OPINIONS

OF THE

ATTORNEY GENERAL

AND

REPORT

TO THE

GOVERNOR OF VIRGINIA

From July 1, 1950 to June 30, 1951

COMMONWEALTH OF VIRGINIA
Division of Purchasing and Printing
Richmond
1951
Letter of Transmittal

November 1, 1951.

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
(Postoffice Address, Richmond)

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<th>Name</th>
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<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>G. Stanley Clarke</td>
<td>Henrico</td>
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<td>D. Gardiner Tyler, Jr.</td>
<td>Charles 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>
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<td>Thomas M. Miller</td>
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<td>Nerhea S. Evans</td>
<td>Charlotte</td>
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<td>Louise W. Poore</td>
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<td>Eleanor W. Tilley</td>
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<td>Helen M. Owen</td>
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ATTORNEYS GENERAL OF VIRGINIA
From 1776 to 1950

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. Ayers ................................................................... 1886-1890
R. Taylor Scott ................................................................... 1890-1897
R. Carter Scott ................................................................... 1897-1898
A. J. Montague .................................................................... 1898-1902
William A. Anderson ........................................................ 1902-1910
Samuel W. Williams .......................................................... 1910-1914
John Garland Pollard ........................................................ 1914-1918
*J. D. Hanks, Jr. ................................................................ 1918-1918
John R. Saunders ................................................................ 1918-1934
**Abram P. Staples .......................................................... 1934-1947
***Harvey B. Apperson ....................................................... 1947-1948
****J. Lindsay Almond, Jr. ................................................. 1948-

*Hon. J. D. 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.

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REPORT OF THE ATTORNEY GENERAL

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12. LaPrade, Harry E. v. Commonwealth of Virginia. From Circuit Court of Franklin County. Unlawfully, feloniously, wilfully and maliciously setting fire. Reversed.


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9. Joyner, C. F., Jr., Commissioner, etc. and J. Lindsay Almond, Jr., Attorney General, etc. v. Howard G. Mathews, Mathews Trucking Company. From 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.
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REPORT OF THE ATTORNEY GENERAL

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CASES PENDING IN THE UNITED STATES COURT OF APPEALS 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. On appeal for judgment of District Court dismissing action as to V. M. I.

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43. Hancock, Claude William v. C. F. Joyner, Jr., Commissioner, etc. Circuit Court of Roanoke County. Suspension of driving privileges. Pending.

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7. Shiflett, Floyd v. W. Frank Smyth, Jr., Superintendent, etc. Hustings Court, Part II, City of Richmond. Petition and rule denied.


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July 15, 1950, Bernice Mildred Grow Apr. 21, 1951, Raymond Jerome Vezina
Sept. 28, 1950, Paul Mumford May 7, 1951, William Davis Longworth
Sept. 29, 1950, Henry Elmer Eaves May 8, 1951, Francis Plaisted
Nov. 16, 1950, Fred L. Ernest May 15, 1951, William Winn
Dec. 11, 1950, Otto Edwin Trefz May 22, 1951, Helen Watson
Jan. 2, 1951, Willie Lee Harris June 15, 1951, John F. Ducan
Feb. 12, 1951, Benjamin P. Klemiata June 15, 1951, Abraham Pritchette
Feb. 15, 1951, Lawt Brammer June 20, 1951, M. S. Harrelson
Feb. 22, 1951, J. G. Peters
EXTRADITION TO VIRGINIA FROM OTHER STATES

Aug., 1950, Billie Nunn, State of Washington
Sept., 1950, James Rufus Brinkley, State of South Carolina
Sept., 1950, Clyde Litchfield, State of California
Dec., 1950, Harry E. Campbell, State of Georgia
Jan., 1951, Harry Lee Jenkins, State of Florida
June, 1951, George W. Potter, State of Kentucky

REVOCATION OF PARDONS
HUSTINGS COURT CITY OF RICHMOND

HONORABLE DENMAN T. RUCKER,
Attorney for the Commonwealth for Arlington County.

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

"This letter has reference to Chapter 198 and Chapter 442 of the 1950 Acts of Assembly. Chapter 198 has for its purpose the granting of authority to Arlington County to establish small districts within our Sanitary District, within which public parking areas are to be established. You will note that the law permits bonds to be issued within such small districts. For your information, the boundaries of our Sanitary District coincide with the boundaries of the County.

"The first question which has been raised concerning Chapter 198 standing alone is the failure to sufficiently amend the title of the original act to include the additional powers sought to be exercised (Section 52, Constitution of Virginia).

"Another serious question appears in Chapter 198 and Chapter 442 when they are considered together. Does Chapter 442 nullify Chapter 198?"

With regard to your first question, we have had occasion previously to deal with similar cases, and in attempting to arrive at an answer we have referred to 50 American Jurisprudence, 135 Statutes, §160, which reads as follows:

"The purpose of a title is to give a general statement of, and call attention to, the subject matter of an act, so that the legislators may be apprised of the subject of the legislation, and be put upon inquiry in regard thereto. A title may also be used for purposes of identification. Indeed, originally, in the English courts, the title of a statute was regarded as intended only as a means of convenient reference."

Keeping in mind this purpose of the title to an act, it has been our conclusion that where as here the title to the amendatory act sets forth the subject of the new matter to be included, the legislators have been properly safeguarded and put on inquiry. As a practical matter, the amending of the title to the old act would serve no useful purpose, and would add no protection which is not had by a proper title to the amendatory act.

It is quite true that this rule has not been uniformly adopted by the courts, however, it has been adopted in several jurisdictions. In Miller v. Iowa-Nebraska Light & Power Co. 262 N. W. 855, a Nebraska case decided in 1935, this specific point was before the Court and in a well considered opinion the Court referred to the purpose of the constitutional provision regarding the title to legislation and said such purpose was "to prevent surreptitious legislation" and concluded that the applicable rule is

"Where the title to an amendatory or supplemental act sufficiently indicates the nature of the legislation in it contained, or the nature of the changes or additions by it made, it is immaterial whether or not the provisions of the act are covered by the title of the act amended or supplemented." (262 N. W. 858)
It is my conclusion that anyone reading the title to Chapter 198 would be sufficiently advised that the act not only amends the 1926 Act, but also adds certain provisions relative to public parking areas, and that it is, therefore, free from objection on that score.

As to your second question, it is my opinion that Chapter 442 does not nullify Chapter 198. One of the cardinal rules of statutory interpretation is that whenever possible effect should be given to every expression by the Legislature. In Lewis' Sutherland Statutory Construction, Second Edition, Vol I, §234, the following rule is set forth:

"Where a section was amended by adding or inserting certain words or provisions and re-enacted as amended, and the same section was again amended in another particular, not inconsistent with the first, and re-enacted, omitting the words inserted by the first amendment and entirely ignoring that amendment, it was held that the first amendment was not repealed and the words inserted remained in force as part of the section. So where a section was amended by striking out certain words, and was again amended in another particular by striking out and inserting words 'so as to read as follows,' and was re-enacted with the words stricken out by the first amendment, it was held that the inclusion of these words was an inadvertence or mistake and the words were disregarded. * * *"

In the instant case it would certainly appear that the omission in Chapter 442 of the words added by the amendment made in Chapter 198 was a mere inadvertence and, therefore, it is my opinion that Chapter 198 is not nullified by Chapter 442.

ACTS OF ASSEMBLY—Sufficiency of title to. F-1

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

This is in reply to your letter of March 16, 1951, in which you inquire whether, in my opinion, the title to House Bill 198 (Chapter 503 of the Acts of Assembly of 1950) satisfies the constitutional requirements.

In my opinion your question must be answered in the affirmative.

The complete title to the Act reads as follows:

"AN ACT to amend the Code of 1950 by adding two sections numbered 28-89.1 and 28-89.2 and to amend and reenact §§28-3, 28-45 and 28-47 of the Code of 1950, the new and amended sections, respectively, relating to limits on taking fish in certain waters, changing the boundaries of the area subject, respectively, to the Commission of Game and Inland Fisheries and the Commission of Fisheries, minimum size limits as to certain fish, and restrictions applicable to certain nets, and to provide penalties for violations.” (Italics added)

Your specific question is whether the underlined portion of the title is sufficient to cover the provision in the Act itself which prohibits the use of haul seines and drifts between the hours of 12:00 noon Saturday and 12:00 midnight the following Sunday. While it is true that the language of the title is general that appears to be a proper, in fact, a desirable practice. As stated in Sutherland on Statutory Construction, Vol. I, at page 308, the rule appears to be:

"A title is not defective because it fails to set forth the details of an enactment. Numerous provisions may be included under a brief, general title, and the title need not, indeed, for purpose of readability, should not, be made
an index to or abstract of the contents of a statute. Particulars are to be found in the act not in the caption."

The case of *City of Richmond v. Pace*, 127 Va. 274, 103 S. E. 647, is cited by the author as adhering to this rule.

**ADOPTION—Adoption in foreign country not sufficient for American citizenship. F-175**

*February 6, 1951.*

**MRS. RUBY ALTIZER ROBERTS,**

Poet Laureate of Virginia.

This is in reply to your letter of January 21, 1951, which reads as follows:

"My husband and I adopted last November a little girl thirteen months old. The girl is German and the adoption took place in the court at Frankfurt which is in the American zone. We want this child to be able to become an American citizen which she may after two years residence in America as our child. But no one is quite sure about her present status. Some have said that she will have to be readopted here; others have said that it is not necessary.

"It has been suggested that if we could obtain a ruling on the matter that children adopted legally by citizens of the state while in foreign countries may become citizens without readoption here and all the unnecessary details attending it, that it would be the best solution not only for ourselves but for others in the same position.

"Could you advise us on this?"

Title 8, §716 of the United States Code Annotated reads as follows:

"An adopted child may, if not otherwise disqualified from becoming a citizen, be naturalized before reaching the age of eighteen years upon the petition of the adoptive parent or parents if the child has resided continuously in the United States for at least two years immediately preceding the date of filing such petition, upon compliance with all the applicable procedural provisions of the naturalization laws, if the adoptive parent or parents are citizens of the United States, and the child was:

"(a) Lawfully admitted to the United States for permanent residence; and

"(b) Adopted in the United States before reaching the age of sixteen years; and

"(c) Adopted and in the legal custody of the adoptive parent or parents for at least two years prior to the filing of the petition for the child’s naturalization."

You will, of course, observe that the provisions of the section lettered (a), (b) and (c) are written in the conjunctive and, therefore, all three of the requirements must be met in order for the child to become a citizen.

In the case of *In re Seeley*, 87 F. Supp. 638, decided in 1949, the Federal District Court in Massachusetts held that the word "adopted" as used in this section means adopted in the United States, and that adoption in a foreign country will not satisfy the requirement. The Court held further that when the adopted child had not been adopted in the United States more than two years prior to the petition for naturalization, the petition must be denied notwithstanding the fact that adoption in a foreign country had taken place more than two years prior to the petition.
ADOPITION—Proceedings should be brought on chancery side. Change of Name—Proceedings should be brought on law side. F-175—F-230

August 28, 1950.

Honorable Thomas P. Chapman, Jr.,
Clerk of Circuit Court of Fairfax County.

This is in reply to your letter of August 21, 1950, which reads, in part, as follows:

"I shall appreciate a ruling by you as to whether adoption cases should be brought at law or in chancery. For many years, we have been carrying adoption matters on the law side of our docket, but in reading Section 63-348 it would appear that perhaps they should be carried on the chancery side. Likewise, we have been carrying changes of name on the law side, and a reading of Section 8-577.1 does not seem to indicate whether they should be law or chancery."

As you point out, §63-348 of the Code of 1950 is the section of the Code which lists the courts having jurisdiction over proceedings for adoption. That section begins as follows:

"Proceedings for the adoption of a minor child and for a change of the name of such child shall be by petition to any court of record having chancery jurisdiction in the county or city in which the petitioner resides, provided that the Chancery Court of the city of Richmond shall have exclusive jurisdiction in every such case arising in such city if the petitioner resides on the north side of the James river, and that the Hustings Court of the city of Richmond, Part Two, shall have exclusive jurisdiction if the petitioner resides in such city on the south side of the James river. * * *"

It is my opinion that the Legislature, in providing that such proceedings be brought only in courts having chancery jurisdiction, intended that they should be brought on the chancery side of such courts.

As to proceedings for change of name, §8-577.1 which provides for such proceedings does not specifically state whether they shall be on the law or the chancery side of the court. The statute does provide, however, that when an application for change of name is granted, an order shall be entered in the current deed book. At common law a person was at liberty to change his name whenever he saw fit, and there was no restriction except when such change was being made with a fraudulent purpose. The statute in Virginia is in aid of the common law and affords an additional method of effecting a change of name. This statutory method has the advantages of being speedy and definite, and it constitutes a matter of record. When the purposes of this statutory proceeding are borne in mind, I know of no reason why they should not be brought on the law side of the court and I am, therefore, of the opinion that your practice of carrying such proceedings on the law side is proper.

AGRICULTURE—Registration of medicated livestock and poultry feed. F-95

April 23, 1951.

Honorable Parke C. Brinkley,
Commissioner Department of Agriculture and Immigration.

This is in reply to your recent letter from which I quote as follows:

"Since the development of certain drugs for use in commercial livestock and poultry feeds, there has been a tendency, on the part of the industry, to
incorporate these drugs in certain feeds to be used as a preventive measure and also as a treatment for livestock and poultry diseases. This has been noted particularly in the special purpose feeds now being used by the poultry industry in our State.

"It has been the policy of this Department to require that feeds containing appetizing ingredients or ingredients with medicinal properties, come under the provisions found in Section 3-642 through Section 3-646 of the Virginia Code. We have, at the same time, requested that these feeds be registered in accordance with Section 3-621, and that the chemical guarantee and the list of ingredients conform with the standards for special purpose feeds.

"As an example, a Chick Starting Mash or a Growing Mash must conform with the protein, fat and fiber guarantee, and the list of ingredients must conform to those which have been prescribed for these special purpose feeds under the authority of the Feeding Stuffs Law. However, in cases where a drug is used, we have required that the label show these guarantees and in addition, include the name of each therapeutically active ingredient; also adequate directions for use and adequate warning against use under conditions in which it may be dangerous to the health of livestock or poultry.

"The question we have confronting us now is whether or not a commercial feed containing a medicated ingredient, for which a permit has been issued under Section 3-643, would also be required to be registered under Section 3-621."

Section 3-643 of the Code, which requires a permit for the sale of condimental stock or poultry feed for which a medicinal property is claimed, is clearly applicable to the commercial livestock and poultry feeds described in your letter. Furthermore, it is my opinion that sections 3-619 to 3-641 of the Code, which were enacted to insure the production and sale of unadulterated feed, are also applicable.

In other words, if drugs are incorporated in commercial feeding stuff, as those words are defined by section 3-619, such feed must be registered in accordance with the provisions of section 3-621, and the manufacturer thereof must obtain the permit required by section 3-643.

It follows, then, that the feeding stuff to which you refer must be inspected for the purpose of ascertaining their food value as well as analyzed and examined microscopically or otherwise by the chemists or other experts of the Department for the purpose of determining their medicinal value. In order to defray the cost of these services, the manufacturer, jobber, importer, etc., is required to pay the inspection tax provided for in section 3-627 of the Code as well as the inspection fee set forth in section 3-643 of the Code.

ALCOHOLIC BEVERAGE CONTROL—Distribution of funds to localities.

F-210

Honorables Byrum P. Goad,
Attorney for the Commonwealth for Carroll County.

This is in reply to your letter of December 21, 1950, in which you request my opinion on the following problem:

"Under the 'Alcoholic Beverage Control Act', the State of Virginia paid to Carroll County, as its share of the profits from the sale of alcoholic beverages the sum of $85,789.16 on August 31, 1950. Which represents Carroll County’s share in the profits for the fiscal year 1949-1950. (From July 1, 1949 to June 30, 1950.)

"The Town of Galax had an annexation proceedings, which took into the
corporation approximately 876 people, and the town has demanded approximately $3,100.00 as its proportionate share of the alcoholic beverage funds.

"The order entered by the three Judge Court provided that the annexation proceedings should take effect on March 29, 1950, which was 93 days before the expiration of the fiscal year 1949-1950.

"Now, the question is whether the alcoholic beverage fund of $85,789.16 counted as funds for the 1949-1950 fiscal year, although it was paid into the County Treasury after the close of the 1949-1950 fiscal year. The funds were collected during the fiscal year 1949-1950.

"If the fund should be considered 1949-1950 fiscal year funds, then the town of Galax would not be entitled to any portion of the funds as all financial conditions still prevailed between the town of Galax and Carroll County until June 30, 1950. The County still paid school tuition for all the school children attending the town school until the close of the school year.

"Although under Section 4-22 an annexation proceedings are provided for, but does not in my opinion settle the question presented, unless the $85,789.16 paid into Carroll County is considered as a matter of fact to be funds for the fiscal year 1950-1951, and not for the year 1949-1950."

Section 4-22 of the Code of 1950, which deals with the disposition of net profits from A.B.C. sales, reads, in part as follows:

"* * * If the population of any city or town shall have been increased through the annexation of any territory since the last preceding United States census, such increase shall, for the purpose of this chapter, be added to the population of such city or town as shown by the last preceding United States census and a proper reduction made in the population of the county or counties from which the annexed territory was acquired. The judge of the circuit court of the county in which the town or greater part thereof seeking an increase under the provisions of this chapter is located is hereby authorized and empowered to appoint two disinterested persons as commissioners, who shall proceed to determine the population of the territory annexed to the town as of the date of the last preceding United States census, and report their findings to the court, and future distributions of the moneys allocated under the provisions of this chapter shall be made in accordance therewith."

(Italics added)

On September 23, 1942, the Honorable Abram P. Staples, then Attorney General, in an opinion to the Honorable I. R. Dovel of Luray, Virginia gave consideration to the quoted portion of the statute and held that the failure of a town to comply with the mechanics of the statute for determining the increase in population prior to a distribution of funds does not deprive the town of its increased share because, even though the money had been distributed, it was at the time of the annexation a "future distribution" of funds within the meaning of the Act.

In the instant case it is my opinion that the term "future distribution" is the controlling factor and not whether the funds are for the fiscal year 1949-50 or 1950-51. If we project ourselves backward in time to March 29, 1950, the day the annexation took effect, the distribution of funds of August 31, 1950 is a "future distribution" and, under the express terms of the statute, the Town of Galax is entitled to an increased share due to its increased population.

You state in your letter that "all financial conditions still prevailed between the Town of Galax and Carroll County until June 30, 1950." It is not within the intended scope of this opinion to determine whether the details of a financial arrangement between the town and county, either legally or equitably, alter the above conclusion. I might add, however, that even should we consider the date of June 30, 1950 as the annexation date, the distribution on August 31, 1950 would still be a future distribution.
REPORT OF THE ATTORNEY GENERAL  

ALCOHOLIC BEVERAGE CONTROL—Distribution of profits—Annexation.  F-210

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

This is in reply to your letter of June 21, regarding the division of A.B.C. profits between the Town of Marion and the County of Smyth for the fiscal year ending June 30, 1950. You point out that in 1949 the Town of Marion annexed certain territory in Smyth County and you refer to Section 4-22 of the Code, which provides as follows:

“If the population of any city or town shall have been increased through the annexation of any territory since the last preceding United States census, such increase shall, for the purpose of this chapter, be added to the population of such city or town as shown by the last preceding United States census and a proper reduction made in the population of the county or counties from which the annexed territory was acquired. The judge of the circuit court of the county in which the town or greater part thereof seeking an increase under the provisions of this chapter is located is hereby authorized and empowered to appoint two disinterested persons as commissioners, who shall proceed to determine the population of the territory annexed to the town as of the date of the last preceding United States census, and report their findings to the court, and future distributions of the moneys allocated under the provisions of this chapter shall be made in accordance therewith.”

Since the 1950 census has not been completed, the population would have to be determined as of 1940. As you point out, it would be a most difficult matter to determine accurately the population of the annexed area as of 1940. I see no reason why, if the Board of Supervisors of Smyth County and the Town Council of Marion can agree on a proper figure of population, as you indicate in the case, the Court should not confirm such an agreement or could not appoint one person suggested by the County and one person suggested by the Town as commissioners, who could then submit a report based on such an agreement or the best estimate available. If the Court should confirm such a report based upon the above procedure as suggested in your letter, it is my opinion that this would be a compliance with the statutory provision.

You will note that Chapter 285 of the Acts of 1950, which you mention, is not applicable to the distribution of State funds. In any event, I am advised by the Keeper of the Rolls that information as to the 1950 census will not be available for use in connection with the fiscal year ending June 30, but that the certification referred to in this Act will probably be made before the termination of the fiscal year ending June 30, 1951.

ANNEXATION—Towns may annex in spite of ban on cities annexing.  F-8

HONORABLE ERNEST ROBERTSON,
Member of the House of Delegates.

This is in reply to your letter of August 30th in which you request my opinion as to whether towns can institute annexation proceedings at the present time in view of Section 15-152.1 which was added to the Code by Chapter 508 of the Acts of Assembly of 1950.

The code section referred to provides that no city shall, prior to July 1, 1952, institute proceedings for the annexation of territory not included in any proceedings
instituted before the effective date of that act unless the governing bodies of the affected areas agree thereto. Section 116 of the Constitution of Virginia, which is contained in Article 8, the article relating to the organization and government of cities and towns, provides that all incorporated communities having within defined boundaries a population of five thousand or more shall be known as cities and all incorporated communities having within defined boundaries a population of less than five thousand shall be known as towns. Section 126 of the Constitution, which is contained in the same article, provides that the General Assembly shall provide by general laws for the extension and contraction from time to time of the corporate limits of cities and towns.

It is my opinion, therefore, that the word "cities", as used in Section 15-152.1, a general law dealing with the extension and contraction of the corporate limits of cities, refers only to those incorporated communities embraced within the definition of the word "city" as given by Section 116 of the Constitution. Since towns were not referred to in this new code section it is my opinion that the restriction imposed thereby is not applicable to towns and that towns are now free to institute annexation proceedings.

APPROPRIATION ACT—Department of Welfare and Institutions has duty to reimburse localities for 50% of expenditures in juvenile and domestic relations courts. F-231

December 4, 1950.

HONORABLE RICHARD W. COPELAND,
Director Department of Welfare and Institutions.

This is in reply to your letter of November 22, 1950, which reads as follows:

"As you know, Section 63-297 of the Code of Virginia gave power to the juvenile courts to appoint probation officers. Section 63-298 of the Code permitted salaries to be fixed for these juvenile probation officers and paid from the county and city treasuries. Since about 1944 the Legislature of Virginia has seen fit to appropriate a sum of money to this department to be used by it in reimbursing cities of the first class one-half of the amount paid by them for salaries of probation officers.

"As you also well know, Sections 16-172.71 and 16-172.72 replaced and enlarged upon 63-297 and 63-298 which have been repealed. The first paragraph at the top of Page 1430, Acts of Assembly 1950, which is a part of Item 361 of the Appropriation Acts of 1950, appropriates a sum of money to this department but bases it upon Sections 63-297 and 63-298, both of which have been repealed.

"The purpose of this letter is to request an official opinion as to what effect, if any, the amendments and repeal of these sections referred to in the Appropriations Act have on this department's duty to reimburse the localities as has formerly been done."

As your letter indicates, Item 361 of the Appropriation Act of 1950 (Chapter 578 of the Acts) sets forth an appropriation to your department based upon §§63-297 and 63-298, both of which have been repealed. As a matter of fact, Chapter 383 of the Acts of 1950, which provides the new State-wide system of juvenile and domestic relations courts and which repealed §§63-297 and 63-298 of the Code, was approved on April 5, 1950, while the Appropriation Act was not approved until April 11, 1950.

The portion of the item in the Appropriation Act under consideration reads, in part, as follows:

"For reimbursing in an amount of 50 per cent for expenditures made by Juvenile and Domestic Relations Courts in cities of the first class for salaries
of probation officers appointed in the manner provided for, and pursuant to §§63-297 and 63-298 of the Code of 1950 * * *.”

It is important to note that, in repealing §§63-297 and 63-298, the Legislature did not remove from the law the provisions contained in those sections but merely transferred those provisions, somewhat broadened, to other sections of the Code. The purpose for which this appropriation was made remains in the law. The numbers of the Code sections in which this purpose is found are changed.

There can be no question but that the intent of the Legislature was that this money be used for the purpose indicated that is “for reimbursing in an amount of 50 per cent for expenditures made by Juvenile and Domestic Relations Courts in cities of the first class for salaries of probation officers appointed in the manner provided for * * *.” That purpose still exists but the manner provided for the appointment of the officers is no longer found in §§63-297 and 63-298, but rather in §§16-172.71 and 16-172.72.

Since the Appropriation Act was passed subsequent to the new Juvenile and domestic relations law (Chap. 383, Acts of 1950) which repealed §§63-297 and 63-298, we cannot conclude that the Legislature has irrevocably tied this appropriation into §§63-297 and §63-298 without attributing to them a completely futile act for in such event this portion of the item under consideration is completely meaningless.

I, therefore, conclude that the repeal of §§63-297 and 63-298 does not affect the provision of this Item of the Appropriation Act.

APPROPRIATION ACT—Transfer of appropriation at Central State Hos-pital.

F-248g

November 1, 1950.

HONORABLE JOSEPH E. BARRETT,
Commissioner Department of Mental Hygiene and Hospitals.

This is in reply to your letters of October 20th and October 30th relative to the transfer of $135,000 appropriated for a tuberculosis building at Central State Hospital by the last General Assembly to be used in the construction of a power plant at the same institution. The State Hospital Board also desires to transfer $70,000.00 from the appropriation to the tuberculosis building to the appropriation made for the laundry building.

With reference to these transfers you state in your letter of October 20th as follows:

"On September 13, 1950, authorization was received from the Governor to award a contract for a laundry building at Central State Hospital in the amount of $153,000. The appropriation for this project is:

Item 763—Building—Unexpended Balance. $101,502.00
Item 759—Laundry Equipment. 65,747.50

"It was considered that by combining the equipment and building appropriations, we would have sufficient for the building and some items of equipment, but not enough for full functioning, although it is expected that we will transfer some old usable equipment from the present laundry.

"Previous to receiving bids for the laundry building, the Division of Purchase and Printing had received bids on the equipment which amounted to approximately $64,000. It is doubtful that a similar low bid could be received on this amount of equipment in the foreseeable future so it would be most economical to buy it now. The State Hospital Board directed that I secure transfer of the necessary funds, $70,000 for contract and contingencies, from the T. B. Building, in order to do this.

* * *
“Another project is the Power Plant for which there is an unexpended balance of $418,992.81. The preliminary estimate of the Engineers for this project was $640,126. So in order to proceed with plans, they were directed to plan to set up certain mechanical equipment such as coal and ash handling equipment, standby boilers, etc. as alternates and possible deductions from the overall bid. These items were listed in the amount of $220,629 which brought the estimated cost down to within the money available.

“This will be the largest heating plant we have in the State Hospital System, and really should be as complete at this time as we can make it. To leave out this mechanical equipment would impair the efficiency of the plant. In view of the fact that it will all eventually have to go in along with additional building, it would be less expensive to install this all now than later. This could be accomplished by a transfer of $135,000 from the T. B. Building to the Power Plant.

“It is the contention of the State Hospital Board that it was the original intention of the General Assembly in making these appropriations that they were integral parts of a coordinated whole, and it was hoped that each could be secured within the money appropriated, but if this could not be done because of later developments, it might be necessary to sacrifice one or more items so the others could go ahead.”

With reference to these transfers you further stated in your letter of October 30th as follows:

“The enlargement of the Power Plant and the enlargement and improvement of the Laundry are occasioned directly by the construction of the Criminal Building and the T. B. Building.

“The Criminal Building to accommodate 240 patients is already under construction, and cannot be adequately heated without more Power Plant. The Laundry is already under construction and cannot be adequately operated without more Power Plant and adequate equipment in the Laundry itself. The T. B. Building, to accommodate 120 patients, which construction is being delayed, is a part of the occasion for enlarging the Power Plant and the Laundry, so they are definitely and closely related.”

From a consideration of the factual statements made by you and Section 12 of the Appropriation Act in my opinion the Governor may in his discretion approve the proposed transfers. For an elaboration of my views on this question I refer you to my letter to you of September 25th with reference to a transfer of funds from the appropriation to the tuberculosis building to the personnel building.

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**APPROPRIATION ACT—Transfer of appropriation—Blue Ridge Sanatorium. F-248b**

**HONORABLE JOHN S. BATTLE,**

Governor of Virginia.

February 6, 1951.

This is in reply to your request for my opinion as to the validity of certain transfers in the unconditional capital outlay appropriations to the Department of Health, Blue Ridge Sanatorium at Charlottesville among the following Items as listed in the Appropriation Act of 1950:

<table>
<thead>
<tr>
<th>From</th>
<th>Amount</th>
<th>To</th>
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</thead>
<tbody>
<tr>
<td>Item 683</td>
<td>$5,000</td>
<td>Item 682</td>
</tr>
<tr>
<td>For roads and parking areas</td>
<td></td>
<td>For household equipment</td>
</tr>
<tr>
<td>Item 687</td>
<td>$5,000</td>
<td>Item 682</td>
</tr>
<tr>
<td>For fireproof infirmary additions</td>
<td></td>
<td>For household equipment</td>
</tr>
</tbody>
</table>
REPORT OF THE ATTORNEY GENERAL

The pertinent part of Section 12 of the Appropriation Act of 1950, which is the section applicable to the State Board of Health, the governing body of Blue Ridge Sanatorium, is as follows:

“In order that a more orderly and efficient use may be made of capital outlay appropriations when considering all of the institutions as a coordinated system, rather than as individual units, the governing board is hereby authorized and empowered, with the written approval of the Governor, to transfer capital outlay appropriations made for one or more buildings or projects in any institution under its management and control to the capital outlay appropriations for one or more buildings or projects in the same or any other institution under its management and control, definitely and closely related to the project for which the appropriation was made, provided that, in the opinion of the Governor and of the governing board, later developments have rendered such transfers appropriate and advisable, to carry out the original intention of the General Assembly in that the appropriations made to the various buildings and projects shall be used to the best advantage and for the best interests of the institutions.”

It is my understanding that because of the rapid rise in the cost of household equipment during the past few months there are not sufficient funds to furnish the new nurses' home additions for which the General Assembly appropriated $221,257 under Item 686 of the Appropriation Act of 1950, and that the funds transferred as described above would be used to complete the furnishing of the new nurses' home. Since it can be said that the furnishing of the nurses' home is practically essential to the completeness and usefulness of the infirmary additions, I am of the opinion that the furnishing of "fireproof infirmary additions" is sufficiently closely related to furnishing "household equipment" to make the transfer of $5,000 from Item 687 to Item 682 permissible under the above quoted provision. I am assuming, of course, that the funds so transferred are not required for the completion of the infirmary additions.

As to the other transfer mentioned in your letter, I feel that no part of the appropriation "for roads and parking areas" found under Item 683 can be used "for household equipment" since to call such appropriations closely related would, in my opinion, be using the transfer authority contained in Section 12 of the Appropriation Act for a purpose beyond that intended by the General Assembly.

APPROPRIATION ACT—Transfer of appropriation at school for deaf and blind. F-160

HONORABLE JOHN S. BATTLE,
Governor of Virginia.

December 27, 1950.

This is in reply to your letter of December 22 in which you requested my opinion as to whether the Virginia School for the Deaf and the Blind at Staunton may be authorized to transfer a maximum of $70,000.00 from Item 552 of the Appropriation Act of 1950, which is part of the sum of $281,880.00 appropriated for the construction of a dormitory, and use the same with other funds ($300,000.00) that are appropriated by Items 553-554 for the construction of a recreation building at the school.

You state that under the present conditions it appears impossible to construct either building within the above mentioned appropriations and that the Superintendent and the Board of the School for the Deaf and the Blind desire to proceed with the construction of the recreation building to be erected at a cost of approximately $370,000.00.
The pertinent part of section 46 of the Appropriation Act of 1950 is 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; * * *"

Since neither building in question can be constructed under present conditions within the appropriations allotted therefor, the transfer of a part of the dormitory fund for use with the fund appropriated for the construction of a recreational building would, in my opinion, at least partially carry out the original intent of the General Assembly. Furthermore, I am of the opinion that the construction of a recreation building at the school is sufficiently closely related to the construction of a dormitory at the same school as to make the transfer to which you refer permissible under the above quoted provision of the Appropriation Act.

APPROPRIATIONS ACT—Transfer of appropriation at V.M.I. P-13

HONORABLE JOHN S. BATTLE,
Governor of Virginia.

April 12, 1951.

I am in receipt of your letter of April 10, from which I quote as follows:

"The Superintendent and Board of Visitors of the Virginia Military Institute have requested me to authorize the transfer of an appropriation of $148,500 from Item 660 in the appropriations for the current biennium, to an appropriation provided by Item 658 of the Appropriation Act, for the construction of a Science Hall at that institution. I quote from a letter written me by General R. J. Marshall, Superintendent, on April 7th, as follows:

"I am writing in reference to the conference in your office on the 4th of April with a number of the members of the VMI Board and myself. In order to provide sufficient funds to proceed with the construction of a science hall at VMI it is necessary among other things to transfer the unconditional appropriation of $148,500, item 660 of the Appropriation Bill for the current biennium, from "rehabilitation of Scott-Shipp building" to the appropriation for the "science hall," item 658 of the same Act. Since the new science hall will provide class room and laboratory facilities for the Physics Department, now housed in Scott Shipp Hall, it will release needed space in Scott Shipp Hall for other academic departments, and, therefore, it is believed the purposes of the two appropriations are very nearly identical. While this does not relieve us from the necessity for continuing Scott Shipp Hall, it does relieve us of an immediate congestion in that building and it does provide permanent
facilities for the Physics Department. The science hall will have universal academic use because all cadets are required to study physics save a few English and History majors, who must make a selection between physics, geology or biology.

"In a conference in my office with a committee from the Virginia Military Institute Board of Visitors and with the Director of the Budget, I was told that this proposed transfer had been discussed with you and that you had expressed an opinion informally that you saw no legal objection to the transfer.

"Will you please let me have your opinion in writing as to the legality of this proposed transfer."

Section 46 of the Appropriation Act for the 1950-1952 biennium 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; * * *.”

From the facts stated in General Marshall’s letter of April 7 to you and supplemented at the conference in this office with a committee from the Board of Visitors of Virginia Military Institute and the Director of the Budget, it is my opinion that the objects embraced by items 658 and 660 of the Appropriation Act are definitely and closely related.

The committee and General Marshall emphasized to me the urgent necessity for the construction of the science hall. Construction of this project will greatly relieve the congestion obtaining in the Scott-Shipp building by the transfer of essential academic operations therein which are closely related to and allied with the purpose and object of the science hall.

If in the opinion of the Governor subsequent developments make this transfer appropriate to carry out the original intention of the General Assembly in making the appropriation for the science hall, it is my opinion that the transfer requested would be in compliance with the quoted provisions of section 46 of the Appropriation Act.

APPROPRIATION ACT—Transfer of appropriations—Department of Welfare and Institutions—Cannot transfer from maintenance to capital outlay fund. F-13

HONORABLE JOHN S. BATTLE,
Governor of Virginia.

May 1, 1951.

I am in receipt of your letter of April 26, in which you state that the Department of Welfare and Institutions has asked your approval of the transfer of $45,000
from the surplus revenues of the State Penitentiary Farm and State Prison Farm for Defective Misdemeanants, this amount to be used for the completion of a water and sewage disposal system at the State Industrial Farm for Women. The transfer is proposed to be effected in this way:

"It is requested that the Governor authorize the transfer of the amount of $45,000 from the appropriations for Maintenance and Operation of the State Farm to the appropriations for Maintenance and Operation of the State Industrial Farm for Women in accordance with the provisions of Section 12 of the 1950 Appropriation Act.

"It is further requested that authority be granted to transfer this amount to Capital Outlay Appropriation Account 716-52 and be allotted for use in completing the Waste Water Treatment and Sewage Disposal Plant at the State Industrial Farm for Women."

The appropriation made for enlarging the water and sewage disposal system at the State Industrial Farm for Women is, of course, an appropriation for capital outlay and is included in the Appropriation Act for 1950 as Item 745. In your letter you make the following comment:

"Your attention is called to Section 12 of Chapter 578 of the Acts of Assembly of 1950. Under this section transfers with the approval of the Governor are authorized under certain conditions from the maintenance and operation fund of any one of the institutions under the control of the State Board of Welfare and Institutions to the maintenance and operation fund of any other one or more of such institutions. Under the second paragraph of this section, similar transfers are authorized, under certain conditions with the approval of the Governor, from the capital outlay appropriations of any one or more of such institutions to the capital outlay appropriations for any one or more of the same or any other institution under the management and control of the Board."

Section 12 of the Appropriation Act, to which you refer, authorizes, with your approval, transfers from maintenance and operation funds of any one of the institutions under the control of the State Board of Welfare and Institutions to the maintenance and operation fund of any one or more of such institutions. The section further authorizes, with your approval, similar transfers from capital outlay appropriations of any one or more of such institutions to the capital outlay appropriation for any one or more of the same or any other institution under the management and control of the Board. The section, however, does not contain any authority for the transfer from the maintenance and operation fund to capital outlay appropriations. In view of this fact, I can find no authority for you to approve the requested transfer to the capital outlay appropriation for enlarging the water and sewage disposal system at the State Industrial Farm for Women.

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**APPROPRIATION ACT—V.P.I.—Appropriation for development of water supply includes acquisition of necessary land.**  
F-268g

Honorable John S. Battle,  
Governor of Virginia.

I am in receipt of a copy of your letter of June 8, 1951, to Dr. Walter S. Newman, President of the Virginia Polytechnic Institute, referring to me Dr. Newman's letter to you dated June 7, 1951.
I quote as follows from Dr. Newman's letter:

"We now have available under Item 624 of the Appropriation Act $96,987 for the development of the water supply. Additional funds were appropriated conditionally. The plans for the development of the Tom's Creek water supply project provided for purchasing the required land out of the appropriation for the water supply project. We are, therefore, asking for authorization to proceed with the purchase of this tract of land of approximately forty acres from Mr. Tom Harmon at the price of $200 per acre with the funds appropriated under Item 624 of the Appropriation Act. The exact number of acres in the tract will be determined by an accurate survey."

In your reply to Dr. Newman you state:

"I agree with your thought that this land should be bought at this time; but, in view of the fact that the appropriation item is 'for additional water supply' without mentioning land purchase, I would prefer to have the opinion of the Attorney General upon the legality of the use of these funds."

Subsequent to receipt of your inquiry I discussed the factual aspects of the matter in a telephone conversation with Dr. Newman.

The Virginia Polytechnic Institute was authorized by former Governor Tuck to secure an option on the property in question. A detailed study has been made by a competent engineering firm relative to the most practical and economical method to secure an adequate water supply for the needs of the Institute. Through the acquisition and development of the site under consideration it is hoped that, and it may in time, it will become the sole source of water supply at the Institute; yet its immediate acquisition is necessary to augment the inadequate and unsatisfactory existing source of supply now available. The development of the water supply requires this additional source which in turn requires the purchase of the land under consideration. It seems factually clear therefore that the matter under discussion relates to an additional water supply, a necessary incidence of which is the acquisition of the land.

It is my opinion that the use of the funds embraced by Item 624 of the Appropriation Act for the purpose stated is within the purview of the appropriation, and is a legal and proper application thereof.

APPROPRIATION ACT—Water system is "structure". F-208

HONORABLE RICHARD W. COPELAND,
Director, Department of Welfare and Institutions.

March 9, 1951.

I have your letter of March 5, in which you direct my attention to Item 731 of the 1950-52 Appropriation Act providing $724,171 for "structures" at the Virginia Manual Labor School for Colored Boys at Hanover, Virginia. You state that you recently requested an allotment of $3,000 from this appropriation for the drilling of a well for the purpose of providing a water supply for these structures. I take it that it is essential that these structures have a water supply, but I can find no appropriation made to this institution which in terms includes the drilling of this well. Certainly the General Assembly would not have intended these structures to be erected without having available a supply of water. I am, therefore, of the opinion that the language of the appropriation is sufficiently broad to authorize the Division of the Budget to approve an allotment for the drilling of this well.
ARRESTS—Holding prisoner without bail. F-129

July 31, 1950.

HONORABLE SAM N. SAMPLE,
Sheriff of Russell County.

This is in reply to your letter of July 27, 1950, which reads, in part, as follows:

"I am confronted with the problem of the length of time a person charged with drunkenness should be retained in jail before he is allowed to be released after he has been admitted to bail. In other words, is it a question entirely within the jurisdiction of the Justice of the Peace to say when the person should be released?"

After a person is admitted to bail he, of course, can no longer be detained. The problem which confronts the officer making an arrest in a case of this kind is, therefore, when shall the person be taken before an official authorized to admit to bail.

In the case of Winston v. Commonwealth, 188 Va. 386, decided by the Supreme Court of Appeals of Virginia on October 11, 1948, it was held to be the duty of an officer arresting a person without a warrant to take such person before a judicial officer with "reasonable promptness" for the purpose of securing a warrant and providing the prisoner with an opportunity to make application for bail. The Court said:

"* * * the actions of the arresting officer and the jailer in denying the defendant this opportunity by confining him in jail because they concluded that he was not in such condition to be admitted to bail, had the effect of substituting their discretion in the matter for that of the judicial officer. Under the circumstances here, the defendant was clearly entitled to the benefit of a judicial opinion and judgment upon the question of his eligibility for bail. * * *"

It is, therefore, my opinion that when a person is arrested for drunkenness he should be taken before a justice of the peace or other officer authorized to admit to bail with reasonable promptness and the decision of whether he should be admitted to bail or detained should be made by such official.

ARRESTS—Without warrant duty of officer. F-136e

July 3, 1950.

HONORABLE STUART CARTER,
Member of the House of Delegates.

This is in reply to your letter of June 15, 1950, which reads in part as follows:

"On November 26, 1948, in an opinion which you prepared for Sheriff James T. Clark, Prince Edward County, Farmville, Virginia, you advised Sheriff Clark with reference to the recent opinion of the Supreme Court of Appeals of Winston v. Commonwealth, 188 Va. 386, in which opinion you advised that an arresting officer must take the accused before a judicial officer without necessary delay following his arrest.

"Chief Stover has been advised by the City Attorney for the City of Bristol, Virginia, that the requirements of the arresting officer as set forth in the Winston decision do not apply to the City Police Officers. Just what is the basis for this opinion Chief Stover and I are unable to determine. There—
fore, on his behalf I respectfully request an opinion from your office as to whether or not the requirements of an arresting officer as set forth in the Winston case apply to City Police Officers."

I have read Mr. Woodward's letter, a copy of which you enclosed. As I understand his views, Mr. Woodward limits the application of the decision in the case of *Winston v. Commonwealth*, 188 Va. 386, to those cases in which an arrest is made by a member of the State Police Force. His conclusion is predicated on the fact that Section 52-21 of the Code of Virginia of 1950 expressly provides that a member of the State Police Force who makes an arrest without a warrant for a misdemeanor shall forthwith bring the person before an officer authorized to issue criminal warrants while there seems to be no such statutory duty imposed upon city police officers.

The facts upon which Mr. Woodward has based his conclusion are correct. However, I believe that the decision of the Supreme Court cannot be limited merely to cases in which the arrest is made by members of the State Police Force. It is true that the Supreme Court made reference to the duty imposed upon State police officers by the statutes, however, at page 394 of the opinion, the Court said:

"But even if the circumstances of the arrest were not within the purview of this particular statute, it was the duty of the arresting officer to have taken the defendant within a reasonable time, or without unnecessary delay, before a judicial officer in order that the latter might inquire into the matter and determine whether a warrant should be issued for the detention of the defendant, or whether he should be released. See *Hill v. Smith*, supra (107 Va., at pages 850, 851); 4 Am. Jur., Arrest, section 70, pp. 49, 50; 6 C. J. S., Arrest, section 17-b, pp. 618, 619."

It can be readily seen that the Supreme Court did not feel that the existence of the statutory duty was necessary to their decision for they found such a duty to rest upon an arresting officer, even in the absence of the statute. In this connection, they cited 4 Am. Jur. Section 70, which reads in part as follows:

"An officer or a private individual who has made an arrest of a person without a warrant has authority to detain him in custody only for such time as may reasonably be necessary to procure a legal warrant for his further detention, or until a preliminary hearing of the charge against him can be had. It is the duty of a police officer, upon making an arrest, to take the prisoner with reasonable promptness before a magistrate; a failure to do so may make the officer liable in damages in an action for false imprisonment. * * * *"

It is, therefore, my opinion that the duties of an arresting officer as set forth in the Winston Case are applicable to city police officers as well as State police officers.

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**ATTORNEY AT LAW— License—Salary of District Attorney not considered for license purposes.**

F-190

February 20, 1951.

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

I am in receipt of your letter of February 9, in which you ask if the salary of an Assistant United States District Attorney should be included as "receipts" in determining the amount of the State license that this officer should secure under Section 58-371 of the Code as an attorney at law. You state that this officer also
engages in the private practice of law, but that his receipts from such practice do not exceed $500.

You present a similar situation in the case of a Trial Justice who receives a regular salary as such, but who also engages in the private practice of law and whose receipts from this practice do not exceed $500.

The pertinent portion of Section 58-371 is as follows:

"*** Every attorney at law who has been licensed for less than five years shall pay fifteen dollars; and every attorney who has been licensed and who has practiced for five years and more, twenty-five dollars; provided, that no attorney at law shall be required to pay more than fifteen dollars whose receipts for the preceding year were less than five hundred dollars."

It is generally accepted, and I believe this office has previously so ruled, that officers such as those to whom you refer are not required to pay licenses under Section 58-371 as attorneys at law unless they engage in private practice of law in addition to performing the duties of their offices. Since the officers to whom you refer would not have to secure a license unless they engaged in the private practice of law, it is my opinion that their salaries as such officers should not be considered as "receipts" within the meaning of the section under consideration.

It is my view, therefore, that, if the receipts of these officers from the private practice of law were less than $500 in any year, the State license tax in each case would be $15.00.

ATTORNEY AT LAW—Nonpayment of dues in Virginia State Bar. F-190

R. E. Booker, Esq.
Secretary-Treasurer, Virginia State Bar.

September 11, 1950.

This will reply to your letter of August 25, advising that a lawyer by the name of William McKinley Murray is practicing law in Alexandria, Virginia, and will not pay his dues in the Virginia State Bar as required by Rules of the Supreme Court. You advise that it appears that it is going to be necessary to sue Attorney Murray for his dues and you make inquiry as to whether he should be sued in the Civil Justice Court in the City of Alexandria or in the Circuit Court of the City of Richmond.

Section 54-50 of the Code of Virginia provides as follows:

"Fees—The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations fixing a schedule of fees to be paid by members of the Virginia State Bar for the purpose of administering this article, and providing for the collection and disbursement of such fees: but the annual fee to be paid by any attorney at law shall not exceed the sum of five dollars."

The rules and regulations for the collection and disbursement of the fees as provided in this section are contained in Section 11 of Rule IV of the Rules for the Integration of the Virginia State Bar and contain no provision for suit for the non-payment of the fees, but provide in part as follows:

"*** and if he remains in default for thirty days after the mailing of such notice, he shall be automatically suspended from active membership in the Virginia State Bar and shall not further engage in the practice of law until he has been reinstated. Such active member so in default may be rein stated only on the payment of all dues in arrears."
It appears, therefore, that, instead of depending upon the customary method of collecting accounts, the Supreme Court felt that the suspension of the right to practice law would be sufficient in itself without exercising any further remedy.

Section 11 of Rule IV mentioned above also provides that the Treasurer of the Virginia State Bar shall promptly give notice of an attorney's delinquency in the payment of his dues to the Judge of the Judicial Circuit in which the attorney principally practices his profession and also to the Clerk of the Supreme Court of Appeals of Virginia. I assume this notice has been given. If the attorney continues to engage in the practice of law before he is reinstated upon the payment of dues in arrears, I think it would be proper for you to report this fact to the Judge of the Judicial Circuit and to the Supreme Court for such action as they deem proper.

BAIL AND RECOGNIZANCE—Surety is not released until final disposition of the case including proceedings on appeal to circuit court.  F-27

HONORABLE JAMES M. SETTLE, Clerk, Rappahannock County.

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

"A person under recognizance, with security, to answer for a misdemeanor before a trial justice, appears at the time specified for trial, and is convicted of a misdemeanor, and thereafter moves for an appeal to the Circuit Court, and the said appeal is granted.

"Question: Is the surety on such bond released from any future liability on said bond upon conviction of accused in the Trial Justice Court, or is said surety held liable on said bond until the appeal, when granted, is finally disposed of in the Circuit Court or to any other Court to which the case may be appealed? Does liability of surety on a bail bond, in misdemeanor cases, continue in full force and effect until final disposition of the case?"

The answer to your question may well depend upon the language used in the particular bond. However, it is my understanding that the form generally used throughout the State reads, in part, as follows:

"*** upon this condition: That the said.........................., shall appear before the.......................... Court of.......................... County on the..............day of.........................., 19........, at ..........m., at.........................., Virginia, and at any time or times to which the proceedings may be continued or further heard, and before any court thereafter having or holding any proceedings in connection with the charge in this warrant, to answer for the offense with which he is charged, and shall not depart thence without the leave of said court, the said obligation to remain in full force and effect until the charge is finally disposed of or until it is declared void by order of a competent court; ***."

This form of recognizance is prescribed in detail by Section 19-104 of the Code and this office has previously ruled that there is no authority for taking a recognizance on any other conditions. See, Report of the Attorney General, 1940-1941, page 12.

Therefore, assuming that bail bond to which you refer is written in language similar to that found in the form quoted above, I am of the opinion that the surety would be liable until the final disposition of the case which would include the disposition of an appeal from a Trial Justice Court to a Circuit Court.
BLIND COMMISSION—Procedure where county refuses to provide minimum aid. F-160

Honorable L. L. Watts,
Executive Secretary, Virginia Commission for the Blind.

October 24, 1950.

This is in reply to your letter of October 19, 1950, in which you state that the Commission passed a resolution effective October 1, 1950, establishing a minimum of 75% in the proportion of need to be met, exclusive of shelter which is to be met in full up to the amount set forth in the State Standard Budget Guide. The purpose of this resolution was to comply with the provisions of the Social Security Act. You state further that all of the welfare boards in the State, with the exception of one, have complied with the regulation, and request an opinion as to whether the Commission's regulation can be enforced and, if so, what procedure is to be followed.

That the Commission has the authority to make regulations which are binding on local boards for the purpose stated is clear. Section 63-174 of the Code reads, in part, as follows:

"The Commission shall co-operate with the Federal Social Security Board, and other agencies of the United States, in any reasonable manner that may be necessary for this State to qualify for and to receive grants or aid from the Federal Social Security Board, the United States, and other agencies thereof for aid to the blind in conformity with the provisions of this law, ** **."

Section 63-171 defines the Commission's rule making power and reads as follows:

"The Commission shall, as to matters relating to aid to the blind make such rules and regulations, not in conflict with this law, as may be necessary or desirable to carry out the true purpose and intent of this law and to provide for the proper supervision and administration of this law. Such rules and regulations shall be binding on all officers, agents and employees, State and local, engaged in the administration of the provisions of this law."

Sections 63-197 and 63-198 provide that the Commission, upon its own motion, may review any decision of a local board and the decision of the Commission shall be final and treated as the decision of the local board.

It seems clear from the above statutes that the Commission is well within its authority in requesting the local boards to make payments to needy blind persons in an amount sufficient to comply with the Social Security Act.

Sections 63-199 and 63-200 provide for the enforcement of such regulations. Section 63-199 reads as follows:

"If any county or city, through its appropriate authorities or officers, shall fail or refuse to provide for the payment of aid to the blind in such county or city in accordance with the provisions of this law, the Commission shall through appropriate proceedings require such authorities and officers to exercise the powers conferred and perform the duties imposed by this law."

Section 63-200 reads as follows:

"For so long as such failure or refusal shall continue the Commission shall authorize and direct the secretary, under rules and regulations of the Commission, to provide for the payment of aid to the blind in such county or city out of funds appropriated for the purpose of carrying out the provisions of this chapter. In such event the secretary shall at the end of each month file with the State Comptroller and with the board of supervisors, council or other governing body of such county or city a statement showing all dis-
bursements and expenditures made for and on behalf of such county or city, and the Comptroller shall from time to time as such funds become available deduct from funds appropriated by the State, in excess of requirements of the Constitution of Virginia, for distribution to such county or city, such amount or amounts as shall be required to reimburse the State for expenditures incurred under the provisions of this section. All such funds so deducted and transferred are hereby appropriated for the purpose set forth in subsection (a) of §63-108 and shall be expended and disbursed as provided in §63-108."

It is my opinion that the Commission should authorize the Executive Secretary to provide for the supplementary payments to the persons in the county refusing to comply with the regulation and then file the required statement with the Comptroller for the purpose of reimbursement.

BOARD OF SUPERVISORS—Authority to install street lights. F-33

HONORABLE FRANK L. McKINNEY,
Attorney for the Commonwealth for Halifax County.

December 18, 1950.

This is in reply to your letter of December 4, relative to the question set forth below:

"** the power of the county to pay the cost of street lighting in a residential development located in the county near the Town of South Boston. This is a development of about twenty-five residences. The people who made the development paid the cost of paving the street, and they are asking that the county bear the cost of lighting the street, which will require about four street lamps. The lighting facilities would, of course, be installed by the electric light and power company without any cost to the county. The only question is the right of the county to pay the expense of street lighting in this development."

Section 15-778 of the Code of Virginia provides:

"The boards of supervisors of counties adjoining and abutting a city with a population of twenty-five thousand, or more, inhabitants, as determined by the United States census of nineteen hundred and thirty may, in their discretion, install and maintain suitable lights on the streets and highways in the villages and built-up portions of such counties, respectively, and pay the costs of such installation and maintenance out of the county fund."

The section quoted above expressly authorizes the boards of supervisors of counties "adjoining and abutting a city with a population of twenty-five thousand, or more, inhabitants" to install and maintain street and highway lighting systems in the villages and built-up portions of such counties.

In the absence of such a statute as this, it would seem that authority to provide such a lighting system might be predicated upon "the general welfare" clause of the Code, section 15-8. Since, however, the Legislature has expressly dealt with the subject in section 15-778, and in doing so has confined the grant of such authority to counties adjoining or abutting large cities, it is my opinion that the authority of the board of supervisors to provide for street lighting is confined, under section 15-778, to counties adjoining or abutting cities of the prescribed sizes.

