure of January 10, 1950, in which you set forth the following problem:

Doc Pannell received from the Department of Public Welfare in Campbell County Old Age Assistance grants in the amount of $60.00 prior to his death. He died on November 13, 1944. After his death, his wife, Emma, received Old Age Assistance grants amounting to $1012.00. Emma Pannell died on January 5, 1949. The Department of Public Welfare did not file a claim against Doc Pannell's estate until March 26, 1949.

The specific question asked is whether or not this claim is still enforceable against the estate of the recipient (Doc Pannell) where no third party purchaser is involved. Section 1904 (18) of the Code of Virginia, 1942, (63-127 of the Code of 1950) 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 local board may require the superintendent of public welfare to execute and acknowledge, as deeds are required to be acknowledged, a notice of such claim showing the total amount paid as such assistance, which notice may be filed within one year after the death of the deceased recipient, with the clerk of the court authorized to record deeds in the county or city where the real estate of such recipient subject to such claim is situated, and when so filed the clerk shall record it in the current deed book and index it in the names both of the local board and the deceased recipient. No fees shall be charged or collected by the clerk for filing, recording or indexing any such notice. After the expiration of said period of one year, such notice, when filed, recorded and indexed as aforesaid, shall have, as to purchasers, the same effect as though a creditors' suit had been instituted and a memorandum of lis pendens duly filed and recorded.

"No such claim shall be enforced against any real estate of the estate of the recipient, however, while such real estate is occupied by the surviving spouse of the recipient so long as such spouse remains unmarried, or is occupied by any dependent infant child or children of recipient."

It is my opinion that failure to file the claim within one year after the death of the recipient does not bar the claim. Reference to Code Section 5829 (Section 8-35 of the Code of 1950) reveals that "No statute of limitations which shall not in express terms apply to the Commonwealth shall be deemed a bar to any proceeding by or on behalf of the same * * * ." I know of no statute of limitations which in express terms bars any such claim of the Commonwealth. Section 1904(18) includes no such statute of limitations. This section expressly provides that the Commonwealth shall have a claim against the estate, and that such claim shall be 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 statute then goes on to provide a means
of filing the claim and provides for the protection of the claim against bona
fide purchasers, if it is so filed. While I am of the opinion that such claims
should be filed within one year to gain protection against intervening innocent
third party purchasers, since, in this case, there is no such purchaser in-
volved, I see no reason why the claim may not be enforced.

I am enclosing an opinion of this office dated May 11, 1948, to Deane
Hundley, Esq., Dunnsville, Virginia, which may also be helpful to you in
this regard.

RECORDATION—Discharge certificate of veterans. F-356a

VETERANS—Recordation of discharge certificates. F-356a

April 10, 1950.

Honorable E. O. Russell,
Clerk of Circuit Court of Loudoun County.

This is in reply to your letter of April 5, in which you request my opinion
upon the following question:

"'A' is drafted or volunteers for service through the draft board in
'B' county. When he is discharged from the service he returns and makes
his home in 'C' county. Can the clerk in 'C' county record his discharge
or can it be recorded only in 'B' county from which he was drafted or
volunteered?"

You refer to the opinion of Honorable Abram P. Staples as recorded on
page 22 of the Annual Report of the Attorney General for the year 1945-1946,
in which he expresses the opinion that under Chapter 31 of the Acts of 1944
the discharge of a Veteran could be recorded only in the county or city in which
the Veteran lived at the time he was inducted.

While this 1944 Act has not been amended since that opinion was rendered,
I call your attention to the fact that Chapter 92 of the Acts of Assembly of
1934 provides as follows:

"The clerk of every circuit or corporation court, or other court in
which deeds are required to be recorded, shall, upon presentation, record,
free of charge, the discharge certificate of any veteran of any war in which
the United States has been engaged."

This provision is now found as Section 17-92 of the Code of Virginia of 1950.
It is my opinion that under this provision the discharge record of any Veteran
may be recorded in a county whether or not the Veteran was a resident of that
county at the time that he was inducted.

RECORDATION TAX—Property used as parsonage. F-90a

November 16, 1949.

Honorable W. L. Prieur, Jr.,
Clerk of Courts for Norfolk.

This is in reply to your letter of November 5, in which you state that a
deed conveying the property to be used for a parsonage, not contiguous to the
church site, has been offered for recordation. You ask whether or not a rec-
ordation tax should be charged in this instance.
While, as you point out, Section 183 of the Constitution expressly provides that buildings, with the land they actually occupy and the furnishings therein, used for the residence of the minister of any church or religious body shall be exempt from taxation, Section 122 of the Tax Code does not specifically exempt from the recordation tax a deed conveying property to be used for this purpose. Section 122 provides that the recordation tax imposed by Section 121 shall not apply to any deed conveying land as a site for a church. In my opinion, this is not sufficient to exempt from the recordation tax a deed conveying property to be used for a parsonage.

The recordation tax is not a tax upon property and Section 183 of the Constitution in exempting certain property from taxation does not in itself exempt from the recordation tax deeds conveying property of the type therein set forth. You will note that there are many types of property which are exempt from taxation by Section 183 which are not mentioned in Section 122, which provides the exemption from the recordation tax of deeds conveying certain types of property. For these reasons it is my opinion that the recordation tax should be collected in the instance cited by you.

RETIREMENT SYSTEM—Applicable to constitutional officers, deputies and employees. F-243a

February 6, 1950.

HONORABLE EDGAR L. WINSTEAD,
Sergeant of the City of Roanoke.

By virtue of your office as sergeant of the City of Roanoke and in your capacity as secretary of the Virginia State Sheriffs' and City Sergeants' Association you have requested, in writing, my opinion as to whether Article 4 of Chapter 3 of the Virginia Retirement Act "applies to Constitutional officers, their deputies and employees."

Section 51-52 of the Code provides that:

"The governing body of any county, city or town, may, by resolution legally adopted and approved by the Board, elect to have its officers and employees become eligible to participate in the retirement system."

It is further provided that acceptance of such officers and employees into membership shall be optional with the Board.

I direct your attention to Section 51-31 (5) of the Code. Here, "State employee", as embraced by the purpose and intent of the Act, is defined. Expressly excepted therefrom are three separate and distinct classifications. We are here concerned with two such classifications. They are: (b) a county or city treasurer, commissioner of the revenue, Commonwealth's Attorney, clerk, sheriff, sergeant or constable, and a deputy or employee of any such officer, and (c) any employee of a political subdivision of the Commonwealth.

Section 51-52 and relative sections embraced by Article 4 set up the modus operandi whereby excepted classification (c) "might become eligible to participate in the retirement system." Those officers, deputies and employees within the scope of excepted classification (b) do not come within the purview of Section 51-52.

I am of the opinion that those officers, their deputies and employees which are the subject of your inquiry are not eligible to participate in the retirement system and that Section 51-52 does not apply to them.
HONORABLE ROBERT BOLLING LAMBETH,
Attorney for the Commonwealth for Bedford County.

This is in reply to your letter of November 18, 1949, in which you ask whether, in my opinion, the Bedford County School Board is required by law to budget grants in aid from the Federal and State Governments for public school purposes, and if budgeted, whether such grants must be used exclusively for the budgeted purposes as other funds must be used.

In an opinion of this office, dated March 30, 1949, it was stated that §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 in the particular county. This opinion went on to state "**This estimate must ** clearly show all necessary details in order that the governing body and the taxpayers of the county or city may be well informed as to every item of the estimate."

Section 25771 of the Virginia Code provides:

"At least thirty days prior to the time when the annual tax levy or assessment, or any part thereof, is made, the boards of supervisors of the counties and the councils or other governing bodies of the cities and towns shall prepare a budget containing a complete itemized and classified plan of all proposed expenditures and all estimated revenues and borrowings for the locality or any subdivision thereof for the ensuing appropriation year, which shall begin for each county on the first day of July of each year or at such other date as may be provided by law for the beginning of the appropriation year. Opposite each item of the proposed expenditures the budget shall show in separate parallel columns the amount appropriated for the preceding appropriation year, the amount expended during that year, the amount appropriated for the current appropriation year, and the increases or decreases in the proposed expenditures for the ensuing year as compared with the appropriation for the current year. This budget shall be accompanied by:

"First. A statement of the contemplated revenue and disbursements, liabilities, reserves and surplus or deficit of the county, city or town as of the date of the preparation of the budget.

"Second. An itemized and complete financial balance sheet for the said locality at the close of the last preceding appropriation year."

(Italics supplied)

Under the provisions of §25771, the Board of Supervisors must prepare a budget containing a complete itemized and classified plan of all proposed expenditures and all estimated revenues and borrowings for the locality. It is my opinion that, in order for the Board of Supervisors to carry out this mandatory duty, the estimate which the Division Superintendent is required to submit to the Board of Supervisors under the requirement of §657 must in turn include all expenditures and receipts.

For the reason set forth, I am of the opinion that the County School Board should budget grants in aid from the Federal and State governments for public school purposes. With regard to whether such funds must be used exclusively for the budgeted purposes, it is my opinion that §656 of the Code, as interpreted by the Supreme Court of Appeals in Board of Supervisors v. County School Board, 182 Va. 266, would require the consent of the tax levying body before the School Board could expend funds for purposes not set up in the estimate.
REPORT OF THE ATTORNEY GENERAL

SCHOOL BOARD—Employment of wife of superintendent. F-188

HONORABLE S. J. THOMPSON,
Commonwealth's Attorney for Campbell County.

I am in receipt of your several communications relative to the following state of facts: A school teacher was employed by the School Board of Campbell County on March 30, 1940; she was reappointed for the sessions of 1940 and 1941 as well as 1941 and 1942. In July 1942 this teacher became the wife of the Division Superintendent of Schools. She was again employed as a teacher for the sessions of 1944 and 1945 through 1947 and 1948 and appointed for the session 1948 and 1949, resigning her post on October 15, 1948.

You desire my opinion relative to the applicability of Section 660 of Michie's Code of Virginia to this state of facts.

The pertinent provisions of Section 660 are as follows:

"* * * It shall not be lawful for the School Board of any county * * * to employ or pay any teacher or other school board employee, from the public funds if said teacher or other employee is the * * * wife * * * of the Superintendent * * *, 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." (Italics supplied.)

The nepotism provision of the act as to relatives of the Superintendent became effective June 19, 1936. However, the act was amended and re-enacted at the session of the General Assembly of 1940 (Chapter 368, Acts of 1940.) The amendment and re-enactment became effective June 22, 1940.

Since it appears that the teacher in question was legally employed in Virginia on March 30, 1940, prior to the effective date of the act, as amended and re-enacted, it is my opinion that she comes within the proviso, "employed at any time prior to the effective date of this act," and that her marriage to the Superintendent in July, 1942, did not and does not render her ineligible for appointment as a teacher in any of the public schools of the State.

A similar situation was presented to the Attorney General of Virginia during the incumbency of The Honorable Abram P. Stables. I concur in the opinion expressed by Justice Staples on May 18, 1942, to The Honorable Dabney S. Lancaster, Superintendent of Public Instruction. This opinion may be found in the "Opinions of the Attorney General," 1941-1942, page 118.

SCHOOL BOARD—Liability for school bus accident. F-203

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

This is in reply to your letter of March 2, in which you request my opinion upon certain questions regarding the liability of local School Boards as the result of school bus accidents. Your first question is:

"Is the local School Board liable in case of suit brought against it as a result of a school bus accident, where the bus is county owned, for any amount beyond the coverage required by State law?"

The statute dealing with liability insurance covering school busses is carried in the new Code as Sections 22-284 through 22-294. The section dealing with the liability of the locality or the School Board is 22-290, which reads as follows:
"In case the locality or the school board is the owner, or operator through medium of a driver, of, or otherwise is the insured under the policy upon, the vehicle involved in an accident the locality or school board shall be subject to action up to, but not beyond, the limits of valid and collectible insurance in force to cover the injury complained of and the defense of governmental immunity shall not be a bar to action or recovery, and in case of several claims for damages arising out of a single accident involving the vehicle, the claims of pupils and school personnel, excluding driver when not a pupil, shall be first satisfied, but in no event shall school funds be used to pay any claim or judgment or any person for any injury arising out of the operation of any such vehicle. The locality or school board so responsible may be sued alone, or jointly with the driver, provided that in no case shall any member of the school board be liable personally in the capacity of school trustee solely." (Italics supplied)

In view of this provision, I agree with you that the liability of the locality or School Board is limited to the amount of the insurance in effect.

Your second question is:

"Can the local School Board be sued jointly with a bus contractor where private contract bus is involved in an accident and the suit is brought for an amount beyond the minimum coverage required by law?"

I agree with your statement that the County School Board can always be sued, but that the defense of governmental immunity from liability would always be applicable except to the extent that it has been modified by the compulsory insurance law. As you point out, the liability is always limited under Section 22-290 to the amount of insurance in the policy naming the locality or the School Board as the insured.

That section only permits an action against the locality or the School Board in cases where the locality or the School Board is "the owner, or operator through the medium of a driver, of, or otherwise is the insured under the policy upon the vehicle." Section 22-285 simply requires every school bus to be "covered in a policy of public liability and property damage insurance." It does not require the locality or the School Board to be named as the insured in all cases. Likewise, Section 22-287 requires the Superintendent of Public Instruction to obtain the necessary insurance "in every case where a locality or its School Board fails to obtain, or to require vehicles operated under contract with it to be covered by, the requisite insurance." The inference from Sections 22-285 and 22-287 is that the locality or the School Board need not be named as the insured when school busses are operated by an independent contractor under a contract with the School Board. If the School Board or the locality is not named as an insured in such case, complete governmental immunity could be pleaded. Of course, if the School Board or the locality is named as an insured (and this may be the best business practice in order to relieve the locality of the expense incident to defending actions which may be instituted against it), it would be liable to suit and judgment, but its liability would be limited to the amount of the insurance in force.

Your third question is:

"Is the local School Board liable to suit when an employee of the Board is involved in an accident in a private car, or found guilty of an act of negligence while in pursuit of his official duties under contract with said Board?"

As you point out, in the absence of a statute waiving the governmental immunity from liability in tort for the actions of public employees, there can be no liability upon the county or the School Board as a legal entity in such cases, the liability resting on the employee alone. There is no statute waiv-
ing generally the governmental immunity of counties and local School Boards as is the case in connection with school bus operations. Your third question is, therefore, answered in the negative unless the accident involves a school bus.

In the cases of school busses, I disagree with the view that public moneys cannot be expended for the purchase of insurance in excess of the compulsory requirements. It is true that there is immunity from liability in excess of such requirements if insurance coverage is limited to such amounts, and there is no need, in so far as liability upon the locality or School Board is concerned, to carry additional insurance. However, I do not believe that this is prohibited if, as a matter of policy, additional protection is desired to protect the employees of the School Board, the pupils who may be injured, or the general public. As you know, there is general immunity in the case of the State, but it has been the consistent policy for State agencies to carry insurance to protect the employees concerned and thereby enable the State to secure satisfactory employees and at the same time furnish proper protection to the public. The expenditure of public funds to secure such insurance has always been deemed a proper expenditure of funds.

You will note that Section 22-285 provides that, in the case of school busses, insurance in the amounts of at least certain specified limits must be secured. This clearly indicates that, if the School Board deems additional insurance desirable, the amount of the insurance may be increased.

SCHOOLS—Bonds; No limitation on bonded indebtedness for school purposes. F-103

February 2, 1950.

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

This is in reply to your letter of January 28, in which you ask if there is any provision of law which generally, or with particular reference to bonds issued for school loans, places a limit upon the amount which a county may borrow.

As you point out, Section 127 of the Constitution limits the amount which may be borrowed by cities and towns to an amount not to exceed eighteen percent of the assessed valuation of the real estate in the city or town subject to taxation, except in the case of certain types of indebtedness. There is no similar constitutional provision applicable to counties. Section 115-a requires the approval of the qualified voters before a county may borrow money, except in the case of temporary loans and loans from the Literary Fund, but it does not limit the amount which can be borrowed.

There is no statute which places a general limit upon the amount of bonded indebtedness which may be incurred by a county. While the statutes relating to bonds issued for sanitary districts in most, if not all, instances limit the amount which can be borrowed for such purposes to eighteen percent of the assessed valuation of the real estate in the district, there is no statute fixing a limit as to amounts borrowed for school purposes.
SCHOOLS—Bonds; Referendum where county as a whole approves bond issue it is immaterial that certain districts disapproved. F-103

Honorable Julius Goodman,
Commonwealth's Attorney for Montgomery County.

This is in reply to your letter of May 24, in which you state that the County School Board of Montgomery County is planning to submit to the qualified voters of the county, in a county-wide bond issue election, the question of whether bonds should be issued to secure funds for the construction and equipment of school buildings or for making additions to school buildings to be located in each of the four school districts of the county.

You ask if, in case the bond issue is approved by the voters of the county as a whole, but does not receive the approval of the majority of the voters in a particular school district, the School Board may make the additional school levy needed to secure funds for the payment of the interest and to provide funds for the sinking fund to redeem the bonds applicable in the school district where the bond issue was not approved by a majority of the voters. You also ask whether the Board may proceed with the construction work planned for such district.

Section 22-167 of the Code reads as follows:

"Whenever it shall be necessary for a county to provide funds for school improvements in such county, including the purchase of sites for school buildings or additions to school buildings, the construction of school buildings or additions to school buildings, the furnishing and equipping of school buildings or additions to school buildings, or the erection and equipping of buildings for the storage, care and repair of school buses, it shall be lawful for the school board of such county to contract a loan for any or all of such purposes, and issue bonds, on the credit of the county, in the manner other loans are authorized to be contracted and bonds authorized to be issued by §§15-601 to 15-604; provided that when any of the improvements aforesaid are erected or furnished at the expense of the school district, or of two or more school districts, the election provided for by the Code sections referred to in this section shall be held only in the district or districts against which such improvements will be a charge; and, provided further, that in such case 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. In all other respects the procedure shall be as required by such Code sections, except that approval, by appropriate resolution of the governing body of a county shall be necessary in the contracting of any such loan or in the issuance of any such bonds."

This section authorizes improvements to be erected or furnished at the expense of a single district, in which case only the voters of that district vote upon the bond issue to finance those particular improvements and the tax to pay the bonds is levied only in that district. However, if the School Board proposes to finance the project or projects on a county-wide basis against which such improvements will be a charge, and, provided further, that in such case 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. In all other respects the procedure shall be as required by such Code sections, except that approval, by appropriate resolution of the governing body of a county shall be necessary in the contracting of any such loan or in the issuance of any such bonds.

This is in reply to your letter of May 24, in which you state that the County School Board of Montgomery County is planning to submit to the qualified voters of the county, in a county-wide bond issue election, the question of whether bonds should be issued to secure funds for the construction and equipment of school buildings or for making additions to school buildings to be located in each of the four school districts of the county.