However, where sanitary districts are created pursuant to certain Code provisions, I am of the opinion that the governing body has the authority to provide
lighting within such sanitary districts. I am not advised as to the types or boundaries of the sanitary districts within your county. I refer to you a former opinion of this office relating to county street lighting rendered to the Honorable John T. Duval on April 18, 1950. For your information, a copy of that opinion is enclosed herewith.

BOARD OF SUPERVISORS—Authority to meet at place other than courthouse. F-33

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

April 24, 1951.

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

"Will you, * * * be good enough to examine the Code sections recited herein, and let me have the benefit of your opinion as to whether or not the Board of Supervisors of this County can legally hold a meeting for the purpose of a public hearing on the budget at a place other than the Circuit Courtroom at Fairfax, Virginia."

Section 15-241 of the Code of 1950 provides for a monthly meeting of the board of supervisors at the courthouse, and it would seem this requirement must be fulfilled. However, §15-242 provides for special meetings of the board at such times and places as the board may find convenient. I am advised of no reason why a special meeting for the purpose of a public hearing on the budget could not be called at such place as the Board desires. It would, of course, be necessary in calling such meeting to fulfill the requirements as to notice, etc., for a special meeting, (§15-243) and also the requirements as to notice for a public hearing on the proposed budget (§15-577).

BOARD OF SUPERVISORS—Authority to pay members of Fire Commission for attending meetings. F-61

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

October 5, 1950.

This is in reply to your letter of September 28, 1950, in which you request my opinion as to whether the Board of Supervisors can expend a portion of the fire levy fund provided for in Chapter 40, page 38, Acts of Assembly for the Extra Session of 1944-45, for the purpose of payment to the individual members of the Fire Commission for attending monthly meetings of the Commission.

You state in your letter that the Fire Commission consists of one representative of each of the county’s fire departments and one member of the Board of Supervisors. Your letter excludes from consideration the member of the Board of Supervisors on the Commission. You further state that "the main purpose of this commission is to consider the various obligations of the various departments, and to recommend to the Board of Supervisors the merits of the various claims of the several departments, and whether or not same should be paid, and to further recommend from time to time the expenditure of the funds in the fire levy fund."

Chapter 40 of the Acts of Assembly for the Extra Session of 1944-45 applies to Fairfax County, and reads in part as follows:

"The board of supervisors may also use any part of the fund raised by such special levy for the purpose of maintaining and operating buildings in
which any such fire equipment is kept, for fuel to be used in heating such buildings, telephone service therein, purchasing of oil, grease, gasoline, tires and necessary replacements and repairs to such fire fighting equipment, for payment of full time or part time firemen,***” (Italics supplied)

Fire commissions, such as that established in your county, play a useful and important part in planning and coordinating a county's fire fighting facilities. The Act provides for the payment of firemen and, inasmuch as attendance at meetings of the fire commission may be properly considered a part of the duties of a fireman, it is my opinion that the Board of Supervisors may use a part of the fire levy fund for the payment of members of the Commission for attendance at the Commission's meetings.

BOARDS OF SUPERVISORS—Authority to prohibit dogs running at large.
F-95
June 25, 1951.

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

This is in reply to your letter of June 19, 1951, from which I quote as follows:

"The Board of Supervisors of Nelson County wishes to prohibit dogs from running at large under Section 29-194 of the Code.

"The provisions of this Section appear somewhat ambiguous to me, and I will appreciate your opinion on the following questions in this connection.

"If the Board passes an ordinance prohibiting the running at large of dogs, as defined in this Section, will it be necessary for the owner of a dog found running at large to be first notified under this Section, before there is a violation?

"Is the Board of Supervisors limited by the fine of not less than five nor more than twenty-five dollars, as set forth in this section, or could they increase the maximum fine to one hundred dollars in the ordinance?

"My interpretation of this Section is that if the owner of a dog, after being notified under the Section that it has been running at large, thereafter permits the dog to run at large, he can then be convicted under the Section, without the necessity of any ordinance. But, the Board could pass an ordinance in this connection, doing away with the necessity of the notice required to the owner of the dog. Is this correct?"

Section 29-194 reads as follows:

"The governing bodies of the counties of this State are hereby authorized, in their discretion, to prohibit the running at large of dogs during such months as they may designate. For the purpose of this section, a dog shall be deemed to run at large while roaming, running or self-hunting off the property of its owner or custodian and not under its owner's or custodian's immediate control. It shall be the duty of the game wardens to enforce the provisions of this section, and any person who after having been notified by any landowner, game warden or other officer of the law that his dog is running at large, permits his dog to run at large thereafter, shall be deemed to have violated the provisions of this section, and shall be liable to a fine of not less than five nor more than twenty-five dollars for each violation."

You will observe from reading §29-194 that the section itself does not prohibit anything, it merely authorizes the governing bodies to do so. In other words, this section is, in my opinion, merely an enabling act. Therefore, the governing body
of a county may by appropriate ordinance prohibit the running at large of dogs during such months as it may designate and under the limitations as to the notice and amount of punishment fixed by the section.

I realize that the phrase "shall be deemed to have violated the provisions of this section" causes the section to appear to be of itself a criminal enactment, but after a careful consideration of the entire section, I am of the opinion that, inasmuch as the section does not purport to prohibit the running at large of dogs but merely authorizes the counties to do so, it should be construed as an enabling act only.

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**BOARDS OF SUPERVISORS—Authority to prohibit running at large of dogs—Rabies. F-33**

**June 12, 1951.**

_Honorable R. V. Sneed,_
Attorney for the Commonwealth for Rappahannock County.

This will acknowledge receipt of your letter of June 9th which I quote below:

"I am writing to request your interpretation of section 29-195 of the Virginia Code."

"The Board of Supervisors of Rappahannock County will meet on June 18 and one of the questions to be decided is whether or not an emergency exists under Section 29-195 of the Virginia Code."

"Although there is no proof that a mad dog is at large and has bitten other dogs in this County, that is a fact in Fauquier County which adjoins Rappahannock County."

"Would the Board of Supervisors in this County have the authority to declare that an emergency exists and pass an ordinance which would become effective immediately upon passage under these circumstances?"

"Should the last sentence of this Section be construed as meaning that the governing body of any county, city or town shall have the power and authority to pass ordinance restricting the running at large of dogs which have not been inoculated or vaccinated only if an emergency exists, or does it mean that the governing body has this power independently of whether or not this emergency exists."

Section 29-195 of the Code, to which you refer, reads as follows:

"Upon proof that a mad dog is at large and has bitten other dogs, an emergency shall exist, and the governing body of any county, city or town shall have the power to pass an ordinance, which shall become effective immediately upon passage, requiring the owners of all dogs therein to keep the same confined in their premises unless muzzled in such manner that persons or animals will not be subject to the danger of being bitten thereby, but such period shall not exceed forty-five days. Any trial justice, on proof that any dog is mad or has been bitten by a mad dog, shall order such dog to be killed. If it is believed that such dog has been bitten by a mad dog but the proof is not sufficient, the trial justice may order the owner to confine it for observation. The governing body of any county, city or town shall also have power and authority to pass ordinances restricting the running at large in their respective jurisdiction of dogs which have not been inoculated or vaccinated against rabies and to provide penalties for the violation thereof." (Section 29-195).

As I interpret the section, I do not think that a mad dog would necessarily have to be running at large in Rappahannock County to justify the Board of Supervisors of that County in declaring an emergency to exist. For example: The dog
may be running at large and have bitten other dogs in the county adjoining Rappahannock but close to the border of the latter county and thus constitute a potential menace in Rappahannock. It should be remembered that the purpose of the section is to protect the citizens of a county and if in the opinion of the Board of Supervisors the factual situation is such as to constitute a very real danger, I am of the opinion that the Board may declare an emergency. A statute of this character should be liberally construed in favor of minimizing the menace so far as possible.

I am further of the opinion that it is not necessary that an emergency exist in order for the Board of Supervisors to enact an ordinance pursuant to the last sentence of the section. This section seems to me to confer a general power upon the Board to restrict the running at large of dogs in its jurisdiction under certain circumstances.

BOARD OF SUPERVISORS—Authority to use General County Funds to establish secondary road. F-192

July 26, 1950.

HONORABLE STANLEY A. OWENS,
Attorney for the Commonwealth for Prince William County.

This will acknowledge receipt of your letter dated July 24, 1950, which I quote as follows:

“Our Board of Supervisors is desirous of knowing whether it is permissible to use county GENERAL FUNDS to establish a secondary road in Prince William County, and not take the cost out of secondary road funds. We desire to make the survey and purchase whatever right of way may be necessary, in connection with the Projected Monticello Highway, so the road can come into being and be eligible for consideration for inclusion into the Primary Road System of the State. Your opinion on this will be appreciated. Our Board will meet on August 10 and we hope you can let us hear from you by that time.”

This office has held several times that it is permissible to use general funds of the county to obtain a right of way for a public road as may be seen from reference to the Reports of the Attorney General in a letter from Honorable Abram P. Staples, Attorney General, to Honorable W. Earle Crank, Attorney for the Commonwealth, Louisa, Virginia, dated January 5, 1938, and again by letter from Justice Staples to Honorable T. Moore Butler, Attorney for the Commonwealth, Covington, Virginia, dated July 10, 1941.

Your attention is called to a portion of Section 33-141 of the 1950 Code of Virginia, which provides as follows:

“* * * and provided further, that when any such board or commission appointed by the board of supervisors or other governing body of a county to view a proposed road or to alter or change the location of an existing road shall award damages for the right of way for the same, in either case to be paid in money, it may be paid by the board of supervisors or other governing body of the county out of the general county levy funds; * * *.”

In view of the plain language of the foregoing section and the previous opinions of this office, I am of the opinion that it is permissible for the Board of Supervisors of Prince William County to use general funds of the County to acquire necessary rights of way to establish a public road to be placed in the secondary system of highways, and that it is not necessary to take such cost out of secondary road funds allocated to the County.
BOARD OF SUPERVISORS—Authority to zone portion of county. F-33

December 20, 1950.

HONORABLE A. L. MARCHANT,
Commonwealth Attorney of Mathews County.

This is in reply to your letter of December 11, 1950, from which I quote as follows:

"Does the Board of Supervisors of Mathews County have the authority to pass a zoning ordinance prohibiting the erection of bill boards and other signs and the establishment of junk yards on private property adjoining the rights of way of the main highways in this county?"

As indicated by your letter the question presented is whether the County Planning Commission should certify to the Board of Supervisors a zoning plan for all of the unincorporated territory in the county or whether, where there is no desire for an over-all zoning plan, it may present a plan for a particular portion of such territory.

I am enclosing a copy of an opinion rendered to the Honorable P. W. Ackiss on October 28, 1938, by the former Attorney General, the Honorable Abram P. Staples, in which the view was expressed that the zoning acts do not contemplate the creation of isolated restricted areas. It should be noted that this opinion was rendered prior to the decision of the Supreme Court of Appeals of Virginia in the case of Fairfax County v. Parker, 186 Va. 675. In the Fairfax County case, as you point out, the court expressed the view that whether the entire area of the county or only a portion thereof should be zoned is left to the discretion of the Board of Supervisors. The court went on to point out that the reasonableness of the restrictions imposed by zoning ordinances is subject to judicial review.

It is entirely conceivable that the court might hold an attempt to zone only a particular portion of a county so as to restrict only certain types of structures would be arbitrarily discriminatory and unreasonable. In my opinion, however, the avowed purpose of the proposed zoning ordinance is a valid one and the restrictions sought to be imposed thereby bear a definite relation to that purpose and are therefore reasonable.

BOARD OF SUPERVISORS—Chairman may vote on all issues not merely to break tie. F-33

December 26, 1950.

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

This is in reply to your letter of December 21st in which you requested my opinion as to whether the Chairman of the Board of Supervisors should vote on every issue before the Board of whether he should vote only in order to break a tie.

As you pointed out, Section 15-223 of the Code provides that the Board of Supervisors shall "choose one of their number as Chairman" and Section 15-245 of the Code provides in part that "all questions submitted to the Board for decision shall be determined by a viva voce vote of a majority of the Supervisors voting on any such questions * * *".

I concur with your conclusion that the above sections clearly indicate that the Chairman should vote on all matters before the Board and I am unable to find any authority to support the contention that he is not allowed to vote on matters before the Board unless there is a tie vote among the other members.
BOARDS OF SUPERVISORS—Constitutionality of statutes providing for election by vote of entire county rather than by vote of magisterial district. F-83

HONORABLE ANDREW W. CLARKE,
State Senator.

This is in reply to your letter of June 29, in which you request my opinion as to whether the statutes providing for the adoption of the county manager form of government in counties may constitutionally provide for the adoption of that form of government by a majority of those voting in the entire county with the result that, if the new form is adopted, the supervisors of the county will be elected by a majority of the voters of the entire county rather than by a majority of the voters of the respective magisterial districts represented.

The organization and government of counties is dealt with in Article VII of the Constitution of Virginia, which embraces Sections 110 through 115a. Section 111 provides that:

"* * * Subject to the provisions of section one hundred and ten, in each district there shall be elected by the qualified voters thereof, one supervisor. * * *"

The underscored language implies that the district autonomy specified in the remainder of the sentence may be dispensed with in accordance with the provisions of section one hundred and ten. The last paragraph of Section 110 reads as follows:

"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, to become effective in any county when submitted to the qualified voters thereof in an election held for such purpose and approved by a majority of those voting thereon."

It is clear, therefore, that statutes providing for the adoption of complete forms of county organization and government by the approval of the majority of those voting in an election submitting the question to the qualified voters of the county as a whole are constitutional, and this is so, whether or not the form of government being passed upon provides for the election of supervisors by the voters of the entire county rather than of the individual districts.

Section 15-268, dealing with the election on the adoption of the county manager and county executive forms of government, follows the requirements of Section 110 of the Constitution in providing that, if a "majority of the qualified voters of the county voting" are in favor of changing the county's form of government, the court shall enter of record the fact as to the form of government adopted. It is my opinion, therefore, that this procedure is clearly authorized by the Constitution of Virginia.

BOARDS OF SUPERVISORS—Contracts between Board members and Board improper. F-33

HONORABLE DANIEL W. McNEIL,
Attorney for the Commonwealth for Rockbridge County.

This will acknowledge receipt of your letter dated July 7, 1950, in which you inform me that it is necessary for the County of Rockbridge to acquire certain lands
from Mr. E. M. Hull, a member of the Board of Supervisors of said County, for right of way to Route No. 780, which is a part of the secondary system of highways. You state that Mr. Hull will convey the land to the County of Rockbridge for a consideration of $300.00 and that this price is agreeable to the Board of Supervisors. The legal question is presented in your letter as follows:

"The question that confronts me is this—under section 15-504 of the Code of Virginia a member of a Board of Supervisors is prohibited from having any interest in the sale of property or other commodity to the Board of Supervisors of his county. I would therefore like to have your advice as to whether or not under the circumstances in this case, it would be improper and unlawful for E. M. Hull to sell and convey by deed to the county of Rockbridge the land involved in this right of way, for public road purposes, at the agreed price of $300.00. The only other method for the county or the Commonwealth of Virginia to obtain title to this right of way is to proceed by condemnation proceedings, and this seems to me to be unnecessary in this instance, as there is no disagreement between the parties. It may be a technical violation of the law, if the supervisor sells his own land to the county for public road purposes, but certainly would only be a technical question according to my view. However, I would like your opinion before this transaction is disposed of."

The pertinent portion of Section 15-504 of the 1950 Code of Virginia, to which you refer, is as follows:

“No supervisor * * * shall become interested, directly or indirectly, in any contract, or in the profits of any contract, made by or with any officer, agent, commissioner, or person acting on behalf of the supervisors, the county school board, or superintendent of the poor of the county, or 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 the working and keeping in repair the public roads in the county.”

I assume from your letter that the Board of Supervisors of Rockbridge County contemplates paying for this right of way out of the general funds of the County pursuant to the provisions of Section 33-141. If this assumption is correct, I concur with your views and am of the opinion that the provisions of Section 15-504 are applicable and would, therefore, prohibit Mr. Hull, a member of the Board of Supervisors, from entering into an agreement with the Board to convey this land.

You state in your letter that you would like my views upon the proper procedure. In this connection, I wish to call your attention to the provisions of Sections 33-46 through 33-49, inclusive, which provide for the control, supervision and management of roads in the secondary system and for the allocation of funds to the several counties for such roads. It is my opinion, if the title to this property is acquired under the provisions of these sections by the Commonwealth of Virginia and paid for by a State check from monies allocated to the County, that the provisions of Section 15-504 would not then be applicable because County funds would in no way be involved. The manifest purpose of this statute is to prevent a supervisor, or other officer, from obtaining an unfair advantage in contracting with the county by reason of the position which he occupies, and, of course, no such advantage could be obtained if the money paid to the officer is from State funds and subject to the approval of the State Highway Commissioner.
REPORT OF THE ATTORNEY GENERAL

BOARD OF SUPERVISORS—Majority required to pass question. F-33

October 23, 1950.

MR. A. STRODE BRECKMAN,
Division Superintendent of Schools.

I am sorry that the press of work in the office has delayed my reply to your letter of October 11th in which you state that a regular meeting of the County Board of Supervisors held on October 10th, at which meeting all six members of the Board were present, the Board voted on a motion to approve the request of the County School Board that it be given authority to apply for a Literary Fund loan, on which motion three members of the Board of Supervisors voted in the affirmative while three members present abstained from voting. You request my opinion as to whether or not this action of the Board of Supervisors would give the School Board legal authority to proceed with their application to the State Board of Education for the desired loan.

Section 15-245 of the Code which deals with how questions presented to the Board of Supervisors are determined provides that

"all questions submitted to the Board for decision shall be determined by a viva voce vote of a majority of the Supervisors voting on any such question."

Prior to 1946 this section, which was Section 2717 of the former Code, provided that questions should be determined by a majority of the supervisors present. I am enclosing a copy of an opinion rendered by the Honorable Abram P. Staples on April 28, 1939, while he was Attorney General, to the Honorable Frank Nat Watkins, Commonwealth's Attorney of Prince Edward County, in which he expressed the view that even under the law as it formerly read a motion receiving a majority of votes of those actually voting was legally passed even though it was not a majority of those actually present. This view was based upon the fact that a number of members who were present but refrained from voting should be considered as acquiescing in the action of the majority of those actually voting. It was pointed out that if any other ruling were given a member could by refraining from voting prevent the operation of the tie-breaker provisions of the statute. In my opinion the views expressed in this former opinion of this office are correct. In any event the amendment of the statute changing the majority of the supervisors required from these present to those voting eliminates any question on this matter. Only a majority of those actually voting is now required.

BOARDS OF SUPERVISORS—Making purchases from member of Board, illegal. F-33

July 26, 1950.

HONORABLE L. B. MASON,
Clerk, Board of Supervisors of King George County.

This is in reply to your letter of July 18, from which I quote as follows:

"The Commonwealth's Attorney of this County has brought to the attention of the Board of Supervisors of this County that you have rendered a recent opinion that it was illegal for the Board of Supervisors to make any money purchases from a member of the Board of Supervisors.

"The Board of Supervisors of this County has for several years been purchasing small articles from a store across the road from the Court House, which is the only store in the village of King George that handles the articles needed. Mr. W. R. Garner, the merchant, was elected a member of the Board of Supervisors for the term commencing January 1, 1948, and the janitor, after
direction by the Board, has continued to purchase janitor supplies such as furniture oil, soap, electric bulbs, brooms, mops, floor oil and other small articles. The bill for the whole year does not amount to $100.00—-to be exact, last year, the whole bill was $82.66. Mr. Garner sells these articles to the County at the same price as he would to any individual.

"Will you please give me your opinion if the Board of Supervisors is violating Title 15, Section 504 of the 1950 Acts of Assembly."

The Commonwealth’s Attorney must have reference to my opinion of May 31, 1950, rendered to the Honorable R. A. Bickers, Commonwealth’s Attorney for Culpeper County, in which it was held that Section 15-504 of the Code clearly prevented a certain corporation from selling parts to a local school board since a member of the board of supervisors had a controlling interest in such corporation.

Since Section 15-504 also expressly includes within its provisions a person acting on behalf of the supervisors as well as the county school board and the superintendent of the poor, I am of the opinion that the conclusion reached in my letter referred to above would be applicable to the facts present here.

Therefore, it is my opinion that it is improper for a merchant who becomes a member of the Board of Supervisors to sell merchandise to the county or to any person acting in its behalf.

BOARD OF SUPERVISORS—May appoint assistant county executive in counties having executive form of government. F-33

March 8, 1951.

HONORABLE D. B. MARSHALL,
Commonwealth’s Attorney for Albemarle County.

I have your letter of March 6, from which I quote as follows:

"The Board of County Supervisors of Albemarle County have asked me to request an opinion from you. As you may recall, Albemarle has the County Executive Form of government as authorized in Title 15, Chapter 11, Article 2, of the 1950 Code of Virginia. (Section 15-272 through Section 15-304).

"The particular question concerns the legality of creation, by the Board of Supervisors, of a position to be known as 'Assistant County Executive' or as 'Assistant to the County Executive' with an appropriate salary allowance in the county budget. It has been suggested that some such position should be created so as to have some person in titular authority at all times to act with the County Executive and to act alone in the event of the latter's absence or disability as contemplated by the language of Section 15-280.

"The decision regarding this matter will have some effect upon the 1951-52 budget for this County now in preparation, so we would appreciate a reply to this inquiry as soon as possible."

Section 15-281 of the Code, dealing with the County Executive Form of government, gives to the Board of County Supervisors the authority to appoint, upon the recommendation of the County Executive, all officers and employees in the administration service of the County with certain exceptions not pertinent here. It seems clear that under this authority the Board may appoint an Assistant to the County Executive and when such an appointment has been made it seems equally clear that under Section 15-280 the Board in the case of the absence or disability of the County Executive may designate the appointee to perform the duties of the office of County Executive.
BOARD OF SUPERVISORS—No authority to carry insurance to protect County Treasurer from personal loss. F-33

April 3, 1951.

HONORABLE BERNARD MAHEN,
Commonwealth’s Attorney for Caroline County.

This is in reply to your recent letter in which you state that the Treasurer of Caroline County is bonded for the protection of the County and the Commonwealth from the loss of public funds. You point out that the premium on this bond is paid by the County and the Commonwealth and desire my opinion as to whether or not the Board of Supervisors has authority to carry an insurance policy which would protect the Treasurer individually if there were any loss.

I am unable to find any authority which will allow the Board of Supervisors to pay the premium on a bond which protects a county official in his individual capacity. As you point out, this type of bond is entirely for the benefit of an individual and in no way protects the County, the Commonwealth or the general public. Under such circumstances, therefore, it is my opinion that the payment of a premium for an insurance policy for the benefit of the Treasurer as an individual would not be a proper expense to be paid by Caroline County.

BOARD OF SUPERVISORS—No authority to divert proceeds of bond issue to a new purpose. F-213a

September 21, 1950.

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

This is in reply to your letter of September 19, 1950, in which you request an opinion as to whether—after holding a referendum and selling bonds for the purpose of acquiring and constructing a sewage collection and disposal system for a particular sanitary district, which system, according to the resolution of the Board of Supervisors authorizing the issuance of bonds, was to be “substantially in accord with the Report of the office of Sanitary Engineer, County of Fairfax, Virginia, dated June 29, 1949”—the Board of Supervisors can now abandon the original plan and use the proceeds of the bond issue, or a portion thereof, for the purpose of participating in the construction and operation of a sewage treatment plant jointly owned and operated with other political subdivisions.

Your letter states that, prior to the referendum, the voters were advised as to the details of the proposed sewage system.

It is my opinion that the Board of Supervisors has no authority to use the funds derived for this specific purpose for some other purpose. The distinction between an independently owned and operated sewage disposal system and a similar system owned jointly with other political subdivisions is immediately apparent and, in my opinion, both the voters and the bondholders could validly object to this drastic deviation from the avowed purpose of the bond issue, in spite of the fact that the proposed deviation might result in a savings to the district.

BOARD OF SUPERVISORS—No authority to enact ordinance paralleling State law or regulating hunting. F-60a—F-71

July 17, 1950.

HONORABLE ERNEST E. ORANGE,
Trial Justice for New Kent County.

This is in reply to your letter of June 14, with which you sent me a copy of an ordinance adopted by the Board of Supervisors of New Kent County on December
12, 1949, prohibiting the possession of loaded firearms upon the public roads of the County, or by persons unlawfully upon the lands of another. You request my opinion as to the validity of that ordinance.

The purpose of the ordinance, as appears from its preamble, is to eliminate the hazards resulting from idle shooting on the highways and on private property where the persons shooting have been given no right to be thereon. The State has general laws prohibiting persons from shooting on the public roads and also prohibiting trespassing on the lands of another. (Sections 33-287 and 18-225 of the Code of Virginia.) There are also State statutes that regulate the carrying of weapons, as the statute forbidding the carrying of concealed weapons and also statutes dealing generally with hunting.

This office has consistently held over the years that a Board of Supervisors does not have the authority to enact laws which parallel the general criminal laws of the State unless the Legislature has expressly authorized the same. It has also expressed the opinion that Boards of Supervisors have no general power to regulate hunting in view of the fact that the power to do so, once conferred upon them by Section 2743, was expressly repealed by Chapter 247 of the Acts of Assembly of 1930. See Reports of the Attorney General 1942-43 at page 34 and 1946-47 at page 18.

While much latitude undoubtedly exists under Section 15-8 of the Code, which authorizes Boards of Supervisors to adopt such measures as they deem expedient to secure the health, safety and general welfare of the inhabitants of their respective counties, particularly in so far as matters of purely local concern are involved, it is doubtful, in my opinion, as to whether the power conferred by that section would extend to the regulation of matters of a general nature which are more properly the subject of regulation by the General Assembly itself as a matter of State law and regarding which various statutory enactments have been adopted. It is, of course, difficult to lay down general rules as to where the dividing line should be drawn.

While the particular ordinance in question does not specifically purport to regulate hunting, it will undoubtedly affect those engaging in that activity as well as others who under the general laws bearing on the question would have the right to have the firearms in their possession. Since State statutes dealing with various phases of the problem involved have been adopted by the General Assembly, it is my opinion that the ordinance in question is of doubtful validity.

BOARD OF SUPERVISORS—No authority to establish price or bounds on private easement of necessity. F-33

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

This is in reply to your letter of December 5, 1950, as to whether, under Section 33-142 of the Code of Virginia, a County Board of Supervisors may establish bounds of and assess the price to be paid by the individual for an easement where one farmer owns land completely surrounded by other private owners without access to public roads.

The statute involved, Section 33-142, is set forth in part below:

"Whenever the board of supervisors or other governing body of any county shall be of opinion that it is necessary to establish or alter the location of a public road, landing or bridge or any other person applies to the board or other governing body therefor ***."

The above statute provides for the establishment or alteration of public roads, landings and bridges and makes no mention with regard to establishing or altering private driveways or lanes. Moreover, the procedure provided under this statute
if literally followed necessitates the spending of public funds and the taking of time of numerous individuals. The facts set forth in your letter show that this would be a private rather than public undertaking by reason of the facts that it would benefit only one individual; that there is no public interest in the course of the right of way and that the compensation for the easement is to be paid by an individual. Accordingly the statutory procedure is not to be followed under the proposed circumstances.

I concur in your view that the question involved relates to an easement of necessity. The principles concerning such right of way by necessity are set forth in Minor on Real Property and relate to established principles of real property law.

It is my opinion, should the parties not be able to settle their private dispute, that this is a question for judicial determination by the courts and, accordingly, outside the province of determination by a Board of Supervisors.

BOARDS OF SUPERVISORS—No authority to initiate a school bond election without concurrence or approval of school board. F-33

HONORABLE FLOYD HOLLOWAY,
Clerk, Board of Supervisors of York County.

March 2, 1951.

This is in reply to your recent letter in which you requested my opinion as to whether the Board of Supervisors has the authority, under Section 15-610 of the Code, to initiate a school bond issue election on the basis of a petition from the qualified voters and freeholders of the county, without first obtaining the concurrence or approval of the school board.

Section 15-610 was originally enacted as a part of Chapter 336 of the Acts of Assembly of 1940, which act is now found as Sections 15-606-15-622, inclusive, of the Code of Virginia. While Section 15-610 authorizes the Board of Supervisors to issue negotiable bonds to finance a "project", Section 15-613 makes it clear in my opinion that the project contemplated must be a revenue producing one. Furthermore, the act deals with county bond issues rather than school bond issues. Therefore, I am of the opinion that the answer to your question must be in the negative and that the only authority to issue school bonds is found in Section 22-167 or in Section 22-168 et seq.

BOARD OF SUPERVISORS—No authority to join with other counties to create district home for poor. F-179

HONORABLE RIPLEY S. WALKER,
Commonwealth's Attorney for Shenandoah County.

December 19, 1950.

I have your letter of December 11, from which I quote below:

"The Board of Supervisors of this County have been approached by other counties to join with them in the purchase of a district home for the benefit and maintenance of their poor.

"They have in their possession a very fine farm consisting of approximately 265 acres of possibly to the value of $40,000.00, and they have been able to care for most of the needy in this county with few exceptions. They do not desire to sell this farm, but would like to cooperate with other counties in a district home for some of the needy, which they have been unable to properly maintain."
"From the Statute 63-313 I think that it infers that when the buildings are finished and ready for occupancy the poor house of the county shall be abolished and the inmates shall be moved to the district home. Under Section 63-310 I think it requires the governing bodies to appropriate the money for the district home from the general funds and the general fund would be reimbursed from the proceeds of the sale of their almshouse.

"It seems to me that if they are required to make the appropriation to the district home from the general funds that it is mandatory that they sell the property and pay back the receipts of sale to reimburse the general fund of the county.

"I am very anxious that the board be advised if they can proceed otherwise in your opinion, and I would appreciate if you would give me your view and opinion in reference to the matter which I will indeed be very grateful."

The question presented by your letter is whether a county may join with one or more other counties in establishing and maintaining a district home for the poor as authorized by sections 63-308 to 63-318, inclusive, of the Code, and at the same time maintain and operate a county poorhouse as contemplated by sections 63-322 to 63-329, inclusive, of the Code.

In my opinion the pertinent statutes do not contemplate such an arrangement. For example, section 63-310 intends that the general fund of the county shall be reimbursed from the proceeds of the sale of the property used for the care of the poor for any appropriations made by the county for the establishment of the district home. Furthermore, section 63-313 provides that, as soon as the district home is finished and ready for occupancy, the poorhouses maintained by the several counties shall be abolished and the inmates moved to the district home. There are other sections of the Code, unnecessary to discuss in detail here, dealing with the two methods of caring for the poor which plainly show that the suggested arrangement is inconsistent therewith.

I understand that the thought has been expressed that something might be worked out by invoking sections 63-222 to 63-231, inclusive, of the Code, but as to this I am not advised.

BOARD OF SUPERVISORS—No authority to offer reward for apprehension of misdemeanants. F-122

HONORABLE D. B. MARSHALL,
Commonwealth's Attorney for Albemarle County.

May 16, 1951.

This is in reply to your letter of May 15th from which I quote as follows:

"The Board of Supervisors of Albemarle County has requested me to obtain an opinion from you concerning the Board's power to offer rewards for information leading to the apprehension and conviction of certain misdemeanants.

"Briefly, the situation is this. The members of the Board of Supervisors have become exercised over the continued practice of dumping trash and other refuse in this county in violation of section 33-279.1 of the Code of Virginia. The Board would like to issue a reward for information leading to the arrest and conviction of violators of that section. I know of no specific authority given to the Board to issue rewards except that contained in section 15-573, which applies only to felonies. In the absence of specific authority in the case of misdemeanors, is the Board without power to offer a reward for violators of section 33-279.1?"
REPORT OF THE ATTORNEY GENERAL

As you point out, section 15-573 of the Code authorizes the Board of Supervisors to offer rewards for the arrest and conviction of a person guilty of a felony. There is no specific authority so far as I can find for the Board to offer rewards in the case of misdemeanors. Since the General Assembly felt it necessary to empower the Board of Supervisors to offer rewards in felony cases, I doubt whether it can be held that the Board has the implied power to take such action in misdemeanor cases. My opinion is, therefore, that your inquiry must be answered in the negative.

BOARD OF SUPERVISORS—Notice required for special meeting.  F-33

April 23, 1951.

HONORABLE B. B. ROANE,
Clerk of Gloucester County.

I have your letter of April 16, in which you present the following question:

"Have the members of the Board of Supervisors of a county the right to waive the requirements of Section 15-243 of the Code of Virginia 1950, and hold a special meeting of the Board at any time a majority of the members may deem necessary.

"That is to say can two members of a three member Board hold a special meeting of the Board at any time they desire without giving the notice required by said Section 15-243."

The section to which you refer provides how a special meeting of the Board of Supervisors shall be held and requires that the Clerk shall notify each member of the Board of the time and place of the meeting and of the matters to be considered at the meeting. No notice of a special meeting to the general public is required. In other words, the information which is required to be contained in the notice is for the benefit of the members of the Board of Supervisors. I am of opinion, therefore, that the requirement as to notice of the meeting may be waived by all of the members of the Board, but I do not think that two members of a three-member Board can hold a valid special meeting when the third member of the Board has not been notified either of the time and place of the meeting or of the matters to be considered.

BOARD OF SUPERVISORS—Not required to let public work by bid unless county has adopted County Purchasing Act.  F-33—F-34

August 29, 1950.

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

This is in reply to your letter of August 28th in which you request my opinion as to whether or not it is necessary for the Board of Supervisors of Montgomery County to advertise for and receive competitive bids before letting a contract for building a new jail.

I agree with you that there is no statute requiring competitive bids on contracts let by counties except in the case of those counties which have employed a county purchasing agent or designated someone to act in that capacity under the provisions of Article 7 of Chapter 16 of Title 15 of the Code. See Section 15-549. Section 15-544 does provide that when such a purchasing agent has been employed all pur-
chases of and contracts for supplies, material, equipment and contractual services shall be based on competitive bids wherever feasible.

While there is a statute which requires contracts for public works in excess of $2500.00 let by the state to be based on competitive bidding after public advertisement except in cases of emergency (Sections 11-17 through 11-22) there appears to be no similar provision which is applicable to all counties. It is my opinion, therefore, that unless Montgomery County has adopted the county purchasing act as embodied in Sections 15-539 through 15-551 the question of whether competitive bids should be asked on contracts for the county is a matter of policy to be determined by the Board of Supervisors.

BOARD OF SUPERVISORS—Powers and duties with regard to adopting budget and fixing levy. F-33

April 11, 1951.

HONORABLE JOSEPH C. HUTCHESON,
Commonwealth's Attorney for Brunswick County.

I am in receipt of your letter of April 9, from which I quote as follows:

"The budget for Brunswick County for the fiscal year 1951-52 was duly prepared and advertised for public hearing at the March meeting of the Board of Supervisors. The advertisement in the newspaper stated that the levy would be a County unit or general levy (as authorized by Section 22-127 of the Code), not exceeding $2.50 per hundred dollars; and which was the same as the levy for the previous year.

"The budget of the School Board for the same fiscal year was duly prepared and presented to the Board of Supervisors for consideration at the same time that the County budget was to be considered. The School Board budget requested an appropriation of $293,550.00. It has been customary in Brunswick County to have a general levy and appropriate funds to the School Board in accordance with Section 22-127 of the Code.

"At the March meeting the Board of Supervisors considered both budgets and set the general County levy at $2.40 per one hundred dollars; and adopted resolutions appropriating the sum of $285,000.00 to the School Board. It was considered at that time by the Board of Supervisors that $285,000.00 was sufficient for School Board purposes and for this reason the levy was reduced to $2.40.

"No citizens appeared at the March meeting to express their opinion on the proposed budget.

"A few days thereafter a special meeting of the Board of Supervisors was called for April 3rd, at which time it adopted resolutions to the effect that it would guarantee the School Board the sum of $8,550.00, in addition to the $285,000.00 already appropriated, if such amount was needed during the fiscal year under consideration.

"The Board of Supervisors then rescinded the resolutions of the March meeting, which set the levy at $2.40; and then adopted resolutions setting it at $2.50.

"The notice of the special meeting of the Board of Supervisors did not state the purpose for which it was being called. It was served on the various members by the Sheriff but within less than five days before the meeting. However, all members of the Board were present at the meeting."

I assume that the Board of Supervisors complied with all of the requirements of Section 15-575 et seq. of the Code relating to the preparation, publication, etc. of the budget.
You ask the following questions:

"1. Was a special meeting of the Board of Supervisors legally held?
"2. Was the Board of Supervisors authorized to make a contingent appropriation to the School Board such as the $8,550.00, upon condition that it would be available 'if needed' during the fiscal year under consideration?
"3. In the event that the Board of Supervisors adopts resolutions setting the levy at the regular meeting for this purpose, may it, thereafter, at a special meeting, rescind such resolutions and adopt substitute resolutions setting the levy at another figure?
"4. If the special meeting, referred to above, was not legally held would the Board be authorized to rescind the resolutions in question and adopt new resolutions, setting the levy at another figure, at its regular April meeting?"

In connection with your first question, Section 15-243 of the Code relates to special meetings of the Board of Supervisors and is as follows:

"A special meeting of the board of supervisors shall be held when requested by two or more of the members thereof. Such request shall be in writing, addressed to the clerk of the board, and shall specify the time and place of meeting and the matters to be considered at the meeting. Upon receipt of such request, the clerk shall immediately notify each member of the board, in writing, to attend upon such meeting at the time and place mentioned in the request. Such notice shall specify the matters to be considered at the meeting. The clerk shall send a copy of such notice to each member of the board by registered mail not less than five days before the day of the special meeting; provided, that the clerk may have such notice served on the members of the board by the sheriff of the county, if he deems the same necessary to secure their attendance; and provided further, that no matter not specified in the notice shall be considered at such meeting, unless all of the members of the board are present. The sheriff shall be allowed fifty cents for the service of each such notice, payable out of the county levy."

From the facts stated by you, some of the above requirements as to a special meeting do not appear to have been complied with. However, all members of the Board were present, and I assume that no objection was raised to the manner in which the meeting was called or to the matters considered. I am inclined to think, therefore, that the meeting was legally held.

I do not think that as a practical matter your second question is particularly important, since Section 22-127 of the Code gives to the Board of Supervisors authority at any time to make an additional appropriation to schools from any funds available. Thus, should the $8,550.00 be needed at any time, the Board can make the appropriation out of any funds available.

Replying to your third question, Section 15-247 of the Code permits the Board of Supervisors to do anything at a special meeting which it may do at a regular meeting unless otherwise provided by law. I should think, therefore, that the action of the Board at the special meeting will stand, but, in view of my answer to your last question, I do not believe that the Board will have to rely entirely on its action at the special meeting.

With reference to your last question, as I have indicated above, while I am inclined to believe that the special meeting can be held to be a lawful one, there was not a literal compliance with the provisions of Section 15-243. The fixing of a county levy is a matter of extreme importance and there should be no doubt concerning the legality thereof. The Board of Supervisors does not have to fix the levy until its April meeting. Section 58-839 of the Code. I would, therefore, suggest that at this meeting the Board adopt appropriate resolutions to fix the levy and rescind the resolution adopted at the March meeting fixing the levy at $2.40 per one hundred dollars.
REPORT OF THE ATTORNEY GENERAL

BOARD OF SUPERVISORS—Powers and duties with regard to adopting budget and fixing levy. F-33

HONORABLE STANLEY A. OWENS,
Attorney for the Commonwealth for Prince William County.

I am in receipt of your letter of April 12, which reads as follows:

"The proposed budget for the coming year in Prince William County necessitates an increase in the levy and a hearing is scheduled for April 30 after thirty days notice.

"The question has arisen as to whether the proposed levy could be further increased by 10% or any amount. I cannot find any authority for it in the Code, but it is the impression of the members of the Board and some of the other county officials that in the past the levy has been increased in some cases as much as 10% at the final hearing without further advertisement. I would appreciate your setting us straight on this point.

"Our proposed budget has set up $97,500 for school capital outlay and $19,500 for the county jail capital outlay. The question has been raised whether at the final hearing on April 30 any portion of these two items could be diverted for some other purpose such as further increases for school teachers or any other purpose, notwithstanding the advertisement showing a proposed use for schools and a county jail.

"Your counsel on these points will be very much appreciated."

Section 15-582 of the Code provides in part that "before any local tax levy shall be increased, the amount and purpose of such proposed increase shall be published * * * 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 to be heard by, the local governing body on the subject of such increase."

I take it from your first question that the Board of Supervisors published notice of the proposed increase, but that it appears desirable now to increase the levy to an amount greater than that specified in the notice. I question the authority of the Board of Supervisors to take such action. The citizens might not object to the increase shown in the notice and thus not attend the public hearing, but they might have objected to a further increase and desired to attend the meeting and express such objection if they had had proper notice.

Referring to your second question, Section 15-575 of the Code requires the Board of Supervisors, at least thirty days prior to the time the annual levy is made, to prepare a budget showing the proposed expenditures and revenue and to publish a brief synopsis of the budget and give notice of one or more public hearings which any citizen of the county shall have the right to attend and state his views thereon. After such hearing the Board of Supervisors then prepares the final budget. Indeed the very purpose of the public hearing is to enable the Board of Supervisors to get information from and the views of any citizens who attend. Then the Board acts on the final budget. If the pertinent statutes contemplated that the proposed budget could not be changed, but was to be the final budget, the holding of the public hearing would be an idle gesture. Generally speaking, therefore, it is my opinion that after the public hearing the Board of Supervisors in fixing the final budget may make such changes in the proposed budget as the facts may justify.
REPORT OF THE ATTORNEY GENERAL

BONDS—Director of Finance—Amount of bond should be calculated on all monies received including proceeds of bond issues and Literary Fund Loans. F-181

February 16, 1951.

Mr. T. S. Dunaway, Jr.,
Director of Finance of Hilton Village.

This will acknowledge receipt of your letter of February 2, 1951, in which you request my interpretation of §15-336, Code of Virginia, relative to receipts from loan and bond issues by the Director of Finance.

Section 15-336 provides as follows:

"The county manager shall give bond to the amount of not less than five thousand dollars. The director of finance shall give bond to the amount of not less than fifteen per centum of the amount of money to be received by him annually. In case the county manager serves also as director of finance, he shall give bond to the full amounts indicated above. The board of county supervisors shall have the power to fix bonds in excess of these amounts and to require bonds of other county officers in their discretion, conditioned on the faithful discharge of their duties and the proper accounting for all funds coming into their possession."

It is to be noted that the sources of "the amount of money to be received by him annually" are not in any way restricted or confined. Moreover, it is the unquestionable intent of the section to provide an adequate bond based upon the amounts handled by the various Directors of Finance of the various counties. Accordingly, it is my opinion that the bond of a director of finance should include the proceeds from Literary Loans and bond issues received by him.

BONDS—Personnel of "courts not of record;" Requirements and payment for. F-181

March 30, 1951.

Honorable J. Gordon Bennett,
Auditor of Public Accounts.

This is in reply to the memorandum submitted by you with regard to the above mentioned matter.

I have thoroughly examined Chapters 3, 5 and 7 of Title 16 of the Code and agree with your conclusion that there are no provisions therein which specifically require a clerk of a civil and police court or a clerk of a police court to enter into a bond for the faithful discharge of his official duties. Furthermore, I am unable to find any requirement in Chapter 7 of Title 16 which would require a Judge of a Juvenile and Domestic Relations Court to be bonded.

In view of the apparent inconsistencies in the bond requirements for personnel of courts not of record, you desire my advice with respect to the following questions:

1. In those courts where collections are made for both the Commonwealth and the locality, and the judge is required to give bond, should the bond be written in favor of the Commonwealth and the locality, or should separate bonds be given in favor of each in order to afford proper protection?

2. In those courts where collections are made for both the Commonwealth and the locality, and the clerks or the clerk and deputies are required to give bond, should the bonds be written in favor of the Commonwealth and the locality, or should separate bonds be given in favor of each in order to afford proper protection?
3. In those courts where collections are made by both the Commonwealth and the locality, and there is no statutory requirement for the bonding of the judge, clerk, or deputies, would a bond be binding in the absence of a statutory requirement?

4. In order to afford proper protection for non-support funds collected in juvenile and domestic relations courts, would these funds be protected under a bond in favor of the Commonwealth, the locality, or would a separate bond be required for each?

5. Who should pay the premiums on the bonds under the several circumstances?

It is my opinion that the answers to the first, second and fourth questions quoted above are controlled by Section 49-12 of the Code. It reads, in part, as follows:

"Every bond required by law to be taken or approved by or given before any court, board or officer, unless otherwise provided, shall be made payable to the Commonwealth of Virginia, with surety deemed sufficient by such court, board or officer. Every such bond required of any person appointed to or undertaking any office, post or trust, and every bond required to be taken of any person by an order or decree of court, unless otherwise provided, shall be with condition for the faithful discharge by him of the duties of his office, post or trust."

It is noted that the above section requires that the bond be made payable to the Commonwealth of Virginia, and I am of the opinion that it was not contemplated that the bond should be written in favor of the Commonwealth and a locality. However, I am also of the opinion that since the bond shall be with condition for the faithful discharge of the duties of the office, post or trust, it would necessarily afford proper protection for the locality.

In answer to your third question, I am aware of no principle of law which would prevent a properly executed bond from being binding due to the absence of specific statutory authority requiring such bond.

It is a well established policy of the Commonwealth to pay premiums on bonds of public officers from the funds appropriated for the expenses of the office. Therefore, in answer to your fifth question, I am of the opinion that the premiums on the bonds under the several circumstances mentioned in your first four questions may be properly paid as an expense of the office in question.

BONDS—Standard Performance Bond—Right of materialman to benefit from State's bond. F-268f

JOHN S. BATTLE, JR., Esq., Attorney at Law.

September 12, 1950.

This is in reply to your letter of September 8, 1950 in which you state that the Superintendent of Construction at the University of Virginia desires my opinion as to whether a materialman furnishing materials to a contractor for use in the performance of a contract with the State receives any benefit from the Standard Contractor's Performance Bond executed by the contractor for the Commonwealth.

On the subject of the right of persons furnishing material or labor to sue on the contractor's bond to the owner, the following appears in 9 American Jurisprudence 61, Building and Construction Contracts §95:

"Although there are a few decisions to the contrary, the great weight of authority establishes the general rule that a person furnishing materials or labor may recover on a building contractor's bond to the owner, where it
contains a condition for his benefit and is intended for his protection, although
the owner is the only obligee named in the bond, and there is no express
provision that it shall inure to the benefit of laborers or materialmen or
that they may avail themselves of the security thereof. Such right is not
dependent on statute. Nor is it ordinarily affected by acts or omissions of the
obligee. ***

Section 55-22 of the Code of Virginia of 1950 reads as follows:

"An immediate estate or interest in or the benefit of a condition respect-
ing any estate may be taken by a person under an instrument, although he
be not a party thereto; and if a covenant or promise be made for the benefit,
in whole or in part, of a person with whom it is not made, or with whom it
is made jointly with others, such person, whether named in the instrument or
not, may maintain in his own name any action thereon which he might main-
tain in case it had been made with him only and the consideration had moved
from him to the party making such covenant or promise. In such action the
covenator or promisor shall be permitted to make all defenses he may have,
not only against the covenantee or promisee, but against such beneficiary as
well." (Italics supplied)

Under the provisions of this statute it was held by the Supreme Court of Appeals
of Virginia in Fidelity, Etc. Co. v. Mason, 145 Va. 138, that one furnishing labor
and material for the construction of a highway under a contract with the State
Highway Commission may sue the surety on the contractor's undertaking bond
entered into under the requirements of law for labor and material furnished in or
about the construction of the highway.

While the bond in the Mason Case is not identical to that now under considera-
tion, the clauses which were considered as binding the surety to the materialman in
that case are very similar to those used in the Standard Performance Bond and, in
my opinion, the materialmen who furnish materials to be used in the construction
or improvement contracted for are protected by the bond and may, under the statute
quoted, maintain an action thereon. As the Virginia Court said in the Mason Case,
"Any other construction than this would make the bond a sham and a fraud."

BONDS—Surety bond on deputy clerk of police court binding despite deputy
is minor. F-181

Honorable J. Gordon Bennett,
Auditor of Public Accounts.

I have your letter of May 25 in which you ask for my opinion on the following
question:

If a young lady who is employed in the clerk's office of a civil and police
justice court and is bonded, in the event of a shortage in court funds where
the employee is found to be responsible, would the fact of her being under
twenty-one years of age nullify the bond in a case where the surety company
becomes surety with knowledge of the infancy?

The surety company enters into the contract with full knowledge of the facts,
and so I am of the opinion that your question must be answered in the negative.
June 25, 1951

HONORABLE DELAMATER DAVIS,
Member of the House of Delegates.

This is in reply to your recent letter relative to the effect of the changes in population as shown by the last decennial (1950) census upon certain Acts of Assembly and sections of the Code of Virginia as they relate to the City of Norfolk.

Pertinent to your inquiry is Chapter 285 of the Acts of 1950 which is, 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."

My information is that the 1950 United States Census has been completed, and that the Keeper of the Rolls, pursuant to the above Act, has certified as of June 30, 1951, the ascertained populations of the cities and counties of the Commonwealth to the authorities thereof. My further information is that, according to the United States Census of 1940, the population of Norfolk was one hundred forty-four thousand three hundred and thirty-two, whereas according to the Census of 1950, its population had increased to two hundred thirteen thousand, five hundred and thirteen. I shall now briefly point out the effect of this change in population upon the statutes you mention, in the order in which they appear in your letter, so far as Norfolk is concerned.

Chapter 19 of the Acts of 1950 (§14-116 of the Code) deals with the fees of sheriffs, sergeants and criers in civil cases. Paragraphs (1) and (2) provide that the fees of these officers in certain cases shall be seventy-five cents, except that "in cities having a population of more than one hundred twenty thousand, but less than one hundred ninety thousand the fees for such service shall be fifty cents ***." Now that Norfolk has more than one hundred ninety thousand population, the fees to these officers for the services mentioned will be seventy-five cents.

Chapter 422 of the Acts of 1950 amends Chapter 261 of the Acts of 1936 which was continued in effect by §58-769 of the Code. The Act deals with the assessment of real estate in cities containing more than one hundred seventy-five thousand inhabitants and provides for an alternative method for the assessment of such real estate. The Act is now, of course, effective in Norfolk, but it does not necessarily change the method of assessing real estate in that City, since it is permissive only, providing that the council may adopt the alternative method.

Chapter 427 of the Acts of 1950 adds a new section to the Code (§24-194.2) relating to the appointment of additional judges and clerks of election by the electoral board of any city containing more than one hundred and ninety thousand population. This section is now applicable to Norfolk, but I call your attention to the fact that it only permits the electoral board to appoint additional judges and clerks.

Chapter 216 of the Acts of 1950 amended §1 of Chapter 408 of the Acts of 1948 which was continued in effect by §24-119 of the Code of 1950. The Act of 1948 makes mandatory a reregistration of all voters in the calendar year 1949 and every tenth calendar year thereafter in cities containing more than one hundred ninety thousand population. This Act is likewise effective in the City of Norfolk, due to the change in population, but since the calendar year of 1949 has now passed, the reregistration required in that calendar year cannot now be accomplished. How-
ever, under the law as it now stands, there will have to be a reregistration in the
calendar year 1959.

Now, taking up the sections of the Code of 1950 to which you refer.

Section 14-135 prescribes the fees of justices of the peace and paragraph (5)
thereof provides for a fee of fifty cents to this officer for issuing a warrant, except
that in cities between one hundred thousand and one hundred and seventy thousand
inhabitants the fee shall be one dollar. Since Norfolk now has a population of more
than one hundred and seventy thousand inhabitants, the fee of a justice of the peace
for issuing a warrant in that City is fifty cents.

You inquire about §16-111 of the Code providing for a civil justice in each city
containing forty-five thousand inhabitants or more. This section was not amended
in 1950 and its status has not been changed.

Section 16-113 deals with the salary of a civil justice in cities containing more
than fifty thousand inhabitants. This section was not amended in 1950 and its
status has not been changed.

Section 16-114 of the Code also deals with the salary of a civil justice in a
city having a population of not less than one hundred thousand, nor more than one
hundred and fifty thousand. This section was not amended in 1950, but since the
population of Norfolk is now more than one hundred and fifty thousand, the section
is not effective in that City.

Sections 16-132 and 16-132.1 were repealed by Chapter 383 of the Acts of 1950.

I must remind you, and this is especially true in considering the acts and
sections relating to the courts not of record in Norfolk, that what I have written
does not take into account any provisions of the City's charter which is not before
me, and upon which I am not attempting to pass. Where the charter of the city
may be involved, I suggest that you consult with the City Attorney.

CHILD LABOR LAWS—Meaning of “Restaurant”.  F-56

February 20, 1951.

HONORABLE EDMOND M. BOGGS,
Commissioner, Department of Labor and Industry.

I am in receipt of your letter of February 5, from which I quote in part as
follows:

"The Child Labor Law provides a minimum age of 18 for girls and 16
for boys for work in ‘restaurants’. We have been defining the word ‘restaurant’
as any place that operated under a restaurant keeper’s license.

"The 1950 General Assembly repealed the law so that on January 1, 1951,
restaurants, soda fountains, etc. are classified and taxed as retail merchants
rather than as restaurant keepers. (See Supplement of Vol. 8, 1950 Code of
Virginia, p. 47, Sec. 58-320)

"May this Child Labor regulation be interpreted that girls must be 18
years of age and boys 16 years of age in order to work in a restaurant, or
any place where food or beverages are consumed on the premises?"

It is true that the last General Assembly repealed Section 58-399 of the Code
imposing a State license tax on restaurants, and classified the keeper of a restaurant
as a merchant for license tax purposes, so that the keeper of a restaurant now secures
his license under Section 53-320 imposing a license tax on merchants. However,
this classification of a restaurant as a merchant was for tax purposes only. It is
my opinion that Section 40-109, prohibiting the employment of a boy under 16 and
a girl under 18 years of age in a restaurant, was not affected by the change in the
tax law dealing with restaurants. I suggest, therefore, that for the purpose of en-
forcing the provisions of Section 40-109 you adopt the same definition of a restaurant
that you have been using in the past.
CHILDREN—Legitimacy of child born in wedlock where husband is proven sterile.  F-231

Mrs. Elizabeth Painter,
Superintendent of Public Welfare.

I am in receipt of your letter of August 3. The material facts stated by you are as follows:

In 1930, H, an inmate of the State Colony, was sexually sterilized. In 1936 H intermarried with W. A child was born of this union in 1940. The circumstances are sufficient to show that H recognized the child as his own and assumed paternal responsibility. In proceedings relating to the support of the child H was required by a court of competent jurisdiction to provide support. Knowledge of H’s sterilization was not brought to the attention of the court until some time subsequent when a certificate of sterilization was presented. H stated that he was not aware that sterilization had been performed.