You ask if, in case the bond issue is approved by the voters of the county as a whole, but does not receive the approval of the majority of the voters in a particular school district, the School Board may make the additional school levy needed to secure funds for the payment of the interest and to provide funds for the sinking fund to redeem the bonds applicable in the school district where the bond issue was not approved by a majority of the voters. You also ask whether the Board may proceed with the construction work planned for such district.

Section 22-167 of the Code reads as follows:

"Whenever it shall be necessary for a county to provide funds for school improvements in such county, including the purchase of sites for school buildings or additions to school buildings, the construction of school buildings or additions to school buildings, the furnishing and equipping of school buildings or additions to school buildings, or the erection and equipping of buildings for the storage, care and repair of school buses, it shall be lawful for the school board of such county to contract a loan for any or all of such purposes, and issue bonds, on the credit of the county, in the manner other loans are authorized to be contracted and bonds authorized to be issued by §§15-601 to 15-604; provided that when any of the improvements aforesaid are erected or furnished at the expense of the school district, or of two or more school districts, the election provided for by the Code sections referred to in this section shall be held only in the district or districts against which such improvements will be a charge; and, provided further, that in such case 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. In all other respects the procedure shall be as required by such Code sections, except that approval, by appropriate resolution of the governing body of a county shall be necessary in the contracting of any such loan or in the issuance of any such bonds."

This section authorizes improvements to be erected or furnished at the expense of a single district, in which case only the voters of that district vote upon the bond issue to finance those particular improvements and the tax to pay the bonds is levied only in that district. However, if the School Board proposes to finance the project or projects on a county-wide basis against which such improvements will be a charge, and, provided further, that in such case 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. In all other respects the procedure shall be as required by such Code sections, except that approval, by appropriate resolution of the governing body of a county shall be necessary in the contracting of any such loan or in the issuance of any such bonds.

This is in reply to your letter of May 24, in which you state that the County School Board of Montgomery County is planning to submit to the qualified voters of the county, in a county-wide bond issue election, the question of whether bonds should be issued to secure funds for the construction and equipment of school buildings or for making additions to school buildings to be located in each of the four school districts of the county.

You ask if, in case the bond issue is approved by the voters of the county as a whole, but does not receive the approval of the majority of the voters in a particular school district, the School Board may make the additional school levy needed to secure funds for the payment of the interest and to provide funds for the sinking fund to redeem the bonds applicable in the school district where the bond issue was not approved by a majority of the voters. You also ask whether the Board may proceed with the construction work planned for such district.

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SCHOOLS—Districts, abolishment of. F-201

HONORABLE J. BRADIE ALLMAN,
Member of House of Delegates.

This is in reply to your letter of December 9, in which you request my opinion as to the method by which the special school district of the Town of Rocky Mount may be abolished.

Section 653-a-2 of the Code of Virginia, as amended by Chapter 247 of the Acts of Assembly of 1948, provides that any special town school district created under its provisions, with the exception of the special school district of Galax, "* * * may, by ordinance of the town council, or other governing body, and by and with the approval of the county school board and 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 county school unit and shall be managed, operated and controlled by the county school board as a part of such unit, and all school property, real and personal, the title to which is held by the school board of any such separate, special or special town school district at the time of its dissolution and shall provide for disposition of any outstanding bonded indebtedness of such school district."

If the procedure therein provided is followed, the special school district for the Town of Rocky Mount would be legally abolished. If it is desired to continue the town as a special school district for purposes of representation only, this can be done under the first paragraph of this section, which provides that any incorporated town having a population of not less than 1,000 inhabitants may by ordinance of the Town Council, and by and with the approval of the State Board of Education, be constituted a separate school district for purposes of representation on the County School Board. If this result is desired, the ordinance adopted by the Council requesting that the special school district for purpose of operation be abolished should also contain a provision requesting the State Board of Education to set up the Town of Rocky Mount as a separate school district for the purposes of representation only.

SCHOOLS—Town's share of school construction funds computed on basis of enrollment of students for which county does not pay tuition. F-206

HONORABLE DAVID GOODMAN,
Town Manager of Abingdon.

This is in reply to your letter of February 20, in which you ask whether the Town of Abingdon is entitled to receive as its share of the school construction funds under the recently enacted school construction bill an amount based on the total enrollment in Abingdon schools on December 1, 1949, or only upon the enrollment of students for which the County does not pay tuition.

As you point out, Section 2 of the Act provides that:

"* * * Towns constituting a separate school district for the purpose of being operated as a separate school district shall be entitled to receive their proportionate share of the amounts allocated under this section to the county or counties in which the towns are located, to be determined as between the counties and towns concerned on the same basis of distribution used by the State in making the allocation of such funds to the counties and cities."
The first sentence of Section 2 provides that the funds available for the first year shall be allocated among the counties and cities on the basis of actual enrollment existing in the several counties and cities on December 1, 1949, the share of each county and city to be in the same ratio which the actual school enrollment therein bears to the total school enrollment in the State. A similar basis of distribution is applicable to the funds available for the second year based on the enrollment existing on December 1, 1950. However, Section 4 of the Act reads as follows:

“For the purpose of making the distributions as provided in Sections 2 and 3 of this Act, a pupil residing in one county or city but attending school in another county or city under an arrangement whereby the county or city in which the pupil resides pays tuition to the county or city in which the pupil attends school shall be considered enrolled only in the county or city in which the pupil resides.”

The purpose of Section 4 of the Act was to help those localities which because of lack of school facilities within their own limits, have to send their school children to another locality under an arrangement whereby the locality of residence of the children pays tuition to the other locality. Since the locality of residence is under the obligation of providing the facilities, either directly or by paying tuition to other localities, it was considered desirable to make the construction funds available to the locality of residence in order to help in the construction of facilities to take care of those children who were presently being sent elsewhere at the expense of the locality of residence.

In so far as children in the category dealt with in Section 4 of the Act are concerned, the basis of distribution between counties and cities prescribed in the first sentence of Section 2 is modified by the language of Section 4. Therefore, the last sentence of Section 2 quoted above providing that towns constituting a separate school district for operation shall receive the proportionate share of the amount allocated to the county on the same basis of distribution used by the State in making the allocation of funds to counties and cities must be read in the light of Section 4, which affects the allocation between counties and cities.

It is my opinion, therefore, that the language of Section 4 is applicable in determining the share of the Town of Abingdon and that the town’s share is based only upon the enrollment of students for which the county does not pay tuition. The reasons for adopting Section 4 are equally applicable when the situation exists as between a town and the county as when the situation exists between two counties or between a county and a city, and, in my opinion, the last sentence of Section 2 clearly makes the provisions of Section 4 applicable to such situation when it exists between a town and a county.

It is noted that you were informed that Senator Stephens, who offered Section 4 as an amendment, is reported to have stated that he did not intend to have special school districts included within the meaning of the amendment. I have conferred with Senator Stephens and he has informed me that he concurs in the views expressed above. While he remembers discussing this question with someone during the consideration of the bill by the General Assembly, he feels that there must have been some misunderstanding as to the question under discussion or of the views expressed by him at that time, for his views were then, as they are now, in accord with my opinion set out above.
SCHOOLS—Town which is separate school district entitled to pro rata share of county levy for school purposes. F-33

June 28, 1950.

HONORABLE H. P. BURNETT,
Commonwealth's Attorney for Grayson County.

This is in reply to your letter of June 13, 1950, which reads as follows:

"The Town of Fries, in the Providence Magisterial District of Grayson County, is a separate school district, and maintains its own school system. For sometime past they have been admitting a large number of out of town students and the School Board of Grayson County has been paying to the Town of Fries the per capita cost of instruction for these outside children.

"The Town of Fries proposes to build additional facilities for a cafeteria, work shop and a gymnasium. It has been suggested that the Providence District, in which the Town of Fries lies, levy a district tax for school construction purposes, some of which is to be given to the Town of Fries in order to help pay for these proposed new facilities to their school. Of course, the property owners in the Town of Fries would have to pay their proportionate part of this District tax. The Town of Fries wants to go ahead with building these additional facilities at their own cost and then have the Board of Supervisors to agree that the amount paid by the tax payers in the Town of Fries on the District levy be returned to the Town of Fries and to be credited by them on the cost of construction of the facilities above named. The Town of Fries contends that since they furnish school facilities, free of cost, to a large number of children, that it would only be fair that the amount paid by the citizens of Fries on this district school levy should be returned to them and credited on the cost of these facilities.

"It is not clear in my mind as to whether the Board of Supervisors would have the right to enter into an agreement of this kind, and I will greatly appreciate it if you will give me your opinion on this question."

I call your attention to §22-141 of the Code of 1950, which reads, in part, as follows:

"(a) Funds to be paid by county treasurer to town treasurer.—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:

"(1) From the amount derived from the county levy and/or appropriations for school purposes, a sum equal to the pro rata amount from such levy or appropriations derived from such town."

It is my opinion that the quoted portion of this Code section governs the situation presented by your letter and that the Treasurer of the Town of Fries would be entitled to receive from the County Treasurer a sum equal to the pro rata amount from the levy derived from the Town.
SCHOOLS AND SCHOOL BOARDS—Authority to sign application for scholastic accident insurance; consequence of so doing. F-203

June 12, 1950.

HONORABLE R. C. HAYDON,
Assistant Superintendent of Public Instruction.

This is in reply to your recent letter in which you enclosed a copy of a letter from the Superintendent of the Richmond City Public Schools. I quote as follows from that letter:

"The Cooperative Education Association has asked me to secure a ruling from the Attorney General concerning whether or not the School Board had the right to sign an application for blanket scholastic accident insurance.

"I am enclosing copy of the application form which is what would have to be signed by a school official if the insurance should be carried with the company that has it for the present year. Of course, bids were taken on this insurance, and it was awarded to the company that had the best contract to offer.

"I would appreciate it very much if you would get an opinion from the Attorney General as to whether or not any such participation on the part of the School Board would violate any existing law, or would set any precedent that would tend to color the present interpretation of the law as it affects the responsibility of the School Board in regard to accidents that occur to pupils at school."

I am aware of no law that would prohibit a school official from signing an application for blanket scholastic accident insurance referred to above. However, if the signing of such an application would have the effect of guaranteeing that the insurance applied for would be taken out by the parents of the public school pupils, or in any way bind the school board to pay the premiums therefor, it is my opinion that school officials would have no authority to sign the application in question.

As to the second question presented, it is my opinion that the fact that a school official signs an application for scholastic accident insurance in no way renders the school board liable for accidents that occur to pupils in the public schools.

SCHOOLS AND SCHOOL BOARDS—Board may not employ board member in any capacity. F-203

May 19, 1950.

MR. CHARLES T. GARTH, Clerk,
Greene County School Board.

This is in reply to your letter of May 18, in which you state that the Division Superintendent would like to recommend the members of the Greene County School Board to take the school census. You ask whether or not the members of the School Board can legally be paid for their services if they take the school census.

Section 22-224 of the Code provides that the school census shall be taken by agents appointed by the County School Board in counties on the recommendation of the Division Superintendent, and each agent shall receive as compensation for his services, to be paid out of the county school funds, an amount to be fixed by the Board appointing him.

Section 22-213 of the Code, which makes it unlawful for members of School Boards to be interested in contracts with the Board, expressly provides that the
Board shall not employ any of its members in any capacity. In view of this provision, it is my opinion that it would be improper for any School Board members to be named as agents to take the school census.

SCHOOLS AND SCHOOL BOARDS—Brother-in-law of member cannot be employed as bus driver. F-203

Mr. Clarence Jennings,
Superintendent of Public Schools for New Kent County.

This is in reply to your letter of July 22, in which you ask whether or not a School Board may employ as a school bus driver a brother-in-law of a member of the County School Board.

Section 660 of the Code provides that it shall not be lawful for the School Board of any county to employ or pay any teacher or other School Board employee from the public funds if said teacher or other employee 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 any member of the School Board.

In view of this provision, it is my opinion that the School Board is not authorized to employ a brother-in-law of one of the School Board members as a school bus driver.

SCHOOLS AND SCHOOL BOARDS—Buses owned by county cannot be used for private purposes. F-201
August 17, 1949.

Honorable Horace T. Morrison,
Commonwealth's Attorney for King George County.

This is in reply to your letter of August 15, in which you request my opinion as to whether it would be proper for the School Board of the county to permit various church groups and others to hire school buses for picnics and other outings under an arrangement whereby such groups would only be required to reimburse the School Board for the expense of operating the buses.

I can find no statute permitting the School Boards to allow others to use for private purposes school buses owned by the county and, in my opinion, the School Board does not have the authority to enter into such an arrangement as set forth in your letter. As you point out, the buses are not licensed for such purposes, and it is doubtful whether the public liability insurance would be applicable when the buses are used for other purposes than the transportation of school children. For these reasons I do not think that the School Board should rent school buses to private groups for their own use.
MR. W. A. EARLY, Division Superintendent, Arlington County Public Schools.

This is in reply to your two letters of September 28th relating to the cafeterias operated in the public schools of Arlington County.

In the first of these letters you state that the Arlington County School Board has over a period of years approved certain people to act as managers on a concession basis for the various lunch rooms operated in the schools. Under the arrangement entered into, the salary of the managers is paid out of the receipts of the operation and the School Board has not assumed any responsibility for the expense of the operations other than to provide space, heat, water, lights, and certain major equipment. You further state that the School Board is desirous of having an auditor audit the books of these concessions. You ask whether the Board may legally employ and pay an auditor to do this work.

The operation of cafeterias in the public schools takes different forms in the various counties and cities of the State. In some localities they are conducted by the school boards, or directly under their control, as an official school board function with the school board, itself, assuming complete responsibility for the operation. In others, as appears to be the case in Arlington County, the school board simply acts as sponsor and assumes no direct financial responsibility for the operation though it may provide space, equipment, and in other respects subsidize in part the operation.

The Arlington County School Board, along with practically all other county and city school boards in the State, participates in the program adopted under the National School Lunch Act, under which federal funds are received to assist in the local school lunch program. Under the agreements governing the payment and receipt of the federal funds which have been made between the local school boards and the State Department of Education and between that department and the Federal Government, it is the responsibility of the local school board to see that certain requirements of the Federal Government are met whether the cafeterias in the schools are run directly by the local boards or merely under their sponsorship. Among these are requirements that the local school lunch program must be operated on a non-profit basis and that proper records must be kept showing among other things the number of meals served, this being the basis of the request for reimbursement from federal funds.

Since the local school board applies for, receives and disburses the federal aid funds and, in connection with the handling of these funds, is charged with the responsibility of seeing that the persons operating the cafeterias in the schools meet the requirements laid down by the Federal Government, it is my opinion that it would be legal and proper for the School Board to employ and pay an auditor to audit the books of the operators of the cafeterias if the School Board deems this a necessary or proper means of securing the information needed to discharge this responsibility. Moreover, since the Board is contributing, in part, to the expense of the operation of the cafeterias, which are closely related to the operation of the schools themselves, it would be proper to pay the expenses of an audit conducted to see that the business affairs of the cafeterias are properly conducted.

In your second letter, you state that the concession cafeteria in one of the schools in Arlington County has accumulated a sizeable deficit with some of the business houses in the community. You ask if the Board is legally obligated to pay for this deficit, and, if not so obligated, would the Board have the authority to pay the outstanding bills from its present operating funds.
Since the concession has not been operated as a direct responsibility of the School Board and the supplies covered by the bills were not purchased in the name of the School Board pursuant to authority previously conferred by it, it is my opinion that the School Board is not legally obligated to pay these bills.

However, as pointed out above, it is not unusual for a school board to subsidize in part the operation of cafeterias in the schools by providing space, heat, water, lights and equipment. This is done by the Arlington County School Board. In some cases the salaries of those working in the cafeterias are paid by the school board and in some cases amounts are appropriated to pay other expenses. If the Arlington County School Board wished to make a direct appropriation of money to defray a part of the cost of operating the cafeterias, it is my opinion that it would be proper for it to do so provided the Board of Supervisors approved. As you know, Section 656 of the Code provides that a school board may incur only the costs and expenses as are provided in its budget without first securing the consent of the tax levying body.

SCHOOLS AND SCHOOL BOARDS—Cannot contract with corporation of which a member owns a substantial part. F-203

Mr. R. C. Haydon,
Assistant Superintendent of Public Instruction.

This is in reply to your letter of January 31, in which you request my opinion as to whether the W. B. English Lumber Company, Inc., which is engaged in the contracting business; can be permitted to bid upon proposed school work in Campbell County in view of the fact that W. C. English, a member of the Campbell County School Board, owns twenty percent of the stock in the corporation and his brother and father own the balance.

Section 15-504 of the Code of Virginia provides that no supervisor or certain other designated officers 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 on behalf of the board of supervisors or the county school board. The amendment of this section in 1948 included the reference to county school boards for the first time.

I think that a person who owns twenty percent of the stock in a corporation is interested, at least indirectly, in a contract of the corporation, particularly when the balance of the stock is owned by his close relatives. It is my opinion, therefore, that, if the School Board of Campbell County has provided that its members shall be paid a per diem, as is authorized by law, thus making its members paid officers of the county, then Section 15-504 would prohibit the corporation in question from dealing with the County School Board.

It may be that mere ownership of a small stock interest in a corporation doing business with a school board would not be such an interest as would make the contract fall within the prohibition of this section. A substantial interest in a closely held corporation, however, does bring the contract within the meaning of the statute.

The amendment of the statute, now found as Section 15-504 of the Code, which was adopted in 1948 so as to make the statute expressly applicable to contracts with school boards, had the effect, in my opinion, of modifying the provisions of former Section 708, now Section 22-213, which authorized the State Board of Education to permit school officers to deal with the school boards in certain cases.

Incidentally, if Section 15-504 were held to be inapplicable to contracts made
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with corporations in which a school board member holds stock, such a contract would in any event be prohibited by Section 22-213, unless special permission was given by the State Board of Education, for this last mentioned section reads as follows:

"It shall be unlawful for any member of the State Board, division superintendent of schools, member of the school board or any other school officer, principal or teacher in a public school, except by permission of the State Board evidenced by resolution spread on the minutes of such Board, to have any pecuniary interest, directly or indirectly, in any contract for building a public schoolhouse, or in furnishing material to a contractor for building such schoolhouse, * * *. It shall also be unlawful for any firm or corporation, in which any member of the board or other officer, principal or teacher, mentioned in this section, is interested, or for any agent of such officers or persons, except by permission of the State Board evidenced by resolution spread on the minutes of such board, to be interested or concerned in any contract or matter mentioned in this section. * * *"

SCHOOLS AND SCHOOL BOARDS—Chairman of Board of Supervisors, Commonwealth's Attorney, or County Treasurer cannot hold contract with School Board. F-203

HONORABLE DENMAN T. RUCKER,
Commonwealth's Attorney for Arlington County.

This is in reply to your letter of August 22nd which I quote in full:

"I have read many of the opinions of the Attorney General interpreting 2707 of the Code, all of which involve situations prior to the last Session of the General Assembly. This Section was amended at that Session. I would like your opinion on three questions which I have in mind.

"The Chairman of the Board of Supervisors has, for a long period of time, been performing work for the School Board. He is a Certified Land Surveyor and does a great deal of their work. I would like your opinion as to whether or not this service is being legally performed.

"I am informed that the firm of Green, Trueax and Wayland was employed by the School Board and pursuant thereto, this firm handled all the proceedings necessary to condemn a tract of land for which they were paid a rather substantial fee. One of the members of this firm is Mr. John Locke Green, the Treasurer of Arlington County. I do not know at this time whether or not Mr. Green shared in the proceeds of the fee, either directly or indirectly, but assuming that he did, is the payment of this fee in violation of the statute.

"My last question concerns me personally. I do not engage in the private practice of law, following a pledge which I made to the people of Arlington that if elected, I would not engage in the private practice of law. The School Board has a substantial amount of legal matters pending at this time. It has been their practice since elected in January of 1948 to have their legal work performed by various firms here at the Court House. However, within the past week there has been a change in that policy and they now wish to refer all, or a major portion, of that work to me as Commonwealth's Attorney, with the understanding that I will be paid for my services. Before I undertake to perform these services, which, although not required by law, appear to be logical duties of the Commonwealth's Attorney, I would like to know if the
above Section of the Code decrees that it is unlawful for me to charge for these services. It is my understanding that Attorneys for the Commonwealth generally, throughout the State, perform services for the School Boards in their respective counties and cities for which they receive compensation."

Prior to its amendment in 1948, Section 2707 of the Code which forbids certain officers from having any interest in contracts with their counties, did not specifically refer to contracts with the School Board of the county nor did it specifically refer to the Treasurer of the county or the Commonwealth's Attorney. In 1948 this statute was amended and its provisions made more strict. It now specifically refers to contracts with county School Boards as one of the contracts in which the officers named cannot be interested. It also specifically names the Treasurer and the Commonwealth's Attorney as well as other specific officers including Supervisors. The last sentence by excepting contracts of employment of the Commonwealth's Attorney to collect certain taxes, makes it clear that even contracts for personal services of a legal nature are forbidden.

While the statute prior to its amendment in 1948 did not require and had not been given as strict a construction as it now requires, it is my opinion that all three types of contracts mentioned in your letter are now prohibited by this statute. It is my opinion that neither the Chairman of the Board of Supervisors, Treasurer of the County, nor the Commonwealth's Attorney can be interested in contracts with county School Boards.

SCHOOLS AND SCHOOL BOARDS—Compatibility of offices; County Electoral Board and County School Board. F-249

Honorable T. Moore Butler, Commonwealth's Attorney for Alleghany County.

This is in reply to your letter of June 13, in which you request my opinion as to whether a member of the County Electoral Board may serve as a member of the County School Board.

Section 22-69 of the Code provides that, with certain exceptions not pertinent to your inquiry, no State or county officer shall be chosen or allowed to act as a member of the County School Board. A member of the County Electoral Board is clearly a State or county officer and is, therefore, prohibited from serving on the County School Board by this section.

SCHOOLS AND SCHOOL BOARDS—Federal officeholder ineligible. F-249

COMPATIBILITY OF OFFICES—Federal officeholder not eligible to serve on school board. F-249

Honorable A. E. S. Stephens, Member of House of Delegates.

This is in response to your telephone inquiry of this date. You desire to know whether a member or employee of the Production and Marketing Division of the United States Department of Agriculture is eligible for appointment as a member of your local School Board. I under-
stand that the person under consideration draws a salary paid entirely by Federal appropriation.

Under Section 133 of our Constitution a member of a school board is a constitutional officer. Section 2-27, Code of 1950, provides in substance that no person shall be eligible to hold any office or post embraced by the applicable section of our Constitution who holds any office or post of profit under the government of the United States or who is in the employment of that government or receives any emolument whatever.

A member of the Production and Marketing Division of the United States Department of Agriculture is an officer or employee of the Federal government. In the instant case the person under consideration draws remuneration from the Federal government. In my opinion the Virginia law clearly disqualifies any employee of the Federal government from acting as a member of the School Board.

There are certain exceptions embraced in Section 2-29. The person referred to by you, however, is not covered by these exceptions.

On May 28, 1934, Attorney General Abram P. Staples held that an employee of the State and Federal Agricultural Extension Bureau was disqualified from becoming a member of a local School Board. (Opinions of the Attorney General, 1934, page 84.) I concur in that opinion expressed by Justice Staples.

SCHOOLS AND SCHOOL BOARDS—Handling of “Quasi-public” funds such as book rental funds, cafeteria funds, etc. F-203

March 6, 1950.

HONORABLE HOWARD W. SMITH, JR.,
Attorney for the Commonwealth for Alexandria.

This is in reply to your letter of March 3, from which I quote as follows:

"I have been asked to seek your opinion concerning the responsibility and liability of the School Board for certain 'quasi-public' funds handled by local public school boards. These funds are not handled by the school boards in the sense of being disbursed or collected by the board, nor does the clerk of the board account for them. They include text book rental funds, cafeteria funds, athletic association funds and similar miscellaneous categories. The accounts for the most of these funds are carried entirely within the individual schools themselves and generally are handled by a finance committee of the individual schools consisting of faculty members who are responsible for auditing the funds annually and to whom financial reports are made during the course of the year."

The answer to your question depends, in my opinion, upon whether the particular function is being carried on as an official function of the School Board for which it assumes responsibility and control or whether it is simply an unofficial activity which the School Board permits to be carried on in connection with school activities, perhaps with its sponsorship and guidance, but not with its direct control.

For instance, in some localities cafeterias are operated directly by or under the control of the School Board as an official school function. In such cases the funds would have to be handled as other official funds and would be subject to all accounting requirements concerning official funds. In other localities cafeterias are operated by outside agencies or individuals under the sponsorship of the School Board, but with the School Board assuming no direct responsibility. In such a case the funds would not be subject to the same accounting restrictions
as in the case with the official funds of the Board. It is my understanding that there is a similar variance in practice with respect to text book rental programs, the operation of athletic associations, and other miscellaneous activities referred to by you.

Your letter does not give me sufficient information to judge whether the activities mentioned by you are being carried on in Alexandria as "official" activities for which the School Board has assumed responsibility, though your letter indicates that this is not the case. In view of the fact that I do not have all of the facts on the nature of the operation of the specified activities in Alexandria or on the action taken by the Board itself with respect to the same, I cannot express any opinion as to how the funds used to carry on the activities should be handled.

SCHOOLS AND SCHOOL BOARDS—Insurance on school buildings; written by agency of which School Board member is officer and director. F-83

INSURANCE—School buildings; written by agency of which School Board member is officer and director. F-83

April 17, 1950.

HONORABLE JOHN T. DuVAL,
Commonwealth's Attorney for Gloucester County.

This is in reply to your letter of April 3, from which I quote as follows:

"I shall be grateful if you will kindly advise me as to whether the fact that a paid officer of the County as designated in Section 15-504 of the Code of Virginia, 1950, who is also an active officer and director of a Corporation conducting a fire insurance agency, prevents the agency from writing fire insurance policies covering public school buildings in the County."

The pertinent part of Section 15-504 of the Code is as follows:

"No supervisor, superintendent of the poor, special policeman, 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 contracts, 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 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, * * * ."

Since you state that the paid county officer is an active officer and director of a corporation conducting a fire insurance agency, I assume that he has at least an indirect financial interest in the corporation. This being true, it is my opinion that the agency in question, by virtue of the above quoted provision, cannot write fire insurance policies covering public school buildings in the county.
SCHOOLS AND SCHOOL BOARDS—Land may be purchased before approval of building project. F-252

HONORABLE T. MOORE BUTLER,
Commonwealth's Attorney for Alleghany County.

July 26, 1949.

This is in reply to your letter of July 20, from which I quote as follows:

"The County School Board of Alleghany County, Virginia, desires to purchase a tract of land in the county near one of the present county schools. Said land may later be used for school purposes. However, no building project has been approved as yet for said building and no funds have been made available for the erection of a school building thereon.

"Will you please give me your opinion as to whether or not the Board of Supervisors of Alleghany County, Virginia, may appropriate funds for the purchase of said land under the above conditions."

If it is deemed of sufficient importance to purchase the land in question before building plans have been formulated, I am of the opinion that the expenditure of funds for such purpose would be legally permissible, even though the building project may not be approved.

Of course, whether or not the expenditure is justified when it is possible that a school building may not be erected on the property is a question for the School Board to determine as a matter of sound business policy.

SCHOOLS AND SCHOOL BOARDS—May contract with private individual to supply water. F-203

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.

August 5, 1949.

This is in reply to your letter of July 28th regarding the payment of $2,500 made by the School Board of Franklin County toward the development of a privately owned water plant.

While the facts set forth in the letter written to you by the Certified Public Accountant who made the audit of the county finances would indicate that this payment was simply a subsidy to a private individual who owned the water plant which served the school board, the material which you sent to me with your letter of August 4th shows that this is not the case.

Under Section 656 of the Code, county school boards have the authority to provide all public schools with an adequate and safe supply of drinking water. With your letter of August 4th you sent to me excerpts of the minutes of the Franklin County School Board which show the efforts of that body to provide an adequate water supply for the Boone Mill High School. These excerpts also show that on June 2, 1945, the school board decided to award a contract to Arthur H. Garst for the construction of a water system, pipe line and reservoir to serve the school building according to plans and specifications prepared for the Board. For this he was to receive the sum of $2,500 plus 50c per thousand gallons of water furnished the school.

The contract which was sent me with your letter of August 4th shows that while the water system was to be owned by Mr. Garst, he was to furnish all water needed in connection with the school at the specified rate unless a different rate was established by the State Corporation Commission or other regulatory body. The county school board was guaranteed priority over all consumers and also guaranteed other protective features by the contractor.
It is my opinion, therefore, that the $2,500 paid to the private individual to construct the water system was not a voluntary gift to a private individual but was a payment made under a contract to secure certain rights and privileges deemed advantageous to the school board. Since the contract provided that the school board should receive good and valuable consideration for its payment and was made under the provisions of law authorizing the school board to provide an adequate water system, it is my opinion that the expenditure was a legal one.

SCHOOLS AND SCHOOL BOARDS—Must have consent of tax levying body before incurring expense not included in budget. F-203

HONORABLE ROBERT BOLLING LAMBETH,
Commonwealth's Attorney for Bedford County.

This is in reply to your letter of June 3, from which I quote as follows:

"The Bedford County Board of Supervisors, in fixing the tax levy for the fiscal year 1949-50 and 1950-51, levied a special county tax for capital expenditures, pursuant to Section 22-128, Code of Virginia.

"The page on the expenditures side itemizes 'capital expenditures under Section 22-128, Code of 1950', and shows an item of $12,231 for the year 1950-51. A corresponding item is carried under revenue estimates in the budget.

"I would appreciate your opinion as to whether the Bedford County School Board is at liberty to spend the funds realized from this special levy without the approval of the Board of Supervisors, or without itemizing the specific school projects the funds will be used for.

"This matter bears indirectly and relates to the opinions which you have previously given me under date of March 30, 1949, and December 1, 1949, relating to the preparation of budget estimates by the school authorities."

Section 22-72 of the Code provides that county school boards may incur only such costs and expenses as are provided in its budget unless they first secure the consent of the tax levying body. It is not clear from the second paragraph of your letter whether the item for capital expenditures there referred to was included in the school budget or simply in the budget prepared by the Board of Supervisors, though, since it is a matter relating to a special levy for capital improvements for school purposes under Section 22-128, I judge that it was included in the school budget as a request for a levy for this purpose and as a request for the right to expend for that general purpose the funds derived from such levy.

Of course, if the school budget did not include any item for capital expenditures, Section 22-72 referred to above would prohibit the expenditures of funds therefor until the approval of the tax levying body is first secured, at which time the Board of Supervisors can require that the specific school projects be itemized. Likewise, if the school budget named certain projects, the funds can be used only for the one specified unless the approval of the Board of Supervisors is first secured.

However, if the school budget contained a general item of $12,231.00 for capital improvements and the Board of Supervisors approved the budget with this general provision, it is my opinion that the school board is at liberty to spend the funds realized from the levy without further approval from the Board of Supervisors and without itemizing the specific projects that are planned, limiting the use of the funds, of course, for capital improvements.
Section 22-122, which deals with the preparation of school budgets, provides that the "estimate so made shall 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." Under the section, the Board of Supervisors could have required a more detailed account of the capital expenditures planned at the time the school budget was submitted for approval, but, if it did not and instead approved a sum for that general purpose, it is my opinion that the school board may expend the funds provided on such capital improvement projects as it deems most appropriate.

SCHOOLS AND SCHOOL BOARDS—Salary and expenses of Division Superintendent—how apportioned between state and localities. P-203

MR. F. E. WENDELL, Chairman,
Cape Charles School Board.

This is in reply to your letter of August 9, in which you ask what portion of the salary and expenses of the Division Superintendent of Schools for Northampton County should be paid by the Town of Cape Charles, which is a separate school district for the operation of schools within the town.

Section 615 of the Code of Virginia, which deals with the salaries to be paid Division Superintendents of Schools, provides in part as follows:

"** Of the above amounts, the State shall contribute sixty per cent, the governing bodies of the counties and cities shall contribute forty per cent, and in addition to such basic minimum annual salary the school board of each county or city shall contribute not less than six hundred dollars out of the school funds in their respective treasuries derived from local taxation or local appropriations. ** The local school board may, out of the local fund supplement the salary above prescribed, ** and the local school board shall provide for the traveling and office expenses of the superintendent; **.*"

As you will note, the portion of the minimum salary of the Division Superintendent which is paid by the locality is required to be paid by the "governing bodies of the counties and cities" and not by the local School Board. Prior to the amendment of this section in 1948 this office ruled that the amount contributed by the locality toward the minimum salary of the Division Superintendent was payable by the Board of Supervisors out of the general county fund and not out of the school fund. While the language of the statute has been changed somewhat, it is my opinion that this is still the case. You will note that the basic salary is payable by the governing body of the county, while the School Board is authorized to supplement this amount out of the school fund.

It follows, therefore, that in providing for the minimum salary of the Division Superintendent of Northampton County the funds are derived by the Board of Supervisors from the general county levy, which is payable by the inhabitants of the town as well as the rest of the county. This minimum salary is not paid either by the School Board of the county or the School Board of the town.

The statute provides that, in addition to the basic minimum salary, the School Board of each county shall contribute not less than $600, and that the local School Board may supplement his salary by an additional amount. Also, the statute provides that the local School Board shall provide for the traveling and office expenses of the Superintendent. The statute does not deal with the situation where a town within the county constitutes a separate
school district and, therefore, does not specifically require the School Board of such town to contribute to the salary and expenses of the Division Superintendent's office. However, it would seem that, since the Division Superintendent serves the schools of the town as well as the rest of the county, a portion of any supplement to the salary of the Division Superintendent and also a portion of the expenses of his office should be borne by the town.

I call your attention to the fact that in some cases a school division is composed of more than one county, and the statute does not deal specifically with the question of what proportion of such expenses are borne by the School Boards of the respective counties comprising the division. Since this matter is not expressly covered by the statute either in the case where there are two or more counties in the division or in the case where there are towns within a county constituting a separate school district, it would seem that the apportionment of these expenses is a matter for agreement between the respective School Boards involved. In my opinion, the school population or the average daily attendance of school children in the respective localities involved would be an appropriate basis upon which to base an agreement.

SCHOOLS AND SCHOOL BOARDS—School Board may not buy from corporation of which School Board member owns controlling interest.

F-33

May 31, 1950.

HONORABLE R. A. BICKERS,
Commonwealth's Attorney for Culpeper County.

This is in reply to your letter of May 16th and your subsequent letter of May 29th, in which you desire my opinion as to whether or not a member of the Board of Supervisors who owns the controlling interest of outstanding stock in a corporation would prevent the corporation from doing business with the local school board. It appears that the corporation in question deals in Chevrolet cars, trucks and parts, and that it is quite a hardship for the school board not to be able to buy parts locally for their Chevrolet school buses.

The pertinent part of Section 15-504 of the Code is as follows:

"No supervisor, superintendent of the poor, special policeman, 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 contracts, 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 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 above language, in my opinion, would clearly prevent the corporation from selling parts to the local school board, for the member of the Board of Supervisors, by virtue of his controlling interest in the corporation, has a very definite financial interest therein.
SCHOOLS AND SCHOOL BOARDS—Teacher employed by town school board may be retained when town board is abolished even though she is related to member of county board. F-203

May 2, 1950.

MR. HAROLD W. RAMSEY,
Division Superintendent of Schools.

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

"For many years the Town of Rocky Mount has constituted a separate School District and has been operated as such by a Board of three members appointed by the Town Council. Effective on June 30, 1950, the Town School Board of Rocky Mount is being abolished, and the County School Board of Franklin County will operate the school formerly operated by the Town of Rocky Mount School Board.

"The Town has employed for several years a teacher who is the son of a present member of the County School Board of Franklin County and has also been employing a half-sister of one of the members of the County School Board of Franklin County. The County School Board contemplates and desires to employ these two teachers for the 1950-51 session in the same position as they have heretofore been employed, if it is not prohibited by Section 22-206 of the Code of Virginia.

"It is needless to say that these are valuable teachers and we are desirous of employing them, but before doing so, we desire your opinion as to the legality of employing them."

Section 23-206 of the Code reads as follows:

"It shall not be lawful for the school board of any county, city or of any town constituting a separate school district to employ or pay any teacher or other school board employee from the public funds if such teacher or other employee 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. This provision shall not apply to any such relative employed by any school board at any time prior to June twenty-first, nineteen hundred and thirty-eight. 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. If the school board violates these provisions, the individual members thereof shall be personally liable to refund to the local treasury any amounts paid in violation of this law, and such funds shall be recovered from members by action or suit in the name of the Commonwealth at the relation of the attorney for the Commonwealth. Such funds, when recovered, shall be paid into the local treasury for the use of the public schools."

Statutes of this kind are to be strictly construed against rendering a person ineligible to employment. See Reports of the Attorney General, 1939-1940, page 198.

You will note that the statute contains a provision stating that it shall not apply to any person within the prohibited degree of relationship "who has been regularly employed by any School Board prior to the taking of office of any member of such Board." While this language does not literally fit the situation described by you, it clearly sets forth the legislative intent that a person holding a teaching position shall not be required to forfeit the same just because a relative later becomes a member of the School Board controlling appointments to his or her position.

In the case you put, the individuals were properly employed as teachers in the school of the Town of Rocky Mount. The members of the School Board
of the County of Franklin will not assume control over that school until June 30, 1950. Considering the purpose of the statute and the intent of the Legislature to prohibit only the employment of a teacher who at the time of his or her first appointment was a relative of a member of the Board, it is my opinion that it would be proper to consider the members of the School Board as “taking office” of the School Board controlling the Town schools on June 30, 1950 and that, therefore, the continued employment of the individuals concerned in their present positions is not prohibited by the statute.

SCHOOLS AND SCHOOL BOARDS—Vaccination of students. F-203

March 8, 1950.