You desire my opinion as to whether Section 64-6 of the Code of 1950 might be so construed as to remove doubt as to the legitimacy of the child in question. This section of the Code relates to the legitimation of children only under the conditions therein specified. There must have been intermarriage after the birth of the child. It applies only to those children born out of wedlock, with subsequent marriage of the man and woman, and recognition by the man either before or after the marriage.

The child in question was born after the marriage of the woman with the presumptive father.

The situation presented by you is somewhat novel. There is a strong presumption of law that the child is legitimate. This, however, is a rebuttable presumption. If it is a fact that the man was effectively sterilized in 1930 so as to render him incapable of procreation, then the assumption of legitimacy is overcome. Inasmuch as the presumptive father is now dead, I can only suggest that you consult medical advice as to the effectiveness of sexual sterilization in all cases where it is applied.

CHIROPODIST—Use of narcotics for local anesthetics.  F-80

Albert Pincus, D.S.C.,
Member, State Board of Medical Examiners.

This is in reply to your letter of October 12, 1950, in which you, on behalf of the Board of Medical Examiners request my opinion as to whether a licensed chiropodist (pediatrist) in Virginia is prohibited from using narcotic drugs within the limits of his professional practice.

Under the present law in this State the practice of chiropody includes the medical, mechanical and surgical treatment of the ailments of the human foot, but does not include amputation of the foot or toe. Formerly a chiropodist was not permitted to correct deformities by surgery or to make incisions involving deep structures, this prohibition was removed from the law by the 1950 Amendment to §54-273 of the Code. It is my understanding that the limitations formerly contained in the law made it unnecessary for a chiropodist to use narcotic drugs.

The Legislature having removed the prohibition against the surgical correction of deformities and incisions involving deep structures, I would be inclined to the view that it was contemplated that a chiropodist might, in the performance of such an operation, legally use such drugs as enlightened medical science recognizes as necessary or proper in connection with such operation, unless such usage was otherwise expressly forbidden. However, it is my opinion that I am not required
to rely upon an implied permission in this case. Section 54-273 of the Code in defining the practice of chiropody reads, in part, as follows:

"* * * but does not include * * * the use of other than local anesthetics."

(italics supplied)

It became immediately apparent that a chiropodist is authorized to administer local anesthetics and, therefore, those narcotic drugs, if any, which are included in that term may likewise be administered by such person.

Your letter directs my attention to the opinions of the Attorneys General of several other states which opinions have defined the term local anesthetics as including certain narcotic drugs. You also direct my attention to two cases, Fowler v. Michigan Board of Pharmacy, 20 N. W. 2d 680, and Fowler v. Kavanagh, 63 F. Supp. 167. In both of these cases the courts defined local anesthetics as follows:

"Local anesthetics are anesthetics that when locally applied produce an absence of sensation in the organ or tissue treated. Narcotics, including cocaine, other derivatives of coca leaves, and similar compounds when properly applied produce such an effect, and are used as local anesthetics."

I have been unable to find any other judicial definition of the term and am in complete agreement with the definition given in the cases cited.

It therefore follows that a chiropodist may, within the limits of his professional practice as defined by law, administer such narcotics as are properly included in the term local anesthetics. I am enclosing your file with this letter.

CITIES, TOWNS AND COUNTIES—City of second class—Election of Commonwealth's attorney, clerk and sheriff. F-100

May 15, 1951.

MR. E. H. UHLER,
Chairman, Fairfax County Electoral Board.

This is in reply to your letter of May 2, 1951 in which you request my opinion on several questions regarding the election of the Commonwealth's Attorney, clerk and sheriff of Fairfax County.

The questions which you have raised come about as a result of the transition of the Town of Falls Church to a city of the second class and involve the interpretation of §15-94 of the Code of Virginia of 1950, which deals with the election of the specified officers in such cases.

Section 15-94 reads as follows:

"The Commonwealth's attorney, the clerk of the circuit court and the sheriff of the county, of which the city is a part, whether heretofore or hereafter elected or appointed, shall continue to exercise and have the same rights and privileges, perform the same duties, have the same jurisdiction, and receive the same fees therefor in such city as they did in such town before such municipality became a city; and the qualified voters residing in such city shall be entitled to vote for such officers at the general election for county officers and the wards of the city shall be treated, for such election purpose, as precincts of the county, as if such city had not been declared to be a city of the second-class." (italics added)

Your questions are as follows:

(1) Must the candidate for the office of Commonwealth's attorney, clerk, and sheriff qualify with the Chairman of the County Democratic Committee
and pay the required fee to the County treasurer or must they qualify with the Chairman of the County Democratic Committee and the Chairman of the City Democratic Committee and pay a portion of the fee to the treasurer of each jurisdiction?

(2) If the said officers must only qualify with the Chairman of the County Committee is it the duty of the County Electoral Board to prepare and deliver the ballots to the various precincts within the City of Falls Church?

(3) Does the County Electoral Board, in such event, appoint the judges and clerks of the precincts of the city and designate the voting places?

(4) Would the results of the election be reported to the Clerk of the Circuit Court to be canvassed by the commissioners of election of the county?

In my opinion all of your questions are answered by those words in §15-94 which I have underscored. That is to say, the conclusion which you reach in your letter is correct, and that the election should be conducted in all respects as though the City had not become a city of the second-class and was still fully a part of the County. However, the wards in the City are to be recognized and treated as precincts of the County in this election which might mean that the transition will have caused a change in the number or size of precincts.

CITIES, TOWNS AND COUNTIES—City or town may not pass ordinance paralleling State auto inspection law. F-60a

HONORABLE DABNEY W. WAITS,
Attorney for the Commonwealth for Winchester City.

February 15, 1951.

This will acknowledge receipt of your letter dated February 5, 1951, the material portion of which I quote as follows:

"I have before me at the present the question of the validity of a municipal ordinance making it unlawful to operate a motor vehicle within the city without a proper inspection sticker. This ordinance parallels Section 46-322 of the State Code of 1950. Although the latter section of the State Code permits municipalities to adopt ordinances to regulate the operation of vehicles on the highways in such cities, not in conflict with the Motor Vehicle Statute, it has occurred to me that, in this particular provision for and the administration of the inspection of motor vehicles in the state are made and executed by the state Division of Motor Vehicles, and the municipality bears no cost involved in this inspection, and that it might, therefore, be improper for a municipality to enforce its ordinance which is parallel to the state law in regard to the inspection of motor vehicles."

Article 10, Title 46, of the 1950 Code of Virginia deals exclusively with inspection and inspection stations, and confers upon the Superintendent of State Police authority to compel the owners and operators of motor vehicles to submit such vehicles to an inspection of their mechanisms and equipment by an official inspection station designated for that purpose; and confers upon the Superintendent power to establish and supervise such official inspection stations. Section 46-322 of this Article prescribes the punishment for a person, firm or corporation violating the provisions of Article 10 relating to inspection of motor vehicles.

Councils of cities and towns are authorized pursuant to the provisions of Section 46-198 of the Code, to adopt ordinances to regulate the operation of motor vehicles on the highways. I construe this language to mean that the regulation only applies to a motor vehicle when it is actually being operated on the highways. In
my opinion, it is not intended to extend this authority to inspection of motor vehicles.

Therefore, I am of the opinion that the provisions of Section 46-198 of the 1950 Code of Virginia do not confer authority upon the councils of cities and towns to adopt an ordinance paralleling the provisions of Section 46-322 of the 1950 Code of Virginia.

CITIES, TOWNS AND COUNTIES—Counties—Change in form of government—Marking ballots. F-100a

November 6, 1950.

HONORABLE EDWIN LYNCH,
Member of the House of Delegates.

This is in reply to your request for my opinion with regard to Section 15-268 of the Code which deals with an election on the change of county organization and government. The pertinent part of Section 15-268 reads as follows:

"The ballots used shall be printed to read as follows:

Question one. Shall the county change its form of government?
☐ For
☐ Against

Question two. In the event of such change, which form of organization and government shall be adopted?
☐ County Executive Form
☐ County Manager Form

"The ballots shall be counted, returns made and canvassed as in other elections, and the results certified by the commissioners of election to the circuit court or judge thereof in vacation. If it shall appear by the report of the commissioners of election that a majority of the qualified voters of the county voting are in favor of changing the existing form of government therein provided for, the circuit court, or the judge thereof in vacation, shall enter of record such fact and the additional fact as to the form of county organization and government adopted."

You wish me to assume that an elector fails to vote on the first question presented and expresses his preference only as to question two, and desire my opinion on whether or not such a vote should be considered in determining the sense of the electors on question one.

The context of Section 15-268, and related sections, clearly indicates, in my opinion, that questions one and two are separate and independent of each other and, as a practical matter, must be treated as if on separate ballots. For example, the electors first vote upon whether there shall be a change in the county form of government. If a majority votes in the negative on this question, then, in effect, there is no election held to determine which form of organization and government is to be adopted, for that question, by necessity, becomes immaterial.

The fact that a majority of those voting in the election indicate no preference as to question one would not, in my opinion, defeat the vote of the majority of those expressing a preference on that question, for an elector who expresses his preference only on question two cannot be said to be either in favor of or against question one. Accordingly, I am of the opinion that votes cast on question two can have no effect in determining the sense of the electors voting on question one.
CITIES, TOWNS AND COUNTIES—County adopting county manager form of government—Magisterial districts not abolished. F-100k

HONORABLE ANDREW W. CLARKE,
State Senator.

November 6, 1950.

I am in receipt of your letter of October 27, in which you present two questions raised by some of your constituents relative to §15-306 of the Code of Virginia in so far as it deals with the election of the board of supervisors in a county adopting the county manager form of government. The question of whether or not §15-306 is unconstitutional is covered in my letter to you of July 10, and I do not presume that you desire any further discussion of this point at this time.

The second question relates to the extent of the conflict, if any, between §15-306 and §§15-55 through 15-65 of the Code providing for the rearrangement, increase and diminution of magisterial districts, it being suggested that §15-306 requiring that there shall be on the board of supervisors one member "for each magisterial district * * *, and no more, who shall be a qualified voter of such district" to be elected by the qualified voters of the county at large, completely abolishes magisterial districts and thus is in irreconcilable conflict with §§15-55 through 15-65.

I have carefully considered the problem and the memorandum submitted by one of your constituents, and I must confess that I can find no substantial support for the contention that §15-306 abolishes magisterial districts. Indeed, it seems to me that it expressly preserves them by stipulating in effect that each magisterial district in the county shall have a representative on the board of supervisors. It is true that all the voters in the county may participate in the election of such a representative, but the district itself is not abolished. There are many sections of the Code relating to magisterial districts which are applicable to counties electing their supervisors, as provided in §15-306. See, for example, §15-338.

Please note also §15-58 of the Code, one of the sections with which §15-306 is said to be in conflict. This section provides that "the provisions of the two preceding sections shall not apply to any county in which magisterial districts have been or may hereafter be abolished by a vote of the people in accordance with sections 15-345 to 15-360, inclusive." (Emphasis supplied) But §15-306 is not one of the sections which is mentioned as abolishing magisterial districts. It would appear that the familiar rule of expressio unius est exclusio alterius is applicable here.

My conclusion is that magisterial districts are not abolished by §15-306 and that, should a county, such as Fairfax, electing supervisors under §15-306 of the Code desire to rearrange, increase or diminish its magisterial districts, it should do so in the manner provided by §§15-55 through 15-65.

CITIES, TOWNS AND COUNTIES—Licenses on restaurants in cities.

F-239

HONORABLE JOHN M. HART,
Commissioner of Revenue for the City of Roanoke.

January 4, 1951.

This will acknowledge receipt of your letter of December 30, in which you say:

"Formerly the State had a separate license for restaurants and other eating places but the last General Assembly classified these people as merchants.

"The City also had a separate license for restaurants and in the case of both State and City where the restaurant sold food not to be eaten on the place required an additional merchant's license.

"Although this matter has been brought to the attention of the City
authorities no action has been taken and the licensees are demanding my opinion.

"I am asking your opinion as to whether or not the City must conform to the State classification in this matter or continue to divide the City classification in two separate business licenses? I think that Hill v. Richmond, 181 Va. Page 744, with which you are familiar, is controlling here."

I have carefully considered Hill v. Richmond, 181 Va. 744, and must agree with you that, in view of the decision in that case, it would be advisable for the City of Roanoke to conform its present license tax on restaurants to the State’s classification of that business as a retail merchant. The case unquestionably holds that where the State has made a classification of a business for the purpose of license taxation, a city is bound by that classification if it desires to require a license for that particular business.

CITIES, TOWNS AND COUNTIES—Towns, authority to impose license tax on various professions. F-190

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

This is in response to your letter of January 6 from which I quote as follows:

"The Town Council of the Town of Marion has enacted a new tax or license ordinance, covering practically every line of business and profession. I presume that they acted under the authority given them under Section 58-266.1 of the 1950 Code.

"This new ordinance has levied a tax or license on lawyers, doctors, dentists, architects, etc. Section 58-371 of the Code, which applies to attorneys at law, requires that in addition to being licensed, sworn and admitted they are to obtain a state revenue license, and then this section says, ‘A revenue license to practice law in any county or city shall authorize such attorney to practice in all the courts of this state without additional license’. Section 58-370, which applies to architects, and Section 58-375, which applies to doctors, have similar provisions, except they do not contain these words, ‘without additional license’. There has been considerable discussion among the attorneys of the Marion Bar as to whether or not it would be legal for the Town to assess this tax on lawyers in view of Section 58-371, containing the words, ‘without additional license’.

"The tax is based $20.00 for the first $2,000.00 of gross income and 20¢ per hundred in excess of $2,000.00 of gross income.

"I will appreciate it if you will give me a ruling and your opinion on this matter."

Section 58-266.1 of the Code, to which you refer, clearly gives cities and towns the authority to impose license taxes on a business or profession conducted therein where a State license tax is required for such business or profession. This local tax, the section provides, is "in addition to the State tax on any license * * *." When this section is considered along with the provision to which you refer in the section requiring attorneys to pay a State license tax and similar provisions in certain other sections, it is plain, I think, that these provisions refer to additional State licenses. For example, an attorney who has paid a State license tax in Smyth County to practice law may practice in other counties of the Commonwealth without paying any other or additional State License tax.

In my opinion the town of Marion unquestionably has the authority to impose a local license tax on the practice of the professions mentioned by you.
CITIES, TOWNS AND COUNTIES—Towns—Limitation of power of eminent domain. F-60

HONORABLE T. B. NOLAND,
Town Manager of Franklin.

This will acknowledge receipt of your letter dated November 1, 1950, which I quote as follows:

"This is to inquire whether towns have the same right as does the State Highway Department, under our eminent domain statutes.

"Specifically, could the Town of Franklin file a petition in the Circuit Court which would give the Town the right to enter upon private property, to perform construction, and then go ahead with condemnation proceedings later?

"The advice of your office regarding this matter will be of immediate benefit."

Towns of the Commonwealth are given the right to exercise the power of eminent domain pursuant to the provisions of Section 25-232 of the 1950 Code of Virginia, the proceedings to conform to the provisions of Chapter 1 Title 25.

While this section also confers the power of eminent domain upon the Highway Commission, Article 5 of Title 33 is usually used as the basis in condemnation proceedings by the Highway Commissioner. Section 33-70 expressly authorizes the Highway Commissioner to enter upon and take possession of the property before instituting condemnation proceedings. Unless such right is granted to a town by its charter, the town would possess no such authority.

I am, therefore, of the opinion that the Town of Franklin could not file a petition in the Circuit Court which would give the town the right to enter upon private property to perform construction and proceed with condemnation proceedings later unless authorized by its charter.

CIVIL AND POLICE JUSTICES—Appeals may be withdrawn within ten days. F-136c

HONORABLE P. O'S. FOSTER,
Clerk, Civil and Police Court of Portsmouth.

This is in reply to your letter of October 5, 1950, from which I quote as follows:

"When there is a conviction in a misdemeanor case, does the defendant after noting an appeal and posting required bond have the right to withdraw his appeal and pay such fines and costs within ten days after conviction by the Civil and Police Court or is the Court required to forthwith return and file papers with the clerk of the court?"

Chapter 546 of the Acts of the General Assembly of Virginia of 1950 provided certain amendments to the charter of the City of Portsmouth and, in Section 1 of Chapter IX of said Chapter 546, it is provided that the Council of the City of Portsmouth shall elect a Civil and Police Justice who "shall perform all duties required of the civil justice and police justice and the offices of the civil justice and police justice as set forth in Chapters 4 and 5 of Title 16 of the Code of Virginia are hereby abolished."

Since the duties of the civil justice and police justice have been imposed on the civil and police justice it follows that the powers conferred on those officers by
Chapters 4 and 5 of Title 16 of the Code likewise vest in the Civil and Police Justice. In Chapter 5 of Title 16 under Section 16-125 the following language appears:

"Any person convicted by such police justice shall have an appeal of right to the Corporation Court or Courts of such cities as provided by general law with reference to appeals from trial justices, provided, however, that any such police justice shall have the power to accept fines and costs within ten days after any conviction if any defendant desires to withdraw an appeal which has been noted."

It is my opinion that under the provisions of this section the Civil and Police Justice of Portsmouth clearly has a right to receive payment of fines and costs within ten days of conviction in his court and to permit the withdrawal of an appeal.

CIVIL DEFENSE—Authority of State and subdivisions to enter into “mutual aid” agreements with other states. F-225b

January 24, 1951.

HONORABLE JOHN S. BATTLE,
Governor of Virginia.

I am in receipt of your letter of January 18, from which I quote as follows:

"In connection with Civil Defense, the question has arisen in certain border areas of the State as to whether political sub-divisions or local or regional civil defense councils can enter into mutual-aid agreements with political sub-divisions or similar agencies of adjacent states and the District of Columbia.

"I shall appreciate your advice as to whether such agreements can be legally executed, either with or without the authorization of the Governor and also as to whether the Commonwealth itself can enter into such mutual-aid agreements with adjacent states and the District of Columbia."

Under Chapter 3, Title 44—Military and War Emergency Laws—Code of Virginia, Sections 44-141 et seq., the Governor as Director of Civilian Defense for the Commonwealth is vested with broad powers. In conferring these emergency powers, in the very nature of such matters, the Legislature has wisely sought to empower the Governor to cope with the varied exigencies which may unpredictably arise. The language employed, pertinent to your inquiry, is therefore general in terms as well as broad in scope.

Whenever in the opinion of the Governor in time of war or grave national peril the safety of the Commonwealth so requires, it becomes the duty of the Governor as Director of Civilian Defense "to take such action, from time to time, as in his judgment is best calculated for the adequate promotion and coordination of State and local civilian activities relating to the defense of the State and the Nation." (Section 44-141)

In addition to all other powers germane thereto, elsewhere prescribed by law, the Governor is charged with the duty and vested with the power "to cooperate with the authorized agencies of the federal government and of the several states engaged in defense activities; and to take such other action as in his opinion will further the organization, coordination and preparation for adequate defense." (Section 44-142).

I am advised that the Congress has enacted legislation empowering the District of Columbia to enter into mutual-aid agreements or compacts with States and with regional areas of such States adjacent to the District of Columbia.

Regional councils of defense are established at the discretion of the Governor
and operate within programs of activity prescribed by him. These councils are placed by statute under the over-all supervision and direction of the Governor. (Section 44-144).

The Governor prescribes the programs of activity for the local councils of defense and they "may be dissolved, reorganized or rearranged" whenever the Governor may deem such action necessary. (Section 44-145).

I do not consider it a matter of any moment whether the arrangements which may be entered into be designated mutual-aid agreements, cooperative agreements or compacts. For the purpose at hand they are distinctions without a material difference.

Predicating my conclusions upon the powers and duties hereinabove enumerated, it is my opinion that the Governor, as Director of Civilian Defense, for and on behalf of the Commonwealth is clothed with authority to enter into mutual-aid agreements with States adjacent to Virginia and the District of Columbia, assuming, of course, that such States possess reciprocal powers.

I am further of the opinion that through and with the authorization of the Governor regional councils of defense and local councils of defense may enter into mutual-aid agreements with political subdivisions or similar agencies of adjacent States and the District of Columbia. Since the programs of activity of regional and local councils of defense are prescribed by the Governor and their supervision and direction are coordinated under him, it is my opinion that they may not legally execute such agreements without authorization from the Governor.

Under Public Law 920—81st Congress, 2d Session [H. R. 9798] a copy of each such civil defense compact must be transmitted promptly to the Senate and House of Representatives of the United States for approval by the Congress.

I feel it incumbent upon me to respectfully point out that such agreements and compacts might conceivably embrace matters transcending the authority herein discussed.

CIVIL DEFENSE—Extent of State participation. F-225b

HONORABLE JOHN S. BATTLE, Governor of Virginia.

You have forwarded to me a letter addressed to you from Honorable Millard Caldwell, Administrator, Federal Civil Defense Administration, dated March 2. Governor Caldwell's letter is as follows:

"Considerations of priorities, allocation of scarce materials, problems of uniform specifications, inspection, knowledge of sources of supply, procurement skills, and determination of areas to be supplied first may require that purchasing of defense equipment and supplies be pooled for the States and effected by the Federal Government in the interest of the earliest procurement.

"Will you please ask your Attorney General to make certain that your State can legally:

"1. Pay into the U. S. Treasury, in trust, advance sums to be applied in payment of your share of the cost of defense equipment and supplies, and,

"2. Reimburse the Federal Government for your share in any instance where the initial outlay is wholly paid from the U. S. Treasury.

"In cases where you may ask you for advance sums we will account for disbursements to your auditors and repay unused amounts as requested."
"If your State does not have such authority you may wish to bring the matter to the attention of your Legislature.

"Should a central Federal purchase procedure for defense equipment and materials be set up, no obligation would be entered into on behalf of the States except as directed by the States."

Under existing law I know of no Virginia officer or agency which has the authority to take the action described in numbered paragraph I of Governor Caldwell's letter.

Commenting on numbered paragraph 2 of the above letter, especially when it is considered along with the last paragraph of the letter, I direct your attention to Section 2-254 of the Code of Virginia. This section provides that the State Purchasing Agent may purchase from the United States Government, or any of its agencies, any surplus or other materials, supplies or equipment which may be offered for sale and needed by any of the agencies of the State when in his judgment such purchases may be made to the advantage of the State. If the Federal Government should acquire equipment and supplies that may be needed by the State for Civil Defense, I should think that some plan could be worked out under the authority of the section to which I have referred by which the State could avail itself of this source of such supplies and equipment. This presupposes, of course, that there is an appropriation which may be used for this purpose.

I might add that you would be in a much better position to say what Virginia could do when a definite program has been formulated by the Federal Civil Defense Administration.

CIVIL DEFENSE—Uniformity of nomenclature in State. F-225b

HONORABLE J. H. WYSE,
Coordinator of Civilian Defense.

October 4, 1950.

This is in reply to your letter of September 29, 1950 in which you ask my opinion regarding the nomenclature under the Virginia Civilian Defense Act.

As you point out in your letter, the nomenclature provided under the Virginia Act is somewhat different from that suggested in the booklet entitled United States Civil Defense which is issued by the National Security Resources Board. You also call my attention to the fact that, on page 11 of the booklet referred to, the following language appears:

"Because of the differences in organization among the States, the exact composition of a State Civil-defense organization is a matter for State determination, ***."

I quote from your letter as follows:

"In this State, at the present time, we have some localities that want to follow the chart and titles as set up on page 125, (of the federal booklet) while others are following our old organization chart, which conforms to the statute and which is attached. Naturally, unless they are all similar, it will cause confusion in the State and in this office. Therefore, I would appreciate your advising me if local Civilian Defense organizations are legally constituted unless they carry the titles as set out in our Act."

Inasmuch as the local councils of defense are provided for in the Virginia Civilian Defense Act it seems apparent that the Legislature deemed necessary some uniformity of organization throughout the State under the Directorship of the Governor, and I am, therefore, of the opinion that the localities have no authority to vary the basic pattern of organization established by the Defense Act.
CLERKS—Deputy clerk must be resident of county.  F-116

HONORABLE E. T. WHITE,
County Clerk of Norfolk County.

This is in reply to your letter of April 4, 1951, which reads as follows:

“I will appreciate your opinion as to whether or not it would be legal for me to appoint a deputy clerk who resides in a county other than Norfolk County?”

This office has previously ruled that a deputy clerk appointed under the provisions of §15-485 of the Code is an officer of the county and any argument on that point would seem to be foreclosed by the fact that that section requires that such deputy, before entering upon the duties of his office, shall take and prescribe the oath now provided for county officers.

Section 15-487 of the Code reads, in part, as follows:

“**Every county officer shall, at the time of his election or appoint-ment, have resided six months next preceding his election or appointment, either in the county for which he is elected or appointed, or in the city wherein the courthouse of the county is, ** ”

It would seem that the provisions of this latter section clearly prohibit the appointment of a deputy clerk who is not a resident of the county for which he is to be appointed.

CLERKS—Duty with reference to U. S. Revenue stamps.  F-90a

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

This is in reply to your letter of December 27th in which you requested my opinion as to whether or not there are any State laws requiring a Clerk to inquire into the necessity for United States Revenue Stamps before admitting a deed to record. You state that it is your understanding that it is the custom in a majority of the clerk’s offices in Virginia to keep these revenue stamps on hand and affix them to deeds when the same are recorded and also request my advice as to whether or not you should be in the position of advising individuals who present deeds for recordation as to their liability for the revenue stamps.

I am aware of no State law that requires a clerk to inquire into the necessity for revenue stamps before admitting a deed to record and it is my opinion that it is the duty of the clerk to admit a deed to record regardless of whether the individual requesting recordation has or has not paid the proper United States Revenue Stamps.

As to the propriety of the custom of advising persons as to their liability for revenue stamps, I might say that it is my opinion that this accommodation to the residents of your community is a proper one if you desire to continue it.
REPORT OF THE ATTORNEY GENERAL

CLERKS—Fee for list of real estate returned delinquent.  F-116

March 14, 1951.

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

This is in reply to your letter of March 10, 1951, which reads as follows:

"Your letter of July 22, 1950, directed to Honorable J. Moorman Johnson, Clerk of the Circuit Court of Bedford County, relative to recordation of delinquent taxes and sales in the Clerk's Office has been brought to my attention.

"On February 21, 1951, the county of Rockingham delivered to me a check dated February 15, 1951, for the recordation of 1949 tracts of land delinquent for 1948 taxes and for 403 tracts of land sold for 1947 taxes. Of course the actual work on both delinquent and sales was done prior to February 1, 1950.

"Since the services were actually performed prior to February 1, 1950, please advise if this abovementioned payment from the County of Rockingham is proper, and also if I am correct in assuming that the only fee the clerk can collect from the county for delinquent taxes is the fee for recording the list of real estate sold to individuals for delinquent taxes."

In the opinion to the Honorable J. Moorman Johnson, to which you make reference, I stated that, in my opinion, since adoption of the Code of 1950, and especially since the adoption of the amendment to paragraph 43 of §14-123 of that Code, a clerk is not entitled to a fee for recording the list of real estate returned delinquent for nonpayment of taxes and levies thereon which list is required to be prepared by the treasurer under the provisions of §58-984 of the Code of 1950. I stated at that time that this provision appeared in the law for the first time in the 1950 Code and became effective on February 1, 1950. I do not believe that the adoption of this provision in the 1950 Code would prohibit a clerk from accepting payment after February 1, 1950 for such services performed prior to the enactment of the provision.

In the final paragraph of my letter to Mr. Johnson I suggested that a clerk would be entitled to a fee for recording the list of real estate sold to individuals for delinquent taxes. I did not mean to imply thereby that this was the only fee that a clerk can collect from a county for services performed relative to delinquent taxes. If there are other provisions in the law which entitle a clerk to fees for such services he would, of course, be entitled to receive them, however, from such examination of the statute as I have been able to make, I have not discovered any such provisions.

CLERKS—Fees—Civil cases removed from trial justice court.  F-116

October 25, 1950.

HONORABLE C. W. EMBREY,
Clerk, Circuit Court of Nelson County.

This will acknowledge receipt of your letter of October 20, from which I quote as follows:

"We would like to have your opinion on whether the schedule of Clerk's fees specified in Section 14-123 (59) of the Code of Virginia applies in cases removed or appealed from the Trial Justice Court to the Circuit Court. In other words, if a civil warrant or motion for judgment for the sum of $450.00 was appealed (under Section 16-80) or removed (under Section 16-81)
from the Trial Justice Court to the Circuit Court, would the Clerk of the Circuit Court be entitled to the flat fee of $5.00 for his fees as provided in Section 14-123 (59)?"

I call your attention to Sections 16-29 and 16-81 Code of Virginia, 1950, which appear to me to answer your inquiry.

Section 16-29 provides that where an appeal is taken from the judgment of a Trial Justice the party taking such appeal shall pay to the Clerk of the Court to which said appeal has been taken the amount of the writ tax as fixed by law "and four dollars on account of costs in the Appellate Court."

Section 16-81 provides in cases of removal of civil cases involving more than two hundred dollars from a Trial Justice Court the defendant shall pay the costs already accrued and the writ tax and four dollars on account of costs in the court to which it is removed.

In view of the sections to which I have referred I do not think that Section 14-123 (59) is applicable in the questions you ask.

CLERKS—Not entitled to fee for recording list of real estate returned delinquent. F-116

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

This is in reply to your letter of July 19, from which I quote as follows:

"This office has received from the County Treasurer a certified list of the delinquent real estate as of June 30, 1950 for the tax year 1949. This list has been recorded in our delinquent tax books. The list has been submitted to the Clerk under Section 58-984 of the Code of 1950.

"Under Section 14-123(43) the Clerk is entitled to a fee for recording delinquent taxes but this section seems to exclude the delinquent tax list submitted by the Treasurer under Section 58-984. I know of no other list of delinquent taxes which the Clerk would be entitled to a fee.

"I would like to have your opinion on whether the Clerk of the Circuit Court is entitled to a fee for recording this list of delinquent taxes or is he supposed to do this work free of charge to the County."

Paragraph (43) of Section 14-123 of the Code is as follows:

"For each tract of land entered in the delinquent land book except under the provisions of §58-984, to be paid out of the treasury of the county, or city, as the case may be, such an amount as may be prescribed by the board of supervisors or other governing body of the county, or the council of the city, not to exceed the sum of, ten cents for each tract of land so entered in the delinquent land book." (Italics supplied)

The italicized exception quoted above appeared for the first time in the Code of 1950, which became the official Code of the Commonwealth on February 1, 1950. While I am not aware of the reason for the inclusion of this exception, the General Assembly declared it to be the law of the Commonwealth upon adoption of the Code, and further declared its intention to include this exception by the enactment of Chapter 340 of the Acts of Assembly of 1950, which amendment re-enacted Section 14-123 of the Code, but did not change paragraph (43) thereof.

Therefore, since paragraph (43) of Section 14-123, and the 1950 amendment thereto, contains the language "except under the provisions of §58-984," I am of the opinion that the Clerk is not entitled to a fee for recording the list of real estate,
returned delinquent for the nonpayment of taxes and levies thereon, required to be prepared by the Treasurer under the provisions of Section 58-984 of the Code.

As to the other lists of delinquent taxes for which the Clerk would be entitled to a recordation fee under paragraph (43) of Section 14-123, I suggest that he would be entitled to a fee for recording the list of real estate sold to individuals for delinquent taxes. See, Section 58-1038 of the Code, and *Tyler v. Combs*, 160 Va. 449.

**CLERKS OF COURT—No fee for copying or microfilming records where the clerk performs no service.** F-116

April 5, 1951.

**HONORABLE THOMAS P. CHAPMAN, JR.,**

Clerk of Court of Fairfax County.

I have your letter of April 4, inquiring whether or not you can legally permit the Utah Genealogical Society to microfilm, without cost, certain early records in your office. From the enclosures contained in your letter it appears that the Virginia State Library vouches for this organization and, since microfilm copies of these records will be furnished to the Library without charge, it is considered that the work the Society is doing is extremely helpful in assuring that copies of these invaluable records are preserved. You state that you have no objection to the work being done, but that the “question comes up in my mind whether, under Section 14-123 et seq., a Clerk has the right to allow free copies to be made in a fee office.” Section 14-123 prescribes the fees of clerks of circuit and other courts and says that “a clerk of a circuit or other court of record may, for services performed by virtue of his office, charge the following fees * * *.” Section 14-124 contains a similar provision. As I understand the method in which this microfilming is proposed to be done, the clerk is not performing any service, but is simply allowing the Utah Genealogical Society access to the records for the purpose of microfilming them. Since the clerk is performing no service for which the statute requires him to make a charge, I do not think that you need be concerned about the question which has come to your mind. An analogous situation would be for a lawyer or other person to personally make copies of certain records in your office in which he is interested. I do not think that the statute contemplates that the clerk’s fee should be charged in such a case.

**CODE OF VIRGINIA—Intention of Legislature must be considered—Titles in Code are no part of law—Act regarding taking of clams in Chesapeake Bay constitutional.** F-233a

January 8, 1951.

**HONORABLE VICTOR P. WILSON,**

Member of House of Delegates.

I am in receipt of your letter of December 28th in which you raise two questions. The first is:

“I am writing to obtain your official opinion on a criminal law contained in Title 28, Section 86, wherein the last three lines state:

‘Nor shall any person operate any device for taking clams within three-quarters of a mile of the shore lying between Lynnhaven Inlet and Willoughby Spit pier in Norfolk County.’ (Italics mine).
"It would appear to me that under the opinion of our court in the case of Anderson v. Commonwealth of Virginia, 182 Va. 560, wherein the court said:

"... Courts are not permitted to rewrite statutes. This is a legislative function. The manifest intention of the legislature, clearly disclosed by its language, must be applied. There can be no departure from the words used where the intention is clear. A penal statute cannot be extended by implication, or be made to embrace cases which are not within its letter and spirit. Such statutes are always construed strictly against the State and in favor of the liberty of the citizen." (Italics mine)

that since Willoughby Spit has been a part of the City of Norfolk since January 1, 1923, and that the above statute has been re-enacted several times since the annexation of this part of Norfolk County, the law would be inoperative and that the only recourse would be to the Legislature rather than to the courts."

As stated in the case you cite, "the manifest intention of the legislature, clearly disclosed by its language, must be applied". Such intention in the provision you quote from section 28-86 of the Code is to prohibit the operation of any device for taking clams within three-quarters of a mile of the shore lying between Lynnhaven Inlet and Willoughby Spit pier. The words "in Norfolk County" were added obviously for the purpose of aiding in identifying the pier which was, at the time of the enactment of the original act, located in Norfolk County. I take it that there is no question now as to the location of Willoughby Spit pier. If my assumption is correct I am of the opinion that the manifest intention of the legislature must be applied and that the words "in Norfolk County" may be treated as surplusage.

You also say:

"I should also like your opinion as to whether or not the title under the old Code known as Section 3175 'Restriction on the Right to Set Nets: Certain Obstructions in Chesapeake Bay Forbidden' would be constitutional since it does not set forth anything of a nature which would pertain to the taking of clams or other shell fish. In other words, the title is not indicative of the body of the section and has never been since its enactment in 1916."

Section 28-86 of the Code, as was section 3173 of the Code of 1919 from which it was taken, is a part of a general codification of the statute laws. These laws were collated and digested under appropriate titles and chapters, and divided into sections and then passed as one act under a proper title. It is well settled that the heading of a section of the Code is purely a matter of informative convenience and in no sense a part of the provisions of the section, Ritholz v. Commonwealth, 184 Va. 339, and thus is not to be considered as if it were the title to an original act not amendatory of the Code. In my opinion there is no constitutional infirmity in section 3173 of the Code of 1919 or section 21-86 of the Code of 1950.

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COLLEGES AND UNIVERSITIES—State supported—Segregation of races.
F-354  .

HONORABLE COLGATE W. DARDEN; President, University of Virginia.

July 10, 1950.

I am in receipt of your letter of June 29.
You state that a Negro student has made application to the Law School of the University of Virginia for admission as a graduate student.
You propound the following inquiry, which I quote from your letter:

"The committee on graduate studies has found his application to be in order and believes him qualified to do the work offered here. In the light of the recent decisions of the Supreme Court of the United States, the Board has asked me to inquire of you as to whether, by virtue of the Constitution and the statutes of the Commonwealth of Virginia, there is a legal duty imposed upon it to deny him admission to the University of Virginia."

Section 140 of our Constitution provides:

"White and colored children shall not be taught in the same school."

Section 22-221 of the Code of 1950 provides:

"White and colored persons shall not be taught in the same school, but shall be taught in separate schools, under the same general regulations as to management, usefulness and efficiency."

Section 140 is found in Article IX of the Constitution. This Article relates to education and public instruction. All sections of this Article preceding Section 140 relate to our system of public free schools and not to institutions of professional and graduate education. It is significant in this connection that the word "children" is used.

Section 22-221 of the Code drops the word "children" and inserts in lieu thereof the broader term "persons." This section is found in Chapter 12 of the Code. This entire chapter relates to our system of public free schools and not to State supported institutions of higher learning.

Aside from the force of Federal decisions construing and applying the Equal Protection Clause of the Fourteenth Amendment, grave doubt arises as to whether the provisions referred to are applicable to graduate schools at State institutions of higher learning and, therefore, whether there "is a legal duty imposed upon" your Board to deny admission under the facts stated by you.

In view of the decision of the Supreme Court of the United States in Sweatt v. Painter, 70 Sup. Ct. 848, that question is no longer material. Sweatt filed application for admission to the University of Texas Law School. Texas law restricted the University to white students. Sweatt's application was rejected solely because he was a Negro. Respondents defended mandamus proceedings under the "equal facilities rule" laid down in Plessy v. Ferguson, 163 U. S. 537 (1896). It appeared that Texas had established a separate law school for Negroes and contended that the facilities there provided were substantially equal to those afforded at the law school of the University of Texas.

The Court stated that the question presented in the Sweatt Case was "To what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a State to distinguish between students of different races in professional and graduate education in a State University?"

In an unanimous opinion delivered by Mr. Chief Justice Vinson the Court reviewed the facilities offered at the two schools and found, as a fact, that the facilities were not equal and reversed the decision of the lower court so holding. The Court said:

"It is fundamental that these cases concern rights which are personal and present. This Court has stated unanimously that 'The State must provide [legal education] for [petitioner] in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group.' Sipuel v. Board of Regents, 332 U. S. 631, 633 (1948). That case 'did not present the issue whether a state might not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes.' Fisher v. Hurst, 333 U. S. 147, 150 (1948)."
In Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 351 (1938), the Court, speaking through Chief Justice Hughes, declared that 'petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those the State there afforded for persons of the white race, whether or not other Negroes sought the same opportunity.'

In accordance with these cases, petitioner may claim his full constitutional right: legal education equivalent to that offered by the State to students of other races. Such education is not available to him in a separate law school as offered by the State.'

Thereupon the decision of the Court was announced in the following language:

"We hold that the Equal Protection Clause of the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School."

While the doctrine of Plessy v. Ferguson (supra) was not reviewed and, in theory at least, still obtains, it has no application to the facts presented by you, for the reason that Virginia has not established a separate law school for Negro citizens.

By virtue of the decisions of the Supreme Court of the United States, it is manifest that a denial of admission to the applicant under the facts stated by you could not be successfully defended if an appropriate action is instituted in the Federal Courts to compel the University of Virginia to admit him to its law school as a graduate student.

COMMISSIONER OF REVENUE — Authority to change assessments.
F-261

September 8, 1950.

HONORABLE SARAH P. BRIGGS,
Commissioner of Revenue for Greensville County.

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

"The general reassessment of land, required by law, was made in Greensville County during the calendar year 1949 under the direct supervision of the State Department.

"In making up the 1950 Land Book, we have uncovered numerous instances wherein property was assessed incorrectly in the name of a former owner. Please advise me what authority, if any, the Commissioner of Revenue has in changing assessments made under this general reassessment, as regards name of ownership and valuation of property."

Section 58-759 of the Code provides that taxes for each year on real estate subject to reassessment shall be extended on the basis of the last general reassessment made prior to such year, subject to such changes as may have been lawfully made. In my opinion this section would prohibit the Commissioner of Revenue from making any changes in the assessments in so far as the valuation of the property is concerned except under the provisions of Sections 58-810 through 58-813, which authorize the Commissioner to make adjustments in value in the case of buildings not previously assessed or when the value of the property is increased by repairs and additions or the erection of new buildings and when the value of the property is reduced by the destruction or injury of existing buildings.

"In the case of property incorrectly assessed in the name of a former owner, it is my opinion that Sections 58-808 and 58-809 authorize the Commissioner of the Revenue to make corrections so as to assess the property against the present owner
when he makes up his land books. Section 58-808 provides that such changes as may happen within the county or city of any Commissioner shall be noted by him in making out his land book and Section 58-809 requires the Commissioner to correct any mistake in entries in his land book provided that land once correctly charged to one person shall not be charged to another unless there is record evidence that such charge is proper. Section 58-771 deals with the assessment of land upon the owner's death. It is my opinion that these sections are applicable in the case where errors are found in a general reassessment.

COMMISSIONER OF REVENUE—Board of Supervisors cannot employ deputy without consent of Compensation Board. F-58

HONORABLE RAYNOR V. SNEAD,
Commonwealth's Attorney for Rappahannock County.

February 20, 1951.

This is in reply to your letter of February 15; from which I quote as follows:

"Would it be legal for the Board of Supervisors of the County to employ an assistant to the Commissioner of Revenue to assess personal property? If so, how should he be paid?"

"Several county officials have expressed the opinion that considerable personal property, particularly automobiles, is escaping assessment and that the present statutes are not broad enough to correct this tax problem. These persons believe that the County should employ some competent person to go from house to house to list and assess personal property."

"The Commissioner of Revenue states that he considers that a number of automobiles are not assessed because the owners do not file returns, obtain license out of the county and, of course, evade taxation, because he does not have the time to make a county wide door to door canvass."

The fixing of the salary of a Commissioner of the Revenue and his deputies is a matter within the jurisdiction of the State Compensation Board. See Sections 14-62, 14-63 and 14-71 of the Code.

If, therefore, your Board of Supervisors is of the opinion that an additional deputy Commissioner of the Revenue is needed in your County, the proper procedure would be for a request therefor to be made to the State Compensation Board, accompanied by a full statement of the facts justifying employment of such deputy. In my opinion, the pertinent statutes contemplate that the State Compensation Board shall pass upon the expenses of the office of Commissioner of Revenue including the compensation of deputies. This being true, I do not think that the Board of Supervisors would have authority to authorize the employment of an additional deputy Commissioner of the Revenue without the approval of the State Compensation Board.

COMMISSIONERS OF REVENUE—Maximum salaries. F-58

HONORABLE E. R. COMBS,
Chairman Compensation Board.

September 29, 1950.

This is in reply to your letter of September 26th in which you request my opinion as to the true maximum salaries of Commissioners of the Revenue. Since the ques-
tion you ask has a complicated legislative background which is set forth in your letter, I am quoting your letter in full.

"The General Assembly by act approved March 28, 1946, Acts 1946, p. 610, added section 7-a to the Compensation Act of 1934. The body of section 7-a as so added reads as follows:

"'The maximum limits of the salaries as provided by this act for county and city commissioners of the revenue are hereby increased to the extent of five hundred dollars.'

"The Commission on Code Recodification in its report to the General Assembly at its session of 1948 took the five hundred dollars mentioned in section 7-a and added it to the maximum salaries as provided in what was section 7 of the Compensation Act.

"The General Assembly at its session of 1948 amended section 7 of the Compensation Act, retaining the old maximums, which were five hundred dollars less than the maximums provided by the new section 7-a aforesaid.

"In 1950 the proposed Code of Virginia as submitted to the General Assembly for reenactment carried the maximums contained in section 7 of the Compensation Act as amended by Acts of 1948, p. 762. This means that such maximums were five hundred dollars less than they had been under the pre-existing law.

"Evidently the draftsmen of Acts 1948, p. 762, did not realize that the Code Commission had incorporated Acts 1946, p. 610, into section 7 as reported in its report to the General Assembly of 1948.

"The effect of the foregoing is to raise the question as to the true maximum salaries of commissioners of the revenue, and the Compensation Board desires to request your opinion on this question. Can it be held that the true legislative intent should be given effect, which would mean that section 7-a of the Compensation Act as added by Acts 1946; p. 610, would be given effect or must it be held that the mistake which was made in the legislative processes above mentioned necessitates a holding that the maximum salaries of commissioners of the revenue must be ascertained from the Code of Virginia 1950 as it now reads without resort to the history of this matter and the true intent of the General Assembly as it is known to all who were concerned in this legislation?"

As you point out, the provisions of Section 7-a were incorporated in the proposed recodification of the Statutes of Virginia submitted by the Commission on Code Recodification to the General Assembly at its session of 1948 by increasing the maximum salaries specified in Section 14-71, the section taking the place of what was formerly Section 7 of the Compensation Act, and by making an appropriate reference in Section 14-70 to the section relating to the maximum salaries of City Commissioners of the Revenue. The proposed code submitted by the Commission was adopted by the General Assembly in 1948 to become effective on February 1, 1950, so the law as adopted at that session actually made a provision for increasing the maximum limits of County and City Commissioners of the Revenue by $500.00 as specified in Section 7-a which was added to the Compensation Act by Chapter 363 of the Acts of 1946.

As you also point out, Section 7 of the Compensation Act, which dealt with the salaries of County Commissioners of the Revenue, was independently amended in 1948. Also, the section dealing with the salaries of City Commissioners of the Revenue was likewise amended in 1948. Since these amendments were separate legislative enactments from the act adopting the new code, the maximums contained in these amendments were, of course, those contained in the original sections of the Compensation Act and did not embrace the increase specified in Section 7-a, which of course, were still in effect and to be applied in fixing the salaries of these officers. There was no occasion for the draftsmen of these separate amendatory acts to take
into consideration the action of the Code Commission in incorporating the provisions of Section 7-7 into the new section it was proposing for Section 7.

The Code Commission in carrying out its duty to incorporate the independent legislation adopted in 1948 into the final printed form of the new code inadvertently substituted the language contained in the amendatory acts dealing with the maximums for County and City Commissioners of the Revenue in place of the language which it had included in the proposed code submitted to the 1948 session of the General Assembly. The fact that Section 7-7 had already been incorporated in those sections and was no longer contained in the code as a separate provision was apparently overlooked. The result is that the code as it now reads does not contain the increase of $500.00 allowed by the 1946 act and the question is whether the reenactment of the code again in 1950 prevents the application of that increase as clearly intended by the General Assembly.

It is my opinion that the true intent of the General Assembly not only should be given effect but also that there is a clear legal basis for so doing. When the proposed recodification of the statute law of Virginia was submitted to the General Assembly in 1948 it was realized that numerous statutes would be independently amended in 1948 and that as amended they would vary from the provisions contained in the proposed recodification. For this reason Section 1-7 of the code provided that "the enactment of this code shall not affect any act passed by the General Assembly which shall have become a law after the 14th day of January, 1948, and before the 1st day of February, 1950; but every such act shall have full effect and so far as the same varies from or conflicts with any provision contained in this code it shall have effect as a subsequent act and as repealing any part of this code inconsistent therewith". When the Code of Virginia was again reenacted in 1950 this identical provision was contained in Section 1-7.

Since the Act of the General Assembly of 1948 which adopted the recodification of the statutes of Virginia was one of the acts which became law between the dates specified in this provision, it is my opinion that provisions contained in the 1948 Recodification Act which vary from the code as reenacted in 1950 can be given effect in order to carry out the true intent of the General Assembly. Since the $500.00 increase in the maximums of salaries payable to County and City Commissioners of the Revenue was contained in the 1948 Recodification Act, it is my opinion that the provision allowing such increase is a part of the statute law of Virginia even though not contained in the present ten volumes designated as the Code of Virginia. For this reason I think this can be taken into consideration in fixing the salaries of these officers.

It is my recommendation that at the next session of the General Assembly legislation should be offered to clarify this matter and make the present provisions read as do the corresponding sections contained in the 1948 Recodification Act.

COMMONWEALTH'S ATTORNEY—Compensation for services to school board. F-69

Honorable Hugh B. Marsh,
Commonwealth's Attorney for Fairfax County.

This is in reply to your letters of December 8 and December 12, 1950, in which you request my opinion as to the following language contained in Section 15-504 of the Code of 1950 as amended:

"On application of the Board of Supervisors, Board of Public Welfare, or School Board, the Circuit Court may designate such attorney, who may be the attorney for the Commonwealth or Trial Justice of such County, to represent either or all such boards in matters requiring the services of an
It is my opinion that the purpose and intent of the Legislature in amending Section 15-504 was to permit the Board of Supervisors, Board of Public Welfare and School Board to employ the Commonwealth's Attorney to represent said Boards or perform legal services for them which they require over and above the services which he would normally perform in executing the duties of his office as Commonwealth's Attorney.

I do not believe that the Legislature intended this amendment to provide additional compensation for the Commonwealth's Attorney acting within the scope of his duties as such. In other words it is my opinion that the whole purpose of the amendment to Section 15-504 was to remove the bar which previously existed on contracts between the Commonwealth's Attorney and the various county boards named. Whether or not the Commonwealth's Attorney could be given additional compensation for the performance of services for the boards would depend in each case upon whether the service performed is over and above the services which the boards have a right to expect of him in his capacity as Commonwealth's Attorney.

COMMONWEALTH'S ATTORNEY—Could not contract with local school board prior to 1950 Amendment. F-69

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

I am writing with regard to our previous correspondence concerning the legality of your receiving a fee for examining a title to certain real estate for the Henry County School Board. I quote as follows from your first letter:

"In accordance with Section 22-150 of the 1950 Code of Virginia, I was designated as an Attorney to report on the title to certain real estate which the Henry County School Board desired to purchase; and for my services I received a fee by check from the School Board, dated June 27, 1950. Since I was then—when the work was done—and am now, the Commonwealth Attorney for Henry County, is it proper for me to receive the said fee? I feel that it was proper, since I was acting in a purely private and disinterested capacity; and I believe the Legislature considered such practice proper when it sought to clarify the law in 1950 by adding the second paragraph to Code Section 15-504."

As I previously informed you, I had the occasion to render an opinion on January 20, 1949, to the Honorable S. J. Thompson, Commonwealth's Attorney for Campbell County, in which I expressed the opinion that Section 2707 of Michie's Code (Section 15-504 of the Code of 1950) prohibited a Commonwealth's attorney from receiving a fee for conducting a condemnation suit on behalf of a school board. However, this office has not had the occasion to consider whether or not the 1948 amendment to Section 15-504 of the Code, which for the first time included Commonwealth's attorneys in the list of those officers prohibited from being interested in contracts and made the section expressly applicable to school boards, had the effect of modifying the provisions of Section 22-150 of the Code.

"After a careful consideration of this matter in the light of the two above-mentioned sections, I am of the opinion that the 1948 amendment to Section 15-504 had the effect of limiting the provisions of Section 22-150 in so far as the designation of Commonwealth attorneys are concerned. In other words, in my opinion, a
judge of a circuit court in designating a competent and discreet attorney at law to examine title to property purchased by a local school board, under the authority of Section 22-150, may no longer designate a commonwealth attorney and fix a compensation for services rendered to a local school board. This conclusion is borne out by the fact that the 1948 amendment to Section 15-504 expressly provided that the section should not apply to attorneys for the Commonwealth employed under the provisions of Sections 58-762, 58-1016 or 58-1102 of the Code. The Legislature's failure in 1948 to include Section 22-150 in this list of exemptions clearly indicates, in my opinion, the intention to modify it to the extent of prohibiting the employment, for compensation, of commonwealth attorneys by local school boards.

However, as you pointed out, the General Assembly of 1950 again amended Section 15-504 of the Code and provided further exceptions in the following language:

"On application of the board of supervisors, board of public welfare, or school board, the circuit court may designate such attorney, who may be the attorney for the Commonwealth or trial justice of such county, to represent either or all such boards in matters requiring the services of an attorney so designated to be paid such compensation by the county or school board or by the board of public welfare, as requisite, as the court prescribes."

The above-quoted amendment became effective on July 1 of this year and on that date, upon application of a local school board, a judge of a circuit court could designate an attorney for the Commonwealth to examine title to school property and fix a reasonable compensation for his services. Thus, my opinions expressed above are not material at this time, but, of course, would be material in your case, since the services to which you refer were rendered prior to the effective date of the 1950 amendment.

I agree with your conclusion that the Legislature considered the practice of local governing bodies and agencies employing attorneys for the Commonwealth for compensation, under certain conditions, a proper and necessary one. However, the 1948 amendment to Section 15-504 clearly and expressly prohibited an attorney for the Commonwealth from being interested, directly or indirectly, in any contract, fee or commission made with a local school board. Therefore, I am of the opinion that the provision of the 1950 amendment to Section 15-504, quoted above, was necessary in order to permit an attorney for the Commonwealth to contract with a local school board for legal services, and cannot be considered as merely clarifying existing legislation.

COMMONWEALTH'S ATTORNEY—Fee in misdemeanor case in circuit or corporation court. F-69

Honorable William S. Holland,
Clerk, Circuit Court of the City of Suffolk.

March 20, 1951.

The Auditor of Public Accounts, by letter dated March 13, has requested me to reply to your recent letter addressed to him. I quote therefrom as follows:

"We have been charging a Commonwealth Attorney's fee of $5.00 (1/2 for City and the other 1/2 for the Commonwealth) when figuring the court cost in a conviction under a City Ordinance on appeal to this Court from the Civil and Police Court. Our authority for doing so has been seriously questioned, therefore, I am asking for your opinion."

This office has previously ruled that, in the absence of a charter provision on the subject, it is the duty of the Commonwealth's Attorney to prosecute all appeals
from civil and police justices which involve violations of city ordinances. See Report of the Attorney General, 1937-38, p. 27; 1949-50, p. 61.

Section 14-130 of the Code provides that a fee of five dollars shall be charged for each person tried for a misdemeanor in a circuit or corporation court by a Commonwealth's Attorney and section 14-67 of the Code deals as follows with the disposition of such fee:

"One-half of all fees to which attorneys for the Commonwealth are entitled for the performance of official duties or functions, shall be paid by them or such official as may collect the same, not later than the tenth day of the month following their receipt, into the treasuries of their respective counties and cities, and the remaining one-half of all such fees shall be paid by such official as may collect the same into the State treasury, not later than the tenth day of the month following their receipt."

Therefore, in view of sections 14-67 and 14-130, I am of the opinion that your practice of charging a Commonwealth's Attorney's fee of $5.00 upon a conviction under a City ordinance on appeal to the Circuit Court from the Civil and Police Court is a proper one.