HONORABLE HOWARD W. SMITH, JR., Commonwealth’s Attorney for the City of Alexandria.

This is in reply to your letter of March 3 in which you request my opinion as to whether or not children who are attending the public schools in this State, may be required to submit to various medical examinations and tests, even though such examinations and tests are contrary to their religious beliefs. You point out that the tests include vaccinations as required by Section 22-249 of the Code, and certain X-ray examinations required by the local school board.

For the purpose of this opinion, I assume that the regulations of the local school board are a valid exercise of power and, therefore, the question to be determined is whether a regulation of the school authorities or an Act of the General Assembly, prescribing certain health measures as a condition of school attendance, is constitutional in view of the religious freedom guaranteed by the federal and State Constitutions.

I have been unable to find a decision of the Supreme Court of Appeals of Virginia or a decision of the Supreme Court of the United States which has dealt with the precise question presented by you. However, there have been a few decisions in other jurisdictions, all of which have held that the requirement of compulsory vaccinations, as a prerequisite to admission to public schools, does not violate the constitutional liberties of religious freedom. Sadlock v. Board of Education, (N. J., 1948) 58 Atl. (2d) 218, 22; Mosier v. Barren County Board of Health, (Ky., 1948) 215 S. W. (2d) 967, 969; and In Re Whitman, (1944) 47 N. Y. S. (2d) 143, 146. See also, 93 A.L.R. 1413, 1431.

In the rather recent case of Rice v. Commonwealth, 188 Va. 224, the Supreme Court of Appeals considered the constitutionality of the compulsory school attendance law which had been violated because of certain religious convictions of the defendants. While the decision is not directly in point with the question involved here, the following language of the Court is pertinent:

“The religious beliefs of the defendants in the case at bar do not exempt them from complying with the reasonable requirements of Virginia laws. The constitutional protection of religious freedom, while it insures religious equality, on the other hand does not provide immunity from compliance with reasonable civil requirements imposed by the State. The individual cannot be permitted, on religious grounds, to be the judge of his duty to obey the regulatory laws enacted by the State in the interests of the public welfare. The mere fact that such a claim of immunity is asserted because of religious convictions is not sufficient to establish its constitutional validity. Nor does the fact that defendants harbored no intent to commit a crime constitute a defense. * * *” (188 Va. 234)
Considering the above-quoted language, the decisions rendered in foreign jurisdictions and the language of the Supreme Court of the United States in the recent case of *United States v. Ballard*, 322 U. S. 78, 64 S. Ct. 882, 88 L. Ed. 1148, in which it was pointed out that while a person may have any religious belief he desires, his conduct may be regulated in the interest of public welfare, I am of the opinion that the compulsory examinations and tests, to which you refer, are not a violation of either the federal or State Constitutions.

As to the enforcement of the requirement of the local school board, it is my opinion that the children in question could be refused admission to the public schools, thus subjecting their parents to prosecution for violating the compulsory school attendance law. This same action could, of course, be followed with regard to the violation of the requirements of Section 22-249 of the Code, or, as an alternative, the parents involved could be prosecuted under the authority of Section 22-250 of the Code which makes it a misdemeanor to violate certain provisions of Section 22-249.

SECRETARY OF THE COMMONWEALTH—Free copy of Acts of Assembly and Virginia Reports. F-3

June 15, 1950.

HONORABLE A. B. GATHRIGHT, Director,
Division of Purchase and Printing.

This is in reply to your letter of June 6, in which you request my opinion as to whether you may furnish to the Office of the Secretary of the Commonwealth, free of charge, a copy of the Acts of Assembly and the Virginia Reports. I understand from Mrs. Thelma Y. Gordon, Secretary of the Commonwealth, that she does not need in her office the copies of the Virginia Reports and that she is not interested in these, but that she does need a copy of the Acts of Assembly.

As you point out, Section 2-232, dealing with the printing and distribution of the Acts of Assembly, does not expressly mention the Secretary of the Commonwealth. However, it does provide that each head of a department shall be furnished a copy. While the Office of the Secretary of the Commonwealth, strictly speaking, may not be a "department" of State government, it is my opinion that it should be so considered for the purposes of this section, which was designed to provide the various State agencies with at least one copy of the Acts. The Secretary of the Commonwealth is a constitutional officer whose office is not a part of any specific department of State government. That office is frequently called upon for information and action requiring reference to the Acts passed by the General Assembly. It certainly has a greater need for a copy of the Acts than a number of other officers mentioned in the section.

I call your attention to Section 2-246, under which you may "sell or distribute" copies of State publications in addition to those required to be distributed. The use of the words "or distribute" would seem to imply that in an appropriate case copies could be distributed without charge, though in the same sentence the language "fixing such price as may be reasonable and sufficient to cover the cost of printing, mailing and handling" is added. The next sentence provides that the receipts shall be paid into the State treasury and credited to the general fund. If the Office of the Secretary of the Commonwealth paid for copies furnished that office, it would do so from funds from the general fund. This would simply entail a bookkeeping transaction involving the taking out and return of funds to the same pocket.

In view of the above considerations, it is my opinion that copies of the Acts of Assembly may be furnished to the Secretary of the Commonwealth without charge.
REPORT OF THE ATTORNEY GENERAL

SENTENCE AND PUNISHMENT—Cutting of radio tower guy wires.
F-75b

HONORABLE CHARLES H. WILSON,
Attorney for the Commonwealth for Nottoway County.

December 7, 1949.

This is in reply to your recent letter from which I quote as follows:

"In August 1948, the Radio Tower of Station WSVS at Crewe was destroyed by cutting the guy wires. The guilty persons have been apprehended and I can find no section of the Code covering such crime other than Section 4479. The maximum punishment provided by this section is in no way commensurate with the crime and if you can suggest any other section under which I might proceed, I shall be deeply grateful."

It has been suggested that these persons might possibly be indicted for the common law misdemeanor of malicious mischief or for the crime of grand larceny.

Section 4479 of the Code provides, in part, that if any person destroy property not his own he shall be fined not less than five nor more than five hundred dollars. Upon investigation, I have found no other section of the Code under which the persons to which you refer could be prosecuted. Furthermore, it is my opinion that the punishment for the common law crime of malicious mischief has been limited by section 4479.

As to the crime of grand larceny, even assuming that the radio tower is not permanently attached to the ground and may be the subject of larceny, under the facts presented by your letter, the essential element of animus furandi is absent.

I agree that the punishment provided by the above section of the Code, in many instances, would not fit the crime and can only suggest that this matter might be corrected by appropriate legislation, such as now exists in connection with the destruction of telephone and power lines and railroad equipment.

SHERIFFS—Fees—Duties related thereto. F-136

Mr. J. A. Hodges,
Sheriff of Norfolk County.

October 27, 1949.

I have your letter of October 18, 1949, in which you ask my opinion on several questions concerning your duties as sheriff. Your first question is:

"When collecting money due on an execution, sometimes after a levy is made, should I add to the costs in addition to the levy fee a commission for collecting same? If so, how much?"

I am enclosing a copy of an opinion rendered on March 25, 1943, in which a question similar to yours was answered in the affirmative by Attorney General, Abram P. Staples. This opinion may also be found at page 244 of the 1942-43 annual Reports of the Attorney General.

Your second question reads as follows:

"When executing a writ of possession should the writ contain a detailed description of the articles to be reposessed?"
Section 6483 of the Virginia Code provides:

"On a judgment for the recovery of specific property, real or personal, a writ of possession may issue for the specific property, which shall conform to the judgment as to the description of the property and the estate, title and interest recovered, and there may also be issued a writ of fieri facias for the damages or profits and costs. ** *.*"

From the quoted portion of the Code section it would appear that the description in the writ should be identical with that in the judgment.

In your third question you inquire:

"When conducting a sheriff's sale does the law require more than one bidder?"

Section 2832 of the Code sets forth the required procedure for a sheriff's sale. This section includes strict provisions for notice of sale, but apparently after such notice is given there is no requirement that there be more than one bidder.

You then ask:

"When breaking into a building to make a levy on an execution or a distress warrant to take into my possession articles listed in a distress warrant am I responsible civilly?"

Section 6490 provides as follows:

"An officer into whose hands an execution is placed to be levied, may, if need be, break open the outer doors of a dwelling-house in the day-time, after having first demanded admittance of the occupant, in order to make a levy, and may also levy on property in the personal possession of the debtor if the same be open to observation."

As to distress warrants, §5526 provides as follows:

"The officer having such distress warrant, or an attachment for rent, if there be need for it, may, in the day time, break open and enter into any house or close in which there may be goods liable to the distress or attachment, and may, either in the day or night, break open and enter any house or close wherein there may be any goods so liable which have been fraudulently or clandestinely removed from the demised premises. He may also levy such distress warrant or attachment on property liable for the rent found in the personal possession of the party liable therefor."

Section 6483 sets forth the authority of the officer under a writ of possession in the following language:

"** * In cases of unlawful entry and detainer and of ejectment, whenever the officer to whom a writ of possession has been delivered to be executed finds the premises locked, he may, after declaring at the door the cause of his coming and demanding to have the door opened, employ reasonable and necessary force to break and enter the door and put the plaintiff in possession. And an officer having a writ of possession for specific personal property, if he find locked or fastened the building or place wherein he has reasonable cause to believe the property specified in the writ is located, may in the day time, after notice to the defendant, his agent or bailee, break and enter such building or place for the purpose of executing such writ."

However, it should be noted that §2831 of the Code forbids an unreasonable levy.
Your final question is:

"When levy is made on stock and fixtures in store and proprietor deserts premises, who is liable in case of fire or theft?"

The law is not entirely clear on this question. However, the better view seems to be that applied by the Court in the case of State to Use of Henderson v. Clark, 20 A. (2d) 127, 138 A.L.R. 704:

"The modern rule is that a sheriff is in a position analogous to that of a bailee for hire, and is bound to use that degree of care in keeping the property under levy which men in general exercise in their own concerns."

This is the view taken by the majority of courts on this question, though I have been unable to find any Virginia decision on the point. Under this view, the sheriff must use reasonable care in the preservation of property and would be liable for neglect to perform such duty.

SHERIFFS—No mandatory duty on, to police ball park near town. F-136e

HONORABLE RIPLEY S. WALKER,
Commonwealth's Attorney for Shenandoah County.

This is in reply to your letter of August 3, regarding the ball park adjoining the corporate limits of the Town of Woodstock. You state that the Town of Woodstock will not police the crowds at the ball park, even though it is located within one mile of the corporate limits, and that the Sheriff of the County refuses to police the games and will take no action unless a warrant is issued for someone's arrest. You ask for my opinion as to what steps can be taken to secure some police protection at the recreational activities held at this park.

I do not believe that there is any mandatory duty upon either the Sheriff or the police officers of the Town of Woodstock to patrol or police the ball park to which you refer. If regular police protection is needed there, it would seem that this would present an appropriate case for the appointment of special policemen for the County of Shenandoah under the provisions of Section 4797 of the Code of Virginia. This section authorizes the Judge of the Circuit Court of any county to appoint special policemen for so much of the county that is not embraced within an incorporated town located in the county. Under this it would seem that the court could appoint some appropriate individual connected with the operation of the ball park to give such police protection as may be needed.

SHERIFFS—Office furnished by county; should not rent a portion thereof for private gain. F-33

HONORABLE T. H. LILLARD,
Sheriff of Madison County.

This is in reply to your letter of June 16, 1950, in which you state that the Board of Supervisors of Madison County has furnished you an office, and that you have taken a Mr. R. L. Jackson in with you and that he pays $5.00 a month rent. You ask my opinion on the question of who is entitled to this $5.00.

Your letter does not state whether the office which has been provided for
you is in the Court House or in some other place, nor do you advise whether
Mr. Jackson is a county official or a private individual. I, therefore, express
no opinion as to the propriety of renting a portion of your office space to Mr.
Jackson. However, I am of the opinion that the County in providing an office
for its sheriff provides this office for his official use and that it would be improper
for him to make use of the office for private gain. It follows from this that
the $5.00 rental should inure to the benefit of the County.

STATE BOARD OF EMBALMERS AND FUNERAL DIRECTORS—
Extension of reciprocal licenses can be granted. F-91

HONORABLE F. C. STOVER, Secretary,
State Board of Embalmers and Funeral Directors.

This is in reply to your letter of July 2, from which I quote as follows:

"We will appreciate having your opinion as to whether or not the
Virginia State Board of Embalmers and Funeral Directors could legally
enter into a reciprocal agreement with the Board of North Carolina
whereby licenses would be issued to a funeral director operating a burial
association."

Section 1721 of the Code, as amended, provides that "no person shall be
entitled to a reciprocal license as a funeral director or embalmer unless he
gives proof that he has, in the State in which he is legally licensed, com-
plied with requirements substantially equal to those set out in this chapter
* * * " (Chapter 72)

The pertinent part of Section 1724-a of Chapter 72 of the Code of Vir-
ginia is as follows:

"No funeral director nor embalmer shall directly or indirectly offer
or give any money or other valuable consideration to any burial as-
sociation, whether incorporated or not, or to any other person for
soliciting, suggesting, advising, requesting or inducing any person to
employ him as a funeral director or embalmer. No burial association,
whether incorporated or not, and no other person corporate or natural
shall receive directly or indirectly any money or other valuable con-
sideration for soliciting, suggesting, advising, requesting or inducing
any person to engage, employ, or arrange with any funeral director or
embalmer for the funeral of any person or burial or cremation of any
deceased body. * * *"

In view of the above section, I concur in the Board's opinion that a
funeral director in the State of North Carolina who operates a burial as-
sociation in connection with his funeral home does not substantially com-
ply with the requirements of Chapter 72 of the Code of Virginia regulat-
ing the practice of embalming and, therefore, is not entitled to a reciprocal
license.
This is in reply to your letter of December 13 regarding Sections 1785-1795 of the Code of Virginia, which relate to the duties and responsibilities of the Department of Health with regard to water works and water supplies. You ask whether or not these sections are applicable to counties, sanitary districts and other agencies not specifically mentioned in the law which operate water supply systems.

Section 1785 defines "waterworks" as all structures and appliances used in connection with the collection, storage, purification and treatment of water for drinking or domestic use and the distribution thereof to the public or more than twenty-five individuals, excepting only the piping and fixtures inside the buildings where such water is delivered. Section 1786 gives the State Board of Health general supervision and control over all water supplies and waterworks in the State in so far as the sanitary and physical quality of waters furnished may affect the public health or comfort. These two sections would seem to be all inclusive and applicable to counties or any other agency establishing waterworks. However, Section 1787, which deals with the securing of a permit from the State Board of Health for the construction of waterworks, reads in part as follows:

"No individual, firm, institution, corporation or municipal corporation shall supply water for drinking or domestic purposes to the public within the State from or by means of any water works that shall hereafter be constructed or extended, either in whole or in part, without a written permit from the State Board of Health for the supplying of such water; * * *

The language does not in express terms include counties or sanitary districts and it is my understanding that in the past the State Board of Health has not considered mandatory provisions of the statute in question applicable to counties and sanitary districts. In view of this administrative construction of the statutes and since statutes are generally held not to apply to governmental agencies, either State or local, unless they are included expressly or by necessary implication, it is my opinion that counties and sanitary districts could not be required to secure a permit from the State Board of Health before constructing a waterworks system. It is also doubtful if the other provisions contained in Sections 1785-1791, giving the State Board of Health certain powers over waterworks and water supplies, would apply to such facilities owned by counties and sanitary districts.

You request suggestions as to how the statutes should be amended to make them all inclusive. To accomplish this result, I suggest that the first part of Section 1787 be amended so as to read: "No individual, firm, association, corporation, public or private institution, county, municipal corporation, sanitary district, or any other agency or authority, public or private, shall * * *

Similar language should be used in the provisions of the other sections where duties and responsibilities are imposed upon the owners of water supply systems and reference is made to such owners.

Since the permit required under Section 1787 applies only to waterworks erected in the future, Section 1789, giving the State Board of Health power to require corrective measures to be taken whenever a water supply is found to be a menace to health, should be amended to make it clear that it applies to existing water supply systems. I suggest that the first part of this section be amended to read:
"When, upon investigation, the State Board of Health finds that a water supply furnished to the public for drinking or domestic purposes, whether furnished from waterworks heretofore or hereafter constructed, is a menace to health, * * * *"

Section 1794, authorizing mandamus proceedings against municipal corporations to compel obedience to orders of the State Board of Health, should be amended so as to be made applicable also to a county, sanitary district, or any other public agency or authority.

STATE COLLEGES AND UNIVERSITIES—Group accident insurance.

F-162

HONORABLE MOSBY G. PERROW, JR.,
State Senator.

This is in reply to your letter of April 27 in which you requested my opinion as to the authority of state institutions of higher learning to offer general group accident insurance plans to their students.

It is my understanding that this service will be made available to the students on a purely voluntary basis and that the various state colleges and universities will incur no expense from the operation of the plan and no liability thereunder. In other words, when an institution arranges to make an insurance plan available to its students it would forward the premium payments received from the students or their parents to the insurance company which would forthwith enclose a certificate to the student or parent, as the case may be, as receipt for the payment of such premium. Thereafter all claims arising under a policy would be settled by the company dealing directly with the insured.

In view of the obvious benefits of a group insurance plan of this nature, I see no objection to it and, in my opinion, it will be proper for the college and university authorities to make such a plan available to their students.

STATE COLLEGES AND UNIVERSITIES—State students; children of non-residents dependent on residents. F-256

Dr. Henry H. Hibbs, Dean,
Richmond Professional Institute.

This is in reply to your letter of April 19, 1950, which reads, in part, as follows:

"Will you please give an opinion as to whether or not the reduced tuition charges provided for Virginia residents should apply in this case? I quote statement from the applicant and also a statement from the aunt:

(1) "I made my home in St. Petersburg, Florida, until three years ago when I went up to live with my aunt and uncle, Mr. and Mrs. Frederick Kitchener, in Quantico, Virginia. Due to the fact that they did not have a school near Quantico which they, my aunt and uncle, wanted me to attend, I returned to St. Petersburg during the school terms and I go back to my aunt's for the summer. I am boarding with my father and mother in St. Pete. and my aunt is supporting me.'

(2) "My niece moved with us three years ago and is our responsibility but due to the fact our being Civilians she could not attend the Post School."
The only School she could attend was Occoquan and we do not care for that School so she has returned to St. Petersburg each School Term to Graduate from the High School there. She returns here just as soon as School is out.

"Both my Husband and I are in Business here in Quantico. I own and operate The Stork Shop, and Mr. Kitchener owns and operates Fred's Electric Shop. We have lived in Quantico since 1937."

It is my opinion that the facts presented by the statements of the applicant and the applicant's aunt are such as to entitle her reduced tuition charges provided for Virginia residents. It would appear from the statements that the applicant is dependent upon her aunt and uncle who are Virginia residents, and the applicant herself apparently resides in Virginia.

You will, of course, understand that we are in no position to determine the accuracy of the statements made on behalf of the applicant.

STATE LIBRARY—Virginia World War II History Commission; funds used for maintenance, operations or additions to library. F-369

HONORABLE RANDOLPH W. CHURCH,
State Librarian.

December 28, 1949.

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

"Under Section 42-63.1 of the Reorganization Provisions of the Code of Virginia the Virginia World War II History Commission was abolished and its duties transferred to the State Librarian. Item 309 of the Appropriation Act, however, makes appropriations to the former Commission which is now an integral part of the State Library. These funds have been transferred to the credit of the Library.

"I would be grateful if you would give me your opinion as to whether these funds may be expended for the maintenance and operation of or additions to the Library, by transfer, under the terms of Section 45 of the Appropriation Act, or otherwise."

As you point out, the duties previously performed by the Virginia World War II History Commission were transferred to the State Librarian upon the adoption of the Reorganization Provisions of the Code of Virginia.

The funds which were set up in the Appropriation Act by Item 309 have now been transferred to the State Librarian under the provisions of Section 3½ of the Appropriation Act. This section was made necessary because the Appropriation Bill had been set up in its present form at the same time the Reorganization Legislation was under consideration, and it reads as follows:

"If legislation has been enacted at this session of the General Assembly transferring any one or more State departments, divisions, agencies or functions of the State government, as established or organized immediately prior to the enactment of such legislation, to any one or more existing or newly created State departments, divisions, agencies or functions, the Comptroller shall, when so instructed by the Governor in writing, transfer the appropriation made by this or any other act passed at this session of the General Assembly for any such department, division, agency or function so transferred, to the existing or newly created department, division, agency or function of the State government to which such transfer was made."
The effect of these provisions is to make the duties formerly performed by the World War II History Commission the duties of the State Librarian and the appropriation made to the History Commission a part of the appropriation made to operate the State Library. You refer to a transfer under the authority of Section 45 of the Appropriation Act, but I assume that you have reference to Section 43, which provides that none of the moneys mentioned in the Appropriation Act shall be expended for any other purpose than those for which they are specifically appropriated, subject, however, to the following provision:

"* * * the several appropriations made by this act may not only be used for the purposes specified in this act, but authority is hereby given to the governing board of any State department, institution or other agency, or, if there be no governing board, to the head of such department, institution or other agency named in this act, to transfer, within the respective department, institution or other agency, any such appropriations from the object for which specifically appropriated or set aside to some other object definitely and closely related to the object for which the appropriation was made, and provided an appropriation is also made by this act to said related object, and provided also that, in the opinion of the Governor and department head, later developments have rendered such transfer appropriate to carry out the original intention of the General Assembly in making this appropriation, subject, however, in every case, to the consent and approval of the Governor, in writing, first obtained; * * * ."

It is my opinion that, if the appropriation made to finance the duties formerly performed by the World War II History Commission are not needed for that purpose, they may be transferred to some other function performed by the State Librarian under the provisions of Section 43 quoted above, provided the object to which they are transferred is one definitely and closely related to the duties previously performed by the World War II History Commission and the other requirements of Section 43 are met.

STATE WATER CONTROL LAW—Stand-by plant required to secure a certificate.

MR. A. H. PAESSLER,
Acting Executive Secretary,
State Water Control Board.

This is in reply to your letter of July 12, requesting my opinion as to whether or not a certain stand-by plant operated by a New Jersey Corporation may properly be issued a certificate to continue to discharge industrial wastes into State waters in accordance with Section 1514-b-17 of the State Water Control Law, or whether such plant is required to comply with the provisions of Section 1514-b-19, which regulates new or reopened establishments.

You also set forth the following facts concerning the operation of the plant in question:

"This plant is kept in a continuous state of readiness and a full-time resident manager and a utility man are kept on the payroll. The owner's major operations are further north, principally in New Jersey. The White Stone plant operates only when fish are scarce further north and it is more profitable to fish off Virginia waters, or if the catch is unusually heavy further north and it is necessary to process the surplus catch in White Stone. It was Mr. Dunton's opinion that the plant had
operated under these conditions for short periods during the 1946, 1947 and 1948 seasons. Further, the plant has operated as a stand-by facility since the early 1930's. The plant can be put in full operation within a few hours notice, the length of time depending on the availability of labor."

The pertinent part of Section 1514-b-19 is as follows:

"No person shall hereafter erect, construct or open, reopen and operate any establishment which in its operation results in the discharge of industrial wastes which would flow or be discharged into any State waters and thereby cause a pollution of the same unless such person shall first provide proper and adequate treatment works for the treatment of such industrial wastes approved by the Board * * *. However, the provisions of this section shall not apply to establishments existing at the effective date of this law which may hereafter be temporarily closed for a period not exceeding six months. An application for a certificate under this section shall be accompanied by a certified copy of pertinent maps, plans, and specifications in scope and detail satisfactory to the Board and such other relevant information as may be required."

It is my opinion that the above section does not apply to so-called seasonal plants that are kept in a state of readiness and may be put into full operation within a few hours, but has reference only to newly constructed establishments and those that are actually closed for more than six months.

Therefore, it is my conclusion that the stand-by plant to which you refer may be issued a certificate under Section 1514-b-17 of the Water Control Law and continue to discharge industrial wastes as provided therein.

TAXATION—Admission—athletic contests. F-259

HONORABLE LOUIS LEE GUY,
Member of House of Delegates.

February 9, 1950.

This is in reply to your letter of February 7, in which you state:

"It is my purpose and desire to introduce a Bill at this session of the Legislature which will have the effect of classifying 'admissions' into several classes, briefly described as follows:

"Class A—Admissions charged for attendance to witness athletic contests and sports events.

"Class B—Admissions charged for events concerning which the entire proceeds will be devoted to charitable purposes; and

"Class C—All other admissions.

"My thought is that, if admissions can be so classified, the governing authorities of cities and towns may, if so desired, impose a tax on one class of admissions and either impose a lower tax, or no tax at all, on other classifications of admissions, as they may desire."

You request my opinion as to whether under the Constitution of Virginia "admissions" can be subdivided and classified as you have indicated, in order that the taxes imposed thereon, while uniform within each of the classes, could be made different for each class.

It is my opinion that the General Assembly could classify athletic contests and sports events differently from events concerning which the entire proceeds will be devoted to charitable purposes and could treat both of these as different from other events for which admissions are charged. Different
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considerations enter into the holding of each type of event, and placing each in a different class and authorizing a different admission tax to be placed upon each would, in my opinion, be a reasonable classification. An Act so providing would, in my opinion, be valid under the Constitution.

TAXATION—Assessment of real estate in annexed area can be increased.

HONORABLE WILLIAM F. STONE,
City Attorney for Martinsville.

This is in reply to your letter of August 1, in which you state that under Section 242-b of the Tax Code there must be a general reassessment of real estate in the year 1950 in the City of Martinsville. You ask whether in making this reassessment the real estate in a certain territory recently annexed to the City of Martinsville should be included or whether the provisions of Section 2958 of the Code would prohibit this.

Section 2958, which deals with the annexation of additional territory by a city, provides in part that “the tax rate upon the land annexed shall not be increased for a period of five years after such annexation” except under certain conditions not pertinent to your inquiry. It is my opinion that this language means only what it says and that the “tax rate” cannot be increased. It does not forbid the reassessment of the property involved, which may or may not result in additional “taxes”. It is my opinion, therefore, that it would be perfectly proper to apply the reassessment which must be made in 1950 to the property embraced within the annexed territory. Of course, the Henry County tax rate in existence at the time of the annexation should be applied to the new assessment figure.

I might add that this very question was presented to the Hustings Court of the City of Richmond in the case of Jamesford Investment Corporation v. City of Richmond after the annexation of certain territory by the City of Richmond in 1941. It was there held that the City of Richmond, in making its annual reassessment of real estate under statutes applicable to that city, could increase the assessment of property located in the annexed area, and that Section 2958 applied only to the rate, not to the total taxes payable on such property. I am enclosing a copy of the opinion rendered by the Honorable A. C. Buchanan, who presided in that case, which opinion goes fully into the matter. I am informed that no appeal was taken from this decision. Section 2958 of the Code has been amended by the Legislature since this decision in 1943 and no change has been made in the language in so far as it is pertinent to this question. The Legislature was probably aware of this decision and felt that it was a proper interpretation of the statutes.

TAXATION—Authority of Treasurer to attach personal property where person moving property from state.

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

This is in reply to your letter of June 22, in which you state that on January 1, 1950, a resident of New Jersey had a number of horses located in Fairfax County, Virginia, but that he failed to file a personal property tax return on the horses. You add that the Commissioner of the Revenue has been advised by the people who own the farm on which the horses are kept
that it was the intention of the owner to remove the same from the State, leaving no other property, real or personal, in Virginia. You ask if the Commissioner of the Revenue may attach the horses and perfect a lien for the taxes, although the taxes will not become delinquent until December 5, 1950.

I agree with you that Sections 58-1014 and 8-519 of the Code would support such procedure, but I believe that the action should be taken by the Treasurer, who is charged with the collection of taxes, rather than by the Commissioner of the Revenue, who simply makes the assessment. Section 58-1014 provides that the payment of any taxes may be enforced by warrant, motion, action of debt or assumpsit, bill in chancery, or by judgment, in the same manner and to the same extent as is provided by law for the enforcement of demands between individuals. Section 8-519 authorizes attachment proceedings to collect a debt, whether the same be due and payable or not, whenever the grounds specified in Section 8-520 exist. Section 8-520 provides that it shall be sufficient grounds for an attachment if the principal defendant intends to remove his property or a material part of his estate out of this State so that there will not be sufficient assets to satisfy the claim.

I call your attention also to Section 58-965, which authorizes the Treasurer to proceed to collect taxes by distress or otherwise. This section further provides that:

"* * * Should it come to the knowledge of the treasurer that any such person or persons owing such taxes or levies is moving or contemplates moving from the county or corporation prior to the fifth day of December, he shall have power to collect the same by distress or otherwise at any time after such bills shall have come into his hands."

While this language speaks of the person moving from the county or corporation prior to the fifth day of December, it is my opinion that it is applicable to such a situation as you describe, where a non-resident is removing all of his property subject to taxation from the county or corporation.

TAXATION—Charter of city providing for tax rates not uniform throughout territorial limits of city is unconstitutional. P-2a

March 1, 1950.

Honorable Victor P. Wilson,
Member of House of Delegates.

This is in reply to your request for my opinion as to the constitutionality of the provision in H. B. 185, the bill providing for a charter of the proposed City of Hampton Roads, which reads as follows:

"The Council may, by ordinance, establish zones or districts within the City of Hampton Roads and the boundaries thereof, for the purpose of segregating areas of a rural class and areas of an urban class into separate zones or districts. The boundaries of said zones or districts may, from time to time, be changed by the Council as the class or nature of the area or a portion thereof may change from rural to urban. The tax rate on all property of the same class shall be uniform but the Council may fix a rate for property of an urban class and a rate for property of a rural class, which rate need not be the same, but may reflect the difference in services and the cost thereof rendered property of an urban class and property of a rural class respectively."

Section 168 of the Constitution of Virginia reads as follows:

"All property, except as hereinafter provided, shall be taxed; all taxes, whether State, local or municipal, shall be uniform upon the same class of
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subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general law. The General Assembly may define and classify taxable subjects, and, except as to classes of property herein expressly segregated for either State or local taxation, the General Assembly may segregate the several classes of property so as to specify and determine upon what subjects State taxes, and upon what subjects local taxes may be levied."

It will be seen from this section that all local taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and that such taxes shall be levied and collected under general law. This uniformity extends not only to the rate and mode of assessment, but also to the territory to be assessed. See Campbell v. Bryant, 104 Va. 509. It would seem, therefore, that the General Assembly could not authorize any local taxing authority to impose a different rate of taxation for general governmental purposes upon properties of the same class within the territorial limits of the local taxing authority.

Possibly, under its power to define and classify taxable subjects, the General Assembly could, by general law, classify different types of real estate and authorize different rates of taxation to be applied to the different classes. In view of the manner in which the Constitution deals with taxation of real estate, a question could be raised even as to this possibility, and I reserve my opinion on this point. It would seem, however, that, if such power to classify different types of real estate exists, it could only be exercised by general law and not by special and local legislation. See Sections 63, 168 and 171 of the Constitution.

In any event, the provision contained in the proposed charter of the proposed City of Hampton Roads does not classify real estate into a rural class and urban class. No definition of the suggested classes is set forth in the Act. The Act simply authorizes the Council to establish zones for the purpose of segregating areas of a rural class from areas of an urban class. If it was intended to authorize the Council to define and establish what constitutes a rural area and what constitutes an urban area (and this seems to be the intent), it would be a delegation of authority to a City Council over a matter which by the Constitution is vested in the General Assembly if it exists at all.

To simply establish zones or districts which are called urban or rural would not be a classification of real estate, since there could well be real estate located in one type of zone which would be identical in kind or classification to real estate situated in the other type of zone. To impose a different rate of tax upon real estate of the same class lying within the territorial limits of the taxing authority would violate the provisions of Section 168 of the Virginia Constitution.

For the reasons stated above, it is my opinion that the provision in question would not be constitutional.

TAXATION—Contractor's license; independent contractor for paint jobs must secure. F-34

June 7, 1950.

Honorable J. E. Drumheller,
Commissioner of Revenue for Waynesboro.

This is in reply to your letter of May 29th, in which you refer to Sections 58-297 and 58-298, which require any person "accepting or offering to accept orders or contracts for doing any work on or in any building, requiring the use of paint * * *" to secure a license as a contractor. You request my opinion upon the applicability of these sections to the following factual situations:

"(A) John Doe, a resident of Waynesboro, does not own any equipment of any kind. He does, however, paint for anyone that
requests it upon an hourly basis, using their equipment and materials which they provide on the job.

"(B) John Doe, a resident of Waynesboro, owns his own equipment. He paints for anyone that requests it on an hourly basis, using his equipment but using the materials which they provide on the job.

"(C) John Doe, a resident of Waynesboro, owns his own equipment. He paints for anyone that requests it, charging on an hourly basis and buys the materials for the job and adds the exact costs to the bill.

"(D) Same as above, except that his bill is figured on an hourly basis plus cost of materials, plus percentage of cost."

In my opinion Sections 58-297 and 58-298 require any person engaged, as an independent contractor, in the business of a contractor to secure a license as such, but that they do not require a person employed merely as a laborer to do painting work to secure a license.

Whether a person is a mere employee engaged to perform certain labor or is an "independent contractor" with whom a contract has been made for the performance of a specific piece of work depends upon a number of factors and each case must necessarily depend upon all of the facts of the particular case. Generally an independent contractor is one who, in exercising independent employment, contracts to do a certain piece of work according to his own methods without being subject to the control of his employer, except as to the product or result of his work. The test lies in the control exercised, the decisive question being as to who has the right to direct what shall be done and when and how it shall be done.

As stated in 27 American Jurisprudence at page 485:

"** commonly recognized tests of the independent contractor relationship, although not necessarily concurrent or each in itself controlling, are the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price, the independent nature of his business or his distinct calling, his employment of assistants with the right to supervise their activities, his obligation to furnish necessary tools, supplies, and materials, his right to control the progress of the work except as to final results, the time for which the workman is employed, the method of payment, whether by time or by job, and whether the work is part of the regular business of the employer."

Subsequent sections of that work point out that the most important test is the control over the work which is reserved by the employer. At page 494 it is stated that while the measure of compensation is important it is not controlling and that whether the compensation is by the day, in a lump sum or on a commission basis is not a material factor. Likewise, the furnishing of the materials and the equipment with which the work is performed is an important, though not always controlling factor, since independent contractors generally furnish the labor and means for doing the work, while mere servants generally use the means afforded by the master.

As to the situations presented by you, it would seem that in situations (C) and (D) the person would be more properly classified as an independent contractor. It is possible that this may be the case in situation (B) since it may just be a term of the contract that the purchaser furnish the material. It is less likely that the person would be an independent contractor in situation (A) since it is likely that a person that furnishes neither the equipment or materials would be subject to full control of the employer.

Since the degree of the control over the work is the primary factor no definite opinion can be expressed regarding any of the cases presented by you in the absence of further facts. As a general proposition I think that, unless other facts are presented to you, you should, for tax purposes, consider
that a person exercising an independent employment, who engages in doing specific pieces of work for others and furnishes the equipment and materials himself is an independent contractor, whether his compensation is determined by any of the methods mentioned by you, and that such person is subject to the license tax prescribed by Sections 58-297 and 58-298.

TAXATION—County levies to be fixed not later than April meeting of Board of Supervisors. F-33

April 7, 1950.

DR. E. M. SANDIDGE, Chairman,
Board of Supervisors of Amherst County.

I am advised by Mr. Wm. E. Sandidge, Clerk, that the Board of Supervisors of Amherst County desires the opinion of this office on a matter relating to the tax levy to be adopted for Amherst County for the current year.

I am advised by Mr. Sandidge that on March 27, 1950, the Board considered the county budget, tentatively approved the same and proposed a levy of $3.70 (60 cents for county levy and $3.10 for schools). This proposed levy was an increase of $1.20 over the levy for previous years. At that meeting the Board directed that a public hearing on the budget and levy be held on May 5, 1950, and that the budget and proposed levy be advertised for 30 days. The first publication of the notice was on March 30.

At a meeting held on April 3 a question was raised as to whether the levy could be adopted later than the month of April and whether, since 30 days notice is required for an increase in the levy, it would be necessary to fix the levy at the same rate fixed for last year and to do so during the month of April.

Section 58-839 of the Code, formerly Section 288 of the Tax Code, provides that the Board of Supervisors of each county shall, at its regular monthly meeting in the month of January in each year, or as soon thereafter as practicable, not later than its meeting in April, fix the amount of the county and district levies for the current year. It is possible that this provision would be held mandatory and that a levy fixed after April would not be considered lawfully fixed. 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 non-compliance with which in no respect affects the rights of taxpaying citizens. Such provisions may be considered directory only, and non-compliance with them does not affect the validity of the tax. See 51 Am. Jur., page 618, and Whitlock v. Hawkins, 105 Va. 242.

The requirement that the levy be fixed during April seems to be of this nature and to be designed to promote the orderly and efficient collection of taxes rather than to be one affecting the rights of the taxpayers. It may be, therefore, that a levy fixed in May would be held valid on that ground. In this connection I am enclosing a copy of an opinion rendered on March 12, 1940, by the Honorable Abram P. Staples, while he was Attorney General, to the Honorable Walter H. Carter, Commonwealth's Attorney for Amherst County, which indicates that he was of that view.

However, if it is possible, I think that the Board of Supervisors should fix the levy not later than the month of April and thus avoid the question of the validity of a levy fixed later than that time. Section 15-577 of the Code provides that a brief synopsis of the budget shall be published and notice given of a public hearing at least 15 days prior to the date set for hearing. This would clearly enable the Board to act on the budget and levy within the month of April, provided no increase is made in the levy. Where there is to be an increase in the levy, the matter is controlled by Section 15-582, which reads as follows:

"Before any local tax levy shall be increased, the amount and purpose of such proposed increase shall be published in a newspaper having general
circulation in the locality affected at least thirty days before the increased levy or assessment is made and the citizens of the locality shall be given an opportunity to appear before, and be heard by, the local governing body on the subject of such increase. This section shall not be construed as in any way interfering with the requirements of §§15-575 to 15-577 as to the manner and form of publicity provided in such sections.”