I call your attention, however, to section 14-99 of the Code which provides that no costs shall be taxed for a Commonwealth's Attorney in any case unless he or his duty authorized assistant actually prosecutes the case before the court.

COMMONWEALTH'S ATTORNEY—No duty of Commonwealth's attorney to bring suit for Board of Public Welfare. F-69

HONORABLE BRADLEY ROBERTS,
Commonwealth's Attorney for the City of Bristol.

This is in reply to your letter of November 30, 1950, from which I quote as follows:

"The Bristol Department of Public Welfare made an old age assistance grant of $46.00 monthly to Clara B. Taylor of Bristol, Virginia, beginning on December 1, 1949, a total of $460.00 having been paid under the grant. As of October 1, 1950, the Department discontinued the payments on information that Mrs. Taylor had failed to disclose assets.

"I am advised that the Board does not feel that Mrs. Taylor should be prosecuted criminally but that it does want to take steps to recover the sum of $460.00. The Board has called on me as Commonwealth's Attorney for the City of Bristol, Virginia, to make an effort to collect the money. Insofar as I can determine I have no authority or duty to act for the Board in any civil matter.

"Since most of the funds are a grant from the Commonwealth it occurred to me that there may be some uniform plan for handling such matters. It also occurred to me that it might be unethical for me to attempt to handle the matter and then possibly be called upon at a later date to prosecute the woman in the event further investigation should disclose that such prosecution should be commenced."

I believe the complete answer to your question is found in Section 15-504 of the 1950 Cumulative Supplement of the Code which reads in part as follows:

"On application of the board of supervisors, board of public welfare, or school board, the circuit court may designate such attorney, who may be the
attorney for the Commonwealth or trial justice of such county, to represent either or all such boards in matters requiring the services of an attorney, such attorney so designated to be paid such compensation by the county or school board or by the board of public welfare, as requisite, as the court prescribes.”

I know of no provision of law which places a duty on the Commonwealth Attorney to maintain a suit such as this for the Board of Public Welfare without compensation and the enactment of the quoted provision indicates that no such duty exists.

Insofar as the ethical question is involved I believe that the Circuit Court, prior to appointment of the Commonwealth’s Attorney, would consider the propriety of such appointment on the factual situation in each particular case.

COMPATIBILITY OF OFFICES—Deputy Sheriff may also be Forest Warden. F-249

MR. N. B. PARROTT,
Chief Fire Warden, Madison and Greene Counties.

This is in reply to your letter of July 17th in which you state that you have been serving as forest warden for Madison and Green Counties by virtue of your appointment under the provisions of Section 10-55 of the Code, and that you have recently been appointed a full time Deputy Sheriff for Greene County for which services you receive a monthly salary. My opinion is desired as to whether it is proper for you to hold both positions and to receive compensation therefor.

This office has previously ruled that Section 15-486 of the Code, which prohibits certain officers from holding any other office, elective or appointive, at the same time, does not in terms apply to deputies and should not be so construed. Furthermore, I am aware of no other statute that might prohibit a deputy sheriff from serving as a forest warden. Therefore, since the duties of a forest warden as set forth in Section 10-56 of the Code do not appear to be incompatible with the duties of a deputy sheriff, I am of the opinion that you may hold both offices.

CONFEDERATE NOTES—Debt or obligations incurred in aid of insurrection against the United States are void.

MR. OTIS B. CROWDER, Treasurer.

This will reply to your letter of October 31st from which I quote as follows:

“A gentleman from Norfolk recently sent me a batch of old Mecklenburg County notes issued in 1862 (one of which is attached to this letter) for collection.

“I don’t suppose they are any good but I don’t know exactly what to write him. Will you please advise me.”

The authority for the issuance of the note is printed on its face in the following language “according to an Act of Assembly passed March 29, 1862”. This act is contained in Chapter 67 of the Acts of Assembly for the years 1861-2 and provides, in Section 4, “that the several cities, town and counties of this commonwealth be
and they are hereby authorized to issue as currency notes or bills of and under the
denomination of one dollar, in sums equal to the amounts they may have respectively
authorized to be appropriated, and which has been actually appropriated by them,
for arming and equipping of their volunteers and supporting the families of those
who are indigent and in service ** *.

Amendment XIV of the Constitution of the United States provides in section
four that any debt or obligation incurred in aid of insurrection or rebellion against
the United States shall be held illegal and void. There is no question but that the
notes in question. were issued for the purpose of aiding the South in an insurrection
against the United States. I am, therefore, of the opinion that these notes are not
collectible.

CORONER—Fee for viewing body to be cremated.  F-78

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

This is in reply to your letter of August 18th with which you submitted a
communication from Dr. G. T. Mann, Chief Medical Examiner, in which my
opinion is requested upon whether or not a Coroner who is called upon to view
the body of a deceased person that is to be cremated should always consider the
case as one involving a "suspicious" death and proceed to make the inquiries
provided for by Section 19-23 of the Code, for which the Coroner is entitled to a
fee of $10.00.

Section 19-22 of the Code requires that a Coroner be notified upon the death
of any person from violence, or suddenly when in apparent health, or when un-
attended by a physician, or in prison or in any suspicious, unusual or unnatural
manner. The Coroner is then required by Section 19-23 to take charge of the dead
body, make inquiries regarding the cause and manner of death and make a full
report of his findings to the Chief Medical Examiner. These sections would not
always be applicable just because a body is to be cremated. There are many cases
of a normal death when the person is attended
by
a physician that relatives may
desire the body to be cremated. In such cases there is no reason for a Coroner to
make full investigation as required
by
Section 19-23.

It is true that Section 54-221 of the Code provides that it shall be unlawful
to cremate the body of a deceased person until a Coroner shall have certified in
writing that he has viewed the body and made personal inquiry into the cause and
manner of death and is of the opinion that no further examination or judicial
inquiry concerning the same is necessary. This section is contained in the chapter
of the Code dealing with embalmers and funeral directors and is clearly a pre-
cautionary measure to insure that bodies are not cremated and the evidence of any
possible crime destroyed before a Coroner can make a full investigation if that were
in fact necessary.

It is my opinion that, if no full investigation is necessary, he may furnish the
written certificate required by Section 54-221 without making the full investigation
required by Section 1923 in the case of "suspicious" deaths. Unless the full investiga-
tion is required by the circumstances of the case which only exist in the instances
specified by Section 19-23, the Coroner would be entitled only to the fee of $5.00
provided for by Section 54-221. If the death is one requiring a full investigation
under Section 19-22 and the full investigation is made, the Coroner would be entitled
to the fee of $10.00 provided for by Section 19-23 which is payable by the county
or city for which he is appointed and also the fee of $5.00 for furnishing the
certificate under Section 54-221 which is payable by the person making application
therefor.
CORPORATIONS—Cooperatives—Reserve fund may exceed 50%. F-176

HONORABLE W. GRIFFITH PURCELL,
Member House of Delegates.

I am in receipt of your letter of December 18, from which I quote as follows:

"I have been asked by a number of my constituents to procure a ruling from your office in reference to the construction of Section 13-243 of the Code of Virginia, pertaining to a cooperative corporation chartered under the general corporation laws:

"'Unless and until otherwise ordered by the association at any general or special meeting the board of directors shall annually apportion the net earnings by first paying dividends on the paid up capital stock not exceeding eight per centum per annum, and by then setting aside not less than ten per centum of the remaining net earnings for a reserve fund equal to thirty per centum of the paid up capital stock, and five per centum of the then remaining net earnings for an educational fund to be used in teaching co-operation...'

"Your opinion as to whether it is possible for the members of a cooperative chartered under Section 12-243 to increase its reserve further beyond 50% as provided therein will be greatly appreciated."

The first paragraph of the section from which you quote (§13-243 of the Code) provides that the net earnings and profits of a cooperative association organized pursuant to §13-238 "shall be apportioned, distributed and applied as the association may at any general or special meeting direct." The paragraph from which you quote specifies what the directors shall do "unless and until otherwise ordered by the association at any general or special meeting..." When the section is considered as a whole, I think that it is entirely clear that the association, as distinguished from the directors, in apportioning the net earnings and profits may allocate to the reserve fund an amount greater than the minimum amount which the directors are required to so allocate. In other words, your question is to be answered in the affirmative.

COSTS—Cost of first trial assessed against accused where new trial granted and conviction results. F-85b

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

This is in reply to your letter of October 14, 1950, from which I quote as follows:

"If the verdict of a jury in a felony case is set aside by the Court and the defendant is granted a new trial, are the costs incident to prosecution in the first trial taxed against the defendant, if subsequently convicted upon a second trial of the case?"

Section 19-296 reads, in part, as follows:

"In every criminal case the clerk of the court in which the accused is convicted, or, if the conviction be before a trial justice, the clerk to which
the justice certifies as aforesaid, shall, as soon as may be, make up a statement of all the expenses incident to the prosecution. ***

In the case of Commonwealth v. McCue, 109 Va. 302, the Supreme Court of Appeals of Virginia had this section under consideration and said:

"More than fifty years ago this statute was considered by this court, and the character of the obligation thereunder of a person convicted of crime to the Commonwealth for the costs incident to his prosecution and conviction was discussed and defined to be an exaction, 'simply for the purpose of reimbursing to the public treasury the precise amount which the conduct of the defendant has rendered it necessary should be expended for the vindication of the public justice of the State and its violated laws. It is money paid, laid out and expended for the purpose of repairing the consequences of the defendant's wrong. It is demanded of him for a good and sufficient consideration, and constitutes an item of debt from him to the Commonwealth. Payment of costs is no part of the sentence of the court, and constitutes no part of the penalty or punishment prescribed for the offense. Indeed, our statute expressly declares that the laws of costs shall not be interpreted as penal laws; they are to construed as remedial statutes, and liberally and beneficially expounded for the sake of the remedy which they administer. The right to enforce payment of them is a mere incident to the conviction, and thereby vested in the Commonwealth for the sole purpose of replacing in the treasury the amount which the defendant himself has caused to be withdrawn from it' Angela's case, 10 Gratt, 696, 701."

It is my opinion that a liberal construction of this statute, as called for, would require that the costs of the first trial be taxed against the defendant if he is convicted upon a second trial. There are, of course, times when a new trial is granted a defendant for things which occurred during the first trial which he objected to, or which were beyond his control. When this condition exists, it seems rather harsh to tax him with the costs of both trials. However, the philosophy underlying the statute seems to be that it is the defendant's wrongdoing which is primarily responsible for all of the proceedings had and, therefore, he is required to reimburse the public treasury for the cost incurred in consequence of his wrongful act.

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COSTS—Plaintiff's cost for civil warrant returnable if defendant not found.
F-85b

HONORABLE L. H. SHRADER,
Trial Justice of Amherst County.

December 18, 1950.

I am in receipt of your letter of December 15, in which you inquire as follows:

"* * * whether or not when a person has a civil warrant issued and pays the $2.80 cost in advance and the defendant cannot be found, the plaintiff is entitled to a refund of a part of the $2.80 cost advanced for issuing the warrant."

Section 14-133 of the Code of Virginia provides in part:

"Fees of trial justices and clerks in civil cases.—A trial justice, appointed under the provisions of chapter 2 of Title 16, and his clerk shall charge and collect for services rendered by them in civil actions and proceedings the following fees only:

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(1) For issuing any civil warrant, attachment, summons in interrogatory proceedings or summons in garnishment when there is one defendant, fifty cents, and when there are two or more defendants in the same warrant, attachment or summons, fifty cents for the first defendant and twenty-five cents for each additional defendant;

(2) For issuing a summons for a witness, twenty-five cents for each witness;

(3) For trying and giving judgment on a civil warrant, notice of motion, attachment or in a garnishment proceeding, including taxing costs, issuing the first execution, filing papers upon return of executions, and issuing one abstract of judgment, one dollar, to be paid by the plaintiff at or before the time of hearing."

This office has heretofore expressed the view that a litigant cannot be required to pay in advance the trial fee of a trial justice. Section 14-133, specifying fees of a trial justice, provides that the trial fee shall be paid "at or before the time of hearing." I am of opinion, therefore, that the plaintiff has the option of postponing the payment of the trial fee until the actual date of the trial. If the trial fee has been paid in advance of the trial and the case is settled and/or the warrant dismissed prior to a hearing, I am of the opinion that the trial fees should be refunded to the plaintiff.

As I am not advised as to the breakdown of the items of costs totaling $2.80, I cannot rule upon each item. However, I am of the opinion that those items of costs may be retained that represent services actually rendered, such as the issuance of the warrant.

COSTS—Travel expenses of judge not to be taxed.  F-100b

ELECTIONS—Contest, on law side of docket.  F-100b

HONORABLE JOE W. PARSONS,
Clerk of Circuit Court of Grayson County.

This is in reply to your letter of July 21, from which I quote as follows:

"There is a contest over the election of the Mayor of the Town of Independence pending in our Court, and two Judges have been designated by the Chief Justice of the Supreme Court of Appeals to sit with Judge Draper.

"I would appreciate it if you will advise me whether or not the expense of the two judges designated to sit with the Judge of this Court should be charged as a part of the cost of the suit.

"Also, I would like to know whether this should be on the Law or Chancery side of the docket."

I assume that the judges to whom you refer were appointed under Section 24-431 of the Code, which provides that the Chief Justice of the Supreme Court of Appeals shall appoint two judges of the circuit or corporation courts of counties or cities remote from the county or city in which the candidates reside to hear an inquiry of this nature with the judge of the court in the clerk’s office of which the complaint is filed. Since I am aware of no statute which authorizes the traveling and other expense of a judge, incurred by virtue of a trial of a case, to be charged as a part of the costs thereof and am aware of no statute which draws a distinction between a one-judge court and a three-judge court in taxing costs upon unsuccessful litigants, it is my opinion that it would not be proper to do so in this instance.

As to your second question, it has been held by the Supreme Court of Appeals, in the case of Penick v. Ratcliff, 149 Va. 618, 140 S. E. 664, that a proceeding to
contest an election is neither an action at law nor a suit in equity, since such action is based upon statute. However, as a practical matter, I would suggest that this case be placed on the law side of the docket, as it appears to have more of the attributes of a law suit than a suit in equity.

COUNTIES—May have executive secretary without election. F-83

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

August 8, 1950.

This is in reply to your letter of August 4th in which you refer to Chapter 248 of the Acts of Assembly of 1950 which provides that any county in this state is authorized to appoint an executive secretary and which prescribes the duties of such officer if appointed. You ask whether it is necessary to have an election under Sections 15-266 and following of the Code in order for the Board of Supervisors of a county to take advantage of the provisions of this Act. Chapter 248 of the Acts of 1950 makes no provision for the holding of an election upon the question of whether or not a Board of Supervisors shall appoint an Executive Secretary. Sections 15-266 and following, to which you refer, relate solely to the procedure which must be followed before a county adopts a county executive or county manager form of government set forth in Chapter II of Title 15 of the Code. It has no bearing upon whether a Board of Supervisors shall appoint an Executive Secretary under the provisions of Chapter 248 of the Acts of 1950, which is an entirely separate enactment. It is my opinion, therefore, that it is not necessary to hold such an election as is mentioned in Article 1 of Chapter II of Title 15.

COUNTIES—Power to acquire sites for trash dump. F-33

HONORABLE GEORGE D. CONRAD,
Commonwealth's Attorney for Harrisonburg.

July 11, 1950.

This is in reply to your letter of July 5, in which you refer to Section 15-707 of the Code, under which the governing bodies of counties are authorized to acquire land to be used as dumps for waste material. You ask whether the county is limited to one site in each district or whether several sites may be acquired in one district so long as the total acreage does not exceed three acres.

The pertinent language of Section 15-707 is as follows:

"The governing bodies of counties are authorized in their discretion to acquire by lease, gift, purchase or condemnation land in each or any magisterial district for the purpose of providing a dumping place for waste material including abandoned automobiles. The area in any magisterial district is limited to three acres **."

In my opinion, this language limits only the total acreage in each magisterial district and does not limit the number of sites that may be acquired for the purpose specified. It is my opinion, therefore, that, if the Board of Supervisors determines that it is best to have more than one location in a district for the dumping of waste material, it may acquire the number of sites deemed necessary for this purpose, so long as the total acreage does not exceed three acres.
COUNTIES—Referendum for change in form of government; when held. F-100k

HONORABLE STILSON H. HALL,
Member of House of Delegates.

This is in reply to your letter of July 27 in which you request my opinion as to when elections may be held, under Section 15-267 of the Code, for a referendum on the question of adopting the County Manager or County Executive forms of Government.

The section referred to above provides that, if the specified petition is filed, the Court shall:

"* * * by order entered of record, require the regular election officials at the next regular election or on the day fixed in such order to open a poll and take the sense of the qualified voters of the county on the question submitted as herein provided. If a special election is called it shall be held not more than ninety days nor less than sixty days from the filing of the petition, but not within thirty days of any general election. * * *"

It is my opinion that the words "regular election" as used in Section 15-267 are interchangeable with the words "general election" and do not refer to the primary elections. Therefore, in answer to your specific question, I am of the opinion that the referendum in question may be held at a primary or within thirty days of a primary, but may not be held within thirty days of a general election.

COURTS—Proceeedings should not be broadcast. F-136c

HONORABLE RICHARD W. LOWERY,
Police Justice of South Boston.

This will acknowledge receipt of your letter of January 25, 1951, relative to a proposal to make tape recordings of trials in the police justice court of South Boston, Virginia, and to replay them over the radio later. You inquire as to whether or not this procedure is legal and whether or not you or members of the local committee for Highway Safety taking the recordings might incur suits for libel or defamation of character.

There have been several articles written upon this procedure and I refer to one found in Michigan Law Review, Volume 36, page 1386. I quote as follows:

"* * * While it is a recognized innate feature of all judicial proceedings that they are open to the public, an apparent limitation upon this fundamental principle has been adopted by the American Bar Association in canon 35 of its Canons of Professional Ethics. This canon makes it unethical practice to permit any trial to be broadcast. The absence of litigation on the issue of whether or not public trials should be broadcast is readily understood when it is considered that the use of radio to report legal proceedings is a comparatively recent innovation, and because essentially this is a question of propriety and legal and judicial ethics rather than of substantive law. The only act of the defendant trial judge, and this was with counsel's consent, was the authorization of the broadcast. Disregarding the propriety of such action, there would seem to be immunity either on the theory of a judge's discretion in trial conduct or on the basis of privilege. * * *"
"Canon 35. 'Improper Publicizing of Court Proceedings. Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.'"

"Canon 35 was adopted at the Sixtieth Annual Meeting of the American Bar Association, at Kansas City, Missouri, Sept. 30, 1937. 62 Rep. A. B. A. 350, 767 (1937)."

While it may be argued that technically the matter is one within the discretion of the court, in view of the above, I would suggest that such a broadcast should not be undertaken in the absence of an expression from the General Assembly or the Virginia State Bar.

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**CRIMINAL LAW—Bad check for $70.00; petit larceny if given for $20.00 value received. F-54**

HONORABLE ROYSTON JESTER, III,
Attorney for the Commonwealth for City of Lynchburg.

This is in reply to your letter of September 19 in which you request my opinion as to whether, on the following set of facts, the accused should be charged with grand larceny or petit larceny:

"The facts reveal that an intinerant traveler, who has a rather extensive criminal record, passed through Lynchburg some months ago; he went to an appliance store and manifested interest in purchasing a home freezer. He gave the appliance dealer a check for $70.00 out of which he received, in cash, $20.00 and the residue, of $50.00, was credited on the purchase price of the freezer. Actually the accused never received the freezer.

"The most that he received was the sum of $20.00. This was not a forgery but a worthless check. ***

It is my opinion that the facts presented raise a case of petit larceny. Section 6-129 of the Code of 1950 reads as follows:

"Any person who, with intent to defraud, shall make or draw or utter or deliver any check, draft, or order for the payment of money, upon any bank, banking institution, trust company, or other depository, knowing, at the time of such making, drawing, uttering or delivering, that the maker or drawer has not sufficient funds in, or credit with, such bank, banking institution, trust company, or other depository, for the payment of such check, draft or order, although no express representation is made in reference thereto, shall be guilty of larceny.

"Any person who, under the provisions of this section, is guilty of grand larceny shall, in the discretion of the jury or the court trying the case without a jury, be confined in the penitentiary not less than one year nor more than five years, or be confined in jail not exceeding twelve months and fined not exceeding five hundred dollars.

"The word credit, as used herein, shall be construed to mean any arrangement or understanding with the bank, banking institution, trust company, or other depository for the payment of such check, draft or order."

The facts presented by your letter reveal that the accused received $20.00 in cash and the remaining $50.00 of the $70.00 check was applied on the purchase price
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of a home freezer which he never received. Actually, the Virginia statute does not require that one who passes a bad check receive anything of value in return. The statute requires only a passing with "intent to defraud." It may well be argued that one who passes a bad check with intent to defraud is guilty though he receives nothing in return; for example, one who gives a bad check in payment for an existing debt. While it is impossible for him to actually accomplish a fraud by erasing the debt, it may be argued that he intended to do so and, hence, is guilty under our statute. For an enlightening discussion on this line of reasoning as applicable to the Virginia statute, see 12 Virginia Law Review, 509.

Returning to the facts in the instant case, it is difficult to imagine that the accused intended to defraud the dealer of more than $20.00. I assume that the freezer was not to be delivered until the balance of the purchase price was paid. It is clear, therefore, that the accused knew that the dealer would discover the worthlessness of the check before delivery, and I am forced to the conclusion that the extent of his intent was to defraud the dealer of $20.00, thus making the offense petit larceny under our statutes.

CRIMINAL LAW—Bad checks and false pretense. F-54

HONORABLE ROYSTON JESTER, III,
Attorney for the Commonwealth for Lynchburg City.

This is in reply to your letter of December 11, in which you request my opinion as to whether or not on the following set of circumstances the individual could be charged under the criminal statutes of this Commonwealth.

You state that the person, a Virginia resident, obtained by fraud a check in North Carolina amounting to $1132, which check was then good and negotiable, and that subsequently the person brought the check to Lynchburg, purchased furniture and received $261 in change. It is also a fact that the furniture dealer called and was advised by the drawee, the North Carolina bank, that there were sufficient funds to meet the check at that time. However, payment was stopped by the drawer prior to the actual presentation of the check for payment.

Section 6-129 of the Code of Virginia reads as follows:

"Any person who, with intent to defraud, shall make or draw or utter or deliver any check, draft, or order for the payment of money, upon any bank, banking institution, trust company, or other depository, knowing at the time of such making, drawing, uttering or delivering, that the maker or drawer has not sufficient funds in, or credit with, such bank, banking institution, trust company, or other depository, for the payment of such check, draft or order, although no express representation is made in reference thereto, shall be guilty of larceny.

"Any person who, under the provisions of this section, is guilty of grand larceny shall, in the discretion of the jury or the court trying the case without a jury, be confined in the penitentiary not less than one year nor more than five years, or be confined in jail not exceeding twelve months and fined not exceeding five hundred dollars.

"The word credit, as used herein, shall be construed to mean any arrangement or understanding with the bank, banking institution, trust company, or other depository for the payment of such check, draft or order."

It would appear that the essential portion of the statute italicized above has not been violated, for the reason that there were sufficient funds in the bank at the time of the delivery. Moreover, penal statutes are to be strictly construed against the Commonwealth. Accordingly, I am of the opinion that, upon the facts presented,
the individual in question has not committed a criminal offense under a strict construction of the above statute.

It would appear that a more applicable statute to the present facts is section 18-180 set forth below:

"If any person obtain, by any false pretense or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of larceny thereof; or if he obtain, by any false pretense or token, with such intent, the signature of any person to a writing, the false making whereof would be forgery, he shall be confined in the penitentiary not less than two nor more than ten years."

A case could be made out under section 18-180 on the basis that the individual in question obtained property and money from the furniture dealer under false pretense. However, the Commonwealth would be confronted with a difficult case from the standpoint of securing sufficient evidence of each element of the crime needed under this statute. Therefore, it is my view that additional facts would have to be proven other than those already stated in order to make out a violation of section 18-180.

CRIMINAL LAW—Gasoline, failure to pay for without express credit is "false pretenses". F-85

HONORABLE C. H. COMBS,
Trial Justice for Buchanan County.

This is in reply to your letter of July 29, 1950, which reads as follows:

"Several instances have arisen in the immediate past in which persons have driven to a gasoline station and asked for gasoline without making any arrangements for credit and after the gasoline was delivered into their tank refused to pay for same and asked that it be charged.

"I would appreciate it if you would advise me whether or not this is a criminal charge, or whether the operator is left to bringing a civil action for the value of the gasoline."

Pursuant to §§1-10 and 1-11 of the Code of Virginia, 1950, the common law and statutory writs made in aid thereof prior to the fourth year of the reign of James I (1607) are in force in Virginia with certain exceptions not pertinent to this opinion.

Under the common law, and as enlarged by the Statute of 33 Henry VIII, c. 1 (1541-2), obtaining property by cheat or false pretense was a criminal offense only if accomplished by some "false token or counterfeit letter." It has been held under this statute that mere words do not amount to a token. See 36 C.J.S. 642, n. 69.

By a later statute, 30 George II, c. 24, §1, passed in 1757, the requirement of a "false token" was eliminated and all that was necessary was a "false pretense;" however, as only those statutes of England passed prior to 1607 are a part of the law of Virginia, this statute may not be considered.

Section 18-180 of the Virginia Code is patterned after the later English statute and reads, in part, as follows:

"If any person obtain, by any false pretense or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of larceny thereof; * * *.”

The authorities are not unanimous on what is required to constitute a false pretense. It has been held that conduct alone may be all that is required. On the
other hand, an old English case held that merely entering an eating house and ordering a meal and eating it without at the time having money to pay for it is not a false pretense. See Reg. v. Jones, (1898) 1 Q. B. 119. This latter case would be an offense in Virginia, however, as we have a statute covering that exact situation. (See, §18-182 Code).

There exists a well reasoned line of authorities to the effect that, where parties are dealing in a particular type of business, the custom of the trade must be taken into consideration in arriving at a determination of their intention. Certainly, the well established custom of the trade in service stations is such that, in the absence of an express agreement in advance for credit, a cash sale is contemplated. Not only is this custom well established but in the service station business, where many customers are transients whom the seller has never before seen and may never see again, it is a commercial necessity.

It is, therefore, my opinion that, by requesting the seller to put gasoline into his vehicle, the buyer—if there are no extenuating circumstances from which he might expect credit—impliedly represents that he will pay cash just as forcefully as if he agreed in words to do so.

It follows from this that if the buyer intending to defraud the seller receives the gasoline into his vehicle and either refuses or is unable to pay cash he stands in violation of §18-180 of the Code. The intent to defraud is an element of the offense and must exist in order for one to be guilty. Whether the buyer has made an honest mistake in believing he had established credit or in believing he had available cash is a question of fact which must be determined from evidence in each case.

I call your attention to §18-183 of the Code which expressly makes it an offense to obtain supplies for any motor vehicle from a garage that stores motor vehicles without payment of cash or first obtaining an agreement for credit provided it is done with intent to cheat or defraud. It may be argued, in opposition to the opinion expressed in this letter, that the existence of this statute is evidence that in the absence of such a statute no offense would be committed. However, I believe the custom in the service station business is so well established and so necessary for the protection of the sellers that a conviction in such a case as set forth by your letter could be sustained if the evidence of fraudulent intent was present.

CRIMINAL LAW—Lottery—What constitutes. F-123

HONORABLE JULIUS W. PULLEY,
Attorney for the Commonwealth for Southampton County.

I am in receipt of your letter of March 31, from which I quote as follows:

“A few days ago a member of a civic club in my county asked my opinion as to whether or not it would be legal to give prizes under plan shown by ticket I am herewith enclosing. Under this plan the purchaser of a 50¢ ticket would be given a chance at a prize to be determined by the drawing of a lucky number at some specified future date. The purchaser of a ticket is called a contributor to the funds of the club that gives away the prize.

“In my opinion the contributor is, in reality, the purchaser of a chance at a lottery and the scheme is a violation of the laws against lotteries as prohibited by section 18-301 and defined in the case of Maughs v. Porter, 157 Va. 415, 161 S. E. 242.”

I have examined the ticket enclosed with your letter. This ticket, in the light of the explanatory facts submitted by you, causes me to concur in the opinion which you have expressed relative to whether or not its use as contemplated constitutes a lottery under the Virginia law.
It is apparent that all of the constituent elements of a lottery, namely, prize, chance, consideration, are combined in the proposal submitted. It is my opinion, therefore, that its use as contemplated would render those participating therein guilty of promoting or being concerned in the managing or operation of a lottery or raffle for money or other thing of value.

CRIMINAL LAW—Petty larceny—Subsequent offenses.  F-85

HONORABLE L. H. SHRADER,  
Trial Justice for Amherst County.

June 12, 1951.

This is in reply to your letter of June 8, 1951, from which I quote as follows:

"Please advise if when a person has been convicted for the third offense of petty larceny and sentenced to the penitentiary and has served his time and been discharged and afterwards again commits petty larceny, will that constitute another third or fourth offense, or does the service of his time for the third offense wipe out the prior petty larcencies and start all over again?"

Section 19-268 of the Code of 1950 reads as follows:

"When a person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted, and admitted, or found by the jury or trial justice before whom he is tried, that he has been before sentenced in the United States for the like offense, he shall be confined in jail not less than thirty days nor more than one year; and for a third or any subsequent offense, he shall be confined in the penitentiary not less than one nor more than two years."

The words "or any subsequent offense" as they appear in the section quoted clearly indicate that the fact that a person may have been sentenced for a third offense of petit larceny and served his sentence does not prevent his being given similar punishment if he is again found guilty of petit larceny.

CRIMINAL LAW—Punishment for common drunkard.  F-148

HONORABLE JAMES H. MONTGOMERY, JR.,  
Associate Judge Juvenile and Domestic Relations Court of Richmond.

March 12, 1951.

This is in reply to your letter of March 1, 1951, which reads as follows:

"At a recent meeting of the Virginia Council of Juvenile Court Judges I was instructed to request your opinion regarding what penalty can be imposed upon a person charged with being a common drunkard. As I understand the law, a person can be charged under the common law with being a person of ill fame, to-wit: a common drunkard, but that the only penalty that can be imposed upon such a person is a bond to keep the peace and stay sober for 12 months."
The Supreme Court of Appeals of Virginia, in the case of Galliher v. Commonwealth, 161 Va. 1014, adopted the view that mere drunkenness, with no other act beyond, is not a punishable offense at common law and that, therefore, mere drunkenness, if a crime at all, is made such by the statutes of this State. The only statute dealing with mere drunkenness of which I am advised is §18-114 which provides that any person having arrived at the age of discretion who shall be drunk in public shall be deemed guilty of a misdemeanor and the punishment fixed at not less than one nor more than ten dollars. It would appear, however, that, under the provisions of §18-9 of the Code, a common drunkard might be considered a person not of good fame and be required to post bond with security conditioned upon good behavior for one year.

CRIMINAL PROCEDURE—Arrest of fugitive on strength of message from another jurisdiction within State. F-129

February 16, 1951.

HONORABLE JOSEPH C. HUTCHESON, Attorney for the Commonwealth for Brunswick County.

This is in reply to your letter of February 3, 1951, in which you request my opinion on several questions relating to the arrest of persons charged with crime. The first series of questions set forth in your letter relates to the privileges extended by the State of North Carolina to officers of this State, who in close pursuit, chase a fleeing felon into that state. Specifically, you inquire whether North Carolina has a statute with provisions similar to those contained in §19-76 of the Code of Virginia. My examination of the Code of North Carolina has failed to disclose any section containing any of the provisions of §19-76 of our Code. Your next list of questions relates to §19-78.1 of the Code of Virginia of 1950. That section reads as follows:

"Members of the State Police force of the Commonwealth, the sheriffs of the various counties, and their deputies, the members of any county police force, the members of any duly constituted police force of any city or town of the Commonwealth and the special policemen of the counties as provided by §15-562, provided such officers are in uniform, or displaying a badge of office, may, at the scene of any motor vehicle accident, or in the apprehension of any person charged with the theft of any motor vehicle, on any of the highways of the Commonwealth, upon reasonable grounds to believe, based upon personal investigation, including information obtained from eyewitnesses, that a crime has been committed by any person then and there present, apprehend such person without a warrant of arrest; and such officers may arrest, with a warrant, persons duly charged with crime in another jurisdiction upon receipt of a telegram, a radio or teletype message, in which telegram, radio or teletype message shall be given the name or a reasonably accurate description of such person wanted, the crime alleged and an allegation that such person is likely to flee the jurisdiction of the Commonwealth."

For clarity and convenience I shall deal with the questions set forth in your letter separately in the order of their appearance in your letter.

"1. Does the phrase 'another jurisdiction' relate only to other counties and cities in the State of Virginia, or does it include those in other states and federal offenses?"

Section 19-52 of the Code reads as follows:

"The arrest of a person may be lawfully made also by any peace officer
or private person without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year. But when so arrested the accused shall be taken before a judge, trial justice, justice of the peace or other officer authorized to issue criminal warrants in this State with all practicable speed and complaint made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer shall be heard as if he had been arrested on a warrant."

In the light of this specific section dealing with persons charged with crime in another state, it is my opinion that the term "another jurisdiction" as used in §19-78.1 means another jurisdiction within this State. The requirement that the message state that such person is about to flee the jurisdiction of the Commonwealth likewise indicates that the message should be from within the State.

"2. Is the message, in itself, sufficient evidence of fact that the person wanted is 'duly charged with crime'; and if not, what evidence should the officer require to establish this fact?"

In my opinion, the officer receiving such message may consider the person "duly charged with crime" for the purpose of this section.

"3. Does the phrase 'charged with crime' include misdemeanors?"

This office has previously ruled that the phrase "charged with crime" in this section include misdemeanors.

"4. Is an officer authorized to act upon receipt of such a message from a private individual, a radio broadcasting station or system or radio commentator? If authorized to act under the last three, namely, a broadcasting station or system or radio commentator, must the message be directed to the officer, or may he act upon a general alarm or request relating to such an offense?

"5. If the officer is not authorized to act under the circumstances set out in paragraph 4 who are the proper persons to send such messages?"

Section 19-78.1 of the Code resulted from the amendment of §52-20 of the Code. Section 52-20 prior to the 1950 Amendment conferred this power of arrest only on members of the State Police force and as originally written required that the message should emanate from an officer authorized to make arrests. This requirement was omitted from the law in the 1950 Amendment either through design or through inadvertence. We must, of course, assume that the Legislature intentionally omitted this requirement; however, by so doing, it is my opinion that the Legislature did not intend that arrests should be made upon receipt of messages from private sources but rather that arrests might be made upon receipt of a message through regular law enforcement channels without the necessity of inquiring whether the sender of the message was authorized to make arrests himself so long as the message itself was the message of an official law enforcement agency.

"6. Upon making such an arrest should the person be committed to jail or bail without a warrant, pending transferring him to the jurisdiction where he is wanted, including extradition, or should the officer swear out a warrant for the offense described in the message?"

While §19-78.1 provides for arrest without a warrant under given conditions, §19-78 deals with persons arrested in the jurisdiction who are to be tried in another and provides that the prisoner shall be turned over to an officer, by warrant, to be carried before the proper court. It appears, therefore, that after arrest is made a warrant should be issued.
"7. If the message is received by an officer of one peace unit, such as a County Sheriff, can it be acted upon by officers of other peace units, such as the State Police Force and Town Officers?"

In my opinion any law enforcement officer receiving such message from an official law enforcement agency could pass the message on to another such agency which agency could act thereon.

"8. Is it mandatory that the message shall contain the information prescribed in the Section, namely, 'the name or a reasonably accurate description of such person wanted, the crime alleged and an allegation that such person is likely to flee the jurisdiction of the Commonwealth.'"

The Legislature has expressly provided what information the message shall contain before an officer may take action thereon and, therefore, such officer should not take such action on a message which does not fulfill those requirements.

CRIMINAL PROCEDURE—Expense of confining parolee from another state in jail paid by Virginia. F-75

March 22, 1951.

MR. FRANCIS C. JONES,
Administrative Officer, Department of Welfare and Institutions.

This will acknowledge receipt of your recent letter requesting my opinion as to whether or not a prisoner supervised by the Virginia Parole Board for another state pursuant to §53-289 and subsequently confined in a Virginia jail awaiting return to the other state is to be maintained at the expense of the Commonwealth of Virginia, in view of the provisions of §§53-179 and 53-182. Your letter further states that you understand the established practice among the member states of the Out-of-State Parolee Supervision Compact in nearly every instance is that the supervising state bears the maintenance while the prisoner is in its jail awaiting return to the sending state.

In an opinion rendered by this office on May 11, 1950, to Mr. Chew, Executive Secretary, Parole Board, in construing §53-289(2) it was stated, "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 prisoners in Virginia is to arrest and recommit such persons where necessary, it is my opinion that this same method must be complied with in supervising parolees and probationers from other states."

Furthermore, inasmuch as §§53-288 to 53-294 of Article 3, Chapter 11, Title 53 provide for a special compact among the various states for the benefit of member states, it is my view that we should look to the particular purpose of these sections for their proper interpretation as related to the operation of the compact rather than to other unconnected statutes.

Therefore, in accordance with the established procedure followed by the other member states whereby each state bears the expenses arising from confinement of out-of-state parolees until his return to the sending state, it is my opinion that the Commonwealth of Virginia should bear the expenses incurred during the confinement of such out-of-state parolees until delivery into the custody of the sending state.
REPORT OF THE ATTORNEY GENERAL

CRIMINAL PROCEDURE—Extradition—Nonsupport case.  F-122

May 16, 1951.

HONORABLE WM. ARCHER ROYALL,
Commonwealth’s Attorney for Tazewell County.

This will acknowledge receipt of your letter of May 11, requesting my advice as to whether §19-62, Code of Virginia, outlines the proper procedure for requesting extradition of a man charged by the chancery side of a court of this State for disobeying its order for support of his infant children. You further state the man was placed in jail after failure to comply with the support payments ordered pursuant to a divorce and custody suit, released from jail upon condition that he make payments, and subsequently removed himself from this State into West Virginia.

By the facts presented, it appears that the man is guilty of contempt of court by disobeying its order and is guilty of violating the terms of his conditional release from jail. Without an expression from the court as to whether it considers the man guilty of criminal contempt or civil contempt, it is extremely difficult to determine whether or not he has committed a crime in this regard in this State as there is little clear-cut distinction between criminal and civil contempt. However, as a practical solution, I would concur with you that it would seem advisable to follow the procedure outlined in §19-62 in requesting an extradition in this matter. I feel that the authorities of the state to which the man has fled would be inclined to return a person who is charged as being a fugitive from service of a jail sentence after violating the conditions of his release and an order of court.

In the alternative you could proceed under §62-91, upon the ground that the man is guilty of the crime of nonsupport in this State. See §20-61, 1950 Code of Virginia, as amended. In the event that West Virginia declines extradition under §19-62, it might be advisable to then proceed under §19-61.

CRIMINAL PROCEDURE—Interest on fine and cost when settlement is made with clerk.  F-173

April 26, 1951.

HONORABLE HORACE ADAMS,
Clerk, Circuit Court of Prince Edward County.

I have your letter of April 21, in which you ask the following question:

"Please advise if interest should be added to the amount of fine or fine and costs for which judgment has been docketed in criminal cases when settlement is made by payment to the Clerk of Court."

I can find no statute requiring that interest be charged on a judgment for fine and costs when settlement is made by payment to the Clerk of the Court. In the absence of such a statute, I do not think that you should collect interest. My information is that it is not the practice of Clerks to collect such interest.

CRIMINAL PROCEDURE—Jurisdiction of trial court to suspend sentence after judgment final.  F-75b

November 30, 1950.

HONORABLE PLEASANT C. SHIELDS,
Executive Secretary of Virginia Parole Board.

This is in reply to your letter of November 13, 1950, and has reference to the court orders in the case of Commonwealth of Virginia v. Gordon E. Robinson and
Lee R. Booker. The first of these court orders appears to be a final judgment of the court finding the defendants guilty and imposing sentence upon them. The latter order takes cognizance of the fact that the Supreme Court of Appeals of Virginia has refused a writ of error to the original conviction and purports to again sentence the defendants.

The question presented is whether the Judge entering these orders now has jurisdiction to suspend the sentence imposed on the defendants.

It is my opinion that the original order makes final disposition of the case and that when that order became final, either by the expiration of the term of court or of fifteen days, that the court no longer has jurisdiction and may not suspend the sentence imposed by the order.

The entry of the second order does not, in my opinion, in any way alter the finality of the first order.

CRIMINIAL PROCEDURE—Necessity of preliminary hearing.  F-85

Honorable Louis F. Jordan,
Civil and Police Justice of Waynesboro.

This is in reply to your letter of May 23, 1951, which I quote as follows:

"Some weeks ago a woman swore out a felony warrant against a man in this City charging him with a felonious assault, with intent to maim, disfigure and disable etc. . . . The man was released on a considerable bond for his appearance before the opening day of the present term of our Corporation Court; but, as no preliminary hearing had been asked for, the Commonwealth’s Attorney or the Court did not see fit to convene a grand jury to hear the case; and thus far, the matter is still in abeyance and no hearing had been set or a date for same requested of me.

"As to whether a preliminary hearing in Virginia is a matter of right has always seemed in doubt to me, and, as I recall it over my years of practice, this has puzzled a number of what I would class our first class criminal lawyers.

"I am writing to ask your opinion in this case; especially to ask if you think I should request the Commonwealth’s Attorney and defense lawyers to submit to a preliminary hearing or definitely waive same, or, as to whether you think I am acting properly to sit by and wait for this request to come through the Commonwealth’s Attorney and the defense lawyers."

I believe the answer to your question may be found in the case of Benson v. Commonwealth, 190 Va. 744, at page 749.

The Court had already held in Jones v. Commonwealth, 86 Va. 661, 10 S. E. 1905, that an accused who had been indicted in a court of record before he had been arrested on a criminal warrant could be tried without any preliminary hearing.

In the Benson case the accused had been arrested on a criminal warrant prior to his indictment by a grand jury; however, the Commonwealth’s Attorney dismissed the warrant and proceeded to indict the accused without any preliminary hearing. The language of the Supreme Court of Appeals was as follows:

"In the second assignment of error the defendant contends that he has been deprived of due process of law in violation of the Fourteenth Amendment, and also in violation of section 8 of the Virginia Bill of Rights, by the refusal of the police justice for the city of Norfolk to conduct a preliminary hearing after he had been arrested on a warrant returnable to that court. It appears that, when the defendant insisted on having a preliminary hearing
before witnesses were allowed to appear before the grand jury, the attorney for the Commonwealth dismissed the warrant. The defendant insists that the purpose of such dismissal was to deprive him of the preliminary hearing and hence of his constitutional rights.

“In Jones v. Commonwealth, 86 Va. 661, 10 S. E. 1005, it was held that an accused who has been indicted in a court of record may be tried on the indictment without any preliminary hearing. We know of no reason why the Commonwealth could not lawfully dismiss the warrant against the accused. The Commonwealth’s attorney had complete authority over the conduct of the prosecution and was at liberty to dismiss the warrant if he thought it would expedite the proceedings. We hold that, under these circumstances, the defendant had no right, either statutory or constitutional, to be afforded a preliminary hearing prior to the finding of the indictment or to his trial thereon.” (Italics added)

The language which I have italicized would seem to be a complete answer to your question. If the control of the case rests with the Commonwealth’s Attorney, and he may, in his discretion, dismiss the warrant and proceed to indict without a preliminary hearing, there would seem to be no duty on you to request that he proceed to submit to a preliminary hearing.

CRIMINAL PROCEDURE—Payment for issuance of subpoenas for defense witnesses where defendant unable to pay. F-293

May 15, 1951.

Miss Betsy N. Jordan,
Clerk of Corporation Court of Waynesboro.

This is in reply to your letter of April 20, 1951, in which you request my opinion on the following questions:

“In summoning witnesses for the defense in a criminal case, where the defendant is unable to pay the costs for serving such subpoenas as are necessary to his defense, will you please advise me who is responsible for the payment of such service fees. * * *.

“I have also been asked if a defendant is entitled to a certain number of witness subpoenas with no charge either for issuing or serving. Will you please advise me if there is such a provision under the Code?”

In the event a defendant is unable to pay the necessary cost incident to the services necessary for his defense, he should be permitted to proceed under §14-180 of the Code of 1950, which reads as follows:

“Any person who, on account of his poverty is unable to pay fees or costs may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees to them therefore, except what may be included in the costs recovered from the opposite party.”

While one might take the view that this section requires the filing of a petition for permission to proceed in forma pauperis, it is my opinion that the recent rulings regarding “due process of law” which have come about as a result of habeas corpus cases make it advisable for us to give a broad effect to the provisions of this section in order to preclude any question of the defendant having been denied full opportunity to meet the charges against him.

In answer to your second question, I have been unable to locate any such provision in the Code.
CRIMINAL PROCEDURE—Withdrawal of Commonwealth's Attorney from criminal prosecution.  F-69

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

September 19, 1950.

I am in receipt of your letter of September 18, from which I quote as follows:

"Does an Attorney for the Commonwealth have the right to withdraw from the prosecution of a criminal case when the complaining witness or others for him employ a private prosecutor to prosecute the case, or if he cannot withdraw completely, can he put the responsibility on the privately employed counsel by requiring him to completely take charge of the case?"

It is the duty of the Commonwealth's Attorney to institute and prosecute cases involving a violation of the penal laws of the Commonwealth. He is not only an official arm of the court, but the duly constituted representative of the people to see that their cause is properly presented in the vindication of justice.

In McCue's Case, 103 Va. at page 1004, it was said: "The right of the public prosecutor to have associated with him an attorney to assist in the prosecution is established law in this State, and is not a proper subject of animadversion."

In Jackson v. Commonwealth, 96 Va. 107, the Court permitted the Commonwealth's Attorney to retire from the case and a private prosecutor to conduct the case and to open and close the argument before the jury. It was held that this was within the discretion of the trial court and not subject to review unless improperly exercised to the prejudice of the accused.

It is my opinion that the Commonwealth's Attorney may accept assistance from an attorney privately employed or he may decline to accept such assistance. With the consent of the court, he may withdraw from the case and leave the prosecution entirely to the private prosecutor. If the public prosecutor accepts the assistance of the private prosecutor, without withdrawal from the case, it is my opinion that he may permit the privately employed counsel to take charge of and conduct the prosecution. I advise, however, that the consent of the court be first obtained before permitting privately employed counsel to take complete charge of the case.

CROP PEST CONTROL LAW—State Entomologist has no authority to require references of good character from applicants for registration.  F-5a

August 8, 1950.

MR. G. T. FRENCH,
State Entomologist.

This is in reply to your letter of August 1st in which you ask if the State Entomologist may, under Section 3-175 of the Code, require an applicant for a Certificate of Registration as a nursery man or dealer in nursery stock to file three references as to character, good standing and business connections which are satisfactory to the State Entomologist and to furnish the names and addresses of the applicant's last three employers.

Section 3-175 reads, in part, as follows:

"It shall be unlawful for any person, either for himself or as agent for another, to offer for sale, sell, deliver, or give away, within the bounds of this State, any plants, or parts of plants, commonly known as nursery stock, unless such person shall have first procured from the State Entomologist a certificate of registration, which certificate shall contain such rules and regulations concerning the sale of nursery stock as the State Entomologist may prescribe."
Section 3-175 is a part of Article 1 of Chapter II of Title 3 of the Code, which deals with tree and crop pests. Several sections contained in this article authorize the Commissioner of Agriculture and Immigration to adopt rules and regulations designed to eradicate and prevent the dissemination of pests which cause the spread of plant disease among nursery stock as that term is defined in Section 3-151. For instance, Section 3-155 directs the Commissioner to provide rules and regulations under which the State Entomologist shall proceed to investigate, control, eradicate and prevent the dissemination of pests as far as may be possible. Section 3-161 authorizes the Commissioner to provide quarantine rules and regulations concerning the planting, exposing, sale and transportation of all plants or parts of plants within the state. None of the sections in this article authorize the Commissioner to adopt rules and regulations governing the qualifications, business or otherwise, of those engaged in the business of selling nursery stock.

Since the statute in question is designed primarily to prevent the spread of plant disease rather than to provide for the regulation of the business activities of those engaged in this occupation, it is my opinion that the State Entomologist cannot require applicants for registration to furnish references as to character, good standing and business connections which are satisfactory to the State Entomologist.

DEEDS—Marginal release of portion of debt. F-245a

January 4, 1951.

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

This is in reply to your letter in which you requested my opinion as to the proper interpretation of the first paragraph of section 55-66.3 which relates to marginal releases. The facts are as follows:

"In the instant case there is a deed of trust on record in this county securing ten notes in the amount of $2,000.00 each, for an aggregate of $20,000.00. At the present time either by marginal release or by deed of release nine of these notes, representing $18,000.00, have been released, and the attorney wishes to release the remaining $2,000.00 by marginal release."

Your specific question is whether or not you are required under the above mentioned section to release not less than 25% of the indebtedness at one time regardless of whether it is the first 25% or the last 25%. Section 55-66.3 reads in part as follows:

"When payment or satisfaction is made of a debt secured by mortgage, deed of trust or vendor's lien, or when any one or more of the obligations representing at least twenty-five per cent of the whole amount secured by any such lien, but less than the whole number of such obligations so secured, when the debt secured thereby is evidenced by two or more separate written obligations sufficiently described in the instrument creating the lien, shall have been fully paid, the lien creditor, unless he shall have delivered a proper release deed, shall cause such full payment or satisfaction, or partial payment or satisfaction, as the case may be, to be entered on the margin of the page of the book where such encumbrance is recorded; ** **." (Italics supplied)

It is my opinion that the 25% minimum fixed by the provision quoted above applies only to "partial payment or satisfaction" and that the italicized portion of the provision of section 55-66.3 requires a marginal release when the clerk is satisfied that the debt has been fully paid and satisfied.
DEED OF TRUST—How released—Taxation—Recordation—Tax on deed set at date of conveyance regardless of later improvements on property.

January 17, 1951.

MR. ROBERT D. HUFFMAN,
Clerk of the Circuit Court of Page County.

This is in reply to your letter of January 6, 1951, which reads as follows:

“'A local bank located in the southern end of Page County has adopted the practice of making an endorsement upon certain paid notes drawn in its favor, and secured by Deeds of Trust and recorded in this office, for the purpose of having released the lien of record, in the following words: 'We hereby this........ day of................, 19........, assign all rights and interests in the within note unto........................................, Attorney

By: ........................................... .... .................................. C

Bank of ....................................................Bank of .......................

The designated attorney in turn makes a marginal release as assignee of the Bank and the paid notes are delivered to him.

'I have taken the position and have so advised all parties concerned that this is not a good and proper release and is certainly a bad practice, will you please advise me.

'Will you please advise me also, what value should be used in determining the recordation tax of a deed of conveyance when subsequent to the execution of the deed and prior to recordation thereof, improvements have been placed upon the real estate conveyed.'

In answer to your first question, please be advised that the procedure which the bank has adopted is novel to me and, as I do not find any such procedure covered by the statutes, I should dislike to hazard an opinion as to its legal effect. In my opinion the better practice would be for the bank to follow either the provision of §55-66.1 or §55-66.3 of the Code. Under the former section the bank could assign the debt and make a marginal entry of such assignment, in which case the assignee could then properly make a release. Under the latter section the bank could designate the attorney, its agent or attorney, or attorney-in-fact and he could then execute the marginal release for them.

With regard to your latter question, I am enclosing a copy of an opinion rendered to Honorable Littleton H. Mears, Commonwealth's Attorney for Northampton County, which deals with a similar question on a deed of lease. I advised Mr. Mears that the value to be used in determining the recordation tax of a deed of lease is the value at the "date of lease." In the event the deed presented for recordation is a deed of sale and not a lease, the amount of tax is determined in accordance with §58-54 of the Code which reads, in part as follows:

"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."

Since the conveyance takes place on the date the deed is executed, the value at that date and not the value at the date of recordation should be used in determining the tax.
DEEDS OF TRUST—Marginal release—Original beneficiary after obligation is paid may “assign” the instrument sufficiently to authorize the assignee to secure a marginal release.

DELINQUENT TAXES—Statute of limitations—Voluntary payment after debt barred—Computing time. F-262 & F-90

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

This is in reply to your letter of June 27, from which I quote in full:

"After an obligation secured by a deed of trust has been fully paid and satisfied to the original beneficiary, in your opinion, is it proper or permissible for such original beneficiary to assign the instrument to an attorney for the sole purpose of releasing the lien of record?"

"Will you also please advise us the correct interpretation to be placed upon section 58-767 of the Code of Virginia, with respect to delinquent taxes on real estate. We have not been collecting taxes on real estate after twenty years from July 1, following the tax assessment year. Is this proper or should we receive taxes for all years delinquent when voluntarily tendered? If our practice in not collecting after the expiration of twenty years is correct is our interpretation of the statute with respect to the date on which taxes on real estate become delinquent correct or could it possibly mean from date of sale?"

Technically, it might be said that the beneficiary, after the obligation secured by a deed of trust has been satisfied, has no interest therein to assign to anyone. However, if such assignment purports to appoint the attorney as the agent of the beneficiary for the purpose of authorizing him to have the deed of trust released under the provisions of Section 55-66.3 of the Code, and you are satisfied that he has such authority, I am of the opinion that it would be permissible to enter a marginal release of the deed of trust.

In answer to your second question, I am enclosing a copy of an opinion rendered on February 8, 1949 to the Honorable John H. Powell, Clerk of the Circuit Court of Nansemond County, in which I expressed the view that real estate taxes for any year become delinquent as of June 30 of the following year. Therefore, it can be seen that I concur in your interpretation of Section 58-767 of the Code and in your practice of not collecting taxes on real estate after twenty years from July 1 of the following tax assessment year.

As to receiving voluntary payments of delinquent taxes that are no longer enforceable because of the twenty-year limitation imposed by Section 58-767, I am of the opinion that it would be proper to point out this section before accepting payment of delinquent taxes that have been so barred and cancelled.

DENTISTRY—What constitutes practice of mechanical dentistry. F-198

MR. CARTER R. ALLEN,
Substitute Civil and Police Justice for Waynesboro.

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

"This is a request for information in regard to what constitutes the practice of mechanical dentistry.

"The Virginia Code, Sections 54-146 and 1947, defines the practice
of dentistry and makes several exclusions as to what does not constitute practice. However, some clarification is desired.

"The problem is this instance involves the question:—can a dental technician, or mechanical dentist, make repairs and minor alterations to bridge work or artificial teeth, where no contact with the human mouth is had. That is, if a technician is presented with an individual’s artificial teeth for repairs, can these repairs be done without involving the technician in the illegal practice of dentistry?"