It will be noted that this section requires 30 days notice of a proposed increase. However, this section is worded differently from Section 15-582 and simply requires that the amount and purpose of the proposed increase be published at least 30 days before the increased levy or assessment is made and that the citizens be given an opportunity to be heard. It does not require 30 days notice of the hearing. It would seem, therefore, that, if the proposed increase is published 30 days before the levy is made, notice of the time for hearing could be published at a later date provided reasonable opportunity for a hearing is given. Since the proposed increase for Amherst County was, in fact, published on March 30, the levy could be adopted on April 29 and 30 days would have elapsed before the levy was made. Subsequent notices could be published correcting the date of the hearing, making that on April 29 instead of May 5. It is my opinion that, if this be done, a levy providing for an increase adopted on that date would meet the requirements of the statutes.

TAXATION—Farm personal property must be taxed in same class as other personality. F-273

COMMISSIONER OF REVENUE—No authority to assess farm personal property at different rate than other personality. F-273

Honorable Hugh B. Marsh,
Commonwealth's Attorney for Fairfax County.

This is in reply to your letter of April 8, 1950, in which you ask whether in my opinion the Commissioner of Revenue of your County may assess farm personal property at a different or lower rate than other personal property.

Section 168 of the Constitution of Virginia provides:

“All property, except as hereinafter provided, shall be taxed; all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws. The General Assembly may define and classify taxable subjects, and, except as to classes of property herein expressly segregated for either State or local taxation, the General Assembly may segregate the several classes of property so as to specify and determine upon which subjects State taxes, and upon what subjects local taxes may be levied.”

The Legislature has classified the various kinds of tangible property and since farm personal property is not placed in a different class from other personal property, it is my opinion that §168 of the Constitution requires that the tax be uniform.

The case of Nashville C and St. Louis Ry. v. Browning et al, 310 U. S. 362, 84 L. ed. 1254, deals with the constitutionality of a state statute which puts the property of public service corporations in a different class from other property for purposes of taxation. The statute was upheld. However, that decision, as I read it, has no bearing on the question presented by your letter, for the Virginia Legislature has not placed farm personal property in a sep-
arate class, and under our Constitution it must be taxed just as other property in the same class. Whether the Legislature could constitutionally place such property in a separate class is a different question.

The term "farm personal property" as I have used it in this letter is not intended to include farm machinery, tools, or farm livestock which, as you have pointed out in your letter, may, in the discretion of the governing body of the county, be placed in a separate classification.

I am of the opinion that the conclusion which you have reached is correct.

TAXATION—Gasoline; Sales to Federal Government taxable in lots of less than 500 gallons. F-150

GASOLINE TAX—Sales of gasoline to Federal Government taxable in lots of less than 500 gallons. F-150

February 8, 1950.

HONORABLE LOUIS LEE GUY,
Member of House of Delegates.

This is to acknowledge receipt of your letter of February 3 in which you ask me whether or not certain bulletins issued by the Commissioner of the Division of Motor Vehicles covering sales to the United States of gasoline in quantities of less than 500 gallons (bulk) correctly state the present law. You call my attention to Section 58-744 of the Code and state, further, that you have a constituent who sells large amounts of gasoline to the agencies of the United States in small quantities of some 10 to 15 gallons, delivered at the pump; and you desire to know whether or not such sales by such constituent are subject to the tax as indicated by the Commissioner's Bulletin.

Section 58-744 is a part of the Use Fuel Tax Act—that is, the Act taxing diesel fuel. The Act taxing gasoline is found in Chapter 13 of Title 58 of the Code of 1950. The pertinent Section relative to the tax on gasoline sold to the United States is Section 58-712.1 which reads, in part, as follows:

"** Each and every dealer in gasoline or other like products of petroleum by whatsoever name designated shall be exempt from the payment of any and all motor fuel taxes upon gasoline or other like products of petroleum sold by such dealer in the State to the United States, its departments, agencies and instrumentalities when such gasoline or other like products of petroleum is sold and delivered by such dealer in bulk lots of not less than five hundred gallons in each delivery to and for the exclusive use by the United States, its departments, agencies and instrumentalities."

The above section was modeled after the Florida Act which was passed in that State about 1947 and amended their law which had exempted the tax on sales to the United States in quantities of more than 500 gallons.

In 1943 the Florida legislature had enacted a law which imposed the gasoline tax on all sales of gasoline, including those made to the Federal Government. In the case of United States of America v. Lee, 153 Fla. 94, the Supreme Court of the State of Florida upheld the validity of the Act. No appeal was taken by the United States from this decision to the Supreme Court of the United States. A leading case on this subject for many years was that of the Panhandle Oil Co. v. Miss., 277 U. S. 218, which held that gasoline sold for the use of the United States was not subject to State taxation. As a result of this case, the Virginia legislature—more than twenty years ago—placed a provision in our Act to the effect that the motor fuel used by the United States was not subject to the Virginia
tax; and thereafter, a system was inaugurated whereby the Federal government was reimbursed the taxes paid on retail purchases in small quantities.

In 1941, the Supreme Court of the United States, in the case of Alabama v. King and Boozer, 314 U. S. 1, overruled the decision in the Panhandle Oil Company case. Since that time there has been a trend all over the country on the part of the States to amend their legislation so as to enable them to collect the tax from the dealers who sell gasoline to the United States. About eight states have amended their law in this respect.

In view of these decisions, I am of the opinion that the Virginia statute, Section 58-712.1, is valid and that the bulletins issued by the Motor Vehicle Commissioner correctly state the law. The individual dealer, such as your constituent, does have to collect the tax from the agency of the United States to which he sells gasoline.

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**TAXATION—License tax on pin ball machine. F-270**

February 8, 1950.

HONORABLE CHESTER J. STAFFORD,
Commonwealth's Attorney for Giles County.

This is in reply to your letter of January 25, in which you ask if an individual who owns his own pin ball machine and has placed it in his own place of business can pay the $25.00 license fee prescribed therefor without being classed as a slot machine operator and have to pay the $1,000 license fee required by Section 198 of the Tax Code.

Section 58-359 of the Code of Virginia, which was formerly a part of Section 198 of the Tax Code, provides that every person, firm or corporation selling, leasing, renting, or otherwise furnishing a slot machine or slot machines to others, or placing a slot machine or slot machines with others, shall be deemed a slot machine operator and shall pay for the privilege an annual State license tax of $1,000. It is my opinion that this provision is not applicable to an individual who owns a machine and has it placed in his own place of business. This section applies only to those engaged in the business of placing their machines with others under a lease or other contract or in the business of selling their machines to others.

It is my opinion, therefore, that in the case put by you the individual is required only to pay the $25 license fee for each machine which he owns and has in his place of business.

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**TAXATION—Military housing on Army and Navy posts. F-273**

March 9, 1950.

HONORABLE HOWARD W. SMITH,
House of Representatives.

This is in reply to your letter regarding Public Law 211 of the 81st Congress relating to military housing on Army and Navy posts.

You ask whether the property constructed by private individuals under this law on land leased to them on a long term basis by the Federal Government would be subject to State and local taxation. You point out that Section 807 of the law provides that it shall be subject to such taxation if the loans are foreclosed and the property comes into the hands of the Federal Government through the Federal Housing Administration, but that the Act contains no express provision for taxing it in private hands. You further
state that the members of the Banking and Currency Committee, which reported the bill, seem in agreement that the private interests should be subject to taxation and appear to be under the impression that the property would be taxable in the hands of private interests, but that the question of the advisability of having a clarifying amendment has been raised.

My first comment is that Public Law 211 is primarily concerned with the financing of such projects and the mechanics for handling loans to finance the same, rather than the nature of the ownership of the property. While it is appropriate to have in this Act such language as is contained in Section 807 to deal with the taxable status of the property when it comes into the hands of the Commissioner as a result of a foreclosure, it is to be doubted whether this particular legislation should deal with the taxable status while the property is held by the private interests. This latter question would seem more properly dealt with in the legislation authorizing the lease of the property to private individuals.

In this connection it is noted that this Act, in Section 805, provides that whenever the Secretary of the Army, Navy or Air Force determines that it is desirable to lease property within the meaning of the Act of August 5, 1947 (61 Stat. 774) to effectuate the purposes of the Act, the Secretary concerned is authorized to lease such property under the authority of the 1947 Act upon such terms and conditions as in his opinion will best serve the national interests without regard to certain limitations contained in the 1947 Act pertinent to this question. Following this provision would be the appropriate place for an amendment dealing with the taxable status of such property if it is felt desirable to have the amendment in this law. I think, however, that the 1947 Act would be the better place.

As a matter of fact, the 1947 Act now contains the following provision:

"Section 6. The lessee's interest, made or created pursuant to the Authority of this Act, shall be made subject to State and Local taxation. Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

The first sentence of this provision makes it clear that the "lessee's interest" shall be subject to State and local taxation. (The second sentence is apparently designed to enable the Government to increase the rental should Congress later permit the Government's interest to be taxable). In my opinion, the language of the first sentence is sufficient to enable the State and localities to tax the lessee's interest in such properties as may be erected on land leased under the Act to private individuals by the Army, Navy or Air Force.

I am not familiar with the terms which will be or are customarily contained in such leases, so I cannot say what would be the nature of the "lessee's interest" either in the land or the buildings which would be erected on the land. Questions could arise as to the nature and extent of the "lessee's interest" and the extent to which the buildings erected would be subject to State and local taxation. In view of this fact it is possible that a clarifying amendment would be helpful, though this may not be necessary or particularly important. Information from the agencies making such leases would be helpful on this question. You are undoubtedly better advised on this phase of the matter than I am.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Real Estate—Boards of Equalization; when board orders increase in taxes Commissioner of Revenue must make up a supplemental assessment. F-242

October 17, 1949.

HONORABLE CLIFTON C. SIMMS,
Treasurer of Grayson County.

This is in reply to your letter of October 5, in which you ask whether, after there has been a general reassessment of real estate in a county, the Treasurer may add on an increase to any landowner's ticket if the Equalization Board raises the assessment, or whether the Commissioner of the Revenue must make up a supplementary assessment as such and report to the Treasurer and the Department of Taxation. You also ask what steps must be taken as to a refund where a decrease is handled by the Equalization Board and the taxes have already been paid by the taxpayer.

This matter is governed by Section 346 of the Tax Code, which I quote in full:

"Any taxpayer may apply to the board of equalization for the equalization of his assessment, including errors in acreage; and any county or city through its appointed representative or attorney may apply to the board of equalization to equalize the assessment of any taxpayer. The board shall hear and determine any and all such petitions, and, by order, may increase, decrease or affirm the assessment of which complaint is made and, by order, it may increase or decrease any assessment, upon its own motion; provided, however, that no assessment shall be increased until after the owner of the property has been notified and given an opportunity to show cause against such increase, unless such owner has already been heard.

"The attorney for the county, city or town, or any taxpayer, aggrieved by any such order, may apply to the circuit court of the county or any city court of record of the city, for the correction and revision of such order, in the same manner and within the same time as is provided by law for the correction of erroneous assessments of real estate by any person who is aggrieved thereby.

"The board shall have power to direct the commissioner of the revenue to enter upon the land books real estate which is found to have been omitted, and to cancel duplicate assessments of real estate.

"The board shall keep minutes of its meetings, and enter therein all orders made and transmit promptly copies of such orders as relate to the increase or decrease of assessments to the taxpayer and commissioner of the revenue. The commissioner of the revenue shall make on his land book the changes so ordered by the board, and if such changes affect the land book for the then current year, and such land book has been then completed, the commissioner of the revenue may for that year make a supplemental assessment in case of an increase in valuation; and in case of a decrease in valuation, the order of the board shall entitle the taxpayer to an exoneration from so much of the assessment as exceeds the proper amount, if the taxes have not been paid by him, and in case the taxes have been paid, to a refund of so much thereof as is erroneous."

You will note that the statute requires the Commissioner of the Revenue to make on his land books the changes ordered by the Board and to make a supplemental assessment if the changes affect the current year and the books have been completed. The statute is self-explanatory as to refunds in cases where a decrease is ordered.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Recordation; chattel deeds of trust covering crops, farm equipment, etc., recorded in miscellaneous lien book subject to tax. F-90a

May 23, 1950.

HONORABLE J. ROBERT SWITZER,
Clerk of Circuit Court of Rockingham County.

This is in reply to your letter of May 17, in which you call attention to the fact that Section 43-53 of the Code of Virginia, which deals with the docketing of chattel deeds of trust covering crops, farm equipment and the like, was amended to give the beneficiary the right to elect whether to have the instrument recorded in the miscellaneous lien book or simply docketed in the agricultural chattel deed of trust book. You ask if the State recordation tax should be collected when the beneficiary elects to have the instrument recorded in the miscellaneous lien book.

Prior to the amendment of this section this office had expressed the opinion that, if the instrument was simply docketed in the agricultural chattel deed of trust book, no recordation tax was chargeable. The view was expressed, however, that if the party offering the instrument for recordation requested that it be recorded in the miscellaneous lien book, then he should be required to pay the clerk's fee for recording the instrument and the State recordation tax. The amendment to the statute makes it clear that the beneficiary may have the instrument recorded and expressly provides that in such case "the beneficiary shall pay the cost of such recordation in excess of the cost of docketing." Since the recordation tax is a part of the cost of recordation, it is my opinion that this tax should be collected when it is requested that the instrument be recorded.

You also state in your letter that you have recently been requested to docket certain instruments in the agricultural chattel deed of trust book and to cross index the same in the miscellaneous lien book index or the general index to deeds. You ask whether you have a right to do this.

I assume that you have been requested to cross index the same in the miscellaneous lien book index or the general index to deeds without recording the instrument in the lien book or deed book. It is my opinion that you have no authority to index the deed of trust in the index for either of these recordation books unless the instrument has actually been recorded in such book. While the amendment to Section 43-53 expressly provides that, when the instrument is recorded in the miscellaneous lien book, docketing in the agricultural chattel deed of trust book shall not be required, but that the deed may be cross indexed in both the manner required for miscellaneous liens and agricultural chattel deeds of trust, it does not provide for cross indexing in the miscellaneous lien book index when it is simply docketed in the agricultural chattel deed of trust book.

TAXATION—Recordation; conveyance of property to trustees to set up a trust and not to secure indebtedness subject to tax. F-90a

April 10, 1950.

HONORABLE J. EDWARD WILTSHIRE,
Clerk of Circuit Court of Orange County.

This is in reply to your letter of March 31, regarding the recordation tax to be collected upon the recordation of a certain trust deed described in your letter. It appears that the deed is not a deed of trust given to secure an indebtedness, but is instead a conveyance of certain real and personal property to trustees under which the property is to be held in trust to be administered by the trustees for the benefit of the cestui que trust named as beneficiary in the deed.
Section 58-54 of the Code, formerly Section 121 of the Tax Code, provides:

"On every deed, except a deed exempt from taxation by law, which is admitted to record, the tax 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."

While Section 58-55 provides that on deeds of trust or mortgages the tax shall be fifteen cents upon every hundred dollars or portion thereof of the amount of bonds or mortgages secured thereby, this section clearly applies only to deeds of trust or mortgages which are given to secure a debt or other obligation and not to deeds of conveyances which are made to trustees, not to secure an indebtedness, but for the purpose of setting up a trust under which the property is held and managed for the benefit of the cestui que trust.

The language of Section 58-54 is all inclusive and is to be applied to every deed offered for recordation unless some other provision of law takes the deed from under the operation of this section. Section 58-55, applying only to deeds given to secure indebtedness, cannot be relied upon to permit the recordation, free of tax, of other trust instruments which are not given to secure debts.

Therefore, I agree with you that the tax upon the deed you mention should be computed upon the consideration of the deed or upon the actual value of the property conveyed, whichever is greater.

TAXATION—Recordation; exemption of deeds to Federal government.

F-90a

HONORABLE TED DALTON,
State Senator.

This is in reply to your letter of March 10, in which you ask my opinion as to whether or not deeds conveying property to the Reconstruction Finance Corporation by individuals who have borrowed money from that agency and, because of inability to meet their payments, desire to convey the property to the Reconstruction Finance Corporation in consideration of the cancellation of the debt are subject to the State recordation tax.

In the case of Federal Land Bank v. Hubard, 163 Va. 860, it was held that the State recordation tax could not be collected on the recording of deeds to the Federal Government or to Federal instrumentalities, unless such a tax is allowed by Federal law. I find no statute authorizing the State to impose a recordation tax on deeds to the Reconstruction Finance Corporation. While Section 607 of Title 15 of U. S. C. A. provides that real property of the Corporation shall be subject to State and local taxation to the same extent according to its value as other real property is taxed, similar language applicable to the Federal Land Bank of Baltimore was held in the case cited above not to permit a tax on the recording of deeds to that Federal instrumentality. It is my opinion, therefore, that the recordation tax on deeds to the Reconstruction Finance Corporation should not be imposed.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Recordation tax; Deed from husband and wife to themselves changing type of estate; tax based on actual value of land. F-90a

RECORDATION TAX—Deed from husband and wife to themselves changing type of estate; tax based on actual value of land. F-90a

HONORABLE A. B. CORRELL,
Clerk of Circuit Court of Montgomery County.

This is in reply to your letter of January 19, in which you ask what is the proper basis for determining the recordation tax to be charged under Section 121 of the Tax Code when a man who owns real estate individually, or jointly with his wife without the right of survivorship, joins in a deed with his wife to convey the properties to himself and his wife jointly with right of survivorship under the authority of Section 5147-a of the Code of Virginia.

Section 121 of the Tax Code provides that on every deed, with certain exceptions not pertinent to your inquiry, which is admitted to record the tax shall be 15 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.

By the type of deed you mention the property is actually conveyed to the husband and wife to create a different estate in the property. Though the husband, and also the wife where the property was previously owned jointly, had an interest in the property prior to conveyance, the deed is in fact a conveyance of the entire tract of land, and, in my opinion, Section 121 of the Tax Code requires that the recordation tax be based upon the actual value of the land included in the deed where the consideration paid is less than this value.

I am enclosing a copy of an opinion rendered on January 24, 1946, by the Honorable Abram P. Staples, when he was Attorney General, to the Honorable H. M. Walker, Clerk of the Circuit Court of Northumberland County, in which the same view is expressed.

TAXATION—Standing timber cannot be sold to pay delinquent taxes of life tenant. F-130

TREASURER—No authority to sell standing timber to pay taxes of life tenant. F-130

HONORABLE ROBERT L. BROWN,
Treasurer for Rappahannock County.