The practice of dentistry is defined by Section 54-146 of the Code. Among other things it includes one who “shall take impressions, or shall supply artificial teeth as substitutes for natural teeth, or shall place in the mouth and adjust such substitutes, * * *”. Section 54-147 specifies certain exceptions to the preceding section among which is “the performance of mechanical work on inanimate objects only, for licensed dentists, by any person employed in or operating a dental laboratory”. I presume that your inquiry relates to a dental technician who is doing the work you describe not for a licensed dentist but that he is dealing directly with an individual who has come to him for “repairs and minor alterations to bridge work or artificial teeth”. In my opinion such a technician does not come within the quoted exception but is engaged in the practice of dentistry as defined by Section 54-146. While it may be that a skilled technician could do minor work on a mechanical appliance without the necessity of the supervision of a licensed dentist, yet once such a precedent is established I am afraid it would be difficult to define the limits within which such a practice might be confined. It seems to me plain that it was the intention of the General Assembly that the performance of work on artificial appliances should be under the supervision of a licensed dentist.

DEPARTMENT OF HEALTH—Authority of over fluoridation of water.
F-224

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

This is in reply to your letter of September 19, 1950, in which you request approval of the following proposed policy:

"The State Department of Health accepts the principle of fluoridation of public water supplies providing such fluoridation can be done under properly controlled conditions. The procedure to be followed, in all instances, is that the governing body of the community concerned officially request approval from the Division of Engineering, State Department of Health, for fluoridation of its water supply, following which the Division of Engineering will make such investigation as may be necessary and approve or disapprove the request.

"It is understood that no special educational program will be put on by the Department of Health to the end that public water supplies will be fluoridated and, further, that all requests by governing bodies of communities will be supported by endorsement of the medical and dental professions, local departments of health, and an ordinance enacted by the local authority governing fluoridation of public water supply."

You also ask my opinion as to the responsibility of the State Department of Health in the event an individual or group of individuals should make any claim for damages as a result of being furnished with a fluoride treated water.

The provisions of law governing public water supplies and the authority of the
State Board of Health to supervise and control same are found in Chapter 3 of Title 62 of the Code of 1950. Generally speaking, the function of the State Board is to assure that public water supplies are pure and not prejudicial to the public health. No authority is given for the approval or disapproval of the addition of substances to water supplies for purposes of medication to the public. Section 62-50 of the Code 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 without a written permit from the State Board of Health for the supplying of such water; except that this provision shall not apply to the extension of water pipes for the distribution of water. The application for such a permit shall be accompanied by a certified copy of the maps, plans and specifications for the construction of such water works or extensions, and a description of the source or sources from which it is proposed to derive the supply and the manner of storage, purification or treatment proposed for the supply previous to its delivery to consumers; and no other additional source of supply shall subsequently be used for any such water works, nor any change in the manner of storage, purification or treatment of the supply be made without an additional permit to be obtained in a similar manner from the State Board of Health.” (Italics supplied)

In the absence of express authority to either approve or disapprove the addition of substances to water for the purpose of medication, it is my opinion that, acting under the provisions of §62-50, the State Board should confine its activity, with reference to such practices, to a determination of whether such water is safe for drinking or domestic use. If a permit is requested for treatment of water with fluorine, and the State Board, following its usual procedure, determines that such water is safe for drinking and domestic use and not prejudicial to the public health, then a permit should be granted, otherwise the permit should be denied. Following such procedure, the questions of liability would be no different than in the normal case.

DEPARTMENT OF PUBLIC WELFARE AND INSTITUTIONS — Blanket bonds for employees. F-181

HONORABLE RICHARD W. COPELAND,
Director, Department of Welfare and Institutions.

This is in reply to your letter of June 30, in which you state that the State Board of Welfare and Institutions has under consideration the purchase of a blanket bond for the employees of your department instead of taking individual bonds on specific individuals. You ask whether or not such a blanket bond would meet the requirements of law.

The statutory provision dealing with the bonds of employees of the Department of Welfare and Institutions is Code Section 63-12, which reads as follows:

“Proper bonds shall be required of all agents and employees who shall handle any funds which may come into custody of the Department. The premiums on the bonds shall be paid from funds appropriated by the State for the administration of the provisions of this title.”

This provision was apparently enacted pursuant to Section 85 of the Constitution, which provides that all State officers and their deputies, assistants or employees, charged with the collection, custody, handling or disbursement of public funds shall be required to give bond for the faithful performance of such duties; the
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amount of the bond and the manner in which security shall be furnished to be specified and regulated by law.

Since Section 63-12 merely provides that "proper bonds shall be required", without specifying either individual or blanket form of bond, it is my opinion that either form of bond would be proper so long as it is conditioned upon the faithful performance of duty on the part of the employees concerned. I understand that surety companies are now writing the blanket form of bond which carries such conditions, though formerly they did not do so. If they are willing to write such a bond, it is my opinion that this type of bond would meet the statutory requirements.

Most of such blanket bonds carry a provision stating that it does not cover employees specifically required by statute to give bond. Since Section 63-12 does require employees handling funds to give bond, any blanket bond which is taken should not contain such an exclusionary provision, or else it should be clearly qualified so that it would only exclude such officers as the Director of the Department and members of the Board, who are required to give individual bonds. In other words, it should be clear that the bond covers those employees mentioned by Section 63-12.

DEPOSITS—Security required for deposits to meet bond payments. F-130

December 1, 1950.

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

This is in reply to your letter of November 27, 1950, in which you request my opinion as to whether an out-of-State bank designated as paying agent in connection with bonds issued for a Sanitary District should be required to deposit securities in escrow to protect deposits made for the purpose of paying interest or principal on such bonds as they become due.

You make reference to my letter to you under date of March 7, 1950, in which I advised that in my opinion out-of-State banks might be designated as paying agents for such bonds.

In that letter no consideration was given the question of the security which such bank should give. However, on August 19, 1936, in an opinion to Honorable L. McCarthy Downs the former Attorney-General, the Honorable Abram P. Staples, held that funds deposited for such purposes should be protected as provided by the Code. I enclose a copy of that opinion for your convenience.

With reference to the question of designating out-of-State banks as paying agents for such bonds and the security required, I call your attention to Section 58-943.1 of the Code of Virginia of 1950. This section is contained in the 1950 Supplement to the Code and reads as follows:

"Deposit in banking institutions without the State of local funds to meet obligations payable outside State.—Notwithstanding other provisions of this article the treasurer of any county or town may if the State Commission on Local Debt first approve, deposit local funds in banking institutions without the State. Such institutions, which shall be designated by the Commission, shall give such security as the Commission deems proper and shall meet such other conditions as the Commission prescribes. All such deposits shall be limited to the sums reasonably necessary to pay principal or interest on obligations of the county or town which are payable at some place outside the State and where any such banking institution is located." Section 58-943.1.

Section 58-943.1 was enacted into law by the Legislature during the 1950 term and was not a part of our law at the time I wrote to you in March. It probably was not in effect at the time of the bond issue in question. However, it is my opinion
that this section indicates an intention on the part of the Legislature that such deposits be protected.

As a practical solution to the problem now confronting the County I would suggest that an attempt be made to effect an escrow agreement to comply with the general law or that the State Commission on Local Debt be apprised of the situation and asked to designate security and conditions under the new law, which security might be less than that required under the law prior to the 1950 Amendment.

DEPOSITS—State funds with Federal Reserve Bank. F-107

HONORABLE JESSE W. DILLON,
Treasurer of Virginia.

July 7, 1950.

This is in reply to your letter of June 29, with which you sent to me a copy of Operating Circular No. 16 and the Form of Agreement of Public Official (Form No. Cust. 6) issued by the Federal Reserve Bank covering the safekeeping and custody by the Federal Reserve Bank of securities pledged by member banks of the Federal Reserve system with public officials.

You ask whether, under Section 2-181 of the Code as amended by Chapter 528 of the Acts of Assembly of 1950, you can, with the consent of banks in which State monies are deposited, permit securities pledged by such banks to protect State deposits to be placed with the Federal Reserve Bank for safekeeping under the circular and agreement prepared by that agency.

Article 4 of Chapter 14 of Title 2 of the Code deals with the deposit of State funds in such banks as are designated as State depositories by the Treasury Board. Section 2-179 provides that such banks shall give a bond to secure the State funds deposited with them. Section 2-181 provides for the deposit of securities in lieu of giving such bonds and as amended in 1950 reads in part as follows:

"Any such bank, however, may deposit with the State Treasurer, or with the approval of the State Treasurer with the Federal Reserve Bank of Richmond, to be held subject to the order of the State Treasurer, in lieu of such bond, registered or coupon bonds of the State of Virginia or State highway certificates, registered or coupon bonds of any municipality, county or subdivision thereof of the Commonwealth of Virginia, issued in compliance with the statutes, authorizing the same, or registered or coupon bonds of the United States, or interest-bearing United States Treasury notes, registered in the case of registered bonds in the name of the bank making such deposit, or bonds of the Home Owners' Loan Corporation, and of any other corporation or agency created pursuant to an act or acts of the Congress of the United States, provided such bonds are guaranteed by the Federal Government as to both principal and interest and the evidence of such guarantee as appears on the face of such bonds. All such bonds and notes shall be taken at the market value on the date of deposit, and shall be held upon the same condition and trust for the protection and indemnity of, and for the payment of interest to the State, stipulated above in relation to the bond given under §2-179. Such banks shall at the same time deliver to the State Treasurer a power of attorney authorizing him to transfer the bonds and notes deposited, or any part thereof, for the purpose of paying any of the liabilities provided for in this title."

The language italicized was added by the amendment in 1950, and was designed specifically to authorize the placing of such securities with the Federal Reserve Bank under the plan which has now been adopted by that agency in lieu
DEPOSITS AND DEPOSITORS—Security required for deposits to meet bond payments. F-248g

September 25, 1950.

DR. JOSEPH E. BARRETT,
Commissioner of Mental Hygiene and Hospitals.

In your letter regarding the bids received by the State Hospital Board for the construction of the personnel building at Central State Hospital you state that the bid submitted by the lowest bidder was $161,610.57 in excess of the combined appropriations contained in Items 764½ and 769 of the Appropriation Act. These two items are the appropriations made for an employees' dormitory and a nurses dormitory and constitute the funds which are being used for the erection of the personnel building. You request my opinion as to whether the additional amount which is needed can be taken from the appropriation of $653,595.00 which is contained in Item 764 of the Appropriation Act as an appropriation for a tuberculosis treatment building and transferred to the appropriation for the personnel building. You state that it is the unanimous recommendation of the State Hospital Board that this be done if legally proper and that this recommendation was based upon the following facts which are set forth in your letter:

"The plans for the T. B. Building are not yet complete, and it is not expected that they could be completed until about December 1st, and they would then have to be advertised for a period of forty days before bids could be received, which would run well into the beginning of next year. In addition, on the basis of present construction cost it is estimated that the T. B. Building will cost no less than $880,000. It is known what the Personnel Building will cost, and it is also known that the erection of this Personnel Building will release no less than 100 beds for patients, which are now being utilized to take care of employees.

"Central State Hospital is 958 patients overcrowded beyond its capacity, and it is very urgent that something be done to relieve this overcrowding. The erection of the Personnel Building will do this faster than any other procedure available just now. It is the opinion of the State Hospital Board that these definitely are closely related projects in that the primary intent of the whole capital outlay program was to provide for more adequate care and treatment of patients, and that later developments have rendered such transfers appropriate and advisable, and that in this way funds appropriated would be used to the best advantage, and to the best interests of the institution."

Section 12 of the Appropriation Act which deals with the capital outlay appropriations made for the institutions under the control of the State Hospital Board as well as other institutions under the control of certain other governing boards reads, in part, as follows:

"In order that a more orderly and efficient use may be made of capital outlay appropriations when considering all of the institutions as a coordinated system, rather than as individual units, the governing board is hereby authorized and empowered, with the written approval of the Governor, to transfer capital outlay appropriations made for one or more buildings or projects in any institution under its management and control to the capital
outlay appropriations for one or more buildings or projects in the same or
any other institution under its management and control, definitely and closely
related to the project for which the appropriation was made, provided that,
in the opinion of the Governor and of the governing board, later develop-
ments have rendered such transfers appropriate and advisable, to carry out the
original intention of the General Assembly in that the appropriations made
to the various buildings and projects shall be used to the best advantage and
for the best interests of the institutions."

It is my opinion that this provision was designed to meet just such a situation
as is presented by the problem now confronting the State Hospital Board and clearly
authorizes the transfer suggested in your letter. The State Hospital Board is ready
to proceed with the construction of the personnel building but from the facts stated
in your letter this cannot be done without additional funds. It appears also that
the appropriation made for the T. B. building would not be sufficient to construct
that building. Such a transfer is necessary in order to make an orderly and efficient
use of the capital outlay appropriation as contemplated by this section. I think this
is true particularly in view of the fact that the plans for the T. B. building are not
complete. The fact that the construction of the personnel building will release at
least one hundred beds for patients now being utilized to take care of employees
would enable the Central State Hospital to better care for its patients, an object
intended to be accomplished by the construction of the T. B. building. The con-
struction of the personnel building is, therefore, in my opinion definitely and closely
related to the project for which the appropriation was made by Item 764 sufficiently
to authorize the proposed transfer if approved by the Governor.

DOG LAW—Owners of poultry killed by dog may recover loss from Dog
Fund without first proceeding against dog's owner. F-33—F-95

HONORABLE WALTER JOHNSON,
Commonwealth's Attorney of Northumberland County.

August 9, 1950.

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

"This is to respectfully request your interpretation of Section 29-202,
as amended, of the Code of Virginia as applied to these facts.

"A citizen of this County applied to the Board of Supervisors of this
County for compensation for poultry killed by dogs. He informed the Board
that the offending dogs belonged to his neighbor and in the interest of
neighborhood tranquility he preferred that the Board, rather than the dog
owner, should compensate him. The Board rejected the application on the
theory that where, as here, the injured person knows identity of the dogs
and the dog owner he should seek his relief there."

Section 29-202, as amended in 1950, reads as follows:

"Any person who has any livestock or poultry killed or injured by any
dog not his own shall be entitled to receive as compensation therefor a
reasonable value of such livestock or poultry. Nothing herein shall be con-
strued as limiting the common law liability of an owner of a dog for damages
committed by it, and when compensation is paid as above provided, the
county or city shall be subrogated to the extent of compensation paid to the
right of action of the owner of such livestock or poultry against the owner
of the dog and may enforce the same in an appropriate action at law.
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.

"Provided, however, that if the governing body of the county of Surry so prescribe by ordinance, no payment by the county shall be made under this section unless and until the claimant shall have exhausted his legal remedies against the owner of the dog doing the damage for which compensation under this section is sought; such governing body of such county may require the submission of evidence that the claimant has exhausted his legal remedies against the owner of the dog, if known."

The last paragraph was added by Chapter 242 of the Acts of 1950 and makes it clear that only in the County of Surry can the Board of Supervisors require the claimant to exhaust his legal remedies against the owner of the dog doing the damages. The first paragraph, which is applicable to other counties, contains no reference to such a requirement and the fact that the Legislature considered a special provision necessary in the case of Surry County is an indication that the first paragraph should not be construed as authorizing counties in general to adopt such a requirement.

As can be seen from Section 29-209, the dog fund was set up in part to provide a fund from which to pay compensation for damage to live stock and poultry. Since, except in the case of Surry County, Boards of Supervisors are not specifically authorized to require the claimant to proceed against the owner of the dog, it is my opinion that they cannot refuse to pay compensation until such remedy has been exhausted.

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ELECTIONS—Ballots—Arrangement of names. F-100a

May 15, 1951.

Mr. H. C. Elmore,
Secretary Dinwiddie County Electoral Board.

I am in receipt of your letter of May 11th from which I quote as follows:

"The Dinwiddie County Electoral Board, will meet at Dinwiddie Court-house on Monday May 21st, 1951 to appoint the Judges for Primary Election and Judges and Clerk's for General Election for the year and to transact such other business that may properly come before our board. I understand that one of the candidates for Commonwealth Attorney, and one for the Board of Supervisors, will appear before our board on the 21st, and request that ballots be printed, with candidates for each office in Alphabetical form. "It has always been the policy of our board to place the incumbent, first in line of candidates for his office. "If this is continued, would like to know if this would be in orderly form. Also, would like to know, whether or not the other candidate for the same office, should be placed in alphabetical form, or in order as filed."

Section 24-215 of the Code deals with the form of the ballots to be used in an election and provides that the names of the candidates shall be printed immediately below the office for which they have announced "in due and orderly succession". Your inquiry raises the question of what is "due and orderly succession".

This office has heretofore expressed the opinion that the section gives to the Electoral Board considerable discretion as to the order in which the candidates names are printed. For example: it has been held that the printing of the candidates' names in alphabetical order or in the order in which they announced their candidacies meets the requirements of the section. Whether or not the printing of the name of the incumbent first followed by the names of the other candidates would constitute
a compliance with the section is a close question. I say this because an incumbent who is running for re-election is, after all, a candidate and occupies the same status as the other candidates. Therefore, I should not think that he would be entitled to any advantage over the other candidates if indeed the printing of his name first may be said to be an advantage. In view of the discretion vested in the Electoral Board I do not feel that I can categorically say that the printing of the incumbent's name first would be contrary to the requirements of the section but I certainly think that either of the two other methods I have suggested would be preferable.

The case to which you refer did not hold that the name of the incumbent should be printed on the ballot first. As I remember the case the court held that the printing of the names of the candidates in the order in which they qualified constituted a compliance with the section.

ELECTIONS—Ballots—Seal of electoral board may be plain stamp rather than impression seal. F-100a

October 23, 1950.

MR. NATHAN M. BRISCO, Secretary The Electoral Board of Smyth County.

I am sorry that the press of work in the office has delayed my reply to your letter of October 10th in which you request my opinion upon the following matter:

"Under Section 158 of Virginia Election Laws it is stated, among other things, that the seal of the Electoral Board shall be affixed to the reverse of the ballot to be used by the voters in elections. I do not find where it is specified that such a seal shall be of an impression type.

"What, in your opinion, would forbid the use of a plain stamp seal, that is, such type as the United States Post Office uses to cancel postage?"

"A portion of former Section 158 which deals with the seal of the Electoral Board is now contained in Section 24-43 of the Code which reads as follows:

"Seal of board.—It shall be the duty of the electoral board of each city and county to procure and adopt a seal, if there be not one already adopted by the electoral board of such city or county, which seal may be changed from time to time in the discretion of such board, and shall not be less than two inches in diameter. The secretary of the electoral board shall keep in his sole custody the seal or stamp of the board in a sealed package, to be opened by him only when necessary for use in stamping ballots."

You will note that this section refers to the seal or stamp of the Electoral Board. In view of this fact I see no reason why the Board cannot adopt as its seal a plain stamp seal of the type mentioned by you. I find nothing in the statute which requires that the seal shall be of an impression type.

ELECTIONS—Candidates—Candidate for board of supervisors must file petition. F-100b

May 14, 1951.

HONORABLE A. LAURIE PITTS, JR., Commonwealth’s Attorney for Buckingham County.

This is in reply to your letter of May 10, 1951, which reads as follows:

"I am writing to ask you to construe Section 24-373 of the Code of
Virginia with reference to the filing of petitions by candidates for the Board of Supervisors.

"A member of the Board of Supervisors asked me if it was necessary for a candidate for the Board of Supervisors, which is a District office, to file a petition along with his declaration of candidacy. I have never known this to be done by any of the candidates for Board of Supervisors, but I would like to have you give me your opinion on the subject."

Section 24-373 of the Code of Virginia, 1950, reads as follows:

"The name of a candidate for the United States Senate, for representatives in Congress, or for any State office shall not be printed upon any official ballot used at any primary, unless he file along with his declaration of candidacy a petition therefor signed by two hundred and fifty qualified voters of the congressional district of the candidate for House of Representatives and of the State at large with respect to a candidate for United States Senate or any State office. Each signature to the petition shall have been witnessed by a person whose affidavit to that effect shall be attached to the petition. The name of any candidate for the General Assembly, or for any city or county office shall not be printed upon any official ballot used at any primary unless he file along with his declaration of candidacy a petition therefor signed by fifty qualified voters of his city or county witnessed as aforesaid and with like affidavit attached thereto." (Italics added).

On May 11, 1935, the late Honorable Abram P. Staples, then Attorney General, in an opinion to Senator Charles E. Burks of Lynchburg, held that a member of a board of supervisors is a county officer and should file the required petition. I concur fully in that opinion, a copy of which I enclose.

ELECTIONS—Candidates—Filing fee amount of when salary scheduled to change. F-100b

Honorable Felix E. Edmunds,
Member of the House of Delegates.

This is in reply to your letter of May 1st from which I quote as follows:

"Section 24-398 of the Virginia Election Laws provides as follows: 'Every candidate for any office at any primary shall, before he files his declaration of candidacy, pay a fee equal to two per centum of one year's salary attached to the office for which he is a candidate'. Section 14-28.1 of the 1950 Code increases the pay for members of the General Assembly from Seven Hundred and Twenty Dollars to One Thousand and Eighty Dollars per annum beginning January 1952, this Section having been amended by Act of 1948.

'Please advise if it is correct to assume that a candidate for election in the August Primary for 1951 will pay two per centum of the Seven Hundred and Twenty Dollars, that being the salary of office as of the date of the 1951 August Primary.'

I concur with your conclusion that a candidate for election to the General Assembly in the August Primary for 1951 should pay a filing fee of 2% of $720.00, that being the salary of office as of the date of the 1951 Primary, as well as the salary of office as of the date of the November General Election.
ELECTIONS — Candidates — Oath required by Democratic Party Plan.  

HONORABLE ROBERT K. BROCK,  
Chairman, Democratic Committee of Prince Edward County.  

I am in receipt of your letter of May 25, from which I quote as follows:

"I have looked through the opinions of the Attorney General to which I have access, and so far I have found no ruling on the following question:

"Is the requirement on page 12 of the Democratic Party Plan that a candidate in filing his declaration of candidacy as required by the State primary laws should in addition subscribe to and file with his declaration of candidacy the following pledge:

"I, .......................................... ..........., do state on my sacred honor that I am a member of the Democratic party and believe in its principles; that I voted for all of the nominees of said party at the next preceding general election in which I voted and in which the Democratic nominee or nominees had opposition; and that I shall support and vote for all of the nominees of said party in the next ensuing general election. Given under my hand this.............. day of.........................., 19..........

"The question has arisen as to whether this pledge to be filed with the declaration of candidacy must be complied with in order for the candidate to get his name on the ballot."

As you state, the Primary Plan of the Democratic Party provides that the name of no candidate shall be printed upon any official primary ballot unless such person complies with all the provisions of the statutes relating to primaries and, in addition, files with his declaration of candidacy the pledge quoted by you.

Section 24-370 of the Code relating to primary elections specifies the times within which a candidate shall file his declaration of candidacy and further requires a candidate to have "complied with the rules and regulations of the proper committee of his party." In view of this provision, I am of opinion that, in order for a candidate to have his name printed on a primary ballot, he must have filed with his declaration of candidacy the pledge to which you refer.

ELECTIONS—Candidates—Party nominee must be qualified voter for name to appear on ballot.  

HONORABLE W. H. ELLIFFRTS,  
Clerk Shenandoah County Circuit Court.  

This is in reply to your letter of June 25, 1951, from which I quote as follows:

"Section 24-132 of the Code of Virginia for 1950 in part says: 'No person who is not qualified to vote in which he offers as a candidate, shall have his name printed on the ballots, unless he be a party primary nominee.'

"Section 24-134 in part says: 'The name of any candidate for office who has been nominated by his party, either by convention, primary or by being declared the nominee of the party when no primary has been held, shall be certified by the chairman of the party or the clerk of the proper court.'

"I would like to know in light of the above if a person who is a candidate for a county office in this election year who is nominated by his party in a convention or by being declared the nominee, who has not paid his poll tax prior to May 6, 1951, can have his name printed on the ballot."
If the person you describe is not eligible to vote in the election in which he
offers as a candidate, I am of opinion that, pursuant to §24-132 of the Code, his
name should not be printed on the ballot. This office has previously expressed the
opinion 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; that 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.

ELECTIONS—Capitation tax—Effect of service in armed forces on liability
for. F-100h

February 23, 1951.

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

This is in reply to your letter of February 15th from which I quote as follows:

"Under Article XVII of our Constitution, which article was adopted on
May 2, 1945, some questions have been raised as to the poll taxes of certain
members of the armed forces in connection with the primary and general
elections which will be held in 1951.

"The questions are:

"1. A person became of age on January 2, 1949, and was therefore
properly assessable with a poll tax for the year 1950, which has not been
paid. He became a member of the armed forces on January 2, 1951, and we
will assume that he will continue in the armed forces through the entire year
1951. As a condition of voting in 1951 must he pay his poll tax for 1950 or
is it extinguished by virtue of Article XVII of the Constitution?

"2. If, instead of continuing in the service during all of 1951, the per-
son is discharged prior to August 7, 1951, the date of the Democratic Primary,
will he have to pay his 1950 poll tax as a condition of voting or is it ex-
tinguished by the amendment? If not extinguished, must it be paid not later
than six months before November 6, 1951, the date of the general election?"

The pertinent provisions of Article XVII of the Constitution read as follows:

"Sec. 1. * * * 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.

"Sec. 2. * * * All poll taxes for the years 1942, 1943, and 1944, assessed
or assessable against any person who is, or who at any time during the
existing World War II has been, a member of the armed forces of the United
States in active service, are hereby canceled and annulled.

"And, also, all poll taxes assessed or otherwise assessable for every year
during any part of which such person is a member of said forces in active
service during said war or any future war, and, also, for the three years
next preceding such person's discharge from said active service, provided
such discharge is not dishonorable, although such person was not in said
service during all of said years, are hereby canceled and annulled."

It is my opinion that the person to whom you refer in question 1 may vote
in 1951, under the authority of Section 1 quoted above, without paying his 1950
poll tax, since he will be in active service during all of this year. However, the 1950 poll tax assessed against him is not necessarily extinguished and whether or not it will be cancelled and annulled depends upon the date of his discharge. For example: If this person is discharged from active service during the years 1952 and 1953, his 1950 poll tax would be cancelled, but if he is discharged subsequent to 1953, he would still be liable for the poll tax assessed against him for the year 1950.

The second paragraph of Section 2 quoted above also controls the answer to your second question and it is my opinion that any person discharged from active service during this year is exempt from the assessment of the 1951 poll tax and is not liable for payment of the poll tax for the years 1950, 1949 and 1948.

In answer to your questions I have assumed that the discharges from active service will not be dishonorable.

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ELECTIONS—Capitation taxes—Must be “Actually Received” by treasurer before deadline. F-100c

HONORABLE LLOYD M. ROBINETTE,
Member of State Senate.

This is in reply to your letter of June 13th in which you ask certain questions relative to the last day for the payment of capitation taxes in order that a person may be eligible to vote. Section 21 of the Constitution requires that such taxes be paid “at least six months prior to the election * * * in which he offers to vote”. Your questions are:

"If capitation taxes are actually mailed at the postoffice of the treasurer of a county on the last day on which poll taxes can be paid in order to vote at the next succeeding election before closing hour of said treasurer's office on said day is such payment of said poll taxes by mail on said date within the six months time limit set by the law?

"If capitation taxes sent by mail to a treasurer of a county reach the post office of such treasurer prior to the closing hour of the treasurer's office is such payment in time, although the treasurer does not visit the post office on that day to receive his mail, and does not actually pick up said capitation taxes until the following Monday?"

In a number of opinions extending over a period of years this office has consistently held that where a person attempts to pay his capitation taxes by mail, even though the letter is mailed, and so postmarked, on or before the last day for the payment of such taxes in order to render him eligible to vote, the tax is not deemed to be paid within the meaning of the constitutional requirement until the tax payment is actually received by the treasurer. In other words, the mere mailing of the tax is not enough. This ruling, so far as I am advised, has been generally accepted and followed—certainly the General Assembly has taken no action to alter it. In my opinion it is applicable on principle to the questions you put.

However, you emphasize in your letter the fact that the treasurer had a post office box in the post office and that he took his mail out of this box on the morning of the last day for the payment of capitation taxes (the last day fell on a Saturday and the treasurer closed his office at noon), but the letter of the taxpayer containing the tax was mailed at such a time that it would normally have been placed in the treasurer's box after that officer had gotten his mail but before the end of the "last day". Actually the last day for the payment of these taxes was a Sunday but the "last day" as used in this letter, and, as I understand it, in yours, refers to the last business day or Saturday.
I have given your letter, and the factual point that you make, careful consideration, but I must adhere to my former opinions and those of my predecessors, namely, that the tax must be actually received by the treasurer within the required time. I do not think that the principle involved can be soundly made to depend on whether or not the treasurer has a post office box. Certainly great confusion would result from such a holding due to the variety of situations that would follow from the facts existing in each particular case.

I do not mean to suggest that a treasurer by deliberately refusing to collect his mail for several days prior to the "last day", and with that purpose in mind, can deprive a citizen of his right of suffrage, but I do not understand that you are presenting such a case.

If this office has been wrong over the years, in its ruling, any citizen whose rights have been improperly denied is afforded a remedy by Section 24-123 of the Code.

ELECTIONS—Conduct at polls; solicitors of votes; witnesses of counting of ballots. F-100

HONORABLE EDWIN LYNCH,
Member of the House of Delegates.

November 2, 1950.

This is in reply to your letter of October 28th in which you requested my opinion on the following questions:

"1. During the day of election is anyone entitled to observe the conduct of the election by the officials at the poll?
"2. What is the distance that solicitors of votes for various parties in elections must stay from the polling place?
"3. In the election on the change in County Government are observers entitled to watch the counting of the vote in each precinct and, if so, who would designate the observers?

The answer to the first and second questions quoted above are controlled by Section 24-186 of the Code which is as follows:

"Except for the judges of election and clerks, no person other than the elector offering to vote shall be within forty feet of the ballot box. In case of a challenge the challengers and challenged and the witnesses may appear before the judges. When such challenge is decided, only the elector having the right to vote shall remain within the prescribed limits."

I am aware of no statute which would prohibit any person from observing the conduct of an election so long as such person stays at least forty feet from the ballot box. It also follows, then, that solicitors of votes for the various parties in elections must also refrain from coming within forty feet of a ballot box.

As to your third question Section 15-268 of the Code provides that in an election on the change of County Organization and Government the regular election officials shall conduct it in such manner as is provided by law for other elections in so far as the same is applicable. While I am aware of no statute expressly applicable to the referendum to which you refer, Section 27 of the Constitution provides that the ballot box shall be kept in public view and shall not be opened nor the ballots canvassed or counted in secret.

It is my understanding that this referendum on the change of County Government is to be held in Fairfax County on November 7th, at which time the electors will elect various officers. Therefore, I am of the opinion that the Judges of such election will be in compliance with Section 27 of the Constitution if they follow
the provisions of Section 24-260 and 24-261 of the Code which deal with partisan elections and select two representatives from each political party represented in the election, or select representatives from bystanders, as the case may be, and, in their presence, open the ballot boxes and canvass and count all the votes cast by the electors on November 7th.

ELECTIONS—Eligibility of voters in area annexed by City. F-100e

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

This is in reply to your letter of July 7, in which you refer to the proceedings brought by the City of Danville to annex certain territory in Pittsylvania County. You state that the City largely prevailed in the suit and that the effective date for annexation was fixed as July 1, 1951. You ask whether persons residing in the annexed area will be entitled to vote in the county or in the city in the primary election to be held on August 7, 1951.

This office has on several occasions in the past expressed the opinion that persons residing in territory annexed to a city can no longer vote in the county since they are no longer residents of the county. The view has also been expressed that, under former Section 2964, now Section 15-144, and former Section 102, now Section 24-90, which latter section deals with the rearrangement of election districts, a problem related to that which exists upon the annexation of territory by a city, the persons living in the annexed area, who before annexation had the right to vote in the county, at once acquire the right to vote in the city. Copies of two former opinions dealing with this question, one of which appears at page 67 of our report for 1936-37 and the other at page 74 of our report for 1943-44, are enclosed. I concur in these opinions.

As you point out, this is not a case of a change of domicile by choice by moving from one county or city to another county or city, and persons who have lived in the annexed area a sufficient time to become entitled to vote in the county precinct of which the area was a part should not lose their right to vote because of a change in the governmental organization controlling the area. Just as in the case when a thickly populated area first becomes a town or city, the statutory provision as to residence in the town or city for a certain length of time is inapplicable. The statutes providing for a transfer of electors residing in the annexed area to the proper poll books in the city and for transfer of voters upon a rearrangement of existing election districts clearly authorize the qualified voters in the annexed area to vote in the city immediately upon annexation.

ELECTIONS—General Registrar—Filling vacancy in office of. F-100d

HONORABLE J. ALDEN OAST,
Commonwealth's Attorney for the City of Portsmouth.

This is in reply to your letter of March 10, 1951, in which you inquire whether the electoral board of your city has authority to appoint a general registrar to fill the vacancy which exists in that office due to the death of the former registrar.

Like you, I have been unable to discover any provision in the statutes governing the appointment of general registrars which provides for the filling of vacancies in the office. However, since the whole question of whether or not the City shall
appoint a general registrar is left to the discretion of the electoral board and, in fact, the board may at the expiration of the term of any such registrar abolish the office by declining to appoint a successor, it is my opinion that the clear intent of the Legislature was that such vacancies be filled by appointment by the electoral board for the unexpired term.

**ELECTIONS — Nominations of candidates by primary or convention — Democratic Party Plan. F-100b**

*Honorable Levin Nock Davis,*
Secretary, State Board of Elections.

I am in receipt of your letter of February 12, in which you enclose a communication addressed to you by Mr. Henry E. Howell, Jr., an attorney of Norfolk. Mr. Howell raises two questions with regard to the interpretation of the election laws and you desire my opinion on them.

Mr. Howell calls attention to Section 24-366 of the Code, which provides that "No party which has adopted the plan of making nominations for office by primary shall have the power to nominate by convention any candidate to be voted for at any particular primary." In connection with this section he says:

"I would like to know, if according to Section 24-366, the Norfolk Democratic Committee at a previous election nominated the candidates by primary they could not change the method in a subsequent election and nominate their candidates by convention. In other words, does Section 24-366 mean that once a party has used the primary for choosing its candidates it cannot change or does it mean that in only a single election, after the choice has been made it cannot be changed, i.e., if the Norfolk Democratic Committee should decide in January, 1951, that the Democratic candidates to the House of Delegates and the State Senate in the November election would be chosen by primary in August, they could not thereafter change that resolution, but in 1953 they could, if they desire, select the candidates by convention rather than by a primary election."

I do not think that the section means that, where the appropriate committee of a political party has decided that its candidates in an election to be held in any one year shall be chosen by a primary, it is then committed to the primary method of choosing candidates in subsequent years. This construction would be inconsistent with Section 24-364 of the Code giving each party the power to provide in any way it sees fit for the nomination of its candidates. What the section means, I think, is where a party committee has chosen to nominate its candidates by the primary method in any year, it cannot then decide to nominate a candidate by the convention method to be voted for at the primary to be held in that year.

Mr. Howell states his second inquiry as follows:

"My second inquiry is as to the proper interpretation of Section 24-370 in view of the provisions of Section 24-351. Section 24-370 provides that in the case of a person desiring to run for the office of State Senator or Representative, the person if his name is to appear on the official ballot in any primary shall file a written declaration of candidacy at least sixty days before the primary. If Section 24-351 leaves within the discretion of the local Democratic committee the decision as to whether the candidates shall be nominated by convention or by general primary, it would mean that a candidate would have to anticipate that a primary would be held and file his declaration of candidacy before the local committee would be required to certify to the State Board of Elections whether or not a primary would be held or the candidates chosen by some other method."

February 26, 1951.
The concern which Mr. Howell expresses is removed by the primary plan of the Democratic Party. That plan, which has been formally adopted by the Party, provides that whenever the appropriate committee of the Party determines that a nomination shall be made by primary election the chairman of the committee shall give at least ninety days notice by publication in at least one newspaper in each county and city of the district. Thus a potential candidate will have sufficient notice that the primary method has been decided upon to enable him to file his written declaration of candidacy at least sixty days before the primary. I presume that any other political party would take similar action if the necessity therefor should arise.

ELECTIONS—Persons acting as judge of election and also commissioner of elections on same day entitled to one day's pay; Mileage. F-100d

HONORABLE MARTIN M. FOLKS,
Clerk of the Highland County Circuit Court.

November 16, 1950.

This is in reply to your letter of November 9, 1950, wherein you requested my opinion on the following situation:

"* * * If a judge returns the poll books and on the same day acts as commissioner of election is he entitled to pay for one or two days service and for mileage on two different days of service? * * *"

Section 24-207 of the Code of 1950 provides as follows:

"The judges, clerks and commissioners of any election shall receive as compensation for their services the sum of seven dollars and fifty cents for each day's service rendered. The governing body of any city, town or county may supplement the compensation herein prescribed for judges, clerks, and commissioners of election or for any one or more of them. (Code 1919, §200; 1920, p. 387; 1926, p. 872; 1928, p. 770; 1932, p. 4; 1934, p. 547; 1938, p. 246; 1944, p. 151; 1946, p. 464; 1948, p. 857; 1950, p. 245.)" (Italics supplied)

Section 24-200, which provides that five judges must also act as commissioners, is as follows:

"The electoral board of each county and city shall, at the time they appoint judges and clerks of election, designate five of the judges so appointed to act as commissioners, who, or any three of whom, shall constitute a board of which the county clerk or the clerk of the corporation court, as the case may be, shall, ex-officio, be clerk."

It is my opinion that the statutory intent is to provide the single sum of $7.50 for "each day's service rendered" and this single amount applies where the judge also acts as commissioner. Provision is made in §24-207, above, allowing the governing bodies to supplement such compensation. Attention is also called to the fact that the Legislature has from time to time, by amendment, sought to provide a reasonable compensation by increasing the amount allowed.

Section 24-208 allows: "Each judge * * * for mileage * * * for each mile necessarily traveled, and $5.00 for carrying the returns and records to the county clerk's office * * *." I am of the opinion that only such mileage as "necessarily traveled" and actually incurred should be reimbursed. Mileage allowances are, of course, not to be used as a method of providing extra compensation, but are only to reimburse actual expense incurred.
ELECTIONS—Primary—Alexandria City of; Charter does not prohibit.  F-30

April 3, 1951.

MR. ARMISTEAD L. BOOTHE,
Member House of Delegates.

This is in reply to your recent letter concerning the interpretation of that part of the charter of the City of Alexandria which deals with municipal elections. Your specific question is whether or not primaries for the nomination of candidates for municipal offices are prohibited by the charter.

As you pointed out, the General Assembly of 1950 provided a new charter for the City of Alexandria and it was enacted as Chapter 536 of the Acts of Assembly of 1950. Chapter 10, thereof, pertains to "Elections" and section 10.01 provides for the election of seven members of Council for terms of three years on the second Tuesday in June, 1952, and on the same date in every third year thereafter.

A reading of the bill as originally introduced in the House of Delegates reveals that section 10.01 contained a prohibition against the holding of a Primary for the nomination of candidates for Council. However, the Senate amended the House bill by eliminating this prohibition and Chapter 10 of the charter was finally enacted without any reference being made to primaries.

Section 10.02 of the charter deals specifically with the nomination of candidates and provides, in effect, that they shall be nominated by petition of not less than fifty qualified voters filed not less than sixty days before the general city election. Further, the names of the candidates must appear on the ballot in the order of their filing. Section 10.03 pertains to the conduct of the general city election and provides, among other things, that the ballots used in the election shall be without any distinguishing mark or symbol.

While sections 10.02 and 10.03 of the charter provide the machinery for the so-called non-partisan election in so far as the general city election is concerned, I find nothing in these sections in conflict with the primary election laws found as Chapter 14 of Title 24 of the Code. Furthermore, the legislative history of the new charter makes it clear, in my opinion, that the General Assembly did not intend to prohibit primaries. Also, it is of interest to note that the General Assembly of 1948, in granting the City of Richmond a new charter, expressly provided that "no primary election shall be held".

Therefore, for the reasons stated above, I concur in your conclusion that the charter for the City of Alexandria does not prohibit the local officials of the Democratic Party from calling a primary to be held on the first Tuesday in April of 1952.

However, I call your attention to the fact that the charter provisions pertaining to the general city election would prevail over general law in conflict therewith. For example, section 10.02, which provides, as pointed out above, that a candidate in order to have his name printed on the ballot shall file with the clerk of the corporation court a petition containing the names of at least fifty qualified voters, must be followed, even though section 24-134 of the Code, dealing generally with candidates for office, provides that when the name of a candidate nominated by primary has been certified to the clerk of the proper court "no further notice of candidacy or petition shall be required".

ELECTIONS—Registrars—Ineligibility for election to office.  F-100d

October 5, 1950.

HONORABLE JOSHUA PRETLOW,
General Registrar for Nansemond County.

This is in reply to your letter of October 3rd which I quote as follows:

"Section 24-66 of the Code of Virginia, 1950, is as follows: 'No person who acts as registrar shall be eligible to an office to be filled by election by
the people at the election to be held next after he has so acted as registrar'.

"I would like to know if this means that a registrar who registers any person after the general election would be ineligible for office to be filled by election by the people the following year; or does the Statute intend to make a registrar who acted on regular registration day, as set forth in Section 24-74 of the 1950 Code of Virginia, ineligible?"

Section 24-76 of the Code provides that the registrar shall at any time previous to the regular days of registration register any party entitled to vote at the next succeeding election who may apply to him to be registered. It is clear, therefore, that a registrar may act as such prior to the regular registration days specified by 24-74. It is my opinion therefore that Section 24-66 is applicable to registrars who have registered voters for the next general election whether he does so prior to or on the regular registration days.

ELECTIONS—Registrars—Ineligibility for election to public office. F-100d

May 10, 1951.

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

This is in reply to your recent letters concerning the eligibility of a certain person to become a member of the Board of Supervisors of Roanoke County in view of the fact that he has previously served as a Registrar in such county.

It appears that the person to whom you refer has recently announced that he will be a candidate for Supervisor of Salem District subject to the Democratic Primary on August 7th of this year. Prior to his announcement this candidate had been serving as Registrar of Glenvar Election Precinct of Roanoke County.

You also state that the candidate in question was appointed Registrar in 1945 and that his term of office expired in May of 1949, but, because of the fact that no one was appointed in his place, he continued to register voters up to and including the 6th day of October, 1950, which was, of course, prior to the last General Election. Furthermore, although he orally advised the Clerk of the Electoral Board that he wished to resign, and many times, after his term of office had expired, he requested that someone else be appointed in his place, he did not tender his resignation in writing until February of this year. Finally, on or about March 12th of this year a new Registrar was appointed and duly qualified, at which time the candidate surrendered possession of the registration books.

The specific question presented by your letter is whether or not this candidate is now eligible to hold the office mentioned above, assuming that he is nominated in the Primary and elected in the General Election to be held this year.

Section 24-66 of the Code provides that Registrars are ineligible for an elective office under certain circumstances, and the pertinent part thereof reads as follows:

"No person who acts as registrar shall be eligible to an office to be filled by election by the people at the election to be held next after he has so acted as registrar; * * * *"

The question to be determined, then, is whether the candidate has "acted as Registrar" since the General Election held in November of 1950. Under the facts presented above, it is my opinion that this question must be answered in the affirmative and, accordingly, it is my conclusion that this candidate would not be eligible for the office which he seeks.

I have reached my conclusion by reference to Section 24-53 of the Code which, among other things, provides that a Registrar shall hold office for two years and "until his successor is duly appointed and qualified". The successor in this case was not appointed and did not qualify until March of 1951, which was, of course,
subsequent to the 1950 General Election. The fact that the candidate did not actually register any one after October 6, 1950, is, in my opinion, not material, the controlling factor being that he had possession of the registration books until his successor qualified in March of 1951, and had the authority and power to act as Registrar until that date.

ELECTIONS—Registrar—No authority to issue a certificate of registration or re-registration.  F-100d

HONORABLE LEVIN NOCK DAVIS,
Secretary, State Board of Elections.

I am in receipt of your letter of August 3rd enclosing letter under date of July 3, 1950, addressed to you by Mr. S. Edward Blair, Chairman, Republican City Committee, Portsmouth, Virginia. Mr. Blair requests information on the right of the General Registrar of the City of Portsmouth to issue a certificate of re-registration to be signed by the General Registrar and given to the person who is re-registered.

A careful examination of the Election Laws of Virginia fails to disclose any authority for the Registrar to issue a certificate of registration to the person registered. This applies to registration as well as re-registration.

The only authority for the Registrar to issue a certificate pertaining to registration is the certificate of transfer to another election district in the same county or city or to transfer to another county or city. This, as you know, is provided for by Sections 24-85, 24-86 and 24-87. The purpose of this certificate is to enable the voter to be registered in another election district. The law requires that the Registration Book shall be kept and preserved by the Registrar and shall at all times be open to public inspection. The only evidence of registration is the record of registration which the law requires the Registrar to keep.

The question posed by Mr. Blair is one which should be addressed to the General Assembly of Virginia.

ELECTIONS—Registrars—Registration books when closed in counties and towns.  F-100d

Mr. LEVIN NOCK DAVIS,
Secretary, State Board of Elections.

This is in reply to your letter of May 21st in which you stated that in towns in which general elections will be held on June 12th for municipal officers the registration books are now closed as to the residents of the respective towns. My opinion is requested as to whether or not the registration books are also closed as to residents of the district in the county.

Section 24-74 of the Code, among other things, provides that Registrars in the towns of this State shall complete the registration of voters for a general election thirty days before the day fixed by law for every such general election, and Section 24-82 of the Code provides that no additional person shall be registered until after the day on which the succeeding general election is held.

It is clear, therefore, that, pursuant to Section 24-82, the special town registration books must be closed on the day fixed therefor as provided in Section 24-74. While Sections 24-74 and 24-82 also apply to Registrars in the various counties, the registration books thereof are not required to be closed until thirty days before the primary or the November general election. Accordingly, I am of the opinion that residents of a district in the various counties may be registered at this time for the purpose of qualifying as electors in the coming Primary.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—Registration—Eligibility of voter—Married woman's failure to change name on book. F-100d

Mr. John C. Hopkins,
Secretary, Radford City Electoral Board.

This is in reply to your letter of July 19, from which I quote as follows:

"There are several young women voters here who have married since registering to vote, our Election Judges have asked each that they request the Registrar to change their names on his books, they have failed to do this. Are the Judges within their rights to refuse these parties the right to vote?"

Section 24-81 of the Code deals with the effect of a change of name of a voter and requires the registrar to enter the change upon the registration books when a voter makes a request to him in writing. However, I am aware of no statute that requires the voter whose name has been legally changed to make such a request.

Therefore, I am of the opinion that the election judges should not refuse the persons to whom you refer the right to vote on the sole ground that they have not requested the registrar to change their names on the registration books.

Of course, if the election judges have reason to believe that an individual is not in fact the person whose name appears on the voting list, and that person fails to satisfy the judges that he is a qualified voter, they may refuse to permit such person to vote.

ELECTIONS—Registrations—Registrars—Must sit at prescribed place on regular registration days—May sit at other places on other days—Should not solicit registrations promiscuously. F-100d

Mr. Sam C. Stowers,
Member of Electoral Board.

I am in receipt of your letter of February 27, requesting my opinion as to whether or not the registrar at Altavista "can register voters at any place, at all, other than his office and the regular voting place."

You further state that "there is no effort being made to have the registrar at this precinct just going around promiscuously to register these voters." It seems that some desire the registrar to sit at the War Memorial Building for purposes of convenience.

Section 24-74 of the Code of Virginia, as you point out, relates to the established days fixed by law when the registrar shall proceed to register the names of all qualified voters within his election district who have not previously registered in the registrar's jurisdictional area, and who shall apply to be registered on such day. This statute provides that registration shall take place at the office of the registrar or at the voting place, and it is further provided that the registrar shall give notice of the time and place at which he will sit for the purpose prescribed in section 24-74. It is clear, therefore, that on these days the registrar must sit at his office or at a voting place, as prescribed by the statute.

Section 24-76 relates to registration at any time previous to the regular days of registration, and requires that the registrar shall register any voter entitled to vote at the next succeeding election who may apply to him to be registered.

I am of the opinion that the registrar, in the exercise of his discretion and for purposes of public convenience, could sit and receive applications for registration and register those qualified to register, at some convenient place within his election district other than the customary place of registration. This matter being within the discretion of the registrar, he could prescribe the times when he would so sit
and the place where he would receive application and register persons entitled to registration.

While the question is not posed, this opinion is not to be construed as giving sanction to a local registrar canvassing and soliciting promiscuously applications for registration.

I call your attention to the fact that the State Board of Elections is empowered to make rules and regulations not inconsistent with law which will be conducive to the proper function of electoral boards and registrars. I am aware of no such regulation having emanated from the State Board of Elections.

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ELECTIONS—Registration books—Closing of before general or primary elections—Norfolk City. F-100d

June 21, 1951.

Mr. Thomas J. Nottingham,
General Registrar for the City of Norfolk.

Your letter of June 8, 1951, addressed to Mr. Levin Nock Davis, Secretary, State Board of Elections, has been referred to this office for consideration. I quote your letter as follows:

"Under Section 24-74 of the Code it would seem as though the Registration Books would be closed thirty (30) days prior to any General or Primary Election.

"But under Section 24-84 it is provided that in cities having a population of not less than Fifty Thousand inhabitants books shall be closed for registering and transferring voters for a period of fifteen days next preceding the day of any Special or Primary Election.

"Please advise this office on what date the Registration Books of the City of Norfolk, which city has a population of more than Fifty Thousand inhabitants shall be closed."

Sections 24-74 and 24-84 of the Code of Virginia of 1950, to which you refer, read as follows:

"Each registrar in the counties, cities, and towns of this State shall annually, thirty days before the day fixed by law for every regular primary election and every general election to be held therein, at his office or voting place, proceed to register the names of all qualified voters within his election district, precinct, town, city, or ward, as the case may be, who have not previously registered in such registrar's jurisdictional area, who shall apply to be registered and shall on such day complete the registration of voters for the succeeding primary or general election."

"In cities having a population not less than fifty thousand inhabitants, according to the last preceding census, and having a general registrar, the registration books for all voting districts or precincts in such cities shall be closed for the purpose of registering and transferring voters, for a period of fifteen days next preceding the day of any special or primary election."

In addition to these sections, §24-82 has a bearing on the question and reads as follows:

"After the completion of the registration on the day fixed therefor as provided in §24-74 no additional persons shall be registered until after the day on which the succeeding primary or general election is held."

In order to answer the question raised it is necessary to review the history of these sections.
Section 24-84 was first enacted in 1923. The section provides for the closing of registration books for the purpose of registering and transferring voters fifteen days prior to any special or primary election in cities having a population of fifty thousand or more inhabitants and having a general registrar.

In 1923 when that law was enacted it did not conflict in any way with the general provisions for closing of registration books for at that time the section, which is now §24-74, referred only to general elections and not to special or primary elections.

In 1946 the section which is now §24-74 was amended. That amendment is found as Chapter 109 of the Acts of Assembly of 1946. The effect of the amendment was to require that registration books be closed for new registrations thirty days prior to any regular primary election in addition to every general election as was previously provided. The final paragraph of that Act reads as follows:

"All acts or parts of acts, general or special, inconsistent with this act are hereby repealed to the extent of such inconsistency." (Italics added)

The provisions of §24-84 in so far as they might be construed to permit registration books in a city with a population of over fifty thousand to remain open until fifteen days prior to a regular primary election are inconsistent with the requirement that they be closed thirty days prior to such primary election, and hence were repealed by the 1946 Act. Therefore, it is my opinion that your registration books should be closed thirty days prior to any general or primary election.

ELECTIONS—Re-registration of voters—Requirements.  F-100d

HONORABLE J. ALDEN OAST,
Commonwealth's Attorney for the City of Portsmouth.

This is in reply to your recent letter concerning the re-registration of voters in the City of Portsmouth.

It appears that the Electoral Board, in November 1949, ordered a re-registration of voters to take place between January 1, 1950 and March 31, 1950. The order was posted and published as required by Chapter 79 of the Acts of Assembly of 1923, as amended, but, contrary to the Act, it required qualified voters who had registered subsequent to August 26, 1920, to again register. (I assume that the registration to which you refer was the first new registration under the authority of the Act).

At a meeting held on January 20, 1950, the prior order of the Electoral Board was amended to extend the time for conducting such re-registration through December 31, 1950, but such action was not posted and published.

By Chapter 192 of the Acts of Assembly of 1950, effective March 14, 1950, the General Assembly amended the then existing law in order to eliminate the exception which provided that those registered subsequent to August 26, 1920, should not be required to re-register. However, no formal action was taken by the Electoral Board, after the passage of the 1950 Act, for the purpose of ratifying its former action.

You state that the Court of Hustings for the City of Portsmouth ruled that the re-registration action of the Electoral Board was invalid and desire my opinion on the following questions:

"(1) If the Electoral Board now issues a new call for a re-registration of all voters except those on the permanent roll in accordance with Chapter 192 of the Acts of 1950, and exempting also, those who have registered since January 1, 1950, publishing and posting notice of the action, would such
REPORT OF THE ATTORNEY GENERAL.

action be valid? Nine thousand voters have re-registered during the year 1950 pursuant to the original order.

“(2) If such action would effectively put to rest any question which now exists, would it be necessary that a court decision by declaratory judgment or otherwise, be secured at the instance of the Board, for the purpose of having adjudicated the fact that the former action was void? This question is presented on account of the provision in the Act of 1950 that a new registration shall not be ordered more frequently than once every ten years.”

It is my opinion that the answer to your first question must be in the negative. In the first place, Chapter 192 of the Acts of the Assembly of 1950 provides only that those qualified voters who registered prior to January 1, 1904 shall not again be required to register as a prerequisite to a right to vote. There is no provision in the Act which might be construed to exempt those who have registered since January 1, 1950. Furthermore, since the Court of Hustings has held invalid the action of the Electoral Board pertaining to re-registration, I am of the opinion that those qualified voters who registered pursuant to the invalid order of the Electoral Board have, in effect, not been “re-registered”, and would be required to register if the Board issues a new order for the re-registration of all voters in the City of Portsmouth.

Because of the views expressed above, it is not necessary to answer your second question other than to state that since it has been concluded that the Electoral Board has taken no valid action with regard to re-registration, the provision of the Act to the effect that a new registration shall not be ordered more frequently than once every ten years would not be violated in the instant case.

ELECTIONS—Special elections and Referendums may be held at general election. F-100

HONORABLE STANLEY A. OWENS,
Commonwealth’s Attorney for Prince William County.

September 18, 1950.