This is in reply to your letter of April 13, 1950, from which I quote as follows:

"There is a party in this County, who owns a life interest in a farm. The tax has not been paid on this land for three years, consequently the land was advertised for the 1947 taxes. At the land sale the property was bought in by the Treasurer in the name of the Comptroller. I would like to know if the Treasurer can sell the timber off of said land to pay the taxes."

I call your attention to §58-1002 of the Code of Virginia, which reads as follows:

"Any timber or wood growing on the land belonging to the person or estate assessed with taxes or levies may be distrained and sold, so far as necessary, to pay the amount of such taxes and levies and expense of sale.
and shall be sold standing in the manner prescribed for the sale of goods and chattels, other than horses, mules and oxen, under distress or levy for taxes; and the purchaser shall have the right to cut and carry away such wood or timber within twelve months after the purchase of the same, with the right of ingress and egress for this purpose, but shall not haul the same over any lands occupied at the time by growing crops.”

In 1925, in the case of Commonwealth v. Wilson, 141 Va. 116, this statute, which at that time was §2439 of the Code of 1919, was considered by the Court. In that case the question to be decided was whether the standing timber on land could be sold to satisfy tax tickets against a life tenant. The Commonwealth insisted that the Treasurer could sell the timber under the provisions of this section of the Code. The Court held that the timber did not "belong to" the life tenant within the meaning of the act, that the cutting and removal of the timber by the life tenant would constitute waste on his part, and that the timber could not be sold for the taxes of the life tenant.

The Court went on to point out that it might be competent for the Legislature to make the whole estate in the land liable for the taxes and levies thereon, but said "it has not done so." The Legislature has exercised this power in certain instances in Virginia. Section 58-768.1 of the Code provides that in any county adjoining three cities, one of which has a population of one hundred ninety thousand or more, taxes against a life tenant shall constitute a lien against the mature timber, and §58-1024 provides for the continuance in force of an act passed in 1944 which act in turn provides that in any county which has adopted the county executive form of government, taxes assessed against land in the name of a party having less than a fee simple estate shall constitute a lien against the entire estate and shall not be limited to a lien on the interest of the party assessed.

It would seem that, by making special provision in certain counties, the Legislature has recognized the rule of Commonwealth v. Wilson and that the absence of any such provision affecting Rappahannock County must be construed to mean that in Rappahannock County the ruling of the Court in Commonwealth v. Wilson is controlling, and that the timber on the land cannot be sold for the taxes of the life tenant.

TAXATION—Taxpayer is relieved of payment of taxes on property taken by State for that portion of the year in which it is taken. F-HF

March 27, 1950.

HONORABLE EDWARD L. BREEDEN, JR.,
General Counsel for Elizabeth River Tunnel District.

This will acknowledge receipt of your letter dated March 24, 1950. You wish to be advised if owners of individual parcels of land are relieved from payment of taxes on such land for that portion of the year in which the property is taken or acquired by the Elizabeth River Tunnel District.

The first sentence of Section 5, Chapter 130 of the Acts of the General Assembly of 1942, reads as follows:

“A political subdivision of the State of Virginia, to be known as the ‘Elizabeth River Tunnel District’, is hereby created. * * *”

This District, being a political subdivision of the State, is embraced within the provisions of Section 58-822 of the 1950 Code of Virginia, the pertinent portion of which is as follows:

“All taxpayers of this State whose property, or any portion thereof, shall be taken in any manner whatsoever by this State or any
county or municipality thereof shall be relieved from the payment of taxes and levies on such property as shall be so taken or acquired for that portion of the year in which the property was or shall be so taken or acquired, from and after the date upon which the title was or shall be vested in this State or any county or municipality thereof. * * * ”

I am of the opinion that the provisions of the foregoing section relieves owners of individual parcels of land from payment of taxes or levies on such land for that portion of the year in which the property is taken or acquired by the Elizabeth River Tunnel District.

TAXATION—U. S. Officers Clubs, Ship Stores, Post Exchanges cannot be taxed by the State. F-149

MOTOR VEHICLES—Officers Clubs, Post Exchanges, Ship Stores not required to have their vehicles licensed by the Commonwealth. F-149

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

August 18, 1949.

I have your letter of August 16 in which you state in part:

“The Officers' Recreation Center at Camp Lee, Virginia, owns and operates upon the highways of this county, outside the jurisdiction of the Camp, a pick-up truck. This truck is a stock vehicle, bearing no military insignia; the truck is not registered or licensed in the State of Virginia.

"* * * * * * Will you please advise me whether or not this vehicle is required to be registered and licensed in the State of Virginia when operated upon the public highways outside the boundaries of Camp Lee.”

Your attention is invited to the case of Standard Oil Company of California v. Johnson, 316 U. S. 483, decided June 1, 1942. In that case, the court stated:

“"The commanding officer of an Army Post, subject to the regulations and the commands of his own superior officers, has complete authority to establish and maintain an exchange. He details a post exchange officer to manage its affairs. This officer and the commanding officers of the various company units make up a council which supervises exchange activities. None of these officers receives any compensation other than his regular salary. The object of the exchanges is to provide convenient and reliable sources where soldiers can obtain their ordinary needs at the lowest possible prices. Soldiers, their families, and civilians employed on military posts here and abroad can buy at exchanges. The government assumes none of the financial obligations of the exchange. But government officers, under government regulations, handle and are responsible for all funds of the exchange which are obtained from the companies or detachments composing its membership. Profits if any, do not go to individuals. They are used to improve the soldiers' mess, to provide various types of recreation, and in general add to the pleasure and comfort of the troops.

"From all of this, we conclude that post exchanges as now operated are arms of the government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties intrusted to it, and partake of what-
ever immunities it may have under the constitution and federal statutes. In concluding otherwise the Supreme Court of California was in error.”

About the same time, the case of *United States v. Query*, 316 U. S. 653, reached the court for decision. In that case, a declaratory judgment was sought to determine whether the State of South Carolina could impose a sales tax on the post exchange at Fort Jackson, and also whether officers' clubs, noncommissioned officers' clubs, ships' stores and similar organizations were amenable to taxation by the state. The court did not pass on these basic questions but determined that the case was a proper one for a three-judge court to determine, it having been decided by a district court. The District Court in deciding the case, 37 Fed. Sup. 972, held that a post exchange was an instrumentality of the United States and not subject to taxation by the states, and also held:

“Headnote. The opinions of the President of the United States and the heads of the various federal departments including the Attorney General, the Comptroller of the Treasury, the Comptroller General, the Postmaster General, the Secretary of War, the Secretary of the Navy, and the Commissioner of Internal Revenue, are given great weight by the courts in determining immunity of an agency from state taxation as a federal instrumentality. Executive Order, Feb. 6, 1934, No. 6589.”

Furthermore, the Court said:

“The court, therefore, holds and declares that the findings herein and the conclusions reached apply to all of the aforementioned Post Exchanges, ships' stores, officers' clubs and noncommissioned officers' clubs.”

The case was affirmed by the United States Circuit Court of Appeals, 121 Fed. Rep. 2d Series, 631.

The officers' recreational center at Camp Lee is controlled by Army Regulation 210-60, promulgated April 3, 1947. That regulation deals with the subject of officers' clubs, noncommissioned officers' clubs and similar organizations. Quoting from that regulation, we find:

“Section II, Par. 8. Legal Status.—Clubs governed by these regulations are integral parts of the Military Establishment, are wholly owned Government instrumentalities, and are entitled to the immunities and privileges of such instrumentalities except as otherwise directed by the War Department.”

There is no doubt in my mind that the officers' recreational center at Camp Lee is an instrumentality of the Federal Government and is therefore not amenable to taxation on the part of the State.

It is therefore the opinion of this office that the Commonwealth of Virginia is without authority to require a truck owned by the officers' recreational center at Camp Lee to be licensed under the provisions of the Motor Vehicle Code as a prerequisite to operating upon the highways of Virginia. Furthermore, post exchanges, ships' stores, officers' clubs and messes, noncommissioned officers' clubs and similar associations, which are controlled and governed by regulations promulgated by the Department of the Army or the Department of the Navy, as the case may be, cannot be taxed by the Commonwealth of Virginia; neither can the Commonwealth of Virginia lawfully extract from such associations, license taxes on their automotive equipment.
REPORT OF THE ATTORNEY GENERAL

TAXES—Interest on taxes paid in advance not allowed. F-270

HONORABLE JOHN LOCKE GREEN,
Treasurer of Arlington County.

This is in reply to your letter of June 28, in which you state that there is some sentiment in Arlington County for receiving taxes in advance and paying interest on the money paid in advance. You ask if this would be legal.

Section 372-a of the Tax Code provides as follows:

"Any person, firm, or corporation desiring to pay any State taxes or local levies for any year prior to the time the treasurer receives copies of the commissioner's books may pay the same to the treasurer and the treasurer shall give his receipt therefor; but if such taxes or levies are of a kind requiring a return to be filed with the commissioner of the revenue in order that the correct amount of taxes or levies may be computed, such person, firm, or corporation shall file such return with the commissioner of the revenue before he pays such taxes or levies to the treasurer. In all cases covered by this section the procedure as between the commissioner of the revenue and the treasurer shall be as prescribed by the Department of Taxation and the Auditor of Public Accounts, acting jointly. But nothing in this section in conflict with the provisions of the charter of any city or town in relation to local levies shall be construed as repealing such provisions."

While the above statute authorizes the Treasurer to receive the payment of taxes in advance, it does not authorize the payment of interest on the money so paid. I find no statutory authority for paying such interest or for allowing a discount upon taxes paid in advance, and it is, therefore, my opinion that it would not be legal to do so.

TOWNS—Mayor elected separately from council. F-100

HONORABLE MILLS E. GODWIN, JR.,
Member of House of Delegates.

This is in reply to your letter of May 24, from which I quote as follows:

"House Bill No. 610, passed by the 1950 Session of the General Assembly of Virginia, and later signed by the Governor, incorporated and provided a Charter for the Town of Whaleyville, in Nansemond County, Virginia.

"Paragraph 2 of the Act provides:

"'The administration and government of the Town shall be vested in a council which shall consist of five members, four of whom shall be denominated "councilmen" and one to be denominated a "mayor", all of whom shall be residents and qualified voters of the Town.'"

"Paragraph 3 of the Act provides:

"'The councilmen and the mayor shall be elected by the qualified voters of the Town on the second Tuesday in June, 1950 * * *.'"
"The question has now arisen as to whether the voters of the Town will cast their ballots for five councilmen and the mayor then to be elected from among the five councilmen, or will the voters cast their votes for a mayor and four councilmen? * * *" 

Since paragraph 3 quoted by you provides that "the councilmen and the mayor shall be elected by the qualified voters" it is my opinion that the voters will vote directly for the mayor as a separate officer at the same time that they vote to fill the four positions on the council. The fact that the mayor may be a member of the council does not make him a "councilman" as that term is used in the charter. Different duties are imposed upon him and he, therefore, holds a different office. There is no provision in the charter that the councilmen shall elect one of their members as mayor, as is true in the charters of some municipalities.

The provisions of the charter of the Town of Whaleyville are similar to Section 24-168 of the Code, the general statute dealing with towns, which provides:

"In every town there shall be elected every two years, on the second Tuesday in June, one elector of the town, who shall be denominated the mayor, and not less than three nor more than nine other electors, who shall be denominated the councilmen of the town. The mayor and councilmen shall constitute the council of the town."

While the wording is slightly different, it is my opinion that the meaning is the same. Therefore, the voters of the Town of Whaleyville should vote separately for the mayor and the four men designated as councilmen.

TREASURERS—Authority to supply list of dog license purchasers. F-356a

HONORABLE E. S. ASHBY,
City Treasurer for Harrisonburg.
April 18, 1950.

This will reply to your letter of January 10, requesting that you be advised if there would be any violation of the State law on your part in furnishing a list of persons to whom dog licenses have been issued to a representative of the Disabled American Veterans who has requested the same for the purpose of circularizing the list with the view of the dog owners purchasing identification tags for their dogs.

Section 13 of the Tax Code provides that information cannot be divulged by revenue officers or employees in the following language:

"It shall be unlawful for any tax or revenue officer or employee to divulge any information acquired by him in respect to the transactions, property, income or business of any person, firm or corporation while in the performance of his public duties. Any violation of the provisions of this section shall be punished by a fine not exceeding five hundred dollars or by imprisonment not exceeding six months or by both; provided, however, that the Governor may at any time, by written order, direct that any information herein referred to shall be made public or be laid before any court; and, provided, further, that this inhibition does not extend to any matters required by law to be entered on any public assessment roll or book, nor to any act performed or words spoken or published in the line of duty under the law."

However, in my opinion, this section would not be applicable to a list of persons who have purchased dog licenses as provided by the statute regulating the
same. The dog laws were not enacted for the purpose of raising revenue, but a license is required of a dog owner at a nominal cost to obtain sufficient funds for the operation of the dog laws. The money derived from the dog licenses is kept separate from the other revenue collected by counties and cities. There is no statute to prevent a treasurer or a game warden from disclosing the name of the owner of a dog carrying a certain license plate. The public should not be denied access to the names of dog owners when it is to the public interest to be furnished this information. I am, therefore, of the opinion that there would be no violation of the State law in your furnishing the list requested.

TREASURERS—City; fee for revealing information on delinquent taxes on land subject to a deed of trust. F-130


HONORABLE ROBERT J. McCANDLISH, JR.,
Member of House of Delegates.

This is in reply to your letter of December 2, in which you ask what fee a city treasurer should receive for furnishing interested persons with information as to delinquent taxes on land subject to a deed of trust under the provisions of Section 386 of the Tax Code.

While Section 386 of the Tax Code contains a provision for certain fees to be paid the treasurer for services to be rendered thereunder, such fees are no longer collectible in view of Chapter 364 of the Acts of the General Assembly of 1934, which abolished the fee system as a method of compensating city treasurers and provided that thereafter they should be paid on a salary basis. Section 2 of this Act, which is found as Section 3516-d(1) of Michie's Code of Virginia, 1942, contains the following provision:

"* * * All fees and commissions provided by or under law to be paid such treasurers and commissioners of the revenue shall be abolished as of the first day of January, nineteen hundred and thirty-five, except those fees paid city commissioners of the revenue for issuing licenses and making real estate transfers. * * *"

You also ask if treasurers can refuse to give information on delinquent taxes where the city is one of the second class and the record is kept in the clerk's office of the city as to such delinquencies.

In view of Section 386 imposing the duty upon treasurers to furnish information as to taxes to certain persons interested in the land, it is my view that he cannot refuse to give the information specified by that section. Of course, he would only have to give information as to matters shown by the records in his office. He can, therefore, be required only to furnish advice as to taxes which are still in his hands for collection.

TREASURERS—Deposits must be protected by bonds—depositories must be within the State. F-130

August 16, 1949.

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.

This is in reply to your letter of August 8, in reference to the proposed bond issue by Giles County. You ask whether or not it would be proper for the treasurer of the county to transfer annually to banks within and without the State money sufficient to cover matured bonds and matured bond coupons under
an arrangement whereby the banks will act as paying agents for the county, without requiring that the funds so deposited be protected in the manner prescribed by Section 350 of the Tax Code.

I am enclosing a copy of an opinion rendered by the Honorable Abram P. Staples on August 19, 1936, when he was Attorney General, to the Honorable L. McCarthy Downs, then Auditor of Public Accounts, in which it was held that Section 350 of the Tax Code made no exceptions for such deposits described by you, and that the funds so deposited should be protected as required by this section of the Tax Code.

For your further information I am also enclosing an opinion rendered to Mr. Downs by Attorney General Staples on January 21, 1941, in which it was held that banks situated without the Commonwealth of Virginia could not be selected as depositories for county funds.

I concur with these former opinions of this office. I might add that monies deposited with a paying agent for the payment of bonds or other obligations, while trust funds to be used only for that purpose, are funds held for the borrower and not the holders of the bonds, and that the deposit of the money with the paying agent does not constitute payment of the bonds. Any loss that might be incurred would be the loss of the debtor and not of the holder of the bonds.

TREASURERS—Liability when deputy illegally signs check. F-130

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.

This is in reply to your request for my opinion as to whether a County Treasurer or a County Director of Finance would be liable for a loss arising from an illegal act of his deputy in signing county checks during the absence of the Treasurer or Director if such deputy has been designated pursuant to the provisions of paragraph (j) of Section 350 of the Tax Code to sign such checks during the absence of the Treasurer or Director.

As a general rule, in the absence of a statute imposing liability or of negligence on his part in appointing or supervising his assistants, a public officer is not liable for the default or misfeasance of subordinates and assistants providing the subordinates or assistants, by virtue of law and of the appointment, become in a sense officers themselves and servants of the people as distinguished from servants and private employees of the officer. However, public officers having the custody of public funds are generally held to a higher accounting almost to the extent of being held to be insurers of the funds under their control. These officers and their sureties are usually held liable for losses caused by the negligence or misconduct of their subordinates. See 43 Am. Jur., Public Officers, Section 281, and 1 A. L. R. 228, 102 A. L. R. 179, and 116 A. L. R. 1059.

It is possible that, since Section 350 of the Tax Code requires that the designation of a deputy to sign checks during the absence of the principal be with the approval of the Board of Supervisors, the courts might decide that the Treasurer or Director of Finance should not be held responsible for the actions of the deputy who was acting with the approval of the governing body of the county. However, in view of the general rule of strict accountability of public officers having charge of public funds, and since the express question has not been decided by the courts of this State, I would advise that action be taken on the assumption of possible liability and that the bond of any deputy given authority to sign checks be fixed in an amount that would furnish adequate protection to the principal.
REPORT OF THE ATTORNEY GENERAL

TREASURERS—May designate deputy to countersign warrant checks. F-130

HONORABLE F. B. HUBER,
Treasurer of Campbell County.

This is in reply to your letter of January 20 in reference to Section 350 of the Tax Code, which deals with the handling and disbursing of funds by county treasurers and provides in paragraph (j) among other things that “the treasurer may * * * designate one of his deputies who shall have authority to sign any such checks * * *.” You ask if the provision quoted refers to the countersigning of warrants issued by the various boards of the county and, if so, does it limit the number of deputies who may be given this authority to only one.

Section 350 of the Tax Code provides that all money payable to and received by a county treasurer pursuant to law shall be deposited, paid out and disbursed by him in the manner therein provided. It specifies that money deposited under the provisions of that section shall be disbursed only upon checks signed by the county treasurer, with the proviso that the treasurer may, with the approval of the board of supervisors by resolution entered of record on the minute book of the board, designate one of his deputies who shall have authority to sign any such checks whenever the necessity therefor shall arise by reason of the sickness or unavoidable absence of the treasurer or his disability to sign checks for any other reason.

In my opinion, this provision is applicable to all checks disbursing county funds held by the treasurer under Section 350 of the Tax Code, including warrant checks which are required by law to be countersigned by the treasurer. Section 2724 of the Code, which deals with warrants issued by the board of supervisors, and Section 656, which deals with warrants issued by the school board, provide that they may be converted to any negotiable check by the treasurer, or any appropriately designated deputy treasurer, by affixing his signature thereto, in conformity with Section 350 of the Tax Code of Virginia, and by designating thereon the bank by which it is to be paid.