This is in reply to your letter of September 13, 1950, in which you inquire whether a referendum on the question of a school bond issue may be held on the same day as the general election (November 7, 1950) or whether it must be held on another day as a special election, and whether there would be any prohibition against holding such special election at a time less than thirty (30) days before the general election.

I am aware of no provision of law which would prevent the referendum from being submitted to the voters at the general election or within thirty days before the general election, and I call your attention to §24-141 of the Code of 1950 which deals with how special elections and referendums shall be conducted. The language of the first paragraph of this section would indicate that the Legislature contemplated that referendums might be held at the same time as a regular election. The paragraph referred to is as follows:

“Notwithstanding any provision of any other statute or act, or of the charter of any city or town, to the contrary, whenever any question or proposition is to be submitted to the electors of any county, city or town, or any referendum is ordered, the election on such question, proposition or referendum whether it be at a regular or special election, shall be held as provided herein.” (Italics supplied)

It is obvious that the holding of the special election by the same election officials at the same time as the general election would result in the saving of considerable
REPORT OF THE ATTORNEY GENERAL

money and also the saving of the time of the voters in again going to the polls to vote if the special election were held at a different time.
I am of the opinion, therefore, that the question may be presented to the voters at the time of the general election. It is my opinion further that separate ballots and separate ballot boxes should be provided for the special election since, technically, it is a separate election from the general election.

ELECTIONS—Special elections—Time for payment of poll tax to qualify to vote. F-100

March 12, 1951.

Mr. Nathan M. Brisco,
Secretary, The Electoral Board of Smyth County.

This is in reply to your recent letter concerning the special election to be held in Smyth County on or about March 27th on the question of whether or not county bonds shall be issued for public school construction. I quote, in part, there-from:

"Specifically, (and assuming this election will be held on March 27th) may a person who is otherwise qualified but who did not vote in the November, 1950 election because of failure to pay poll taxes on time for that election, vote on March 27, 1951 if his poll taxes have now been paid by six months prior to June 12, 1951, or in other words by December 12, 1950?"

Section 24-22 of the Code deals with the qualifications of voters at special elections and, in my opinion, is applicable to the election in question. It provides that at any special election held before the second Tuesday in June in any year a person who is otherwise qualified to vote shall be qualified to vote at such an election if he 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. Accordingly I am of the opinion that the person to whom you refer may vote in the election to be held on March 27th of this year.

ELECTIONS—Special—Qualifications of voters. F-100

October 26, 1950.

Honorable B. W. Hamilton,
Town Attorney for the Town of Appalachia.

This is in reply to your request for my opinion as to what voters will be qualified to vote in a special election which you state will be held in the Town of Appalachia in December of this year.

Section 24-22 of the Code reads as follows:

"Qualifications of voters at special elections.—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. The term 'special election' as used in this section shall be deemed to include such elections as are held in pursuance of any special law, and also such as are held to fill a vacancy in any office, whether the same be filled by the qualified voters of the State, or of any county, city, magisterial district or ward."

You will see from this provision that since the election is to be held after the second Tuesday in June all persons who are qualified to vote at the regular November election will be qualified to vote in the special election. In addition those persons otherwise qualified who have paid all capitation taxes assessed or assessable against them for the three preceding years six months prior to the date of the special election to be held in December will be eligible to vote even though they did not pay such capitation taxes six months prior to the regular November election of this year. This is so since the first clause of Section 24-22 provides that the qualifications of voters at any special election shall be such as are prescribed for voters at general elections and Section 24-17 and Section 21 of the Constitution simply require that the capitation taxes be paid six months prior to the election.

ELECTIONS—Voters—Domicile—Member of armed forces may retain Virginia domicile though continuously out of State. F-100e

HONORABLE LEVIN NOCK DAVIS,
Secretary, State Board of Elections.

February 20, 1951.

I am in receipt of your letter of January 30, enclosing a communication from Mr. Rudolph Bumgardner, Jr., General Registrar for the City of Staunton. Mr. Bumgardner sets out the following case:

"Capt. Calvin C. Crum resided at 307 North Lewis Street in the City of Staunton, prior to his entry into the military service, Marine Corps, August 28, 1942. He has continuously remained in active military service and holds a regular and permanent commission as an officer in the Marine Corps. As such he is stationed at various places in the country, usually out of the State of Virginia. Capt. Crum has presented himself to me to register as a voter in the City of Staunton.

"It is my opinion and I believe that the decisions support it that a person in the military establishment retains as his legal residence, in the absence of some overt act to change it elsewhere, the place from which he entered the service. Accordingly, Capt. Crum would appear to be entitled to register in the City of Staunton. The question now presents itself as to whether or not he is presently required to pay a poll tax in order to register and, if so, the years for which he would be required to pay such poll tax."

If Captain Crum was domiciled in Staunton prior to his entry into the military services, I am of opinion that he may retain his Staunton domicile so long as it is his intention to do so. The mere fact that he has been absent therefrom in the military service does not cause him to lose his original domicile.

As to Captain Crum's liability to the State capitation tax, I beg to advise that technically a state of war still exists. Therefore, under the provisions of Article
17 of the Constitution he is not required to pay a capitation tax in order to vote. Therefore, assuming that it is Captain Crum's intention to retain his domicile in Staunton, I am of opinion that he may now register and vote there without the payment of any capitation tax.

ELECTIONS—Voters—Members of Armed Forces in time of war exempt from poll tax under Constitution of Virginia. F-100b

HONORABLE LEVIN NOCK DAVIS,
Secretary, State Board of Elections.

This is in reply to your letter of August 10, 1950, which reads as follows:

"It appears that Chapter 79 of the Acts of 1945, Section 220 (57) of the 1948 Supplement to the Virginia Code of 1942, has been omitted from the new 1950 Code, and as I understand it the above chapter and section is no longer in the law. You will recall that under provisions of said Chapter 79 of the Acts of 1945, Section 220 (57) of the 1948 supplement to the old code, a person discharged from the Armed Forces was entitled to vote in any election during that year or the year following his discharge without the payment of any poll tax. According to my interpretation of Article XVII, Section 2, of the Constitution, a person discharged under said circumstances is still excused from the payment of his poll taxes for the year of discharge and also for the year following his discharge, but I would like to have your opinion on this question."

Article XVII, Section 2 of the Constitution of Virginia reads as follows:

"All poll taxes for the years 1942, 1943, and 1944, assessed or assessable against any person who is, or who at any time during the existing World War II has been, a member of the armed forces of the United States in active service, are hereby cancelled and annulled. "And, also, all poll taxes assessed or otherwise assessable for every year during any part of which such person is a member of said forces in active service during said war or any future war, and also, for the three years next preceding such person's discharge from said active service, provided such discharge is not dishonorable, although such person was not in said service during all of said years, are hereby cancelled and annulled. Members of the armed forces of the United States in active service in time of war shall be exempt from future assessments of poll taxes by this State for all years during a part of which they are hereafter engaged in such service."

As you, of course, know, one of the qualifications for voting in Virginia is that a person shall have paid, not later than six months prior to the election in which he offers to vote, all the State poll taxes required during the three years next preceding that year in which the election is to be held.

Article XVII, Section 2 of the Constitution, exempts members of the armed forces of the United States in time of war from all poll taxes for all years during a part of which they are engaged in active service and for the three years next preceding discharge, (other than dishonorable) even though such person was not in service during all of such years. The effect of this is that such person may, if otherwise qualified, vote in elections during the year of his discharge and also the year following his discharge, since he is exempt from the payment of all poll tax for the year of discharge and the three years next preceding. However, the person is assessable with poll tax for the year following his discharge and, in order to be entitled to vote in subsequent years, would be required to pay such taxes.
ELECTIONS—Voters—Members of Armed Forces may vote by absentee ballot—Requirements as to poll tax and registration. F-100h

Honorable John S. Battle,
Governor of Virginia.

February 12, 1951.

This is to acknowledge receipt of your letter with reference to the members of the armed forces being allowed to vote without payment of the poll tax or registering.

Specifically, you desire my opinion as to whether or not a member of the armed forces of the United States may vote by absentee ballot without being required to register or to pay any poll tax if his application by mail shows that he meets the resident and age requirements prescribed by law and is in active service.

Section 1 of Article XVII of the Constitution provides, in substance, that no member of the armed forces while in active service in time of war shall be required to register or pay a poll tax as a prerequisite to the right to vote, and Section 3 thereof reads as follows:

"Notwithstanding any other provision of this Constitution or of any law, every citizen of the United States, otherwise qualified to vote in this State, who is exempted from the payment of poll taxes by the provisions of this Article, shall be entitled to vote in any and all elections, including legalized primary elections, in person or by such absentee voting procedure as may be authorized by law, provided such citizen shall have registered or is exempted from registering by the provisions of this Article." (Italics supplied).

Although the President of the United States has issued a proclamation declaring the cessation of hostilities, treaties of peace have not been signed with all belligerents and for this reason I have previously expressed the opinion that a technical state of war still exists. Therefore, Article XVII of the Constitution is in full effect today.

The General Assembly of 1945 enacted legislation, applying only to members of the armed services, which provided three methods by which they could vote without registering or paying a poll tax, namely, (1) application by mail for an "Official Virginia War Ballot"; (2) application in person for an absentee ballot, and (3) being physically present on Election Day.

The so-called War Voters Act, Chapter 2 of the Acts of Assembly of 1945 (extra session) provided machinery by which any member of the armed forces could make application by mail to the Secretary of the Commonwealth for an Official War Ballot and subsequently vote by such absentee ballot if it were accompanied by an affidavit to the effect that he met the resident and age requirements prescribed by law and was then in active service in the armed services of the United States. This act expired by its own limitation on July 1, 1948. Chapter 79 of the Acts of Assembly of 1945 (extra session) provided the machinery for methods Nos. 2 and 3 mentioned above and no date was prescribed for the expiration thereof.

On September 21, 1948, Mr. C. W. Newton, Registrar of the Graham Precinct, Bluefield, Virginia, requested my opinion as to whether a person in the armed services was eligible to vote without paying a poll tax and, if so, how should he apply for a ballot. At that time I stated, in effect, that since the War Voters Act had expired, a member of the armed forces who had not registered could vote only by being physically present on Election Day or by securing an absentee ballot by making request in person. These two methods remained by virtue of Chapter 79 of the Acts of 1945 which was still in effect and, as pointed out above, was legislation pertaining to a particular class, namely, members of the armed services of the United States in actual service in time of war.

My opinion to Mr. Newton, therefore, was based on the fact that while the General Assembly had permitted the War Voters Act, Chapter 2 of the Acts of Assembly of 1945, to expire, there still remained special machinery whereby members of the armed forces could secure absentee ballots, viz, by making request in person.
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Since the Legislature saw fit to pass such specific legislation in this field, the election laws dealing generally with absent voters were, in my opinion, not applicable at that time. Furthermore, the machinery provided by Chapter 79 of the Acts of Assembly of 1945 satisfied the provisions of Article XVII of the Constitution, for Section 3 thereof provided only that members of the armed forces could vote “by such absentee voting procedure as may be authorized by law”. In other words, the General Assembly, pursuant to Article XVII, set up specific machinery for absentee voting by members of the armed forces, and in 1945 provided two methods by which this could be done. Subsequently, on July 1, 1948, one method was, in effect, abolished and the compelling implication was that the General Assembly in its wisdom desired members of the armed forces to vote by absentee ballot only when such members applied for their ballots in person.

However, in 1950 the Code of Virginia was adopted by appropriate action of the General Assembly and Chapter 79 of the Acts of Assembly of 1945 was omitted therefrom. Thus, on February 1, 1950, the effective date of the new Code, the special legislation dealing with absentee voting by members of the armed forces was no longer in effect. Of course, the statutes dealing generally with “absent voters” were carried into the new Code and are found as Chapter 13, Title 24, thereof.

As already noted, Section 1 of Article XVII of the Constitution exempts members of the armed forces in active service in time of war from registering or payment of the poll tax, and Section 3 thereof authorizes them to vote “by such absentee voting procedure as may be authorized by law”. Therefore, it is my opinion that since there is no longer any legislation dealing specifically with absentee voting by members of the armed forces, the provisions of Article XVII of the Constitution, and especially the language of Section 3, just quoted, demands the conclusion that Chapter 13 of Title 24 of the Code, entitled “Absent Voters”, is applicable to members of the armed forces who are now in active service.

Of course, I am aware of the fact that the machinery found in Chapter 13 of Title 24, pertaining to applications by mail for absentee ballots, does not fit perfectly the situation in which members of the armed forces are found by virtue of their exemption from registering and the payment of the poll tax. However, I am of the opinion that it is the duty of the various Registrars to enroll the name and address of the applicant if they are satisfied that such applicant is a member of the armed forces in active service and meets the age and resident requirements prescribed by law, and that it is the duty of the local Electoral Boards to send such applicant an absentee ballot. Specifically, then, such words as “registered voter” and “duly registered” must be interpreted, in the light of the exemptions provided by Article XVII, to mean that a person who is a member of the armed forces in active service in time of war is “duly registered” and a “registered voter” as those words are used in Chapter 13 of Title 24.

ELECTIONS—Voters—Poll tax for persons moving into State. F-100c

Honorable Otis B. Crowder,
Treasurer of Mecklenburg County.

June 11, 1951.

I am in receipt of your letter of June 7th from which I quote below:

“Several years ago by an Act of the Legislature a person was made assessable with a capitation tax for the year in which he moved to Virginia, whether he was here on January 1st, or not.

“Please advise if a person moving into Virginia after January 1st, 1950, and who will have been here for one year by the general election, is required to pay the 1950 capitation tax by May 5th, 1951 in order to vote in the primary and general election?”
In my opinion the person you describe must pay the 1950 capitation tax assessable against him in order to be eligible to vote in the Primary and November General Election to be held this year. This is so because Section 21 of the Constitution requires that as a prerequisite to the right to vote he shall have paid, at least six months prior to the election, all state poll taxes assessed or assessable against him during the three years next preceding that in which he offers to vote. The year 1950 is, of course, one of the three years next preceding the election in 1951 in which he offers to vote.

ELECTIONS—Voters—Privileges of members of armed forces in time of war. F-100h

September 11, 1950.

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

This is in reply to your letter of August 29th, regarding the voting privileges of members of the Armed Forces of the United States, specifically with reference to registration and the payment of the poll tax.

While it does not appear that Chapter 79 of the Acts of Assembly of Virginia, Extra Session 1945, was carried into the Code of Virginia of 1950, this question is covered by Article XVII of the Constitution of Virginia which provides that 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 election, including legalized primary elections. Section 2 of Article XVII exempts members of the armed forces from assessment of poll taxes for all years during a part of which they are in active service in time of war and also for the three years next preceding such person's discharge if such discharge is not dishonorable. Chapter 79 of the Acts of Assembly of the Extra Session of 1945 was apparently left out of the Code because its provisions were covered directly by these constitutional provisions.

Since there has been no formal declaration that a state of war has been terminated (in fact, the continued existence of a state of war was expressly recognized by the Presidential Proclamation declaring the cessation of hostilities), and since treaties of peace have not been signed with all belligerents, this office has previously expressed the opinion that a technical state of war still exists. The provisions of Article XVII of the Constitution are, therefore, operative at the present time.

For your further information on this matter I am enclosing a copy of my opinion to the Honorable Levin Nock Davis, Secretary of the State Board of Elections, rendered on August 22, 1950.

ELECTIONS—Voters—Registration—Persons becoming twenty-one. F-100d

May 15, 1951.

MR. CHARLES E. PETERFISH,
Registrar, Stanley, Virginia.

This is in reply to your letter of May 13, 1951, in which you inquire whether persons who have registered with you will be eligible to vote in the town election on June 12, 1951, though they will not attain the age of twenty-one until after that date.

Section 24-67 of the Code of Virginia sets forth those persons who may be registered and reads as follows:
"Each registrar shall register every citizen of the United States, of his
election district, who shall apply to be registered at the time and in the man-
ner required by law, who shall be twenty-one years of age at the next election,
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 register thirty days
next preceding the election, who, at least six months prior to the election,
has paid to the proper officer all State poll taxes assessed or assessable against
him for three years next preceding such election, or if he come of age at
such time that no poll taxes shall be assessable against him for the year
preceding the year in which he offers to register, has paid one dollar and fifty
cents in satisfaction of the first year's poll tax assessable against him." (Italics
added)

Since the election of June 12, 1951, is a general election for town officers, it is
my opinion that only those persons who will be twenty-one years of age at that
election are eligible to be registered and those who will became twenty-one there-
after must wait until after that date in order to register.

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ELECTIONS—Voters—Residence and domicile.  F-100e

MR. CHARLES W. MOTTESHEARD,
Central Registrar of Radford.

I am in receipt of your letter of May 1, from which I quote as follows:

"Applicant was born and reared and made her home in Radford, Virginia.
She became 21 years of age during the year 1950. In September, 1950, ap-
plicant became a resident of Bassett, Virginia, going there to live and teach
in the Bassett schools. She applied to register in Radford on April 28, 1951.
"Due to the fact that applicant had made her home in Bassett since September,
1950, and returned to Radford only occasionally to visit her family, I denied
her application to register.
"Will you please give me a ruling upon this matter at your earliest con-
venience."

The matter of residence is governed largely by the intention of the individual
seeking to register. You state that the applicant was born and reared, and made
her home in Radford. The mere fact that since September, 1950, she has taken up
her place of abode in Bassett, and teaches in the school of Bassett, would not of
itself be determinative of the issue. If in fact she has moved from Radford and
taken up her residence in another political subdivision, with the intention to abandon
her former residence and to establish her residence in Bassett, then she is not entitled
to register at Radford.

However, if this person actually considers herself temporarily residing in the
new abode and intends to return at some time in the future to her Radford home,
then it is my opinion that she is entitled to claim Radford as her place of residence
for registration and voting purposes.

No hard and fast rule can be laid down on the subject, as each case must depend
on the surrounding facts and circumstances relating to the intention of the applicant.
ELECTIONS—Voters—Residence—Married woman's residence not controlled by residence of husband.  F-100e

May 7, 1951.

Mr. HARRY E. WELLS,
Registrar. Falls Church, Virginia.

I am in receipt of your letter of May 2, in which you ask my opinion on the following question:

"A person who has resided in Arlington County, Virginia, for one year and has paid the required capitation tax is claiming legal voting residence of her husband, who also resides in Arlington County but maintains his voting residence in the City of Falls Church, Virginia. Since this person has never resided within the City of Falls Church (Fairfax County), is she eligible to register and vote in the city?"

Section 24-21 of the Code provides that "For the purposes of registering and voting, the residence of a married woman shall not be controlled by the residence or domicile of her husband." In view of this statute, it would not appear from your letter that the person you mention has taken the necessary steps to establish her legal residence in Fairfax.

EMBALMERS AND FUNERAL DIRECTORS—Burial of dead bodies is "Funeral Directing" and requires license.  F-91

February 2, 1951.

Mr. F. C. STOVER,
Secretary State Board of Embalmers and Funeral Directors of Virginia.

This is in reply to your letter of January 18, 1951, from which I quote as follows:

"I am requested by the State Board of Embalmers and Funeral Directors of Virginia to ask if you will kindly give us an opinion on the following: Under the Virginia statute can a person who does not hold Virginia funeral director's license disinter and reinter dead human bodies for profit?"

"The reason for asking that we get an opinion on this is that a number of Virginia licensed funeral directors have bid on cemetery relocations in Mecklenburg County. There was also a bid from a corporation from outside the State and no one in the corporation holds Virginia funeral director's license. The Government engineer in charge has asked us to get an opinion as to whether or not this corporation would be violating any Virginia statute if awarded the contract. I think there are two or three cemeteries located in Virginia that are involved."

Section 54-217 of the Code of Virginia defines the terms "funeral directing" and "funeral director" as follows:

"'Funeral directing' or 'funeral director' shall be construed to mean the business or profession of directing or supervising funerals for profit, or the business or profession of preparing dead human bodies for burial by means other than embalming, or the disposition of dead human bodies; or the provision or maintenance of a place for the preparation for disposition or care or disposition of dead human bodies, or the use in connection with a business of the word or term 'funeral director', 'undertaker', 'mortician' or any other word or term from which can be implied the business of funeral directing; or the holding out to the public that one is a funeral director."
REPORT OF THE ATTORNEY GENERAL

In attempting to determine whether the disinterment and reinterment of dead human bodies for profit constitutes funeral directing it is interesting to note that in §54-218 the following language appears:

"* * * Nor shall anything in this chapter be construed to apply to the burial of paupers or inmates of State institutions when buried at the expense of the State or political subdivision thereof."

From the language quoted it would appear that the burial of dead bodies constitutes funeral directing and is covered by the provisions of our law, unless it comes within this exception. I conclude, therefore, that the disinterment and reinterment of dead human bodies does constitute funeral directing and that, therefore, a person who does not hold a Virginia funeral director’s license may not lawfully engage in such practice.

Section 54-250 of the Code provides that any corporation that desires to engage in the practice of funeral directing must be managed by a person holding funeral director’s license and in the case of Walton v. Commonwealth, 187 Va. 275, the Supreme Court of Appeals of Virginia construed this language to mean that this license must be secured under the provisions of the Virginia law. It would appear, therefore, that the manager of such corporation must be licensed as a funeral director by the State of Virginia. It is my understanding that the corporation from outside of Virginia which has bid on the relocation of the cemetery in Mecklenburg County contemplates employing a Virginia corporation, the manager of which does hold a Virginia funeral director’s license to actually perform the acts of disinterment and reinterment. However, it is my opinion that the corporation in seeking this contract comes within the provisions of §54-217 in that it is holding itself out to the public as a funeral director and that, therefore, the seeking of such contract is in itself unlawful, unless the manager of that corporation is a licensed funeral director in this State.

EMBALMERS AND FUNERAL DIRECTORS—Firm may hire licensed director to manage business. F-91

February 8, 1951.

Mr. F. C. Stover,
Secretary, State Board of Embalmers and Funeral Directors.

This is in reply to your letter of January 18, 1951, which reads, in part, as follows:

"* * * If three persons purchase a funeral home, each owing one-third interest, and one of the three holds a Virginia funeral director’s license but works at a funeral home in another Virginia city and does not want to give up this position to become manager of the new funeral home but wishes to employ a licensed funeral director who has no financial interest in the funeral home, to manage and operate it, would this be permitted under the Virginia statute?"

Section 54-250 of the Code of 1950 reads, in part as follows:

"At least one member of every firm and the manager of each place of business conducted by any corporation that desires to engage in the practice of funeral directing, shall be a licensed funeral director, but no assistant, no member of any firm, and no officer or employee of any corporation shall engage in the care, preparation, disposal and burial of dead human bodies, or the management of burials, or the discharge of any of the duties of a funeral director, unless he shall be a licensed funeral director under the provisions of this chapter."* * *"
It would appear that a firm operating in the manner set forth above is in compliance with the law. One member of the firm is a licensed funeral director, which the law requires, and as long as no assistant, member of the firm, or other employee who is unlicensed is engaging in the actual practice of caring for, preparing, or disposing of dead human bodies or managing burials or acting as a funeral director, it would appear that the requirements of the statute are being satisfied.

EMBALMERS AND FUNERAL DIRECTORS—Requirements for license.

F-91

HONORABLE F. C. STOVER,
Secretary, State Board of Embalmers and Funeral Directors of Virginia.

This is in reply to your recent letter in which you requested my opinion on the following questions:

"(1) Is an applicant for a license to engage in the practice or business of funeral directing or undertaking required to be a resident of the Commonwealth of Virginia?

(2) Assuming that residence is prerequisite to the granting of a license to engage in the business of funeral directing or undertaking, is the applicant required to live within the State, is the establishment by the applicant of a place of business within the State sufficient to meet the requirement of residence?

(3) Is an assistant to a funeral director or undertaker required under Section 1720a, last quoted above, to serve as an assistant of a 'licensed' funeral director or undertaker before being entitled to a license to engage in the practice or business of funeral directing or undertaking?"

Section 54-244 of the Code of 1950 provides that "every person engaging in the practice of funeral directing shall obtain a license from the Board; and the Board shall issue the license if the applicant is properly qualified and passes the required examination."

As you pointed out, the Circuit Court of the City of Richmond passed upon the action of the Board in refusing to grant licenses to two applicants, who were domiciled in the State of Tennessee, in the case of J. W. Huff et al v. The State Board of Embalmers and Funeral Directors. In the written opinion in that case, dated September 29, 1941, the late Honorable Julien Gunn stated that the petitioners, when and if they established a place of business in the Commonwealth of Virginia, would be entitled to a license provided, of course, they met the qualifications and standards established by the Board.

While Section 54-254 of the Code of 1950 provides that any person who has been refused a license may appeal "to the corporation court of the city, or circuit court of the county, as the case may be, in which he resides," it is to be noted that the State Board, in its answer filed in the above-styled suit, stated that it construed the language, "city, or * * * county * * * in which he resides," to mean the city or county in which the applicant or licensee has or proposes to establish a business residence, or place of business or funeral home, as distinguished from legal domicile. I concur in the construction.

Therefore, in view of the words "every person", found in Section 54-244 of the Code and in view of the administrative interpretation of Section 54-254 of the Code, with which I agree, it is my opinion that the answer to your first question must be in the negative. The answer to your second question would be, of course, that the
establishment by the applicant of a place of business within the State would be sufficient.

In answer to your third question, Section 54-244 of the Code of 1950, formerly a part of Section 1720a of Michie's Code to which you refer, provides for the qualifications of applicants and the issuance of licenses to them as funeral directors. It specifically provides that "no person shall be entitled to a license to engage in such practice unless he has served as an assistant to a funeral director for at least two years prior to being licensed."

In my opinion, the words, "funeral director" as used in that part of Section 54-244 quoted above, must now necessarily be construed to mean a "licensed" funeral director, for, at this time, all persons engaged in the practice of funeral directing in this State are licensed.

EMBALMERS AND FUNERAL DIRECTORS—Use of name of unlicensed person in firm name or advertising. F-91

February 8, 1951.

Mr. F. C. Stover,
Secretary, State Board of Embalmers and Funeral Directors.

This is in reply to your letter of January 18, 1951, which reads, in part, as follows:

"* * * in view of Section 1720c, sub-section d, if any name can appear in the name or in the advertising of a funeral home except the name of a licensed funeral director or licensed embalmer. "

"We think the statute is very clear in this respect and have held that one must be a licensed funeral director or licensed embalmer for his name to show in any manner in the name or in the advertising of a funeral home. This question has been raised, for instance, The Strasburg Furniture Company, Incorporated, and incorporated under this name, owns and operates a funeral home. They contend that any member of the corporation can show his name in the name of the funeral home even though he holds no Virginia funeral director's or embalmer's license, and we have advised that it is a violation of the law and the name should be removed. Now we would like to know if we are correct in our stand or if we have erred."

Section 1720c, subsection d, of the Code of 1942 to which you refer is found in the Code of 1950 as §54-258, and reads as follows:

"No person, except a licensed funeral director or licensed embalmer, shall advertise on any billhead, sign or card, or orally, or in any other manner, that he is competent, willing or desirous to arrange for or to conduct funerals. No licensed funeral director or licensed embalmer shall advertise in any manner which shall be deceptive, misleading, improbable or unethical."

In my opinion, the name of a corporation could contain the name of unlicensed individuals. For example, a corporation could be named "Joe Doe Funeral Home, Inc.," even though Joe Doe is not a licensed funeral director, because the corporation is a separate legal entity and the name used is the corporate name and not the individual's name. However, for the name of an unlicensed person to appear on any billhead, sign or card in such manner as to indicate that that person is competent, willing or desirous to arrange for or conduct funerals would seem to be a violation of the statute.
REPORT OF THE ATTORNEY GENERAL

EMBALMERS AND FUNERAL DIRECTORS—What member of firm must be licensed. F-147

January 16, 1951.

Mr. F. C. Stover,
Secretary, State Board of Embalmers and Funeral Directors.

This is in reply to your letter of January 8, 1951, which reads, in part, as follows:

"I am requested by the Board to ask your opinion on the following: May a person or persons who are not licensed funeral directors, own a funeral home if they employ a Virginia licensed funeral director to manage and operate the funeral home?"

Section 54-244 of the Code of 1950 requires a license to practice funeral directing in Virginia. Section 54-217(3) defines funeral directing in the following language:

"'Funeral directing' or 'funeral director' shall be construed to mean the business or profession of directing or supervising funerals for profit, or the business or profession of preparing dead human bodies for burial by means other than embalming, or the disposition of dead human bodies; or the provision or maintenance of a place for the preparation for disposition of dead human bodies, or the use in connection with a business of the word or term 'funeral director', 'undertaker', 'mortician' or any other word or term from which can be implied the business of funeral directing; or the holding out to the public that one is a funeral director." (Italics supplied)

In my opinion the solution to the problem presented is found in §54-250 which, in so far as material to this opinion, reads as follows:

"At least one member of every firm and the manager of each place of business conducted by any corporation that desires to engage in the practice of funeral directing, shall be a licensed funeral director, but no assistant, no member of any firm, and no officer or employee of any corporation shall engage in the care, preparation, disposal and burial of dead human bodies, or the management of burials, or the discharge of any of the duties of a funeral director, unless he shall be a licensed funeral director under the provisions of this chapter. **" (Italics supplied)

The term "firm" in legal parlance means partnership. It appears, therefore, that if a partnership desired to own and operate a funeral home at least one partner ("member of the firm") would be required to be a licensed funeral director. The firm could not hire a licensed funeral director to manage the business and satisfy the requirements of the statute.

It seems unreasonable to assume that the Legislature intended the owner of a business to be able to hire a licensed funeral director as a manager and engage in funeral directing where the owner is a single individual but intended that, where a partnership is involved, one partner must be a licensed funeral director.

In my opinion the intent of the Legislature and the meaning of the sections cited is that where a business is owned and operated so as to constitute funeral directing, the owner must be a licensed funeral director, but if the ownership is in a partnership only one partner need be licensed and, if in a corporation, the manager must be licensed.
FEDERAL PROPERTY—Fort Monroe—Land does not revert to State if private person provides military housing thereon. F-163

HONORABLE JOHN S. BATTLE,
Governor of Virginia.

This has reference to the letter of February 1 of General Mark W. Clark, Chief of Army Field Forces, and your reply of February 7, relative to a proposed housing project at Fort Monroe for the use of military and civilian personnel of the Army, Navy, Marine Corps and Air Force. Subsequently I have had some correspondence and several conferences with the military authorities at Fort Monroe.

In his letter to you General Clark represents that “we have an urgent need for permanent type family quarters for officers and non-commissioned officers to replace the temporary frame buildings that have been in use for so many years,” and under existing law, he says, it is contemplated that housing of this nature be constructed “through private enterprise” and, therefore, “we must be prepared to lease the necessary land to the sponsoring agency.”

Colonel Paul R. Goode, Deputy Post Commander at Fort Monroe, has submitted the following “Statement of Facts”:

“On March 1st, 1821, the General Assembly of the Commonwealth of Virginia passed an act authorizing the conveyance by deed, by the Governor of the Commonwealth of Virginia, land not in excess of 250 acres at Old Point Comfort to the United States. This Act provided in part as follows: ‘That should the United States at any time abandon the said lands and shoal, or appropriate them to any other purposes than those indicated in the preamble to this Act, that, then and in that case, the same shall revert and revest in this Commonwealth.’

“The provisions of the preamble are as follows: ‘Preamble; whereas it is shown to the present General Assembly that the Government of the United States is solicitous that certain lands at Old Point Comfort, and at the shoal, called the ‘Rip Raps’, would be, with the right of property and entire jurisdiction thereon, vested in the said United States for the purpose of fortification and other objects of National Defense.’

“Pursuant to the above legislative act, the Governor of the State of Virginia, by undated deed, which was recorded in the year 1838, conveyed the property described in the legislative act to the United States. This deed provided in part as follows: ‘This conveyance on the condition and reservation (vis), 1st, that the United States shall use the said two tracts of land for the purpose of fortification and National Defense and no other, and if the United States at any time abandons the said land at the shoal or appropriate to any other purpose other than those mentioned herein, then this conveyance would be void and the said lands and shoal to revert and revest in the Commonwealth of Virginia.’

“The above described legislative act and deed covers that part of Fort Monroe which is known as the original grant.

“Subsequently, on the 12th day of March, 1908, the General Assembly of the Commonwealth of Virginia passed an act authorizing the United States Government to acquire jurisdiction of submerged lands belonging to the Commonwealth of Virginia, adjacent to federal military and naval reservations, which may be acquired for the purpose of enlarging such reservations or for the purpose of seacoast defense for Chesapeake Bay and its tributary waters. Pursuant to this Act, the Governor of the Commonwealth of Virginia, on the 21st day of November, 1908, executed a deed to the United States of America for certain submerged lands adjoining Fort Monroe. This deed covered two separate tracts of land which contained 41.20 acres and the other 29.16 acres.
"Copies of all of the above mentioned deeds have been delivered to the Honorable J. Lindsay Almond, Jr., Attorney General for the Commonwealth of Virginia, and are now in his possession.

"On the 8th day of August, 1949, the Congress of the United States passed an Act which was an amendment to the National Housing Act, Title 12, U. S. Code, Section 1701, which amendment was titled 'Military Housing Insurance', Public Law 211, United States Code, Congressional Service, 81st Congress, 1st Session, 1949, page 582. Also cited in Title 12, Section 1748, et seq. United States Code, 1946 Edition, Supplement 3, 1950.

"This act provides that a mortgagor or sponsor may lease the property from the United States for a period of at least fifty years and construct thereon buildings which shall be designed for rent and residential use by civilian or military personnel of the Army, Navy, Marine Corps, or Air Force, including Government contractor's employees assigned to duty at a military installation at or in the area of which such property is constructed.

"It is further provided that the Secretary of Defense or his designee must certify to the Commissioner of the National Housing Administration that (1) the housing is necessary to provide adequate housing for such personnel (2) that such military reservation is deemed to be a permanent part of the military establishment (3) that there is no intention to curtail activities at such installation.

"It is provided in the act 'that no mortgage shall be insured under this title after July 10, 1951, except (a) pursuant to a commitment to insure issued on or before such date or (b) a mortgage given to re-finance an existing mortgage insured under this title...'

"To carry out the intention of this Act, a form of lease has been drawn whereby land owned by the Government is leased to the intended mortgagor (or sponsor) who thereafter proceeds to build the rental housing, to administer the housing, to obtain insurance of the mortgage necessary for the construction of the housing and do all the things necessary in the operation of the housing project.

"A draft of the proposed lease is attached hereto for your information and reference.

"The procedures which have been set up establish the fact that such property definitely passes to and under the control of the mortgagor.

"It is proposed to construct housing units in the area covered by the original deed from the State of Virginia, and also a part of that land which was obtained as submerged land from the Commonwealth of Virginia under the deed of 1908, which is described as the 41.20 acres tract of land. The provisions of the deed pertaining to the grant of the original land have placed a cloud upon the ability of the Federal Government to carry out the provisions of the above cited Congressional Act in that the Federal Government will not be directly administering this property and will not have direct control over the property such as it now has.'

It should also be stated that the lease provides that, upon the expiration thereof, or earlier termination, all improvements made upon the leased premises shall remain thereon and 'be the property of the Government without compensation.' It is further agreed in the lease in effect that, if there are not sufficient military and civilian personnel of the armed services to occupy all units of the housing project, the mortgagor may under prescribed conditions lease the surplus units to other persons, but that such a situation will arise is considered to be only a remote possibility.

"Will the execution of the attached lease, in conformity with the above cited Act of Congress cause a determination, or be grounds for a determination that there has been a change in the purpose and use of this property such that there would be a reversion of the property to the State of Virginia under the provisions of the original deed?"
I have carefully considered the proposed lease and the pertinent statutes and documents and it is my opinion that the question must be answered in the negative. The condition in the grant which is before me for consideration is that the United States shall use the land "for the purpose of fortification and national defense and no other, and if the United States at any time abandon the said lands and the shoal or appropriate to any other purpose other than those mentioned herein, then this conveyance to be void and the said lands and shoal to revert and revest in the Commonwealth of Virginia." It seems obvious that sufficient housing for the personnel on a military reservation such as Fort Monroe is a necessity and thus contributes to the national defense. The fact that this housing is to be provided through the medium of a private contractor does not alter the situation.

The opinion I am herein expressing is limited to the question asked and is in no way to be construed as expressing any opinion upon the authority of the State or any of its political subdivisions in any other respect.

FEDERAL PROPERTY—Licensed agent may solicit for unlicensed company on territory ceded exclusively to U.S. F-162

May 25, 1951.

HONORABLE R. WINSTON BAIN,
Member House of Delegates.

I am in receipt of your letter of May 22 in which you ask for my opinion on the following question:

"On April 26, 1950, the Commissioner of Insurance issued a directive to insurance agents concerning unlicensed Insurance Companies and Other Insurers. Attention was called to Section 30-60 of the Code.

"The question has arisen as to whether or not a licensed insurance agent might not represent an unlicensed insurance company for the solicitation of personnel on federal reservations only, without violating the aforementioned statute."

The answer to your inquiry depends in large measure upon the respective jurisdictions of the State and Federal Governments over the reservation where the insurance is to be solicited. If all of the activities of the agent in soliciting the insurance take place on a reservation over which the United States has exclusive jurisdiction, then I am of opinion that such solicitation would not constitute a violation of §38-60 of the Code. If, however, the State has concurrent jurisdiction over the reservation, then I am of opinion the section prohibits such solicitation.

FEDERAL PROPERTY—License tax on taxicabs at Pentagon. F-85

April 30, 1951.

HONORABLE CHARLES R. FENWICK,
22nd Senatorial District.

This is to acknowledge receipt of your letter of April 19 concerning the operation of taxicabs in Virginia which are licensed in the District of Columbia. You state in part:

"In connection with the Pentagon Building, which was not involved in the boundary dispute, the deed reserved to the State of Virginia the right to tax
businesses not necessary to the governmental function of the Pentagon. As a result, all of the private businesses in the concourse of the Pentagon pay local and state taxes.

"Since the reciprocity agreement between the District of Columbia and Virginia does not provide for District of Columbia-licensed taxicabs occupying cab stands, the question has arisen whether they have this right at the Pentagon without paying license privileges to the State of Virginia. I suggest this for your further consideration."

From what you pointed out, apparently the United States authorities in charge of the operation of the Pentagon Building have allocated certain areas near that building for the use of taxicabs, providing that District of Columbia licensed cabs occupy stands at a certain location, and Virginia licensed taxicabs occupy certain cab stands. I think that this is merely a police regulation just as the municipal authorities of certain cities designate sections of the streets to be used as cab stands and prohibit the use of those areas by privately owned vehicles. I do not think the reservation of the deed to the State of Virginia in taxing businesses on which the Pentagon Building stands should be construed to mean that Virginia would require taxicab operators to pay a license tax for the privilege of using these taxicab stands. As I see it, the licensing of motor vehicles is a question of reciprocity on which I have already expressed my opinion.

The Governor, with the advice of the Reciprocity Board, can enter into agreements with foreign states, including the District of Columbia, in which the requirement to license motor vehicles can be waived (see Section 46-21 and 46-22 of the Code of Virginia). This authority is complete and all inclusive.

FEDERAL PROPERTY—Medical examiner has no jurisdiction on property ceded exclusively to U. S. F-96

June 5, 1951.

DR. G. T. MANN,
Chief Medical Examiner.

This is with further reference to your letter of April 17, 1951, regarding your jurisdiction with regard to postmortem examinations within the Pentagon building.

I have now been able to determine that the State of Virginia has ceded exclusive jurisdiction except for the service of process, to the federal government within the area known as the Pentagon. It is, therefore, my opinion that your jurisdiction does not extend to this area.

FEDERAL RESERVATIONS—Where exclusive jurisdiction lies in Federal Government residents are not Virginia residents. F-163

November 28, 1950.

HONORABLE R. A. PEED,

With further reference to the letter which you left with me addressed to you from certain civilian employees of the Federal Government residing on the Naval Proving Ground at Dahlgren, Virginia, I am writing to say that I have carefully considered the request of these gentlemen that they be treated as residents of Virginia and assessed with State capitation taxes so that they may be eligible to vote in Virginia.
This office has uniformly held that residence of an individual on a military reservation of the Federal Government over which it has exclusive jurisdiction, which appears to be the case here, does not have the effect of constituting such person a resident of Virginia for the purpose of voting. And not being a resident of Virginia no capitation tax is assessable. Thus even if you were to comply with the request of your correspondents to assess them with an invalid capitation tax it would have no legal effect.

FEES—Arrest fee for violation of Motor Vehicle Code.  F-353

November 1, 1950.

MR. W. G. SCOTT, JR.,
Substitute Trial Justice for Christiansburg.

This is to acknowledge receipt of your letter of October 28th, making certain inquiries concerning the charging and disposition of certain fees arising out of the arrests by town officers of persons charged with offenses in violation of The Motor Vehicle Code. Your questions will be answered seriatim:

"A question has arisen in this office as to whether an arrest fee can be charged on Motor Vehicle violations, and if so, what disposition is to be made of such fee when the arrest is made by Town Officers on State Warrants. Will you please advise whether or not it is lawful to charge an arrest fee on conviction of such violations; and if it is lawful to collect an arrest fee, please advise what disposition shall be made of the same."

The arrest fee can be charged provided the officer is in uniform. Section 46-14 (referred to in your letter) empowers the local officers to enforce the provisions of The Motor Vehicle Code, but the officer must be completely uniformed at the time of enforcement. The officer must also be paid on a salary basis. If the arrest is made by a town officer, paid by the town on a salary basis, then the town is entitled to the fee, even though the officer is arresting under a State warrant. I may state, however, that it is impossible to give any general rule, as the charters of many of these towns set forth the disposition of all the fees collected; and it would be necessary to examine the charter of the town before advising you the disposition of any fees.

In my opinion it is lawful to charge an arrest fee upon conviction for said violation, provided the officer is fully uniformed and displays the badge of his authority. The disposition of the arrest fee is the same as set forth in the preceding answer.

I am enclosing herewith a copy of a letter written by the Honorable A. P. Staples, then Attorney General of Virginia, under date of November 28, 1942, addressed to the Honorable W. E. Hogg, bearing on the same subject. That opinion dealt, however, with arrest by sheriffs, sergeants and their deputies—of counties rather than towns. Inasmuch as the county sheriffs, sergeants and their deputies, receive a part of their compensation from State funds, the fee collected should be pro-rated between the county concerned and the State.

FEES—Clerks—Fee for copying papers.  F-116

May 16, 1951.

HONORABLE ROBERT H. OLDHAM,
Clerk Circuit Court for Accomack County.

This will acknowledge receipt of your letter of May 14th in which you say in part:
“The Code prescribes flat fees for the Clerk in civil suits and also in divorce suits and I presume this means for the trial of said suits.

“Oftentimes in civil suits the Clerk is asked to make numerous exhibits and I would like to be advised whether or not I can charge for said exhibits in addition to the flat fee.”

It is not entirely clear to me just what papers you are asked to copy but in my opinion if you are requested by either party to a suit to make copies of records in your office which are not a part of the pleadings but are to be used as evidence in the suit, you may charge the party requesting such copies the fee prescribed by section 14-123 of the Code for such services.

If I misunderstood your inquiry please advise me.

FEES—Clerks not authorized fee for issuing special “Bear-Deer” licenses in certain counties. F-116

July 26, 1950.

HONORABLE JOE W. PARSONS,
Clerk Circuit Court of Grayson County.

This is in reply to your letter of July 21, 1950, which reads as follows:

“Chapter 208 of the 1950 Acts of Assembly provides for a special stamp for Grayson County for hunting bear and deer.

“I would appreciate it if you will advise me, whether or not, in your opinion, I as Clerk would be entitled to compensation for issuing these stamps, out of the funds collected.”

Chapter 208 of the Acts of 1950 provides for a special stamp for hunting bear and deer in four counties: Washington, Grayson, Bath and Rockbridge.

Section 2 of the Act provides, in part:

“The money received from the sale of such special stamp shall be paid to the county treasurer to the credit of a special fund, and the net amount thereof, or so much as is necessary, shall be used for the payment of damages to crops or livestock by deer or bear in the county, whenever such damage amounts to ten dollars or more. Such payments shall be limited to the net amount accruing in the special fund from the sales of such stamps in the particular county during the license year in which the damage occurred and any surplus remaining at the end of such year shall remain in such fund and be used for the conservation of wild life in the county under the direction of the board of supervisors. * * *.”

Section 3 reads as follows:

“The special stamps herein provided for shall be obtained from the clerk of the circuit court of the county. Any person violating the provisions of this act shall be guilty of a misdemeanor and upon conviction punished accordingly.”

Paragraph 2 reads as follows:

“Any acts or parts of acts imposing similar license requirements as to hunting bear and deer are hereby repealed insofar as they affect the counties of Washington, Grayson, Bath, or Rockbridge.”

No provision is made in the Act for a fee for the clerk issuing the license.
As is indicated by paragraph 2, the Legislature has previously passed similar acts relating to certain of these counties. The first of such acts which has come to my attention is found in Chapter 472 of the Acts of 1942. That Act pertains solely to Bath County. The third paragraph of that Act reads as follows:

"The special license herein provided shall be obtained from the clerk of the circuit court of Bath county and the commission shall pay such clerk the sum of ten cents for each such license issued by him."

This 1942 Act was amended and re-enacted by the Legislature in Chapter 32 of the Acts of 1946. The 1946 Act included the counties of Bath, Highland and Rockbridge. Section 3 of the 1946 Act reads as follows:

"The special stamps herein provided for shall be obtained from the clerks of the circuit courts of Bath and Highland and Rockbridge counties and the commission shall pay such clerks the sum of ten cents for each such stamp issued by them, respectively. Any violation of the provisions of this act shall be deemed a misdemeanor."

The Act of 1950 expressly repealed the 1946 Act in so far as it relates to Bath and Rockbridge Counties and we must assume, therefore, that reference was made to the 1946 Act at the time the Act of 1950 was drafted. Since the earlier Act specifically provided for a fee to be paid the clerk for issuing the license and the 1950 Act does not so provide, it is my opinion that the clerk is not entitled to compensation out of the funds collected.

I am aware of the provisions of §29-69 which allow compensation for the clerk for licenses issued "under this title" but inasmuch as the Act of 1950 was not made a part of the Code, the licenses issued under the Act are not issued under Title 29 and it is, therefore, my opinion that §29-69 is not applicable to this special license.

I know of no other provision of law under which the clerk would be entitled to compensation for issuing these licenses.

FEES—Sheriff—Fee for serving as administrator paid into treasury of county.
F-136

HONORABLE RUDOLPH L. SHAYER,
Sheriff of Augusta County.

This is in reply to your recent letter in which you requested my opinion as to whether or not a sheriff is entitled to the expenses and commissions allowed a fiduciary under §26-30 of the Code when he is appointed as an administrator of an estate under the provisions of §64-124 of the Code.

As you pointed out, the fees collected by sheriffs are now paid into the Treasury of the County and, as you know, the salaries and expenses of the office of sheriffs are fixed by the State Compensation Board. Section 14-81 et seq., of the Code. Since a sheriff must serve as an administrator under certain conditions, as provided in §64-124, such service must be considered a part of the duties of his office. Therefore, it is my opinion that any fee or commission collected by a sheriff when serving as administrator should be handled as other fees and paid into the Treasury of the County.

As to the expenses incurred by a sheriff by virtue of his appointment under §64-124, I am of the opinion that they may be treated as necessary expenses incurred in the performance of his duties and, accordingly, the Compensation Board would have the authority to make an allowance for such expenses if so requested.
REPORT OF THE ATTORNEY GENERAL

FERFEES—Treasurer's fee for levying abolished. F-130

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

This is in reply to your letter of August 21st in which you request my opinion as to the levy charge where the treasurer levies to collect personal property taxes. You ask what fee should be charged and whether or not the treasurer is entitled to the same individually or whether it should be turned over to the county.

I judge that you have reference to the action taken under Section 58-1001 which provides that any goods or chattels in the city or county belonging to the person or estate assessed with taxes or levies may be distrained therefor by the treasurer. This section of the Code was derived from Section 376 of the Tax Code which formerly provided that where a sheriff, constable, collector, treasurer, sergeant or other collecting officer has to levy or distrain and sell or levy or distrain without selling, he shall receive a fee of sixty cents to be collected with the taxes.

However, you will recall that when county treasurers were placed upon a salary basis by Chapter 426 of the Acts of Assembly of 1932 it was provided by Section 1 of that Act that all fees and commissions theretofore provided by law to be paid treasurers were abolished. On the basis of that provision this office has previously ruled that treasurers no longer collect the fees which were provided for certain services rendered by them in the various statutes. You will note that the action taken by the General Assembly in 1932 abolishing treasurers' fees was carried into effect in the recodification of the Code because Section 58-1006 which now contains the provision as to fees formerly contained in Section 378 of the Tax Code no longer names the treasurer as one of the officers who should receive a fee for making a levy or distraining for taxes.

It is my opinion, therefore, that when the levy or distraint is made by the treasurer no fee should be charged or collected.

FERTILIZER LAWS—Lime and Potash mixtures—Reported for tax payments under same procedure as other fertilizers. F-5

MR. M. B. ROWE, Fertilizer Executive, Department of Agriculture and Immigration.

This is in reply to your letter of November 17th in which you requested me to reconsider my ruling of August 21st, at which time I expressed the opinion to you that Section 3-89 of the Code, as amended in 1950 so as to provide that all manufacturers, etc., who offer any complete fertilizer or fertilizer material for sale in Virginia shall use a reporting system for reporting and paying the inspection fee on the tonnage of fertilizer sold in Virginia, does not apply to manufacturers, etc., who sell lime and potash mixture.

As I previously pointed out, Section 3-89 is a part of Chapter 8 of Title 3 of the Code, the first section of which, Section 3-80, provides that the terms "commercial fertilizer" or "fertilizer materials", when used in that chapter, shall not be held to include lime, land pasteur, ashes, common salt or unground tobacco stem, when sold as such unmixed with other fertilizer materials. Agriculture liming material and agricultural liming material with potash are separately dealt with in Chapter 9 of Title 3.

Section 3-132, which is contained in Chapter 9 of Title 3, provides that all manufacturers, etc., of agricultural liming materials with potash shall secure tax tags furnished by the Commissioner of Agriculture, and such tags shall be the same as used for fertilizer and subject to the same rules and conditions under which fertilizer tax tags are furnished. It can be seen, therefore, that it was the intention
of the Legislature to provide a uniform system of reporting tax payments for all manufacturers of "commercial fertilizer" and "agriculture liming materials with potash".

Section 3-89 heretofore dealt with the system of tax tags to be used by manufacturers of "commercial fertilizer", and, by the implied reference to it in Section 3-132, also dealt with the system of tax tags to be used by manufacturers of "agricultural liming materials". As noted, the General Assembly of 1950 amended this section so as to substitute a "reporting system" for the old system of tax tags. However, Section 3-132 was not amended and still deals with tax tags which "shall be the same as used for fertilizer and subject to the same rules and conditions under which fertilizer tax tags are furnished".

It is my understanding that practically all of the lime and potash mixtures sold are handled by "fertilizer" manufacturers rather than by "lime" manufacturers and that it was the desire of the 1950 General Assembly, on the advice of the fertilizer industry, to provide for a uniform reporting system throughout the industry. Such legislative intent, as pointed out above, is also gleaned from the very language of Section 3-132, and since the Commissioner of Agriculture, in fact, no longer furnishes fertilizer tax tags or promulgates rules under which such tags are subject. I am of the opinion that the Commissioner would be justified in applying Section 3-89, as amended, to manufacturers of agricultural liming materials as well as to "fertilizer" manufacturers.

Therefore, while I feel that Section 3-132 should have been amended to conform with the 1950 amendment to Section 3-89, it is my conclusion that, for practical reasons, the Commissioner should follow the new procedure prescribed in Section 3-89, as amended, and establish a uniform reporting system throughout the fertilizer industry.

FERTILIZER LAWS—Sale of unregistered raw rock phosphate. F-5

Mr. M. B. Rowe,
Fertilizer Executive, Department of Agriculture and Immigration.

March 26, 1951.

This will acknowledge receipt of your letter of March 13, relative to the Virginia Fertilizer laws prohibiting the sale of ground rock phosphate and whether or not certain facts should be considered as a violation of those laws. You state that there are certain instances where representatives of fertilizer manufacturers solicit prospective buyers in this State to obtain prohibited fertilizers by addressing a letter with check enclosed to one of their out-of-state offices. You set forth the below stated questions:

1. Is it legal, under the Virginia law, for sales of Raw Rock Phosphate to be made in the manner as outlined above, where letters and checks are mailed to an out-of-state office?

2. Is it legal, under the Virginia law, for a farmer who has not been solicited by a representative of a Fertilizer Company, to write a Manufacturer's out-of-state office and order carload lots of Raw Rock Phosphate?

3. If a representative of a Fertilizer Manufacturer distributes literature and instructs a prospective buyer as to how he should proceed to order Raw Rock Phosphate, is he doing so in violation of the law?

Section 3-88 of the Code provides as follows:

"No fertilizer manufacturer, dealer or agent, shall be allowed to register or offer for sale any complete fertilizer, superphosphate with potash, superphosphate with nitrogen, or plain superphosphate, or ground rock phosphate or similar materials in this State, which contains less than eighteen per centum
of plant food, namely, available phosphoric acid, nitrogen and potash, either singly or in combination, except there may be one grade of tobacco plant bed fertilizer 4-9-3 and one grade of regular tobacco fertilizer 3-8-5; provided, that in mixed fertilizer there shall not be less than two per centum of potash and two per centum of nitrogen, when one or both are present in the same mixture. This minimum food requirement shall not apply to natural animal or vegetable products not mixed in other materials." (Italics supplied)

Section 3-95 of the Code provides as follows:

"Any manufacturer, dealer or agent who shall sell, or offer for sale, in this State any fertilizer or fertilizer material which has not been previously registered with the Commissioner, or which has not been branded or tagged as hereinbefore provided, or who shall use tags the second time or any person who shall receive or remove any such fertilizer, or any railroad or transportation company that shall deliver to any point in this State any untagged fertilizer shall be guilty of a misdemeanor, and subject to a fine or forfeiture of not less than twenty-five dollars nor more than two hundred dollars for each and every offense when prosecuted to conviction in the manner now provided by law in prosecutions for violation of the revenue laws of this State." (Italics supplied)

Section 3-96 provides, in part, as follows:

"All fertilizer or fertilizer material sold or offered for sale in violation of any section of this chapter shall be condemned, and seized by the Commissioner, or his agents. ***"

Furthermore, §3-97 states that prosecutions shall be conducted by the Commonwealth's Attorney.

Section 3-88 is clear in stating that no manufacturer, dealer or agent shall sell or offer for sale any prohibited fertilizer. Therefore, any manufacturer, agent or representative who sells or makes offers for sale has violated the terms of that section and shall be subject to the prescribed penalties. It is my view that a representative distributing literature and instructing prospective buyers as to the procedure for ordering prohibited fertilizer is making an unlawful offer. The criminal penalty which may be inflicted upon the manufacturer, dealer or agent is set forth in §3-95.

Furthermore, §3-95 also provides for conviction of "any person who shall receive or remove" any such prohibited fertilizer. Accordingly, this would necessarily include any farmer who receives or removes this prohibited fertilizer.

With regard to any particular conviction, it is my opinion that it would be mainly a matter of proof to show that the manufacturer, dealer or representative offered fertilizer for sale and, as heretofore set forth, it would appear that a solicitation of the order would be an offer of the fertilizer for sale and, therefore, in violation of the statute.

FIRE LAWS—Open fires between March and May. F-220

November 27, 1950.

MR. GEORGE W. DEAN,
State Forester.

This is in reply to your letter of November 22, 1950, in which you state:

"The question has arisen as to whether a warming fire which occurs at 10:00 A.M. on March 11, used by a house construction crew, is a violation
REPORT OF THE ATTORNEY GENERAL

of Title 10, Chapter 4, Article 4, Section 10-62, Subsection (b), even though the warming fire is located on cleared land but within 10 feet of woodland and brush land, and within a county which has formally adopted the provisions of the Section. A further circumstance connected with the fire is that the material used consists of blocks of lumber and other building refuse from the lumber used in constructing the building. Your opinion on the above matter will be appreciated."

Section 10-62 of the Code of Virginia provides as follows:

“(a) It shall be unlawful for any owner or lessee of land to set fire to, or procure another to set fire to, any woods, brush, logs, leaves, grass, debris, or other inflammable material upon such land unless he previously shall have taken all reasonable care and precaution, by having cut and piled the same or carefully cleared around the same, to prevent the spread of such fire to lands other than those owned or leased by him. It shall also be unlawful for any employee of any such owner or lessee of land to set fire to or to procure another to set fire to any woods, brush, logs, leaves, grass, debris, or other inflammable material, upon such land unless he shall have taken similar precautions to prevent the spread of such fire to any other land.

“(b) During the period beginning March first and ending May fifteenth of each year, even though the precautions required by the foregoing paragraph shall have been taken, it shall be unlawful, in any county or portion thereof organized for forest fire control under the direction of the State Forester, for any person to set fire to, or procure another to set fire to, any brush, leaves, grass, debris or field containing dry grass or other inflammable material capable of spreading fire, located in or within three hundred feet of any woodland or brushland, except between the hours of four o’clock meridian and twelve o’clock midnight. (Italics supplied)

The question thus appears whether or not in a county wherein the section is adopted an open fire at the time and place prescribed in your letter of wood chips, blocks and other building material debris would fall within the categories as enumerated by statute. It is my opinion that subsection (b) is applicable and that such material is “debris” and “inflammable material capable of spreading fire, and is within the classifications prescribed. Therefore, it would be unlawful for a person to build the type of fire in question between March first and May fifteenth, except between the hours of 4:00 P. M., and midnight.

FIREWORKS—Effect of permit to display. F-66

June 22, 1951.

Honorable Hugh D. McCormick,
Commonwealth’s Attorney for Warren County.

I am in receipt of your letter of June 20 which, for purposes of reply, I quote below in full:

“Some time ago the State Police obtained a search warrant and seized a quantity of illegal fireworks which the owner was offering for sale in violation of Code Sec. 59-214. The owner was fined, however, no disposition has been made of the fireworks seized.

“One of our local organizations desires to obtain a permit for display of fireworks, which is authorized under Code Sec. 59-215. However, Code Sec. 59-214 makes it unlawful to buy, sell, use, etc., fireworks, and the 1950 Supplement to Code Sec. 59-214 goes even further and makes it unlawful to store and transport them.
"I am referring this matter to you for answer to the following questions:

1. How should the fireworks be disposed of?
2. Are they classified as contraband and forfeited to the State?
3. How can Sec. 59-214 be reconciled with Sec. 59-215 if a permit is given for display of the fireworks?

The owner of the fireworks is willing to donate the same to the organization desiring a permit for display of fireworks over the 4th of July and, if this is permissible, I would like to know how the fireworks can be transported in view of Sec. 59-214."

In view of the fact that the owner of the fireworks is willing to donate them to the organization to which you refer, it would appear unnecessary to pass upon the first two questions you ask.

As you point out, §§59-215 of the Code authorizes the board of supervisors of a county to issue a permit for the display of fireworks by certain organizations. You are concerned, however, by the provision in §59-214, making it unlawful, among other things, for any person, firm or corporation to transport fireworks. Your thought being that if the fireworks cannot be transported to the place where they are to be displayed under §§59-215, then the permit issued by the board of supervisors is useless. I think that the conflict between the two sections is more apparent than real. The statute should not be so construed as to hold that the General Assembly has done a vain thing in authorizing the granting of permits for displays of fireworks. If the fireworks to be displayed cannot be transported to the place of display, then, of course, §59-215 is meaningless. It is my opinion that the necessary transportation of fireworks to be displayed under authority of a lawful permit is not prohibited by §59-214.

FIREWORKS—Lawful type—Eligibility for use permits. F-66

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

August 8, 1950.

This is in reply to your letter of August 4th in which you request my opinion as to whether Section 59-218 of the Code of Virginia, 1950, permits merchants to buy, store, sell and offer for sale Roman candles, sparklers, caps for pistols, fire crackers not in excess to two inches long and one-quarter inch in diameter, pinwheels commonly known as whirligigs, spinning jennies, provided the merchant inquires of the purchaser whether the same are to be used, ignited or exploded on private property with the consent of the owner of such property and the reply is in the affirmative.

Section 59-218 is a part of Chapter 15 of Title 59 of the Code. The first section of that chapter provides that, except as otherwise provided in the chapter, it shall be unlawful for any person, firm or corporation to transport, manufacture, store, sell, offer for sale, expose for sale or to buy, use, ignite or explode any fire cracker and other explosives commonly known as fire works. Section 59-218 expressly provides that the chapter shall not apply to Roman candles, sparklers, caps for pistols, fire crackers not in excess of two inches long and one-quarter inch in diameter, pinwheels commonly known as whirligigs, or spinning jennies, when used, ignited or exploded on private property with the consent of the owner of such property.

Since the statute clearly provides that the types of fire works mentioned in 59-218 may be used as therein provided without the restrictions of the law being applicable, it is my opinion that merchants may buy, store, sell and offer such fire works for sale to be used on private property with the consent of the owner of such property. It would, of course, be impossible for the merchant to be assured that the fire works would be so used but if he takes the precaution of making inquiry before
sitting, then it is my opinion that he would not be violating this statute to have such articles on hand for sale or to sell them under such circumstances.

You also ask whether Section 59-215 should be construed to empower the Board of Supervisors to issue permits to merchants. This last mentioned section authorizes the governing bodies of counties, cities and towns to provide for the issuance of permits for the display of fire works by fair associations, amusement parks or other organization or group of individuals, and provides that after such permit has been issued sales of fire works may be made for use under such permit. In my opinion this section provides only for the issuance of the permits to the fair associations, amusement parks or other organization planning to use the fire works and does not contemplate that the permit will be issued directly to the merchant.

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FORFEITURES—Weapon found concealed on one person but owned by innocent party not forfeited. F-71

HONORABLE RICHARD W. LOWERY,
Police Justice, South Boston.

I am in receipt of your letter of September 26, from which I quote as follows:

"I wonder if you could advise me whether or not concealed weapons found on a defendant and proved to belong to someone not before the court, can be confiscated."

As you know, the matter of forfeiture of weapons is embraced by Section 18-146 Code of Virginia. The language applicable to forfeiture is couched in mandatory terms and no provision is made for the protection of the rights of property which may vest in an innocent owner.

In my opinion the provision for forfeiture of the weapon is predicated on the principle that possession of personal property is prima facie evidence of title and ownership, assuming, of course, that the weapon is one which may be lawfully owned. Upon conviction, therefore, it is mandatory that the court order disposition of the weapon as the statute directs. However, I do not believe that the statute should be so construed as to deny due process to an innocent owner whose property has been used in violation of law without his knowledge, connivance or consent, express or implied.

It is my opinion that, if the weapon be such as might be lawfully owned and an innocent party carries the burden of establishing such ownership and that the property was not being used in violation of law with his knowledge, connivance or consent, express or implied, the court could not lawfully invoke the forfeiture provision of Section 18-146 of the 1950 Code. I believe that the opinion here expressed is in line with the reasoning of the Court in McNelis v. Commonwealth, 171 Va. 471.

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GAME, INLAND FISH AND DOG LAWS—Act restricting authority of Commission which referred in title only to Commission of Fisheries is void in part. F-233

HONORABLE I. T. QUINN,
Executive Director, Commission of Game and Inland Fisheries.

This will acknowledge receipt of your latter dated December 13, 1950, which I quote as follows:
"Chapter 584, Acts of Assembly, 1950, page 1595, provides for the elimination and prohibition of certain restrictions on tidal waters and marshlands established as within the jurisdiction of the Commission of Fisheries.

"The body of the Act provides for the elimination and prohibition of certain restrictions on tidal waters and marshlands established as within the jurisdiction of the 'Commission of Fisheries or the Commission of Game and Inland Fisheries'.

"Subsequent to the introduction of H. 362, which resulted in the enactment of Chapter 584 referred to supra, Section 50(c) of the Virginia Constitution was observed. Members of the House and Senate had no opportunity to observe that the Commission of Game and Inland Fisheries was included in the Bill since said Bill was read only by title.

"In Commonwealth v. Dodson, 176 Va. 281, 11 S. E. (2d.) 120, it was held that 'the title of an Act must not be made a cover for surreptitious or incongruous legislation'. In Wooding v. Leigh, 163 Va. 785, 177 S. E. 310, it was held that 'the title to an Act sets the bounds of the Act; and to the extent that its provisions exceed those bounds they are void'.

"It is the contention of the Commission of Game and Inland Fisheries that since this Agency is excluded from the title of the Act and is included in the body thereof that the bounds of the title have been exceeded and, therefore, the Act is void insofar as it relates to the Commission of Game and Inland Fisheries.

"Your opinion in this matter is respectfully requested."

The act to which you refer is Chapter 584 of the 1950 Acts of the General Assembly of Virginia and is cited as Section 28-4.1 of the 1950 Code of Virginia, as amended. The caption of the section reads as follows:

"An Act to eliminate and prohibit certain restrictions on tidal waters and marshlands heretofore established as within the jurisdiction of the Commission of Fisheries."

The body of the Act includes not only Commission of Fisheries, but, in addition, the Commission of Game and Inland Fisheries. These two Commissions are separate and distinct agencies of the Commonwealth. It is obvious, therefore, that the body of the Act is broader than its title. You wish to be advised if it is in contravention of Section 52 of the Virginia Constitution.

This precise question has never been passed on by the Virginia Supreme Court of Appeals. However, in the case of Irwin v. Commonwealth, 124 Va. 817, 97 S. E. 769, the Court passed upon a somewhat similar question, that is, the title to the act in that case was restrictive. It enumerated the places in which it would be unlawful to use the common or roller towel, namely, in any hotel, railway train, railway station, public or private school, public lavatory or washroom. The body of the act, however, added 'office building'. The court said:

"* * * It has thus set the bounds, and to add 'office building' (another distinct place) in the body of the act, would violate the terms and intendment of the section * * *.*

The section referred to by the court being Section 32-60 of the Code of Virginia.

In view of the holding of the court in this case, it would seem to follow that the same construction should be applied to Chapter 584 (Section 28-4.1) even though two State agencies are involved because the title to the Act is restrictive and misleading. I am, therefore, of the opinion that so much of this Chapter as relates to "Commission of Game and Inland Fisheries" is void.
GAME, INLAND FISH AND DOG LAWS—Authority to advertise for bids on project prior to securing site. F-233

Honorable I. T. Quinn,
Executive Director, Commission of Game and Inland Fisheries.

I am in receipt of your letter of August 29, from which I quote as follows:

"The Commission of Game and Inland Fisheries has made a commitment to construct a public fish pond in Pittsylvania County. The County is to acquire the lands for the site where the Commission has located a suitable area for construction of such fish pond. Contract will have to be awarded for the construction of this public fish pond subsequent to advertising for bids. The question arises as to whether or not such advertising for bids may be made prior to the actual transfer of title by the County to the Commonwealth of Virginia, Commission of Game and Inland Fisheries."

The advertisement for bids and the letting of the contract to the lowest responsible bidder are steps preliminary to the construction of the project. The Commission is vested with authority to reject any and all bids.

It may well be that the County would not desire to expend funds for the acquisition of the site and the adjustment of claims for consequential damages prior to action on the part of the Commission in advertising for bids as well as the letting of the contract for actual construction.

I would advise that the advertisement state that the letting of the contract would be subject to the acquisition of the lands and rights necessary for the construction and operation of the project.

Under the circumstances stated I am of the opinion that the Commission may, with legal propriety, proceed to advertise for bids prior to actual transfer of title by the County to the Commonwealth of Virginia, Commission of Game and Inland Fisheries.

GAME, INLAND FISH AND DOG LAWS—Bag limit on White Bass. F-233

Honorable E. H. Richmond,
Commonwealth's Attorney for Scott County.

This will acknowledge receipt of your letter of March 29 in which you inquire as to the bag limit of white bass in Scott County.

I am informed by the Commission of Game and Inland Fisheries that the striped bass, also known as the white bass, is a recent inhabitant of Virginia waters and is not yet classified as a game fish. Accordingly, I concur with the view of the Commission that there is no creel or bag limit upon these fish.

GAME, INLAND FISH AND DOG LAWS—Commission has no authority to enter into reciprocal agreements with Tennessee. F-181

Honorable Stuart Carter,
Member of House of Delegates.

I am in receipt of your letter of February 5, from which I quote below:

"As you probably know the South Holston Dam constructed near Bristol
by the T.V.A. will create a large lake a part of which will be in Virginia and
the balance in Tennessee. This of course will be a popular fishing spot. The
sportsmen here in this Virginia-Tennessee area would like to have a re-
ciprocal agreement between Virginia and Tennessee so that they could fish
anywhere in this lake with a license issued either by Virginia or Tennessee.
"I would like therefore to request your opinion upon the question
whether or not the Commission of Game and Inland Fisheries of the Com-
monwealth of Virginia has the authority to enter into a reciprocal agreement
with the State of Tennessee upon this matter."

I do not think that the Commission of Game and Inland Fisheries would have
the authority to enter into such an agreement as you describe unless such authority
is granted by statute. I have carefully examined the pertinent statutes and cannot
find where such power is conferred upon the Commission. Assuming, therefore, that
the Commission has jurisdiction over the lake in question, I conclude that your
inquiry must be answered in the negative.

GAME, INLAND FISH AND DOG LAWS—Commission of Game and
Inland Fisheries—may pay for storage of illegally possessed wild rabbits
when seized, and for publication involved in seizure. F-233

February 26, 1951.

HONORABLE I. T. QUINN,
Executive Director, Commission of Game and Inland Fisheries.

This will acknowledge receipt of your letter of February 2, 1951, in which you
inquire whether or not the Commission of Game and Inland Fisheries is authorized
and required to pay for publications inserted in the papers by the clerk of the
Police Court in a certain matter wherein an agent of the Commission summoned
a merchant into that court for illegally possessing for sale wild rabbits. Further-
more, you state that the carcasses were held by direction of the Court, and there
is a bill outstanding thereon.
Section 29-13 of the Code provides:

"The Commission is vested with sole jurisdiction, power and authority
to enforce or cause to be enforced all laws for the protection, propagation and
preservation of game birds and game animals of this State and all fish in the
inland waters thereof, which waters shall be construed to mean and to include
all waters above tidewater and the brackish and fresh water streams, creeks,
bays, including Back bay, inlets, and ponds in the tidewater counties, and all
dog laws."

Section 29-14, concerning prosecutions, states:

"The Commission shall prosecute all persons who violate such laws and
shall seize and confiscate any and all game birds, game animals and fish that
have been illegally killed, caught, transported or shipped." (Italics added)

It would appear that the above-quoted sections provide sufficient authorization
for your Commission to pay the storage bill that accrued after the cases of rabbits
were taken under control of the court and also for the newspaper publication. The
above quoted sections would be unenforceable if the Commission were not allowed
to take the necessary steps to provide for such enforcement in accordance with its
lawful duties.

I have made an exhaustive study of the other sections of the Code pertaining to
court costs in forfeiture matters and do not find any other section that would be directly in point with regard to the problem presented in your letter.

It may have been possible for the police court to place the costs upon the offending merchant if he were convicted, but I shall not pass upon that phase as I do not know the outcome, nor do I know whether or not he would be subject to the service with process in the Commonwealth of Virginia. Furthermore, the police court should not be required to bear from its own funds the costs of publication and other matters arising from warrants which have been instituted in that court.

GAME, INLAND FISH AND DOG LAWS—Commission—Requirements for publication of proposed regulations. F-233

August 9, 1950.

HONORABLE I. T. QUINN,
Executive Director, Commission of Game and Inland Fisheries.

This is in reply to your letter of August 7th in which you request my opinion as to whether the Virginia Commission of Game and Inland Fisheries may adopt a method of publication of proposed regulations other than publication in a newspaper. You refer to Section 29-126 of the Code which reads as follows:

"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."

It is my opinion the reference to publication "in such other manner as may be convenient" is applicable only where there is no newspaper published in the county which is affected by the regulation. I realize that the cost of publishing a proposed regulation in a newspaper in every instance can be very costly and that the method suggested in your letter may be quite adequate to give the people of the community full notice of the contemplated action of the Commission. However, it is my opinion that the statute quoted above requires publication in a newspaper published in the county where there is such a newspaper. I can only suggest that this matter be submitted to the next session of the Legislature if it is felt that this procedure has proven too costly.

GAME, INLAND FISH AND DOG LAWS—Compensation for livestock killed by dogs not payable for dogs killed by dogs. F-95

December 13, 1950.

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

This is in reply to your letter of December 2, 1950, relative to whether or not a board of supervisors may make payment to the owner of a licensed dog for injuries sustained by the dog when attacked by a stray unlicensed dog.
Section 29-202 of the Code of Virginia provides in part as follows:

"Section 29-202. Compensation for livestock and poultry killed by dogs. —Any person who has any livestock or poultry killed or injured by any dog not his own shall be entitled to receive as compensation therefor a reasonable value of such livestock or poultry."

Under Section 29-183 the following definition is made:

"(a) 'Livestock' includes cattle, sheep, goats, swine and enclosed domesticated rabbits or hares."

Under Section 29-203 treatment is provided for persons bitten or exposed to the rabid animal.

An examination of the above statutes fails to disclose provisions for reimbursement to owners of dogs injured by stray dogs. "Livestock" as defined clearly does not include dogs. Therefore, it is my opinion that a board of supervisors is not allowed by statute to make payment to the owner of a licensed dog for injuries sustained to the dog when attacked by a stray unlicensed dog.

GAME, INLAND FISH AND DOG LAWS—Deer—Restrictions on hunting.

Mr. I. T. Quinn, Executive Director, Commission of Game and Inland Fisheries.

December 4, 1950.

This is in reply to your letter of November 30th in which you requested my opinion as to whether Sections 29-144 and 29-162 of the Code, first enacted by the General Assembly of 1938 and approved by the Governor on March 31st of that year, are in conflict. They read in part as follows:

"Section 29-144. It shall be unlawful to kill any deer in the counties west of the Blue Ridge Mountains, except a deer with at least two prongs or points on one horn. The penalties for violation of this section shall be as prescribed by Section 29-162."

"Section 29-162. * * * Any person killing a deer which does not have horns visible at least two inches above the hair, or who exceeds the bag limit for deer, or who kills a deer during the closed season, shall be fined twenty-five dollars."

Statutes are considered to be in pari materia when they relate to the same subject matter, and especially when they are passed at the same session of the Legislature and approved by the Governor on the same day. Furthermore, this principle of statutory construction demands that such statutes, although in apparent conflict, be construed in harmony with each other whenever reasonably possible. City of Richmond v. Dreyer-Hughes, 122 Va. 178.

Therefore, since the sections quoted above are clearly in pari materia, and since Section 29-144 specifically refers to Section 29-162, it is my opinion that the intent of the Legislature will be carried out if the Commission of Game and Inland Fisheries enforces the provisions of both sections by requiring that west of the Blue Ridge Mountains a deer must have at least one pronged horn before he can be legally taken and that east of the Blue Ridge the horns of a deer must be not less than two inches above the hair before being legally taken.
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GAME, INLAND FISH AND DOG LAWS—Dogs—Board of Supervisors to determine reasonable value of poultry killed by dog. F-50—F-95

October 13, 1950.

HONORABLE JOSEPH H. POFF,
Attorney for the Commonwealth of Floyd County.

This is in reply to your letter of October 9, 1950, from which I quote as follows:

"The Board of Supervisors has requested me to write you in regard to compensation for livestock and poultry killed by dogs. The 1950 Acts of Assembly at page 406 still permits the Board of Supervisors to pay a person the assessed value of livestock or poultry killed by dogs and a fair value of unassessed lambs or poultry. On page 662 of the 1950 Acts of Assembly it provides that a person may receive a reasonable value for livestock or poultry killed or injured by a dog not his own. Which one of these sections should be followed?"

It is true, as you point out, that the Legislature passed two acts concerning this problem at the 1950 session. Both of these acts were written so as to amend and reenact Section 29-202 of the Code of 1950. The first of the acts (Chapter 242 of the Acts of 1950) was approved March 17, 1950, and made no change in the former law except to add a special proviso concerning Surry County. The latter act (Chapter 377) was approved April 5, 1950, and amended the language of the code section itself. This latter act did not include the proviso concerning Surry County.

It is my opinion that the effect of these two amendments when considered in the light of well recognized principles of statutory construction has been properly interpreted by the Virginia Code Commission as set forth in the 1950 supplement to the Code of 1950, the result being that Section 29-202 has been changed to the extent that any person who has livestock or poultry killed by any dog not his own shall be entitled to receive not the assessed value as previously but rather a reasonable value.

Your letter continues as follows:

"Most of the time livestock are killed by dogs unseen or unknown, making it difficult to collect from the owner of the dog. Then on the other hand the owner of a sheep, which is commonly killed or injured, will assess it from $5.00 to $10.00 per head and as soon as it is killed or injured by a dog, it will take the value of from $30.00 to $60.00. If they are to use the reasonable value section, with no way of knowing the actual value, it becomes a drain on the county funds."

I call your attention to the fact that the act provides that the owner "shall furnish evidence under oath of quantity and value" to the governing body and it is my opinion therefore that in the final analysis the governing body and not the owner determines the "reasonable value" of the livestock or poultry destroyed and therefore any unwarranted drain on the county funds may be averted.

GAME, INLAND FISH AND DOG LAWS—Dogs—Purchase of license outside territory of residence. F-95

March 29, 1951.

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

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

"It has come to my attention that residents of Hanover County are in some instances purchasing dog licenses from the Treasurer of the City of
Richmond and from Henrico County.

"I would appreciate your advising me whether or not such dog license is valid when purchased by a Hanover County resident from a treasurer of a city or county other than Hanover County, and what the responsibility of the county or city is for making such sale."

Section 29-88 of the Code provides that a person "may obtain a dog license by making oral or written application to the treasurer of the county or city in which such person resides, accompanied by the amount of the license tax." The section further provides that "The treasurer shall only have authority to license dogs of resident owners or custodians who reside within the boundary limits of his county or city and may require information to this effect from any applicant."

The quoted language is plain and needs no interpretation from me as to the authority of the treasurer of a county or city to license dogs of resident owners or custodians who reside within the boundary limits of another county or city.

As to the validity of a State dog license purchased from a treasurer who did not have authority to sell the same, I am of opinion that the dog owner is not to be held responsible for the mistake of the treasurer and that, if he has secured and paid for a State license for his dog, such a license is a valid one.

GAME, INLAND FISH AND DOG LAWS—Fishing license for hook and line fishing required only in inland waters. F-233

November 13, 1950.

HONORABLE FERDINAND F. CHANDLER,
Commonwealth's Attorney for Westmoreland County.

This will acknowledge receipt of your letter of November 2, 1950, requesting an opinion on the following question:

"Will you please give me your opinion as to whether it is necessary for a person to have a license to fish with hook and line for any species of fish below the line which divides the jurisdiction of the Commission of Fisheries and the Commission of Game and Inland Fisheries, and what the species of fish are that he has to have a license to fish for in such waters, if any."

Section 29-51 of the Code of Virginia of 1950 providing license requirements 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 exceptions set out in the following section." (Italics supplied)

Section 29-55(1) "Fees to Fish Only" provides:

"(1) County resident season license to fish in inland waters above salt water, within the regulations and restrictions provided by law, within the county limits of the county of residence, named on the face of the license, with a rod and reel, or other method whereby artificial lures, or minnows are used as a bait or to fish for bass or trout, one dollar." (Italics supplied)

We find the phrase "inland waters" defined in §29-13.

"The Commission is vested with sole jurisdiction, power and authority to enforce or cause to be enforced all laws for the protection, propagation and preservation of game birds and game animals of this State and all fish in the
inland waters thereof which waters shall be construed to mean and to include all waters above tidewater and the brackish and fresh water streams, creeks, bays, including Back bay, inlets, and ponds in the tidewater counties, and all dog laws."

Upon consideration of the statutes above, it is my opinion that license requirements are based upon whether or not the fishing is done in "inland waters" and, accordingly, a noncommercial fisherman is not required to have a license to fish with hook and line in waters other than inland waters, as defined. Former Attorney General Saunders rendered an opinion on June 29, 1930, construing the above Code provisions prior to certain revisions into their present form to hold:

"*** The exception as to the necessity for a license to fish in Tidewater Virginia does not apply to brackish or fresh water streams, creeks, bays (including Back Bay), inlets and ponds, and this is so whether the tide ebbs or flows in such streams, creeks, bays, inlets or ponds."

GAME, INLAND FISH AND DOG LAWS—In counties requiring special deer and bear stamp landowner must purchase stamp to hunt such animals on his own land. F-233

HONORABLE JOE W. PARSONS,
Clerk, Circuit Court of Grayson County.

This will acknowledge receipt of your letter of March 29 requesting my opinion as to whether or not land owners are required to purchase the special stamp for hunting deer and bear on their own land in accordance with Chapter 208 of the Acts of Assembly of 1950.

Chapter 208 provides that it is unlawful to hunt bear or deer in Washington, Grayson, Bath and Rockbridge Counties without having obtained a special stamp. Part 2 of the aforesaid chapter provides that the receipts shall be used for the payment of damages to crops or live stock by deer or bear. This chapter makes no provisions for exemptions for land owners. Moreover, land owners would be the recipients of the benefits in the event of damages to their crops or live stock by deer or bear. Accordingly, it is my opinion that a land owner in the aforementioned county would be required to buy the special stamp as provided by Chapter 208.

Inasmuch as Chapter 208, enacted by the 1950 Legislature, is specific in its provisions and enumerates the counties, I did not deem it necessary to distinguish this chapter from §29-122 of the Code of Virginia which was enacted at a previous date and is general in its application.

GAME, INLAND FISH AND DOG LAWS—Payment for damage to crops by deer in Craig County covers only land in Craig County. F-50

HONORABLE THURMAN BRITTS,
Attorney for the Commonwealth for Craig County.

This is in reply to your letter of December 20, 1950, in which you set forth the following problem on which you desire my opinion:

"Mr. Hutchison, whose farm lies in Giles County, but who for a great
number of years has voted in and paid all of his taxes in Craig County, is making a claim for damages done by deer to a portion of his wheat crop. Mr. Surber (the game warden) has contended that, inasmuch as the property is not in Craig County, he has no jurisdiction to make an investigation or act upon an investigation made in Giles County for damage done by game in Giles County.

"Since the property is in Giles County, the Board of Supervisors of Craig County would have no authority to pay damages from the damage stamps sold in this county for the hunting of big game. Mr. Hutchison contends that, inasmuch as he is a taxpayer and a voter in this county, and has bought his hunting licenses and damage stamps in this county, he is entitled to any relief afforded under the Act enacted in 1948, authorizing the sale of damage stamps at $1.00 to create a special fund for damages to crops or livestock by deer or bear in the county of Craig.

"While the Act specifically states that payment shall be made for damages by the aforementioned deer and bear in the County of Craig, it would seem that, since Mr. Hutchison considers himself a citizen of this county and exercises all of the privileges of a citizen, and pays all of his taxes in this county, he should have some protection."

The pertinent portion of Chapter 294 of the Acts of 1948, which is the Act referred to, is found in §2 thereof and reads as follows:

"The money received from the sale of such special stamp shall be paid to the county treasurer to the credit of a special fund, and the net amount thereof, or so much as is necessary, shall be used for the payment of damages to crops or livestock by deer or bear in the county of Craig. Such payments shall be limited to the net amount accruing in the special fund from the sales of such special stamps in such county during the license year in which the damage occurred and any surplus remaining at the end of such year shall be covered into the general fund of the county. * * *.” (Italics supplied)

In my opinion it is clear that this Act covers only damage to crops or livestock in Craig County. Mr. Hutchison is, of course, protected by this Act for any crops or livestock he may have in Craig County, but the fact that he is a resident of the county does not bring his crops or livestock lying in another county within the protection provisions of the Act.

GAME, INLAND FISH AND DOG LAWS—Second offense need not be within year for increased penalty. F-233

September 19, 1950.

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

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

"I wish you would give me your opinion as to whether Section 29-182 of the 1950 Code of Virginia would be applicable in the following case.

"We have a man charged with violating the game and inland fisheries laws. The warrant also charges a second offense. The man has plead guilty to the violation of the law as charged in the warrant. The record shows that his last conviction for violation of the game law has been over one year prior to the violation charged in the warrant. My opinion is that since the second violation did not occur within a year next following the last conviction that Section 29-182 could not be applied. The Trial Justice is of the opinion that it probably could be applied, but stated that he would prefer to have a ruling from you on this question."
"My chief reason for feeling that it does not apply is that all other sections of the Code, that I know anything about, that require more punishment for second convictions provides that the second conviction be within one year subsequent to the prior conviction. Also, whenever any jail sentence is suspended on a misdemeanor for good behavior this suspension is only for a period of twelve months."

Section 29-182 of the Code of 1950 reads as follows:

"If a person be convicted a second time of any offense, mentioned in this title, the trial justice rendering judgment therefor shall require him to give a bond for not less than one hundred dollars, with sufficient surety, for his good behavior for a year and if he fails to give such bond, commit him to jail for one month, unless he sooner gives it. The bond shall be deemed to be forfeited if the person commit such other offense within the time specified in the bond."

This statute does not specify any particular length of time within which the prior offense must have been committed in order to make applicable its provisions. As you have pointed out, many of the statutes dealing with second convictions do prescribe a time limit and it may be argued with much force that, by failing to include any such time limit in §29-182, the Legislature manifested an intent that no such limitation should apply to this statute. It may also be reasoned that, since many of the game laws are seasonal, a requirement that the second offense must be committed within a year might have the effect of making the provision practically worthless in some instances. For these reasons I am of the opinion that §29-182 must be applied even though the first offense was committed more than a year prior to the violation charged in the warrant for a later offense.

GAME, INLAND FISH AND DOG LAWS—Special bear and deer stamps—Use of proceeds for sale of. F-233

HONORABLE J. M. MCLAUGHLIN,
Chairman, Board of Supervisors of Bath County.

June 15, 1951.

This is in reply to your letter of June 12, 1951, regarding the disposition of funds derived from the sale of special bear and deer stamps within Bath County. As you point out, Chapter 208 of the Acts of 1950 provides that money received from the sale of such special stamps shall be paid to the county treasurer to the credit of a special fund, and the net amount thereof, or so much as is necessary, shall be used for the payment of damages to crops or livestock by deer or bear in the county, whenever such damage amounts to $10.00 or more. At the end of the year any surplus remaining shall remain in the fund and be used for the conservation of wild life in the county under the direction of the board of supervisors. You state that the Board of Supervisors has set up in its budget for the expenditure of funds derived the following items:

Printing of stamps
Administrative costs
Payment for damages to crops or livestock by deer or bear in the county, whenever such damage amounts to $10.00 or more, as covered in the Act.
Seeds for cleared areas
Mineralized salt
Team and tractor hire
Rewards
Miscellaneous operating functions
Inasmuch as the Act provides that the net amount received, as distinguished from the gross amount received, shall be used for the payment of damages to crops or livestock, it is my opinion that the use of such funds for the printing of stamps and for administrative costs is entirely proper, irrespective of whether any surplus remains after the payment of damages to crops or livestock. The last five items which you have listed are, in my opinion, directly related to the conservation of wild life and, as such, are valid items toward which any surplus which remains after the payment of damages to crops or livestock may be directed.

GAME WARDENS—Authority to arrest with warrant. F-233

July 6, 1950.

HONORABLE I. T. QUINN,
Executive Director, Commission of Game and Inland Fisheries.

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

"The question is interposed that under certain circumstances whether a game warden would have the right of arrest. For example, a game warden may hear an explosion on a stream or other public body of water. Within a short time the warden appears at the point of explosion, sees dead fish floating on the water, finds one or more persons at the point of explosion; they have no fish in their possession. Has the game warden the right then and there to arrest without warrant the person found at the point of explosion? If not, is the warden within his right to procure warrant of arrest and then place such person or persons under arrest?"

As you point out, Section 29-32 of the Code vests all game wardens with the authority upon displaying their credentials to arrest any person found in the act of violating any of the provisions of the hunting, trapping, inland fish and dog laws. As Section 29-154 makes it a misdemeanor to destroy fish in the manner described in your letter, it can be seen that game wardens in the instant case have the same power as other law enforcement officers, in that they may make an arrest without a warrant for a misdemeanor committed in their presence.

I am of the opinion that, under the above set of facts, the persons to whom you refer could not be said to have been found in the act of violating Section 29-153 or be said to have committed a misdemeanor in the presence of the game warden. Therefore, the game warden could not make the arrest in question under the authority of Section 29-32.

However, since Section 29-30 of the Code empowers game wardens to enforce the hunting, trapping, inland fish and dog laws and authorizes them to serve original and mesne process as sheriffs and sergeants in all matters arising from the violations of such laws, it is my opinion that the warden may procure a warrant and then place such persons under arrest.

HIGHWAYS—Discontinuance of. F-3

April 27, 1951.

HONORABLE DENMAN T. RUCKER,
Attorney for the Commonwealth for Arlington County.

This will acknowledge receipt of your letter dated April 19, 1951, which, for sake of brevity, will not be quoted in full. The inquiries presented are as follows:
"1. Did the repeal of Sections 156 to 158 of Title 33 by the Acts of Assembly, 1950, page 724, also repeal that part of Section 33-140 which continued the act in effect?

"2. Did the repeal of Sections 33-156 to 33-158 by the Acts of Assembly of 1950 repeal that part 15-766?

"3. Did the repeal of Section 33-156 to 33-158 prior to the enactment of Section 15-766.1 make void the legislation on that subject?"

The repealed sections to which you refer, 33-156 to 33-158, were formerly carried as Section 2039(9) of Michie's 1942 Code. These sections prescribed procedure for discontinuing roads not in either system of State highways and was repealed by an act of the General Assembly approved April 5, 1950. The Assembly on the same date enacted an act now cited in the Code as Sections 33-76.1 to 33-76.24. These sections provide a comprehensive procedure for the abandonment of roads in the highway system, public roads, streets and alleys. Article 6.3 of this act prescribes the procedure for abandonment of roads not in State highway system or secondary system, and defines the word "road" to include streets and alleys, Articles 6.1 and 6.2 of this act provide for both discontinuance and abandonment of highways while Article 6.3 deals only with abandonment. In legal parlance, the two words are synonymous; however, the word "discontinue" as used in Articles 6.1 and 6.2 refers to deleting the road as a part of the system of highways as distinguished from abandonment of the same as a public road. This, I believe, accounts for the fact that no method is prescribed in Article 6.3 for discontinuing a public road; therefore, the procedure for abandonment of roads not in the State highway or secondary systems is fully embraced in Article 6.3 of the act and concerns the same subject matter as Sections 33-156 to 33-158 which were repealed.

Section 33-140 referred to in your first inquiry concerns county road laws continued in effect for certain counties which have withdrawn from the provisions of the 1932 Act, known as the "Byrd Act", and maintain their own roads. We find in this section reference to the statutes which were repealed, that is, Sections 33-156 to 33-158. This section was contained in the old Code and was reenacted in the new Code unchanged. After the effective date of the 1950 Code, the 1950 General Assembly repealed Sections 33-156 to 33-158 and enacted Articles 6.1, 6.2 and 6.3 of Title 33 of the Code which seem to be intended as full, complete and comprehensive legislation relating to abandonment of public roads in this State.

"The intent to repeal all former laws upon the subject is made apparent by the enactment of subsequent comprehensive legislation establishing elaborate inclusions and exclusions of the persons, things and relationships ordinarily associated with the subject. Legislation of this sort which operates to revise the entire subject to which it relates, by its very comprehensiveness gives strong implication of a legislative intent not only to repeal former statutory law upon the subject, but also to supersede the common law relating to the same subject. * * *" (Sutherland Statutory Construction, 3rd Edition, Volume 1, Section 2018)

In view of the foregoing, I am of the opinion that the Legislature not only by express terms repealed that portion of Section 33-140 which refers to Sections 33-156 to 33-158, but in addition thereto repealed the same by the enactment of comprehensive legislation on the same subject matter. Therefore, in answer to your first inquiry, you are advised that it is my opinion the repeal of Sections 156 to 158 of Title 33 by the Acts of Assembly of 1950 also repealed that part of Section 33-140 continuing this section in effect.

In reference to your second and third inquiries, it should be pointed out that Section 15-766 was reenacted by the General Assembly of Virginia at its 1950 Session by inserting the words "or other provisions of law" in line three:

Section 15-766.1 is a new section enacted by the 1950 Assembly. The first of these sections concerns alteration and vacation of streets and alleys and provides, in part, as follows:
"Streets and alleys may be altered or vacated in the manner provided by §§33-156 to 33-158 or other provision of law for the alteration and discontinuance of county roads. * * *." (Section 15-766. Italics supplied.)

The pertinent provisions of Section 15-766.1 are:

"Notwithstanding any other provisions of law to the contrary, and in addition to any other methods provided by law, any street or alley, or part thereof, shown on a plat of subdivision or other plat, heretofore or hereafter recorded, may be vacated either in the manner provided in §15-766 of the Code of Virginia or by all owners of properties abutting such street or alley. * * *." (Italics supplied)

Your attention is called to the provisions of Section 33-76.24, which reads as follows:

"None of the provisions of articles 6.1, 6.2 and 6.3 of this chapter shall affect the provisions of chapter 23 of Title 15 of the Code of 1950."

The sections now under consideration, namely, 15-766 and 15-766.1, are a part of Chapter 23, Title 15 of the Code.

For the purpose of construction of these two statutes, it is important to note that they were enacted by the 1950 General Assembly and not merely carried over into the Code as was the case with Section 33-140.

In view of the provisions of Section 33-76.24 hereinbefore quoted, the same rule of construction would not apply as given to Section 33-140.

In view of the numerous decisions of our Supreme Court, it is unnecessary to consider the constitutional effect of amending or reenacting a section by simply referring to the number of its section.

Our Court has, on a number of occasions, upheld statutes which were amended, reenacted or repealed by an act referring to the number of its section in the Code.

In the Iverson Brown Case, 91 Va. 762, 21 S. E. 357, the Court said:

"When an act of Assembly has been incorporated in the code, this act may be amended, reenacted or repealed by an act which simply refers to the number of its section."

Supporting this are the cases of Tresnor v. Supervisors, 120 Va. 203, 90 S. E. 615; and Ritholz v. Commonwealth, 184 Va. 339, 35 S. E. 2d 210.

Applying the above reasoning of the Court, it would seem to follow that the reenactment of Section 15-766, with reference to the repealed statutes 33-156 to 33-158, would be valid. I feel that the same should apply to Section 56-766.1 although this is not free from doubt because this section does not, by express terms, refer to the repealed sections of the Code. However, it seems to be reasonable that the two sections should be read and considered together.

In view of the foregoing, I am of the opinion that Sections 33-156 to 33-158 were reenacted insofar as they concerned Sections 15-766 and 15-766.1 of the Code of Virginia.

HIGHWAYS—Dumping coal along highway is misdemeanor. F-192-353

HONORABLE C. H. COMBS, Trial Justice of Grundy.

November 13, 1950.

This will acknowledge receipt of your letter dated November 8, 1950, which I quote as follows:
"I have had several cases recently which have caused considerable concern. As you know there are numerous trucks hauling coal in this county and recently the State Police have been weighing the trucks to determine whether or not they are hauling larger loads than the law permits.

"Several of the drivers upon seeing the State Police weighing the trucks have pulled to the side of the road and dumped a part of their coal so they could not be weighed, or if weighed would not be over the road limit.

"The State Police have summoned some of these persons before me charged with dumping coal on the highway right of way, but I can not find any section of the Code which prohibits this. I would like to find some way to prevent this practice, because if several of the truckers get away with it, soon all will dump their loads instead of being weighed.

"I would appreciate it very much if you would advise me what section of the code is being violated, or how this can be stopped."

Section 33-18 of the 1950 Code of Virginia provides, insofar as here material, as follows:

"The rules and regulations together with any additions or amendments thereto, prescribed by the Commission under the provisions of paragraph (3) of §33-12, shall have the force and effect of law and any person, firm, or corporation violating any such rule or regulation or any addition or amendment thereto shall be guilty of a misdemeanor and, upon conviction, be fined not less than five nor more than one hundred dollars for each offense.

"*

Section 20 of the rules and regulations of the State Highway Commission, which were adopted June 25, 1947, and became effective September 1, 1947, provides as follows:

"It shall be unlawful for any person or persons, firm or corporation, to dump, pile, or scatter, or cause to be dumped, piled or scattered, any debris or rubbish upon any portion of the right of way of any of the highways of this Commonwealth, and any person or persons, firm or corporation, violating this rule shall be guilty of a misdemeanor and punished as provided in §33-18, Code of Virginia (1950), and shall also be civilly liable to the Commonwealth as provided by said section, provided, however, this rule shall in no way be construed to conflict with any violation which may arise under §33-288, Code of Virginia (1950)."

In view of the plain language of Section 20 of the rules and regulations of the State Highway Commission, I am of the opinion that the violations set forth in your letter would constitute a misdemeanor.

If you do not have available a copy of the rules and regulations of the State Highway Commission, I am sure you could find the same on file in the Clerk's Office of the Circuit Court of Buchanan County.

HIGHWAYS—Livestock pastured along primary road unattended. F-192

May 28, 1951.

HONORABLE H. M. HEUSER,
Trial Justice for Wythe County.

This will acknowledge receipt of your letter dated May 26, 1951, requesting my opinion on the following question:

"Does Section 53-125, Code of 1950, repeal Section 1969-e as amended in Acts of 1938, page 550, and thus limit the punishment of pasturing live stock, unattended, only when it is committed on a Primary Road?"
The body of this section remains unchanged by the enactment of the 1950 Code of Virginia and refers to roads in the State Highway System. However, the title of the 1938 Act was broader than the body of the act since it referred to any highway. It is reasonable to assume that the Commission on Code Recodification purposely changed the title to make it correspond with the act.

If an act is ambiguous in its meaning the title may at times be helpful in construing a statute. However, such is not the case presented by your inquiry because it is clear from Section 33-23 of the Code that the term "State Highway System" shall not include the secondary system of State Highways.

I am, therefore, of the opinion that Section 33-126 of the Code limits the punishment of pasturing live stock, unattended, only when it is committed on a Primary Road.

HIGHWAYS—Load limits. F-353

Honorable Horace T. Morrison,
Commonwealth's Attorney for King George County.

I am in receipt of your letter dated July 15, 1950, in which you requested my opinion concerning the application of Section 113(a)—sub-section (2) old Motor Vehicle Code of Virginia now carried in Section 46-336 (2) of the 1950 Code of Virginia. Section 46-336 contains four sub-sections which read as follows:

“(1) For the purpose of this section an axle load shall be defined as the total load on all wheels bearing upon the road surface whose axle centers are not more than forty-eight inches apart.

“(2) For the purpose of determining gross weight, no axle shall be considered unless the wheels thereof are equipped with brakes in conformity with §§46-283 to 46-286.

“(3) Subject to the foregoing limitations, the gross weight of any vehicle, or combination of vehicles, having three axles, six wheels or more, shall not exceed forty thousand pounds, nor shall the axle weight of any such vehicle, or combination, exceed eighteen thousand pounds.

“(4) Subject to the foregoing limitations, the gross weight of any vehicle, or combination of vehicles, having four axles, eight wheels or more, shall not exceed fifty thousand pounds, nor shall the axle weight of any such vehicle, or combination, exceed eighteen thousand pounds.”

Your letter refers to a specific instance in which a three-axle, ten wheel truck was weighed. The first axle weighed 4,500 pounds, the second axle 15,700 pounds, and the third axle (having no brakes on it) weighed 7,200 pounds. Several questions are asked in the correspondence which you attach with reference to the above quoted sub-section (2), which I shall endeavor to answer in the general statement that follows.

In my opinion, Section 46-336 (2) is designed to require brakes in conformity with Sections 46-283 to 46-386 and applies only to gross weight. This sub-section does not mean that an axle is to be excluded from computation because it is not equipped with brakes. Such an axle must conform with weight limitations the same as any other axle and its weight must, also, be included in tabulating the gross weight of the vehicle. An axle without brakes is only considered when determining what weight classification the truck shall be subjected to. The permissible gross weight varies with the number of axles on a truck. There are different gross weights for two-, three-, and four-axle vehicles. (Sections 46-334, 46-336 (3), 46-336 (4), respectively.) If, for example, on a road designated by the Highway Commission for increased rates in accordance with Section 46-336, a four-axle truck has one axle not equipped with brakes, the unequipped axle is excluded for classification purposes, and the vehicle must then conform with weights prescribed for three-axle
vehicles. This would mean a reduction from the allowable gross weight of 50,000 pounds for four axles on a posted road to 40,000 pounds (three-axle weight).

In your specific case, the vehicle is a three-axle truck, one axle of which is not equipped with brakes. The unequipped axle should be counted for axle and gross weights, but the vehicle will only be considered as a two-axle truck for determining the permissible gross weight. Since there are no provisions for a two-axle vehicle in Section 46-336, this truck must comply with the general provisions of Section 46-334. The axle loads are 4,500; 15,700; and 7,200 pounds respectively. So far as the axle load is concerned, each one is within the law. The gross weight is 4,500 plus, 15,700 plus 7,200, or 27,400 pounds. The maximum gross weight for a two-axle vehicle, applicable in this instance, would, in my opinion, be 24,000 pounds. (Section 46-334.) This particular truck is then 3,400 pounds in excess of the permissible gross weight. The operation of sub-section (2) is more strongly enunciated when you consider the fact that had each axle in the instant case been equipped with brakes, the allowable gross weight would have been 40,000 pounds instead of 24,000 pounds.

HIGHWAYS—Penalty for overload must be paid. F-199

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

This will acknowledge receipt of your letter dated July 18, 1950, in which you refer to a decision of the Circuit Court of the City of Richmond, and ask to be advised whether or not when a person is convicted of overweight if he still has to pay two dollars per hundred-weight or fraction thereof to the Literary Fund.

The case to which you refer did not declare the act unconstitutional, but ruled that a conviction of the driver was not a conviction of the owner unless such owner had been duly served with process. An appeal to the Supreme Court of Appeals of Virginia is being sought from the holding.

You are, therefore, advised that a person convicted of overweight is required to pay two dollars per hundred-weight or fraction thereof to the Division of Motor Vehicles for the benefit of the Literary Fund.

HIGHWAYS—Weight laws—Axle overweight and gross overweight separate offenses. F-353

HONORABLE R. M. MARRIOTT, Trial Justice for Fauquier County.

I have your letter of August 10th in which you state, in part:

"Sec. 46-334 of the Code of Virginia (1950) defines the gross weight per axle and vehicle for those using the public highways, separating the two into axle weights and gross weights. Section 46-338.1 (1950) provides that any violation of any provision of Secs. 46-334, 46-335 or 46-336 shall constitute a misdemeanor ... and shall be punished by a fine as follows: two cents per pound for each pound of excess gross weight over the statutory limit when the excess is less than five thousand pounds; and five cents per pound for each pound of excess gross weight over the statutory limit when the excess exceeds five thousand pounds."
"The question that is in controversy, and on which your opinion is requested, is whether or not it is proper to add the over-axle weights to the over-gross weight in determining the amount of penalty, i.e., whether the whole overload should be at the five cent per pound rate, or the axles at the two cent per pound rate, and the remainder, if the weights so indicate, at the five cent per pound rate."

You give a hypothetical case in which the operator of a truck is charged with the violation of the over-axle weight to the extent of 1500 pounds through the second axle and 1500 pounds through the third axle, and the maximum gross weight limitation to the extent of 5,100 pounds. If all three were added together, the fine would have to be assessed at the rate of five cents per pound on 8,100 pounds and would amount to $415.00; but if the fines were assessed separately on the three violations, they would be figured as follows:

- 1500 lbs. at 2¢ per lb. $30.00 (second axle)
- 1500 lbs. at 2¢ per lb. 30.00 (for third axle)
- 5100 lbs. at 5¢ per lb. 265.00 (over max. gr. wgt.)

Or a total of $325.00

Both Sections 46-334 and 46-336 provide that the law is violated when the weight on an axle exceeds 16,000 pounds and 18,000 pounds respectively. In like manner the two sections provide that the maximum gross weight for each of three types of vehicle shall be 35,000 pounds, 40,000 pounds and 50,000 pounds respectively.

It is, therefore, my opinion that the over-axle weight and the over-gross weight are separate and distinct violations and, therefore, the penalties prescribed under Section 46-338.1 should be assessed on the separate violations and not on the combined weight of the violations. In the hypothetical case cited above, the defendant should be assessed a fine figured at the rate of two cents per pound on 1500 pounds excess weight through the second axle, the same fine for the third axle violation, and a fine figured at five cents per pound on 5,100 pounds by which the gross weight of the vehicle exceeded the maximum allowable gross weight for that type of vehicle and the road over which it was being operated. This would mean that the sum of the three fines would be $325.00.

I am enclosing herewith a copy of an opinion issued by this office on August 11th with reference to the over-weight law, in which Section 46-338.1 of the Code is construed to the effect that that section applies to the axle weight limitations as well as to the gross weight limitations. Although this opinion is not exactly on the point you raised, it may fortify your position at some time in deciding cases of this type.
this instance, I am of the opinion that Section 46-341 has no application and the vehicle is in violation of the permissible gross weight of the last mentioned road.

In the second case described by you, the same situation as above pertains, except that the road of reduced capacity has now been lessened by action of the State Highway Commission in an effort to safeguard against deterioration resulting from poor weather conditions. In this instance, I am of the opinion that the fourth paragraph of Section 46-341 is germane and the truck is not in violation of the restricted road, if there is in fact no other accessible public road free from such restrictions. Section 46-341 is legislative authority for fixation of weight limits by the State Highway Commission at less than the maximum otherwise provided by law, when in the Commission’s opinion it is advisable for the protection of State roads. The lawful invocation of such reductions, however, is specifically precluded when it can be proven by one accused of a violation that

"... the journey upon which such motor vehicle or combination of vehicles was then engaged originated or was intended to terminate upon the section of highway upon which it was then traveling and upon which the maximum weight had been lessened under the provision of this section and that such person had no other public road free of such restrictions upon which he might have operated such motor vehicle or combination of vehicles from the point of origin of the journey or to the destination, as the case may be."

In the third case related by you involving an out-of-state truck, I am of the opinion that the remarks made in case numbers 1 and 2 would apply.

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**HIGHWAYS—Weight laws—Gross weight includes weight of vehicle. F-353**

_Honorable E. R. Hubbard,_

Justice of the Peace of Wise.

January 24, 1951.

This will acknowledge receipt of your letter dated January 20, 1951, in which you inquire in part as follows:

"... several of our roads are posted to 16,000 to 18,000 lbs."

"... I want to know if this means gross weight of coal not the empty truck as there are trucks that will weigh around this weight empty."

Gross weight, as used in the Virginia Weight Laws, means the load including the weight of the vehicle.

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**HIGHWAYS—Weight laws—How violations punished. F-192**

_Honorable Julius Goodman,_

Attorney for the Commonwealth for Montgomery County.

May 9, 1951.

This will acknowledge receipt of your letter dated April 15, 1951, requesting my opinion upon the following:

"Under Section 46-340 of the Code of Virginia, 1950, certain provisions are set out therein with reference to the protection of secondary system highways and bridges and in the same section the penalty provided for the
violation of such rules and regulations constitute a misdemeanor and punishment made as provided by Section 46-18, of the said Code. Section 46-18 only provides a penalty as therein set out, of not less than $5.00, nor more than $100.00, etc., in violation of Section 46-340 of the Code.

"Section 46-338.1 of said Code, also provides further penalties for exceeding the maximum load limits. I call your special attention to Section 46-338.1 which is an additional penalty for exceeding maximum load limits in violation of Section 46-340, however, in the 1950 Cumulative Supplement of the 1950 Code of Virginia, on page 36 thereof, Section 46-338.1 has amended and does not include, as I see it, any further penalty in violation of Section 46-340.

"I cannot understand why the mentioned Section 46-338.1 in the 1950 Cumulative Supplement, omitted providing further penalties for exceeding maximum load limits for a violation of Section 46-340 of the Code.

"As I interpret the same, it would seem that any truck with an excessive maximum load limit on a secondary road, violating Section 46-340, could only be fined for a misdemeanor under Section 46-18, and no further penalty could be added as was originally prescribed under Section 46-338, prior to the adding of the new Section 46-338.1 in the 1950 Cumulative Supplement.

"If this is the case, any truck on a secondary system of our highways loaded with a lot of scrap iron and heavy material and far in excess of the posted limit that is permitted on secondary roads, to protect them from undue damage or strain, the truck driver is only subject to a fine or jail sentence for a misdemeanor as set out in Section 46-18 of the Code, and could not be given a further penalty under Section 46-338.1 as originally called for prior to new Section 46-338.1 in the Cumulative Supplement, since this new Section 46-388.1 in the Cumulative Supplement does not include any penalty for violation of Section 46-340.