Section 350 prescribes the method by which a deputy may be designated to sign checks and requires that such designation be with the approval of the board of supervisors and limits the number of deputies who may be given this authority to only one.

TREASURERS—No liability on deposit of funds by board of supervisors. F-33

HONORABLE B. W. MAUCK,
Treasurer of Page County.

This is in reply to your letter of July 7, from which I quote in full:

"When the Board of Supervisors deposit money to the account of the County Treasurer without the approval of or notifying the Treasurer until some days later, this making the deposit more than the depository has pledged under section 350 of the Tax Code of Virginia and the Federal Deposit Insurance combined, in case of loss of money in this account due to the default, failure or insolvency of the depository, who would be liable for the loss?"

Section 369 of the Tax Code provides that the treasurer of the county shall receive levies and other amounts payable into the treasury of such county while section 350 of the Tax Code provides the manner in which such money is to be disbursed by the treasurer.
I am unable to find any statute that permits the Board of Supervisors to deposit money to the account of the treasurer in the manner described in your letter and, if county or state funds are so deposited, it is my opinion that the treasurer would not be liable for any loss due to the default, failure or insolvency of the depository.

TRIAL JUSTICE—May not act as agent for company bonding treasurer.

HONORABLE C. G. ROWELL,
Trial Justice of Surry County.

This is in reply to your letter of June 5, in which you ask if you may act as agent for a bonding company in connection with the bond for the newly appointed Treasurer of Surry County.

You state that, since your salary is not paid by the County, you have been under the impression that you could perform this service.

Section 15-504 of the Code of Virginia (Section 2707 of the former Code) was amended in 1948 to expressly name the Trial Justice as one of the of-ficers who are prohibited from becoming interested, directly or indirectly, in any contract or in the profits of any contract made by or with any officer, agent, or person acting on behalf of the Board of Supervisors, or in any con-tract, fee, commission, premium, or profit from any contract which is paid in whole or in part by the county. In view of this amendment in 1948, it is my opinion that it would not be proper for you to act as agent for a bonding company in writing the bond of the Treasurer of the County.

UNEMPLOYMENT COMPENSATION—Common ownership or affiliation clause—Liability for tax of employing unit determined by reference to the controlling interest.

HONORABLE LANDON R. WYATT,
Member of the House of Delegates.

This is in reply to your letter of April 4th, in which you state:

"A local grocery merchant who operates as an individual, who has more than eight employees, is paying unemployment insurance tax. This same individual is president of a small corporation that operates a bakery. He owns the majority of the stock in this corporation but has outside stock-holders who have no interest whatsoever in his business. The Unemployment Insurance Commission has called on this corporation to pay unemployment insurance on the grounds that the president and manager stockholder is subject to the tax.

"Please advise your opinion as to whether the law requires a corpora-tion under the above conditions to be subject to the tax."

The pertinent provision of the Virginia Unemployment Compensation Act under which the Unemployment Compensation Commission acted is paragraph (4) of Section 60-12 of the Code of 1950, which is as follows:

"'Employer' means:
Any employing unit which together with one or more other employing units, is owned or controlled, by legally enforceable means or otherwise,
directly or indirectly by the same interests, or which owns or controls one or more other employing units, by legally enforceable means or otherwise, and which if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this section."

Paragraph (1) referred to in Section (4) is as follows:

"‘Employer’ means:

"Any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, within either the current or the preceding calendar year, has or had in employment eight or more individuals, irrespective of whether the same individuals are or were employed in each such day."

An employing unit is defined in Section 60-13 as any individual or type of organization including a corporation "which has or subsequent to January first, 1936, had in its employ one or more individuals performing services for it within the State."

It can be seen that under Section 60-13 both the individual who owns and operates the grocery store and the corporation that operates the bakery are employing units. Under paragraph (4) of Section 60-12, the two employing units, if "owned or controlled by legally enforceable means or otherwise, directly or indirectly by the same interests" shall be treated as a single unit for the purpose of determining whether or not the two employing units together have had in their employment eight or more individuals for the statutory time prescribed in paragraph (1) of Section 60-12. Obviously, since the individual who owns the grocery store has employed eight or more persons for a sufficient length of time to become subject to the taxing provisions of the Virginia Unemployment Compensation Act without regard to the number of persons employed by the corporation, the two units are separate employers under the Act, provided the corporation is owned or controlled by legally enforceable means or otherwise, directly or indirectly by the person who owns and operates the grocery store.

Whether or not the corporation is subject to the tax imposed under the Unemployment Compensation Act depends upon the facts in the case as applied to the statutory provision under consideration here. In my opinion, the Unemployment Compensation Commission has the authority to make determination with respect to the facts. This may be done by an ex parte ruling or pursuant to the provisions of Section 60-58 of the Code. Even though, as in the instant case, an ex parte ruling has been made by the Commission, the corporation may proceed under Section 60-58 for a formal decision which is appealable to the courts as set forth in Section 60-59 of the Code.

I do not feel that it is within the province of this office to determine the facts. However, if the facts show that the corporation is owned or controlled in the manner set forth in paragraph (4) of Section 60-12 by the same person who owns the grocery store, then, in my opinion, the corporation is subject to the taxing provisions of the Unemployment Compensation Act, although as a separate legal entity it does not have in its employment as many as eight individuals.

The constitutionality of a similar provision in the Mississippi Act as being in violation of the "equal protection" clause of the Federal Constitution was raised in the case of Mississippi Unemployment Compensation Commission v. Avent, 4 So. (2d) 296, and that court held that there was no constitutional inhibition to the provision. The case was carried to the Supreme Court of the United States where it was dismissed with the comment that "the appeal is dismissed for want of a substantial Federal question."—62 S. Ct. 947, 86 L. Ed. 1727. There are no cases in Virginia with respect to this question, but the validity of the provision has been upheld by the courts of quite a number of states.

It is my opinion, therefore, that the Virginia Unemployment Compensation Commission may assess an unemployment compensation tax against the corpora-
tion to which you refer, provided the Commission finds that the section of the Act under consideration here is applicable to the facts in the case with respect to ownership or control by the same interests owning or controlling the grocery business.

UNIVERSITY OF VIRGINIA—Police of Charlottesville without authority to arrest on grounds of. F-268f

ROADS AND HIGHWAYS—On grounds of University of Virginia, no jurisdiction of town to police. F-268f

HONORABLE COLGATE W. Darden, Jr., President, University of Virginia.

This is in reply to your letter of June 30, from which I quote as follows:

"We have had no end of trouble with parking on Hospital Drive, the road which goes through University property and passes in front of the University of Virginia Hospital. The City of Charlottesville has indicated to me that it would be glad to police the road provided the Highway Department has no objection. They made this provision because Hospital Drive has been made a part of the system of roads maintained by the Highway Department within the University grounds.

"Do you see any reason why the University should not make an agreement with the City for this police work? * * *"

Since the grounds of the University of Virginia are not incorporated with the City of Charlottesville, it is my opinion that the City Police would have no authority to patrol the roads therein in order to enforce parking and traffic regulations promulgated by the University. Therefore, an agreement between the University and the City authorizing such policing would necessarily be ineffectual.

However, I am of the opinion that special legislation, similar to that which vests in the Police Justice of the City of Richmond the power to try misdemeanor cases committed in the Capitol Square, could be enacted in order to accomplish the purposes of the proposed agreement between the University and the City.

VIRGINIA POLYTECHNIC INSTITUTE—Retirement plan. F-243a

HONORABLE J. GORDON BENNETT, Auditor of Public Accounts.

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

"During the course of the examination of the accounts and records of Virginia Polytechnic Institute, we observed that compensation was included on the regular payrolls of the institution for a professor and for an administrative officer who were not performing any duties for the institution because of physical incapacities. We learned from the institutional authorities that these payments were made in accordance with a plan approved by the Board of Visitors, and which became effective on July 1, 1939. A copy of the 'President's-Executive Bulletin
dated December 22, 1938,' which quotes the plan approved by the Board of Visitors effective July 1, 1939, is included for your information. There is also included another Bulletin dated July 31, 1942, issued by the President further relating to this plan.

"Several members of the staff of the institution are being compensated under this plan, but all are performing part time services in accordance with the provisions of the action of the Board of Visitors as set forth in the plan adopted by it on July 1, 1939, except the afore-mentioned professor and the administrative officer who as previously stated are physically incapacitated and unable to perform any duties.

"We were advised that the professor was retired on July 1, 1945, but had performed no duties since February or March of 1946. We were also advised that the administrative officer was retired on January 1, 1948, but had been unable to perform any duties since the date of retirement because of physical disability."

You request that I review the plan adopted by the Board of Visitors of V. P. I. and advise you with respect to the legality of the payments to the professor and administrative officer referred to in your letter.

The executive bulletins submitted with your letter show that the Board of Visitors adopted the Retirement Plan effective on July 1, 1939, which provides as follows:

"1. Whenever any teacher or administrative officer of instruction shall have reached the age of 70 years, he shall no longer perform the full duties that he has theretofore performed, but he shall perform such duties as may be designated by the President of the College. For the satisfactory performance of duties so designated, he shall receive compensation equal to twenty percentum of the salary received by him at the age of 70 years, plus one percentum of the said salary for each year of his full service in the College, but not to exceed one-half of the average annual salary received by him during the preceding five years. The salary so modified shall be paid as salaries of the faculty of the College are paid, so far as available funds will permit. The Board of Visitors in its discretion may extend the regular and full service of any individual, by reappointment from year to year, after he has reached the age of 70 years, upon the recommendation of the President of the College, supported by evidence sufficient to convince the Board that such regular and full service will be satisfactorily performed.

"2. Whenever any member of the resident faculty or general administrative staff of the College shall have become convinced that it would be best for him and for the College to decrease his responsibilities, due to advancing years, ill health, or any other cause, he may, with the consent of the President of the College, be privileged to do so without prejudice, provided that a corresponding adjustment in compensation be accepted. Initiative in this respect may also be taken by the President of the College in cooperation with the Dean or other appropriate head of the Division or Department in which the individual is included."

Effective July 1, 1942, the plan was liberalized by extension to service employees 60 years of age or over.

Section 6 of the Virginia Retirement Act contains the following provision:

"Any institution of higher education which, at the time of the establishment of the retirement system, has established, or which may thereafter establish, a retirement plan or arrangement covering in whole or in part its employees engaged in the performance of teaching, administrative or research duties, is hereby authorized to make contributions for the benefit of its employees who elect to continue or be under such plan or arrangement
and elect to participate in such plan or arrangement rather than in the retirement system established by this act. Any present or future employee of such institution shall have the option of electing to participate in either the retirement system established by this act or the plan or arrangement provided by the institution employing him. The election herein provided shall, as to any future employee, be exercised not later than thirty days from the time of entry upon the performance of his duties."

In view of that provision of the Virginia Retirement Act, it is my opinion that it is perfectly proper for a State institution of higher learning to adopt a retirement plan separate from the Virginia Retirement System, and that payments in accordance with such a plan would be legal and proper. Under the plan set up by V. P. I., it is provided that the retired personnel shall, after retirement, perform such duties as may be designated by the President of the College, but in my opinion the plan does not make the assignment of partial duties mandatory or preclude participation in the plan because physical disabilities render the assignment of duties inadvisable or impractical.

It is my opinion, therefore, that the payments mentioned in your letter are legal and proper.

**WELFARE—Recovery from estate of recipient of welfare; funeral expenses of $100 exempt.**

*F-231*

Miss Frances Booth,
Department of Public Welfare.

September 28, 1949.

I am in receipt of your letter of September 19th requesting the opinion of this office relative to recovery of estate of Dudley Moreton. The facts presented by you are substantially as follows:

In November, 1948, Dudley Moreton, a recipient of assistance, was found dead and his body delivered to a funeral home. It was reported to the funeral home by the Sheriff of Orange County that the deceased recipient was "on the welfare." No specific directions were given by any representative of the Board of Welfare to the funeral director. The Superintendent of the Board of Welfare did not contact the funeral director, as it had been customary for undertakers to contact the agency whenever arrangements were not made for pauper burial. The Sheriff disclosed that the deceased had sufficient funds on his person for burial expenses. His total estate amounted to $438.75. The deceased had been the recipient of Old Age Assistance in the amount of $929.40. It is here assumed that the Sheriff qualified to administer the estate under Section 5374 of the Code of Virginia. The funeral director charged $215.00 for funeral expenses and the Sheriff charged $21.94 for expenses of administration.

You desire the opinion of this office relative to funeral costs and expenses of administration.

Under the assumptions above stated, it is my opinion that inasmuch as the Sheriff was the legal representative of the estate, his charges, which no doubt have been approved by the court, were entirely proper.

Section 1904 (18) of Michie's Code of 1942 charges the local Board of Welfare with the duty of attempting to recover from the decedent's estate, the total amount paid as assistance whenever there is estate to satisfy the claim in whole or in part. The only exceptions are prior liens and funeral expenses not in excess of $100 and hospital bills, etc., not in excess of $150.

The only item here involved is the charge of the funeral director in excess of $100.

In view of the notice which the funeral director had to the effect that the deceased was a recipient of public welfare, even if there were not specific directions
given by a representative of the local Board, it is my opinion that so much of his charge, in excess of $100, constitutes an improper charge under the law. The Welfare Board has no authority to release its claim for the amount of this excess charge.

The facts tend to disclose that the funeral director acted in good faith and it is therefore suggested that the Board endeavor to work out a compromise with him and submit same to the State Department of Welfare and Institutions with the Board's recommendation for authority from the State Department to effect settlement on the basis of such compromise.

WELFARE AND INSTITUTIONS—Contributions of locality to pension plan for social service workers is administrative expense under Public Assistance Act. F-231

October 27, 1949.

COLONEL RICHARD W. COPELAND, Director,
Department of Welfare and Institutions.

This is in reply to your letter of October 20, in which you state that the City of Newport News has now adopted a pension plan effective January 1, 1950, under which each employee of the City will be required to contribute to the pension fund and the City will provide an additional amount for the fund. You state that the superintendent of the Social Service Bureau of Newport News City Department of Public Welfare wishes to know whether the City's contributions to the pension fund as relate to salaries paid to employees of the Social Service Bureau would be considered as administrative expenditures for which the locality would receive reimbursement from the State under the provisions of Section 63-106 of the reorganization provisions of the new Code (formerly found as Section 1904(61) of Michie's Code of Virginia). The superintendent states that no claim will be made for reimbursement of the City's payment for group pension credit for past services.

The statute referred to provides in part as follows:

"Administrative expenditures incurred by the localities in connection with aid to the needy aged, aid to dependent children, and general relief, shall be ascertained by the State Board, and the commissioner shall monthly reimburse each county and city therefor out of State and federal funds in an amount not less than fifty per centum nor more than sixty-two and one-half per centum of such administrative costs."

In my opinion, if a locality adopts a pension plan under which it will make certain contributions in proportion to the salaries paid to the employees, such payments made in connection with employees of the local Department of Public Welfare would properly be considered administrative expenses incurred in connection with the administration of the Public Assistance Act. Such payments are in substance a part of the compensation paid to the employees and are as much a part of the administrative costs as the direct salaries paid. It is my understanding that the Federal government considers such payments a part of the costs reimbursable from Federal funds if they are so considered by the State.

It is my opinion, therefore, that it would be proper for you, as Director of the Department of Welfare and Institutions, to consider this expense as one for which reimbursement can be made by the State to the extent stated in Section 63-106.
WILLIAM AND MARY COLLEGE—Leave of absence for member of teaching staff. F-268

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.


This is in reply to your letter of October 17, from which I quote as follows:

"During the recent audit of the accounts and records of the College of William and Mary, we determined that an administrative officer was granted a leave of absence for one year on account of ill health. The Board of Visitors authorized this leave on October 2, 1948, but made no mention concerning compensation of the officer during the leave of absence. The secretary of the Board of Visitors advised us that it was the intention of the Board for the officer to receive full pay during the leave of absence. We were advised that the leave of absence took effect in September, 1948, and the employee was continued on the Commonwealth's payroll at her regular salary.

"The employee in question is a member of the Virginia Retirement System. In addition to the administrative responsibilities of this employee, she also served as an assistant professor."

You request my opinion as to the legality of the payment to an employee out of Commonwealth funds, under the aforementioned circumstances.

The rules governing leaves of absence of State employees promulgated by the Governor, as Chief Personnel Officer, under the Virginia Personnel Act do not authorize leaves of absence with pay for as much as a year. However, these rules do not apply to the case presented by you since the individual involved was employed as an assistant professor as well as in an administrative capacity. The Virginia Personnel Act expressly provides that it is not applicable to "the presidents, and teaching and research staffs of State educational institutions."

Section 935 of the Code of Virginia provides for the appointment of a Board of Visitors to govern the affairs of the College of William and Mary and contains the following provision:

"(k) The Board shall control and expend the funds of the College and any appropriation hereafter provided, and shall make all needful rules and regulations concerning the College, appoint the president and all professors, teachers and agents, and fix their salaries, and generally direct the affairs of the College."

It is my opinion that this section authorizes the Board of Visitors of the College of William and Mary to provide for leaves of absence for teaching personnel under such terms and conditions as it deems proper for the management of the affairs of the College, and that such terms and conditions would not have to be the same as those set up for personnel subject to the Virginia Personnel Act. This can be done by setting up formal regulations on the subject or by handling each case individually, as appears to be the case in the instance cited by you. These are questions of policy to be determined by the Board of Visitors.

It is my opinion, therefore, that it was within the legal powers of the Board to authorize the payments mentioned in your letter.
MR. W. I. HALL,
Merit System Supervisor.

This is in reply to your letter of April 5, in which you ask whether, in computing grades or ratings on examinations given by the Merit System Council, a veteran's preference rating should be given to a person whose service in the armed forces has all been since December 31, 1946.

Section 2-80 of the Code provides that the grades of "a person who has served in the armed forces of the United States in World War I or World War II" having a discharge not dishonorable shall be increased by certain percentages. This office has previously ruled on the authority of *Hamilton v. Kentucky Distilleries Company*, 251 U. S. 146, and other cases that a "state of war" will continue to exist until treaties of peace are ratified. See Opinions of the Attorney General, 1945-1946, page 164. While December 31, 1946, has been declared by the President as the cessation-of-hostilities date of World War II, this proclamation was issued under Federal statutes providing for the termination of certain war time powers whenever such a proclamation was issued.

The Virginia statute involved does not define World War II or relate its provisions to any specific date as that fixed by proclamation of the President. In the absence of such a provision it must be assumed that the General Assembly had in mind that the period of war extends to the ratification of the treaties of peace.

As pointed out in the opinion of this office referred to above, the General Assembly may amend this and other similar statutes as may be desirable, and it has done so in the case of some statutes of this nature. Until the statute is so dealt with by the Legislature it is my opinion that the generally accepted legal meaning of the language used must be applied.
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**ATTORNEY GENERAL OF VIRGINIA**

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