"I would appreciate very much your letting me have a complete and full opinion on this matter, because it means a great deal towards protection of our secondary system of roads and certainly if the only penalty against trucks having excessive load limits on posted secondary roads, can only be fined in accordance with Section 46-18, and not permitted to be given a further penalty, I feel that there has been some inadvertance on the part of someone in preparing the Code of Virginia, 1950, and the 1950 Cumulative Supplement when they failed to provide under the new Section 46-338.1 in the Cumulative Supplement, penalty for violation of Section 46-340. I hope that I have made myself clear, however, if not, you may further advise me."

The provisions of Code §46-340 apply to both primary and secondary system of highways. This statute provides, in part, as follows:

"Whenever in the judgment of the State Highway Commission it would promote the safety of travel or is necessary for the protection of any highway or section of highway or bridge constituting a part of the State Highway System or the Secondary System of State highways from undue damage or strain; * * * " (Italics added)

In order to properly construe the statutes mentioned in your letter it is necessary to consider the provisions of §46-334 which prescribes the maximum axle and gross weight to be permitted on the road surface. The State Highway Commission, pursuant to the provisions of §46-336, may, by general or special order,

" * * * increase the maximum weight permitted on the road surface of certain highways, or parts thereof, such as in the opinion of the Commission are capable, from the standpoint of the design, strength and condition, of carrying such maximum weights as prescribed in this section."
The Commission may, pursuant to the provisions of §§46-340 and 46-341, reduce the weight limit to less than the maximum provided by law, that is less than the weight permitted by §46-334. If the legal weight limit is reduced by the Commission on a road in either the primary or secondary system of highways an offender would be punished under the provisions of §46-18. If, on the other hand, the weight limit was in excess of the maximum permitted by §46-334, the offender would be in violation of that section and be punished as provided in §46-338.1.

It follows that if the maximum weight permitted on the road surface of certain highways or parts thereof, have been increased by the State Highway Commission in accordance with the provisions of §46-336, a violation of such increased weight limit would be punishable pursuant to the provisions of §46-338.1.

I am, therefore, of the opinion that a violation of either §§46-340 or 46-341 is punishable by the provisions of §46-18, and if the weight limit exceeds that permitted by §§46-334 or 46-336, the offense would be punishable as provided by §46-338.1.

HIGHWAYS—Weight laws—Penalties apply to axle overloads as well as gross overloads. F-353

August 11, 1950.

J. A. ANDERSON,
Commissioner, Department of Highways.

I am in receipt of your letter dated August 3, 1950, with reference to the above styled matter, which I quote in part as follows:

"In a recent overweight case a trial justice ruled that the penalties provided for under Section 46-338.1 of the Code of 1950, as amended, apply only to violations of the gross weight of the vehicle or vehicle combination, and that such penalties do not apply in the case of violations of the axle weight limits.

"I would appreciate an opinion from you as to whether or not the penalties provided for in the above mentioned Section apply to violations of the axle weight limits as well as the gross weight limits."

Section 46-338.1 of the 1950 Code of Virginia as amended reads as follows:

"Any violation of any provision of §§46-334, 46-335 or 46-336 shall constitute a misdemeanor and every person, firm or corporation convicted thereof shall be punished by a fine as follows: two cents per pound for each pound of excess gross weight over the statutory limit when the excess is five thousand pounds or less: and five cents per pound for each pound of excess gross weight over the statutory limit when the excess exceeds five thousand pounds.

"All fines or forfeitures collected upon conviction of, or upon forfeiture of bail by any person, firm or corporation charged with a violation of any of the provisions of §§46-334, 46-335, or 46-336 shall be paid into the State treasury to be credited to the Literary Fund. Upon notification of the failure of such person, firm or corporation to pay the fine imposed under this section as provided above, the Division and the Department of State Police may thereafter deny to the offending person, firm or corporation the right to operate a motor vehicle or vehicles upon the highways of this State until the fines imposed hereunder have been paid. The penalty provided for by this section shall supersede the penalty imposed by §46-335.1 and §46-18."

The introductory words to this section make it clear that the new penalty provisions are to apply with equal efficacy to any violation of Sections 46-334,
REPORT OF THE ATTORNEY GENERAL

46-335, or 46-336. Included in the latter mentioned sections are limitations on axle weights as well as gross vehicle weights. Some miscomprehension of the overall applicability of Section 46-336.1 may have arisen from the fact that reference is made in this section to so much "per pound for each pound of excess gross weight over the statutory limit . . .". The words "gross weight" when so used, however, are not intended to restrict this section to the gross weight of vehicles only, but are intended to convey total load in excess of the statutory limit prescribed for both axle and gross vehicle weights. This is further substantiated when reference is made to Section 46-334, which speaks of axle limits in gross weight terms as follows:

"The maximum gross weight to be permitted on the road surface through any axle of any vehicle shall not exceed sixteen thousand pounds . . .".

It is, therefore, my opinion that the provisions of Section 46-336.1 apply to violations of axle weight limits as well as gross weight limits.

HIGHWAYS—Weight Laws—Punishment for violation and suspension there-of. F-353

HONORABLE C. H. COMBS,
Trial Justice for Buchanan County.

November 10, 1950.

I have your letter of November 2nd in which you ask several questions concerning the fines imposed under the provisions of Section 46-338.1 of the Code of Virginia. I shall answer these questions seriatim:

Question No. 1. I have been confused by the maximum weight section of the code concerning trucks as amended in the 1950 Supplement of the Code, Section 46-338.1. From this section I take it that the 2¢ per hundred pounds is assessed against the driver of a truck when the weight exceeds 16,000 pounds per axle; or when the gross weight for a four-wheel truck exceeds 24,000 pounds, or when the gross weight of a six-wheel truck, or any combination, exceeds 35,000 pounds; or when the gross weight exceeds the gross weight set for the highway. Is that correct?

Answer. This question must be answered in the affirmative. The fines assessed under the provisions of Section 46-338.1 of the Code of 1950 are applicable on any convictions arising out of excessive loads, prohibited in Sections 46-334, 46-335 and 46-336 of the Code.

Question No. 2. Where the driver of a truck has a load which exceeds his licensed weight, although not more than the weight allowed on that particular highway, should the 2¢ per hundred lbs. be assessed for the amount he is over his licensed weight, or should he be fined for a misdemeanor, as provided by Section 46-18?

Answer. When a person operates a motor vehicle over the highways of Virginia having a weight that exceeds the weight for which the vehicle is licensed, he is guilty of a misdemeanor and should be fined under the provisions of Section 46-18 of the Code. The provisions of Section 46-338.1 have no application in a case of that character, unless the gross weight exceeds the limitations prescribed in Section 46-334, 46-335 and 46-336 of the Code.

Question No. 3. If the 2¢ per hundred is assessed in the proper case, can the judge, or trial justice, suspend the assessment or any part of it?
Answer. As you know, Section 19-336 of the Code explicitly prohibits any Court from remitting any fine, except a fine imposed for contempt. Section 53-272 of the Code permits the Court to suspend the imposition or the execution of a sentence. The term "sentence" here includes a fine as well as imprisonment, and has been so held by this Office. See "Opinions of the Attorney General for 1937-38", page 176, and "Opinions of the Attorney General for 1938-39", page 116. I am of the opinion, therefore, that the sentences imposed under the provisions of Section 46-338.1 of the Code can be suspended, just as any other sentences are. However, this does not mean that the Court has the authority to enter into an agreement with a prisoner to excuse him forever from the penalties of his crime. See Richardson v. Commonwealth, 131 Va. 802. In other words, the Court (for the reasons enumerated in Section 53-272) has the authority to suspend the execution of the sentence under such conditions as the Court may determine; and those conditions must be fulfilled by the person found guilty. Otherwise, the judgment must be executed against him. Such terms should be clearly set forth in the suspension order.

HIGHWAYS—Weight laws—Tolerance not allowed in computing fine. F-353

HONORABLE HARRY L. CARRICE, Trial Justice for Fairfax County.

This will acknowledge receipt of your letter dated August 29, 1950, in which you inquire as follows:

"The state highway department is operating a weighing station in this county and have in use a set of portable scales or loadometers. I understand that the United States Department of Commerce has issued a bulletin on the use of these loadometers which recommends that a five per cent tolerance be given to cover any error that might occur in the use of these scales. I further understand that the highway department in weighing vehicles on the highway allows this five per cent tolerance, but when the total weight of the vehicle exceeds the maximum weight provided by law, plus the five per cent tolerance, then the driver is charged with the total excess above the maximum and the tolerance is not deducted in the summons or warrant which is issued.

"I would like to ask your opinion, as a guide in future cases, as to whether or not the Trial Justice should deduct a five per cent tolerance before imposing the penalty provided by Section 46-338.1 of the code."

The pertinent portion of Section 46-338.1 of the 1950 Code, Accumulative Supplement, reads as follows:

"Any violation of any provisions of §§46-334, 46-335 or 46-336 shall constitute a misdemeanor and every person, firm or corporation convicted thereof shall be punished by a fine as follows: Two cents per pound for each pound of excess gross weight over the statutory limit when the excess is five thousand pounds or less; and five cents per pound for each pound of excess gross weight over the statutory limit when the excess exceeds five thousand pounds."

Since this statute prescribes a fine for each pound of gross weight over the statutory limit, I am of the opinion that the court trying the case is without authority to deduct any tolerance before imposing the penalty.
HOLIDAYS—Governor may designate the thirteen legal holidays to be observed by certain State colleges. F-111

July 20, 1950.

Honorable Harris Hart,
Director of Personnel.

I am in receipt of your letter of July 14 and enclosures therewith, viz: copy of letter from you to President G. Tyler Miller of Madison College under date of July 12 and copy of joint report from Longwood, Madison, and Virginia State Colleges, in regard to observance of legal holidays. I return herewith the two last named documents.

For the reasons stated therein the joint report makes the following recommendation:

"RECOMMENDATION: It is recommended that, on and after July 1, 1950, Longwood, Madison, and Virginia State Colleges, with the approval of the State Director of Personnel and the Governor, be authorized, in the discretion of the President of the institution, to observe holidays for administrative, clerical, and other personnel in accordance with the schedule set forth below:

"Schedule of Holidays

<table>
<thead>
<tr>
<th>Holiday</th>
<th>Days</th>
</tr>
</thead>
<tbody>
<tr>
<td>Independence Day (July 4th)</td>
<td>1</td>
</tr>
<tr>
<td>Labor Day</td>
<td>1</td>
</tr>
<tr>
<td>Thanksgiving (including Thanksgiving Day)</td>
<td>2½</td>
</tr>
<tr>
<td>Christmas (including Christmas Day)</td>
<td>6</td>
</tr>
<tr>
<td>January 1st</td>
<td>1</td>
</tr>
<tr>
<td>Easter (including Easter Monday)</td>
<td>1½</td>
</tr>
</tbody>
</table>

Total: 13 days"

NOTE

"In the discretion of the President of each institution, adjustments may be made in the above schedule of holidays for such institution, provided that not more than thirteen (13) days in any one fiscal year are allowed as holidays to administrative, clerical, and other personnel of such college. Also, in the discretion of the President of each institution, in order that offices may be kept open, holidays may be observed, in some instances, on a staggered attendance basis; and, in other cases, compensatory leave may be allowed college employees in the State Personnel System at these institutions in order that such employees may receive not more than thirteen (13) days as holidays during the year."

You desire the opinion of this office as to whether or not the recommendation relating to the schedule of holidays is in contravention of the statutory provisions establishing legal holidays in Virginia.

This subject is dealt with in Chapter 3, Sections 2-19, et seq. of the Code of 1950.

Section 2-19 provides that each day specified therein and any day appointed by the Governor or the President of the United States shall be a legal holiday for the transaction of all business. Acts done and business transacted on such days are not thereby rendered invalid. (Section 2-20).

I can find no provisions of law, statutory or otherwise, restricting the Governor in any rearrangement of the thirteen legal holidays which in his judgment would best serve the public interest and be adaptable to situations and conditions pertaining to administrative, clerical and other personnel at the three colleges embraced by the joint report. His powers and duties in the administration of the Virginia Personnel Act would seem to lend sufficient force to this statement.
It seems that the proposal submitted in the joint report coincides with the administrative practice obtaining at other State supported colleges, except those under the control of the State Board of Education.

It is my opinion that the above quoted schedule of holidays is permissible if and when approved and promulgated by proper authority.

HOUSE OF REPRESENTATIVES—Election of members if General Assembly fails to redistrict. F-29

HONORABLE ANDREW W. CLARKE,
State Senator.

May 9, 1951.

I am in receipt of your letter of May 4, in which you ask for my opinion on the following question:

"A number of my constituents are inquiring what will happen, should the General Assembly fail to act on a Redistricting Bill, dealing with the creation of ten Congressional Districts. Some are of the opinion that if the General Assembly fails to act, there is a possibility that all ten members of Congress will have to be elected at large and others are of the opinion that this only applies to a decrease in representation and not as an increase and that if the General Assembly fails to act, nine of the Congressmen will be elected from their old Districts and the ten will have to be elected at large."

Pursuant to Section 2(a) of Title 2 of the U. S. Code Annotated, the Clerk of the House of Representatives has certified to the Governor that in view of the decennial census Virginia is entitled to ten members of the House of Representatives, which is an increase of one. By Section 24-3 of the Code of Virginia the State is now divided into nine Congressional Districts. Section 2(a), to which I have referred, further provides that "until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner:

* * *
(2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the Districts then prescribed by the law of such State:

* * *

In view of the above, I am of opinion that, if the next General Assembly should fail to redistrict the State so as to prescribe ten Congressional Districts, then one Representative will be elected from each of the existing nine Congressional Districts and the tenth Representative will be elected from the State at large.

I have examined such decisions of the Supreme Court of the United States as might appear to be applicable and can find nothing contrary to the view expressed herein.

INFANTS—Appointment of guardian ad litem requires entry of formal order—Where entered. F-175

HONORABLE JOE W. PARSONS,
Clerk of Circuit Court of Grayson County.

September 18, 1950.

This is in reply to your letter of September 14, 1950, which reads as follows:

"Under Section. 8-88 of the 1950 Code, provision is made for the Clerk of the Court to appoint a Guardian ad Litem for an infant or an insane person
and I would appreciate it if you will advise me whether or not it is necessary for a formal order to be entered by the Clerk and, if so, in what book should this order be entered by the Clerk?"

The Supreme Court of Appeals of Virginia has held that an infant can only appear and defend by a guardian ad litem, and proceedings against him are generally fatally defective unless the record shows that such guardian was assigned to him. (See Langston v. Bassett, 104 Va. 47, 51 S. E. 218, and Kavanaugh v. Shackett, 111 Va. 423, 69 S. E. 335).

It is, therefore, my opinion that when you, as Clerk, appoint a guardian ad litem under the provisions of §8-88 a formal order should be entered. The appointment being made for the purposes of a particular suit or action, it is my opinion that the order should be entered in the order book of the Court appropriate to that particular action. In regard to this latter question, I enclose a copy of an opinion rendered on March 14, 1950 to the Honorable Charles R. Purdy.

INSANE, EPILEPTICS, ETC.—Clinical Psychologist may serve on Commission examining person mentally deficient. F-148

August 24, 1950.

Dr. John N. Buck,
Chairman, Examining Board of Lynchburg State Colony.

This is in reply to your letter of August 21st in which you ask if certified clinical psychologists are now permitted to sit upon commissions assembled to examine persons suspected of being mentally deficient.

The laws relating to the insane, epileptics, feeble minded and inebriate persons are contained in Title 37 of the Code. As used in that title the phrase “mentally ill” means an insane person or one who is an idiot, lunatic, non compos mentis or deranged. The phrase “mentally deficient” means feeble minded, idiot or imbecile.

In Chapter 3 of Title 37, which deals generally with the commitment, admission and disposition of persons alleged to be mentally ill, epileptic, mentally deficient or inebriate, it is provided that the Judge or Trial Justice with whom the complaint or information is filed shall summon two reputable physicians with him as a commission to inquire whether the person involved be mentally ill, epileptic, mentally deficient or inebriate. See Section 37-62.

However, in Chapter 7 of Title 37, which contains the provisions specifically relating to the feeble minded and epileptics, the phrase “mentally deficient person” is further defined as meaning any person with mental defectiveness from birth or from an early age so pronounced that he is incapable of caring for himself or managing his affairs or being taught to do so and who is unsafe and dangerous to himself and others and to the community, and as including a person who from birth or by reason of failure of early development has not attained the maximum mental age of three years according to the Binet or other approved mental tests. The statutes dealing specifically with the commitment of these persons are contained in Article 2 of this chapter as Sections 37-193 through 37-225. Section 37-195 provides that the Judge or Justice before whom the complaint is filed shall summon one physician and a certified clinical psychologist if practicable and, if not practicable, two physicians. Section 37-196 provides that the Judge or the Justice and the certified clinical psychologist or the two physicians shall constitute the commission to determine whether or not the person involved is mentally deficient as alleged.

Different problems are presented in the case of persons who are mentally deranged because of some mental illness and persons who are mentally deficient because of mental defectiveness from birth which prevents their mental development. In the first instance a medical question is presented and the statutes require that the commission consist of two physicians and the Judge or Justice. In the second
instance the question is one of mental growth which can be judged according to the Binet or other approved mental tests in which field certified clinical psychologists have special training. It is clear that the statutes contemplate that in the case of persons alleged to be mentally deficient a clinical psychologist not only may be called to sit upon the commission but should be called whenever this is practicable.

It is my opinion, therefore, that certified clinical psychologists are permitted to sit upon commissions assembled to examine a person suspected of being mentally deficient.

INSANE, EPILEPTIC, ETC.—Commitment—Fees of Trial Justice and officers.  F-148

MISS RUTH O. WILLIAMS,
Trial Justice of Patrick County.

This is in reply to your request for my opinion as to the proper fees which should be certified for payment to the Board of Supervisors in cases involving the commitment of mentally ill, epileptic and the mentally deficient or inebriate persons.

Section 37-75 of the Code provides for certain specified fees for the physicians who serve on the Commission and the witnesses regularly summoned to appear before the Commission. It also provides for certain fees for the Justice or Justice of the Peace who summons the physicians and sits with them as the Commission, and also for the officer making the arrest and summoning the physicians and witnesses.

As you point out, Section 37-75 was amended twice by the General Assembly of 1950. While the two Acts, Chapters 465 and 585, appear to be conflicting, in my opinion, effect can be given to the amendments sought to be made by each. Reading the two Acts together, it is clear that when the Commission is convened by a Trial Justice, who is paid an annual salary, no fee is to be allowed for the Trial Justice. See Chapter 465 of the Acts of 1950. The fees provided for the physicians, witnesses and the officer who summons them are the same in both Acts amending this section, so no question arises as to them except where, as in your county, the arrests will be made and the summoning will be done by the Sheriff or his deputies or by some other officer who is paid on a salary basis.

The statute provides that the officer making the arrest and summoning the witnesses shall receive the same fees as are allowed for like services in a felony case. Officers who, like sheriffs, are paid on a salary basis and receive no fees for such services in felony cases, would, of course, not receive any fee for these services in the cases brought for the commitment of the mentally ill. This construction is supported by Section 14-82, which is a part of the statute placing sheriffs on a salary basis and which provides that they shall not receive fees for services performed for their localities. It is to be noted that the costs in proceedings under Section 37-75 are payable out of the treasuries of the localities.

INSANE, EPILEPTIC, ETC.—Commitment of adults.  F-239—F-148

HONORABLE K. A. PATE,
Judge, Juvenile and Domestic Relations Court.

This is in reply to your recent letter from which I quote as follows:

"A question has arisen as to the jurisdiction of a Juvenile Judge in holding lunacy commission hearings for persons coming within the jurisdiction of the Juvenile Court."
REPORT OF THE ATTORNEY GENERAL

"Specifically, we should like to have your opinion on whether or not a Juvenile Court Judge has the authority to summon physicians and witnesses, and upon the proper evidence, commit adults to a mental institution."

While paragraph 2 of §16-172.23 of the Code of 1950 (Cumulative Supplement) authorizes judges of juvenile courts to commit mentally defective or disordered children under certain instances, I can find no similar authority for the commitment of adults. However, I call your attention to §16-172.57 of the Code of 1950 (Cumulative Supplement), the pertinent part of which is as follows:

"The court may cause any person within its jurisdiction under the provisions of this law to be examined and treated by a physician, psychiatrist or clinical psychologist; and upon the written recommendation of the physician or psychiatrist the court shall have the power to send any such person to a State mental hospital for observation."

As you know, §16-172.23 gives jurisdiction to juvenile courts in certain cases involving adults. Therefore, it can be seen that, while a juvenile court judge has no authority to hold lunacy commissions in the case of adults, he may, under the above quoted provision, send an adult to a State mental hospital for observation.

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INSANE, EPILEPTIC, ETC.—Commitment of veterans to Veterans Administration facility. F-148

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

May 14, 1951.

This will acknowledge receipt of your letter of May 12th from which I quote below:

"A question has arisen among local Physicians and the United States Veterans Administration, concerning the applicability of Article III of Chapter III of Title 37 of the Code of Virginia, or, to be more specific, Sections 37-103 through 37-112.

"You will note that the procedure outlined in these Sections calls for the admission and detainment of a patient on petition and certificate of two physicians, and the subsequent commitment of the patient to a hospital without the formality of a hearing before a lunacy commission. The statute itself mentions only State Hospitals, and there is a doubt here as to whether or not Sections 37-73 and 37-74 are sufficiently broad to cover the procedure outlined in Sections 37-103 et seq. The general commitment procedure as outlined in Sections 37-61 et seq is obviously to Veterans Administration Hospitals by Sections 37-73 and 37-74.

"Inasmuch as the Veterans Administration Hospital, dealing with mentally ill patients, is located in Roanoke County, and since a large number of commitments to that Hospital come within our jurisdiction, I am wondering if you will not give me an opinion as to the applicability of the procedure as outlined in Section 37-103 et seq to Veterans Administration Hospitals.

"In view of the uncertainty concerning the procedure established by the aforesaid Section, the Veterans Hospital is reluctant to accept patients under that Section, and I cannot help but agree with them."

I agree with your conclusion. It seems reasonably plain to me that Sections 37-73 and 37-74 of the Code, dealing with the commitment of veterans to a Veterans Administration Facility, apply only to veterans who have been duly committed under proceedings as prescribed in Sections 37-61 et seq of the Code. In fact the first
sentence of Section 37-73 provides that "whenever it appears that the person so adjudged to be insane * * *" he may be committed to a Veterans Administration Facility, the word "so" clearly referring to one adjudged to be insane pursuant to the procedure set out in the preceding section. On the other hand, under Sections 37-103 et seq. of the Code, persons may be admitted to a State Hospital or Colony in the manner provided therein without having been formally adjudged to be insane.

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INSANE, EPILEPTICS, ETC.—Costs in commitment proceeding. F-148

HONORABLE LOUIS F. JORDAN,
Civil and Police Justice for Waynesboro.

This is in reply to your letter of March 10, 1951, which reads, in part, as follows:

"Yesterday I sat with two physicians in a commission to determine whether a citizen was an inebriate and should be sent to Western State Hospital. The two physicians agreed with me that the evidence introduced by the petitioner, the man's wife, was not sufficient for a commitment and the proceedings were accordingly dismissed. In the order of dismissal I provided that costs of the proceeding should be assessed against the petitioner. The attorney for the petitioner, after considering Code Sec. 37-75 advised his client not to pay, taking the view that the City of Waynesboro should bear the costs.

"I am aware that this Code section mentions the fact that the City shall pay etc where there is a commitment, but, there is nothing said in the section as to what happens respecting payment of costs if the petitioner fails to have the Commission send the one complained of to an asylum. I resorted to general principles in concluding that the petitioner ought to bear the costs inasmuch as there was not sufficient evidence to order a commitment.

"If you will advise me on this it will be appreciated * * * ."

I assume that your statement "I resorted to the general principles in concluding that the petitioner ought to bear the costs inasmuch as there was not sufficient evidence * * * " refers to the provision in §19-233 of the Code of 1950 whereby a court may, in a criminal case, give judgment against the prosecutor for costs. I know of no similar provision dealing with proceedings for commitment of inebriate persons, and I do not believe that this statute which is applicable to criminal proceedings should be applied to such case and, in the absence of any statutory authority for the taxation of costs against the petitioner in a commitment proceeding, I do not believe that such action should be taken.

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INSANE, EPILEPTICS AND INEBRIATES—Duty of clerk to notify Department of Mental Hygiene and Hospitals of appointments of committee. F-248

HONORABLE R. J. WATSON,
Clerk of Courts of Roanoke.

The necessity of preparing for an unusual number of cases to be argued at the May session of the Supreme Court of Appeals has been the cause for the delay in answering your letter of April 20. I quote as follows therefrom:
"Section 37-153.1 as amended by Act of the Legislature of 1950, Page 924, reads as follows:

'DEPARTMENT TO BE NOTIFIED IN CERTAIN CASES.
—In any suit or action for the appointment of a committee, trustee, guardian or any fiduciary who is to have the management and control of funds belonging to any mentally-ill, mentally-deficient, inebriate, epileptic, drug addict or opium eater who has been committed to any State hospital or colony, the Department shall receive notice of such suit or action and the clerk of any court in which such suit or action is pending shall notify the Commissioner of that fact.'

"Please advise if the notice required above, to be given by the Clerk, should be for any specified time before the appointment of a committee, or merely to notify the Commissioner of Mental Hygiene and Hospitals that such appointment has been made."

It is my opinion that the above quoted section was enacted primarily for the purpose of insuring that the Department of Mental Hygiene and Hospitals obtains correct information as to who has the legal authority to act on behalf of the patients under its control. Therefore, if the committee is appointed by the Court under the provisions of section 37-136 of the Code, as amended, I am of the opinion that the Clerk should merely notify the Commissioner of Mental Hygiene and Hospitals that such an appointment has been made and furnish him with the name of the committee.

However, if the appointment of a committee is made on motion of an interested person, pursuant to section 37-137 of the Code, as amended, and the Court does not immediately grant the motion, it is my opinion that the language of section 37-153.1 of the Code requires that the Clerk forthwith notify the Commission of the pending suit or action.

INSANE AND EPILEPTICS, ETC.—Liability of child to support parent.
F-148

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

May 23, 1951.

This will acknowledge receipt of your letter of May 22 in which you request my opinion on the following question:

"I would like to have the benefit of your opinion concerning the constitutionality of Section 37-125.1 of the 1950 Code of Virginia, which reads as follows:

"'Any person who has been or who may be committed or admitted to any hospital for the insane or colony for the epileptics or the feeble-minded, and any person admitted or committed for drug addiction or the intemperate use of alcohol, or the estate of any such person, or the person legally liable for the support of any such person, shall be liable for the expenses of his care, treatment and maintenance in such institution. Such expenses shall not exceed the actual per capita cost of maintenance, or the sum of forty dollars per month, whichever amount is the lesser, and shall be fixed by the Department of Mental Hygiene and Hospitals.'

"A case has just been referred to me as Commonwealth's Attorney for the City of Suffolk by Doctor Joseph E. Barrett, Commissioner of Mental Hygiene and Hospitals.
"The attorney representing the defendant in this case, who happens to be a son of an inmate of the Eastern State Hospital, takes the position that the son, who is admittedly able to pay the $40.00 maximum provided in this section, is not liable for the care of his mother."

While you do not state the theory upon which the above statute is alleged to be unconstitutional, I can think of no section of the Constitution that is offended by requiring a child who is legally liable for the support of his or her parent to bear the expenses mentioned in the statute.

You are, of course, familiar with §20-88 of the Code, the first paragraph of which is:

"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 or necessitous circumstances."

The question of whether or not a child may be required to support a parent under the provisions of the section must be determined by the facts in each case, but you state that in the case before you the son is "admittedly able to pay the $40.00 maximum provided in this section ***."
where such persons or others responsible for their support are financially able to do so, they should bear a part of the expense necessary to provide such care and treatment. Section 37-125.1 reads as follows:

"Any person who has been or who may be committed or admitted to any hospital for the insane or colony for the epileptics or the feeble-minded, and any person admitted or committed for drug addiction or the intemperate use of alcohol, or the estate of any such person, or the person legally liable for the support of any such person, shall be liable for the expenses of his care, treatment and maintenance in such institution. Such expenses shall not exceed the actual per capita cost of maintenance, or the sum of forty dollars per month, whichever amount is the lesser, and shall be fixed by the Department of Mental Hygiene and Hospitals."

It will be noted that this section embraces any person who is committed or admitted to any State Hospital for the insane or colony for the epileptics or the feeble-minded. No exception is made for those who may be charged with or convicted of crime. The cost of maintaining the State mental hospitals is heavy and if others who are committed or admitted are required to contribute to the cost of treatment provided in order that additional funds may be secured to provide better treatment and facilities, there is no reason why persons who are under a criminal charge or conviction and are committed because of their mental condition and receive the benefit of treatment there afforded should not be required to contribute if they are financially able to do so. While they may be required to answer to criminal process when and if restored to sanity, they are being held in the mental hospitals because of their mental condition and are to be given the treatment there afforded the mentally sick.

The language of Section 37-125.1 does not exempt such persons from its provisions and, in my opinion, the General Assembly has provided without distinction that they, as is the case with all others, should contribute to the cost of their care, treatment and maintenance if they are financially able to do so.

INSANE, EPILEPTIC, ETC.—Liability of State hospital for loss of patient's personal belongings. F-248

April 4, 1951.

DR. JOSEPH E. BARRETT,
Commissioner, Department of Mental Hygiene and Hospitals.

This will acknowledge receipt of your recent letter requesting my opinion as to whether or not a State hospital or colony for the mentally deficient is liable for loss of a patient’s clothing or other valuables while he is receiving treatment at the time of his death. You state that there have been occasions where articles were destroyed by other inmates and where clothing disappeared during the period of treatment or at the time of the patient’s death. You state that there are instances where the legally liable persons for the support of the inmate request a deduction from their contract obligation for the value of the articles lost or destroyed. You state that it is the clothing of the patient, so I will assume that all articles personally belong to the patient. Moreover, my views will be limited to the situation where there exists a contract for the maintenance of an inmate.

I know of no reported Virginia case upon the immediate problem. Therefore, the following will be my views and, of course, subject to a contrary interpretation by a court which might have occasion to rule upon a particular case. Furthermore, I point out that any possible court determination would depend to a certain extent upon the facts presented to it in the particular case. Accordingly, the situation does not readily lend itself to general rules.
It is my opinion that, in the absence of contract provisions to the contrary, the obligation of the legally liable person upon his contract for support is to be distinguished from any obligation of the hospital for loss of clothing or damage to articles belonging to a patient. It is to be emphasized that a person liable upon the contract for maintenance is not necessarily the proper person for instituting a claim for the personal property of the patient or if deceased of his estate. Furthermore, in order to institute a claim in behalf of the patient or his estate, a person must have the proper legal capacity for instituting such claim.

It is an established principle that the Commonwealth and its institutions cannot be sued in actions for tort, but they may be sued and held liable upon contract actions. Therefore, in order to hold an agency liable there would have to be established a contract in fact or implied by law. It may be that an implied contract could be established upon the bailment theory which, in general, requires restitution to the owner of articles coming into another's complete control or a satisfactory explanation for failure to make such restitution. A recovery based upon this theory could be more easily established in the case where the patient dies and the articles fall into the sole custody of the institution.

On the other hand, it does not appear that a claimant could establish an implied contract against an institution for damages to personal belongings by other inmates, nor does it appear that an institution could be held liable every time an article belonging to an inmate is misplaced during his period of treatment.

In conclusion, it would be my opinion that the hospital would be justified in seeking to hold a legally liable person upon his contract for maintenance. Moreover, a party claiming loss from the institution would first have to be a proper person to institute a claim and, secondly, would have to establish a contract claim against the Commonwealth or its institution.

INSANE AND EPILEPTIC, ETC.—No allowances to patients for duties performed which are required for therapeutic reasons. F-248

June 11, 1951.

DR. JOSEPH E. BARRETT,
Commissioner, Department of Mental Hygiene and Hospitals.

This is in reply to your letter of June 6th in which you raised the following question:

"The question has arisen whether or not a legally liable person should be required to pay for the support of a patient in a state mental institution who is performing duties assigned him by the Superintendent.

"It would appear that any work to which a patient is assigned would be considered of therapeutic value and that it would have no bearing on Article 6 of the 1950 Code, Sections 37-125.1 through 37-125.14.

"It is the administrative policy at all of the hospitals and colonies for the Superintendents to assign to certain patients duties of a constructive nature to perform without any monetary consideration. The work assigned the various patients does definitely expedite their recovery and it is for this reason primarily that those patients who are physically and mentally able are assigned certain duties to perform."

The sections of the Code to which you refer require, among other things, a patient in a State Mental Institution to pay under certain circumstances the expenses of his care, treatment and maintenance in such institution. The payment required shall not exceed the per capita cost of maintenance or the sum of Forty Dollars per month, whichever amount is the lesser. My information is that, generally speak-
ing, the cost of maintenance in one of the State Mental Institutions is substantially more than Forty Dollars per month. I understand from your letter that it is the administrative policy that all of the Mental Institutions, where practicable, from time to time to assign to patients certain tasks which they are able to perform, this practice having been adopted as a therapeutic measure, it having been ascertained that it definitely expedites the recovery of a patient who is physically and mentally able to do the work. Your question is whether or not a patient who is able to pay the Forty Dollars a month should be allowed a credit on this amount for the value of the services which he renders.

In my opinion your question should be answered in the negative. As I have stated, the cost of maintaining a patient in a mental institution is substantially more than the amount he is required by the statute to pay and, where the primary purpose of giving this patient some work to do is for the welfare of the patient and to expedite his recovery, I do not think that a monetary credit should be allowed. Certainly there is no statutory authority for such allowance.

INSURANCE—Requirements for license of agents—Insurance on “Risk of Others.” F-162

March 26, 1951.
Honorable Julian H. Rutherford, Jr.,
Member House of Delegates.

This is in reply to your letter of March 6, 1951, in which you inquire whether §38-93 of the Code of Virginia would “prohibit an automobile dealer or his employee, licensed as an insurance agent, from classifying insurance written on cars sold by that dealer or his employee as insurance on the property of ‘others’, but would instead, consider such insurance as being written ‘upon property or risks in connection with, or arising out of, the business of his employer.’”

My search has failed to disclose any judicial interpretation of this section and, while the meaning of the section is by no means entirely free from doubt, a consideration of the probable purpose of the statute coupled with an analysis of the wording, has led me to the conclusion that such insurance should be considered insurance on the property of “others.”

The portion of §38-93 material to this discussion reads as follows:

“...if such person held a license as a solicitor for the previous year, unless such person is ‘engaged actively in the insurance business’, which shall be taken to mean that during the year preceding the application for such certificate or license, the licensee seeking such renewal shall have placed a total volume of premiums on insurance or surety for others, other than life, title, or ocean marine insurance, greater than the total volume of premiums which such applicant shall have placed upon his own property or risks, whether in his individual or fiduciary capacity, or upon the property or risks of his employer or both, or upon property or risks in connection with or arising out of the business of his employer,...”

It would appear that the underlying purpose behind this enactment was to prevent the possibility that certain persons would get cheaper insurance than the general public by securing an insurance license. This is, of course, but a part of an over-all legislative policy concerning discriminatory practices and rebates in the insurance field.

It appears clear that where a dealer sells an automobile to another person it is no longer his property and, therefore, if covered by the section at all such insurance would have to be covered by the term “in connection with or arising out of the business of his employer.” It becomes clear then that the section does not preclude
an automobile dealer from considering such insurance as insurance on the property of others, for it does not read "in connection with or arising out of his business." Only the employee is precluded from classifying such insurance as insurance on the property of "others" if anyone is precluded. The fact that the automobile dealer himself would be able to classify insurance written on cars which he sells as insurance on the property of "others" makes it inconceivable to me that the employee of such dealer would be precluded from so classifying the insurance which he writes on cars sold by his employer.

JAILS AND PRISONERS—Good time for jail prisoner. F-75b

November 24, 1950.

HONORABLE L. H. SHRADER,
Trial Justice for Amherst County.

This will acknowledge receipt of your letter of November 18, 1950, from which I quote in part:

"Will you please advise whether or not a person sentenced from the Trial Justice Court of Amherst County to the Amherst County jail for thirty days, would be be entitled to any time off for good behavior. In other words, where a person is sentenced to a city or county jail term, which of the sections would apply to his confinement?"

Section 53-151, Code of 1950, provides as follows:

"The jailer shall keep a record describing each person committed to jail, the terms of confinement, for what offense or cause he was committed, and when received into jail. The jailer shall also keep a record of each convict, and for every month that any convict appears by such record to have observed faithfully the rules and requirements of the jail while confined therein, and not to have been subjected to discipline for violation of same, there shall, with the consent of the judge, be deducted from the term of confinement of such convict ten days. The time so deducted shall be allowed to each convict for such time as he is confined in jail, and for each violation of such rules prescribed as herein provided the time so deducted shall be added until it equals the full sentence imposed upon such convict by the court." (Italics supplied)

Attention is called that the above section is contained in Article 1, Chapter 6 entitled "Jails and Jailers" under Title 53, which Article 1 deals primarily with local county and city jails.

By contrast §53-213 provides as follows:

"Every person who on or after October first, nineteen hundred forty-two, has or been convicted of a felony and every person convicted of a misdemeanor and confined in any part of the State prison system shall, for every twenty days he is or has been held in confinement after sentence, either in jail or awaiting removal to the State prison system or in any part of the State prison system to which he has been or is sent to serve the sentence imposed upon him, without violating any jail or prison rule or regulation, be allowed a credit of ten days upon his total term of confinement to which he has been or is sentenced in addition to the time he actually serves or has served. So much of the credit allowed to misdemeanants by this section as applies to time served prior to June twenty-fourth, nineteen hundred and forty-four, shall be in lieu of, and not in addition to, any credit they may have earned under the law as it existed prior to such date." (Italics supplied)
The latter section is found under Chapter 8 of the aforementioned title, which Chapter 8 deals primarily with felons and misdemeanants awaiting removal to the "State prison system." Furthermore, §53-209 also found under Chapter 8, provides that "The Director shall keep a record of the conduct of each felon and misdemeanant confined in the penitentiary or other part of the State prison system." By the wording of the sections under Chapter 8, it is my view that the State prison system is to be distinguished from county jails, and that the State prison system embraces the more formal institutions of correction.

Therefore, it is my opinion that a prisoner confined for thirty days to the Amherst County jail does not qualify for the allowances given by §53-213, which deals with prisoners confined or awaiting removal to the State prison system. It is my further opinion that §53-151 is the applicable section in the situation presented by your inquiry. It also follows that, by §53-151, the person would have to complete a month before it could be determined whether he had faithfully observed the rules and requirements which would qualify him for the ten-day deduction.

JUDGMENTS—Confessed by attorney in fact—When copy must be served on debtor. F-72

MR. EMBRY E. FRIEND, Clerk, Pittsylvania Circuit Court.

This is in reply to your letter of October 24th in which you request my opinion as to the length of time in which a certified copy of the order in a confessed judgment by an Attorney-in-Fact can be served under the provisions of Section 8-362 of the Code of Virginia.

The section to which you refer reads as follows:

"When judgment confessed by attorney in fact copy to be served on judgment debtor.—If a judgment is confessed by an attorney in fact, it shall be the duty of the clerk within ten days from the entry thereof to cause to be served upon the judgment debtor a certified copy of the order so entered in the common law order book, and the officer who serves the same shall make return thereof within ten days after such service to the clerk who shall promptly file the same with the papers in the case, and note in the judgment lien docket when the judgment is docketed the date of such service and return, and if the same be not returned 'executed' within sixty days after the date of entry of such judgment he shall note such fact at the appropriate place in the judgment lien docket. The failure to serve a copy of such order within sixty days from the date of entry thereof shall render such judgment void as to any debtor not so served. Service of a copy of such order on a non-resident judgment debtor by an officer of the county or city of his residence, authorized by law to serve processes therein, or by the clerk of the court sending a copy of such order by registered mail to such non-resident judgment debtor at his last known postoffice address and the filing of a certificate with the papers in the case showing that such has been done or of a receipt showing the receipt of such registered letter by such non-resident judgment debtor, shall be deemed sufficient service thereof for the purposes of this section."

While the first part of this section directs that the clerk within ten days from the entry of the order shall cause a certified copy of the order to be served upon the judgment debtor and that the officer shall make return thereof within ten days after service, it is my opinion that a copy of the order may be served at any time within sixty days after the entry of the judgment.
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It is clear from the rest of the section that the first part of the section is merely directory. While it is the duty of the clerk and the officer to act within the earlier period specified, the validity of the judgment is not affected if the copy of the order is served within sixty days after entry of the judgment.

JUDGMENTS—Money judgments docketed "without delay." F-72

HONORABLE BERTHA R. DRINKARD,
Clerk of Courts of Bristol.

October 31, 1950.

This is in reply to your letter of October 19, 1950, which reads as follows:

“There seems to be a doubt in the minds of some of the clerks over the State as to when a judgment rendered by a court, either corporation or circuit court, should be docketed on the judgment lien docket.

"Will you please advise me of the proper time of docketing the judgments rendered in this court, both those appealed and those not appealed?"

It is my opinion that §§8-373 and 8-374 of the Code of Virginia of 1950 require that judgments for money shall be docketed "without delay." I am aware of no provision of law which would alter this in any manner when an appeal is noted.

JUSTICE OF PEACE—Authority to admit to bail for appearance in Mayor's Court. F-27

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

June 20, 1951.

This is in reply to your letter of June 14, 1951, in which you ask the following question:

"Do you think that a bond taken before a Justice of the Peace in misdemeanor cases for trial before the Mayor for a violation of a town ordinance would be legal?"

In my opinion the answer to your question may be found in §19-88 and §1-13(30) of the Code of Virginia, 1950. Those sections read, in part, as follows:

"* * * and in any county a justice of the peace may admit to bail only persons charged with misdemeanors and only before such persons have been arraigned or tried before a police justice, civil and police justice or trial justice. * * *.

"The term 'trial justice' shall be construed to include not only trial justices, associate trial justices and substitute trial justices appointed under the provisions of chapter 2 of Title 16, but also:

* * *

"(1) Mayors or other trial officers of cities or towns upon whom authority has been conferred pursuant to §16-129, if the matter referred to in the section using the term is within the authority so conferred."

Since the term "trial justice" includes "mayor", I believe a justice of the peace may admit to bail persons charged with a misdemeanor for trial before the Mayor for violation of a town ordinance."
REPORT OF THE ATTORNEY GENERAL

JUSTICE OF PEACE—May not delegate power to accept cash bonds.
F-136b

July 26, 1950.

MIR. EARL GRAVES,
Justice of the Peace.

This is in reply to your letter of July 21, 1950. You state that you are a Justice of the Peace properly bonded to accept cash deposits, in lieu of recognizances with surety, and give receipts therefor. You ask whether, in my opinion, you may delegate to some other person the power to act in your absence and accept such deposits and issue receipts signed by you in advance.

I am aware of no statute authorizing a justice of the peace to so delegate his powers and, in the absence of statutory authority, it is my opinion that he may not do so.

Cash deposits in lieu of recognizances with surety are provided for in §§19-106 and 19-107 of the Code of 1950 which read as follows:

"When a person charged with a criminal offense is admitted to bail by a court or an officer authorized by law so to do for his appearance before a court or trial justice having jurisdiction of the case, for a hearing thereon, he may instead of entering into a recognizance with surety give his personal recognizance and deposit or cause to be deposited for him, in cash, the amount of bail he is required to furnish, with such court or officer, who shall give him an official receipt therefor.

"In order that justices of the peace may be able to give such official receipts, it shall be the duty of the Auditor of Public Accounts to provide all such justices with official prenumbered receipt books in quadruplicate, consisting of an original and three carbon copies, the original receipt to go to the person posting the cash bond, the first carbon copy to go to the court or trial justice before whom such person is recognized to appear, the second carbon copy to the Auditor of Public Accounts and the other copy to remain in the receipt book; and the justice of the peace with whom such cash was so deposited shall deliver the same, along with the first carbon copy of the receipt, to the court or trial justice before whom such person is recognized to appear, or to the clerk of such court or justice, if authorized by law to receive the same, who shall give him an official receipt therefor; provided, however, that no justice of the peace shall receive any such cash deposit unless and until he shall have given bond before the clerk of the circuit court of his county in the penalty of five hundred dollars, with approved security, and conditioned for the faithful performance of his duties and the proper accounting for all money that may come into his hands."

It seems clear from the language of these sections that the cash deposit must be made with a court or officer authorized to admit to bail. The appointed agent of a justice of the peace would not be such an officer.

My conclusion that the justice of the peace may not delegate his powers in this manner is bolstered by the fact that the bond executed by the justice of the peace for the protection of the State is conditioned on the proper accounting for money "coming into his hands" and it is at least questionable whether the surety would be liable for money deposited with an agent of the justice of the peace.
REPORT OF THE ATTORNEY GENERAL

JUSTICE OF PEACE—Only one warrant to issue out of single transaction though several persons involved. F-381

Honorable J. Gordon Bennett,
Auditor of Public Accounts.

November 10, 1950.

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

"In examining a number of fee bills submitted by justices of the peace, we have observed that separate warrants are apparently being issued in many cases against each person who may have been arrested at the same time and charged with the same offense in the same infraction of the law. For example, an officer will arrest two or more persons involved in the same reckless driving case which resulted in an accident, and separate warrants will be issued against each person thus arrested. It would appear to us that under the provisions of Section 14-137 in a case similar to that cited above only one warrant would be issued against all the persons against whom the same charge of reckless driving was made and that only one fee could be paid to the justice of the peace issuing the warrant."

"Will you please advise us if our interpretation of this Section is correct and whether it would be our duty to take exception to those warrants issued in excess of one and recommend to the court that allowance be made only for payment of one fee to the justice of the peace. Your advice in this connection will be very much appreciated."

Section 14-137 of the Code of Virginia of 1950 to which you make reference reads as follows:

"No justice of the peace in any county, city or town shall issue more than one warrant against a number of persons charging them separately with an offense of the same nature, nor shall a justice of the peace receive more than one fee for issuing more than one warrant of arrest or search warrant, or trying or examining more than one case of misdemeanor, or examining more than one charge of felony against the same party defendant, when such warrants are issued or trials or examinations had on the same day. Such a justice shall include in one warrant the names of all parties defendant charged with an offense of the same nature, committed at the same time."

It is my opinion that your interpretation of the section is correct. It appears obvious that it was the intent of the Legislature that only one warrant should issue out of a single transaction even though a number of persons might have been involved, and I think the case set forth in your letter comes within the meaning of this section and that only one warrant should be issued. Since the statute specifically states that only one such warrant should issue, I believe it is your duty to take exception to those warrants issued in excess of one and to recommend that allowance be made for the payment of only one fee.

Juvenile and Domestic Relations—Appeal for suspended sentence or revocation of suspended sentence. F-239

Honorable James H. Montgomery,
Associate Judge of Juvenile and Domestic Relations Court of Richmond.

October 30, 1950.

This is in reply to your letter regarding several appeals from the Juvenile and Domestic Relations Courts.
In attempting to arrive at an answer to the problems presented I have found it helpful to consider the cases as presenting two specific questions. The first question is as follows:

When a defendant is convicted in a Juvenile and Domestic Relations Court and sentence is suspended or imposition of sentence is suspended and subsequently (more than ten days after entry of such order) the suspension of sentence or imposition of sentence is revoked, can the defendant then appeal from the original judgment?

It is my opinion that the case of Fuller v. Commonwealth, 189 Va. 327, requires a negative answer to this question. In the Fuller Case the Court said:

"After the trial court has adjudged the defendant 'guilty' and has suspended either 'the imposition or the execution of sentence, or commitment' of the defendant, and has fixed the terms of his probation, it has made a complete disposition of the case within the purview of the statute. Its action is then final and subject to review." (189 Va. 332)

I believe that the authorities uniformly agree with the Virginia Court that an adjudication of guilt and imposition of sentence, execution of which is then suspended, is appealable. However, many jurisdictions do not consider an adjudication of guilt coupled with a "suspension of imposition of sentence" as a final judgment from which an appeal may be had. Nevertheless, the reasoning of the Virginia Court is compelling:

"But to say that a defendant must surrender his right to a suspension of the imposition of sentence and submit to a judgment, perhaps branding him a felon, as a condition to his right of appeal, would strip this highly remedial statute of much of its usefulness. Few defendants would be so bold as to swap the certainty of escape from punishment, offered by a suspension of imposition of sentence or a suspension of execution of sentence, for the uncertainty of escape through a possible reversal of the judgment on appeal. Clearly, we think, the statute does not contemplate that the defendant should be put in that position." (189 Va. 332-33)

It seems clear under the rule laid down in the Fuller Case that a defendant may appeal from either of these actions by the Court. Therefore, the passage of ten days precludes such an appeal.

The second question involved is as follows:

May a defendant appeal from the order revoking suspension of execution of sentence or the order revoking suspension of imposition of sentence?

The case of Slayton v. Commonwealth, 185 Va. 357, answers this question in the affirmative. The language of the Court is, in part, as follows:

"To put the matter another way, the sufficiency of the evidence to sustain an order of revocation is a matter within the sound discretion of the trial court. Its finding of fact and judgment thereon are reversible only upon a clear showing of abuse of such discretion. * * *.” (185 Va. 367)

From this language, I conclude that an abuse of discretion by the court revoking such suspension is reversible, and to be reversible is of necessity subject to appeal.
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JUVENILE AND DOMESTIC RELATIONS—Authority of court to commit child to local department of welfare in another jurisdiction. F-239

April 10, 1951.

HONORABLE RICHARD W. COPELAND,
Director, Department of Welfare and Institutions.

This is in reply to your letter of recent date, in which you refer to Section 16-172.44 of the Code, which reads in part as follows:

"If the court shall find that the child or minor is within the purview of this law it shall so decree and by order duly entered proceed as follows:

* * *

"(3) Take custody and commit the child or minor to the guardianship and custody of the local department of welfare which shall accept the custody of any child or minor so committed."

You then ask:

"Does the use of the article 'the' before local department mean that the court in committing a child to a local department of welfare has to commit said child only to the local department of welfare in the same jurisdiction as the court?"

In my opinion, the quoted language of the section is not to be so narrowly construed. I think that "the local department of welfare" is the department of welfare of the county or city to which, in the opinion of the court, the facts in any particular case make it proper for the child to be committed. I am strengthened in this view by Section 16-172.25, which provides that the actual presence in a county or city within the jurisdiction of the court of any child within the purview of this law shall determine the venue of any proceeding concerning any such child. It should also be remembered that Chapter 7 of Title 16 of the Code, dealing with juvenile and domestic relations courts, provides that the law shall be construed liberally and that the court shall proceed upon the theory that the welfare of the child is the paramount concern of the State; that a child coming within the scope of the Chapter whose custody the court assumes shall be considered a "ward of the State."

You state in your letter the facts in two hypothetical cases and ask for my opinion as to the disposition thereof. I do not think that I should attempt to pass upon such cases. As I have indicated above, the disposition of a child is to be determined by the juvenile and domestic relations court and that court will, of course, be guided in its action by the facts proven by the evidence presented.

JUVENILE AND DOMESTIC RELATIONS—Authority of court to punish minor husband for nonsupport. F-239

August 21, 1950.

MR. EUGENE W. CHELF,
Attorney for the Commonwealth for Roanoke County.

This is in reply to your letter of August 12th, in which you state that the Judge of the Juvenile and Domestic Relations Court has raised the question of his authority to try and sentence to the road force, or otherwise punish, a husband for desertion and non-support of his wife or children where the husband is a minor under the age of eighteen.

Section 16-173.23 of the Code, which is a part of the Juvenile and Domestic Relations Court Law adopted in 1950, not only provides that the Judges of the
Juvenile Courts shall have exclusive original jurisdiction of all cases involving the custody, control or disposition of a child who violates any State law, but also expressly provides that he shall have exclusive original jurisdiction of all proceedings involving:

"5. An adult or person sixteen years of age or over charged with deserting, abandoning or failing to provide support for any person in violation of law."

It is clear therefore that the Juvenile Judge does have jurisdiction in such a case as you present. However, where the husband is under the age of eighteen, he must be dealt with as a child according to the procedure prescribed in the Juvenile and Domestic Relations Court Law. Thus, while the Court may apply the corrective measures specified in Section 16-172.44, the adjudication is not a conviction nor can the child be confined in jail or detained in association with criminals. See Sections 16-172.45 and 16-172.62.

It is my opinion, therefore, that a husband under the age of eighteen cannot be sentenced to the convict road force for desertion and non-support unless the Juvenile Judge determines that he cannot be controlled or induced to lead a correct life by use of the various disciplinary and corrective measures set forth in the Juvenile and Domestic Relations Court Law. If, however, he deems that to be the case, the Judge may, under the provisions of Section 16-172.43, direct that the child be dealt with as if he were an adult.

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**JUVENILE AND DOMESTIC RELATIONS—Authority of court of record to proceed in criminal case involving juvenile.**  F-239a

October 17, 1950.

**Honorable Walter Johnson,**
Attorney for the Commonwealth for Northumberland County.

This is in reply to your letter of October 10, 1950, which reads, in part, as follows:

"On October 9, 1950, in our Circuit Court a Grand Jury returned a two-count indictment charging Johnnie Bunns with (a) Robbery and (b) Malicious Maiming. The date of the alleged acts was October 6, 1950. It now develops that this boy will not become 18 years of age until next December. The question is whether or not we are procedurally sound. Reference is made to Chapter 383 of the Acts of the General Assembly of 1950."

Chapter 383 of the Acts of the General Assembly of 1950 has been incorporated into the 1950 Supplement of the Code of Virginia as §§16-172.1 through 16-172.84. Section 16-172.23 provides that "except as hereinafter limited" the judge of the juvenile court within the respective territorial jurisdictions shall have exclusive original jurisdiction in any matter involving a child who violates any state law or municipal or county ordinance. The term "except as hereinafter limited" becomes pertinent in view of the provisions of §16-172.41 and §16-172.43. The first of these sections reads, in part, as follows:

"If during the pendency of a criminal or quasi-criminal proceeding against any person in any other court it shall be ascertained that the person was under the age of eighteen years at the time of committing the alleged offense, such court shall forthwith transfer the case, together with all papers, documents
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and evidence connected therewith, to the juvenile court of the city or county having jurisdiction, provided if such is pending in a court of record, the judge thereof, in his discretion, may continue with the trial thereof.\*\*\* (Italics supplied)

The last paragraph of §16-172.43 is as follows:

"In the hearing and disposition of cases properly before a court having general criminal jurisdiction the court may sentence or commit the juvenile offender in accordance with the criminal laws of this State or may in its discretion deal with the juvenile in the manner prescribed in this law for the hearing and disposition of cases in the juvenile court."

It is my opinion that, under the provisions of law set forth above, the circuit court may, in its discretion, continue with the trial of the case about which you inquire and, inasmuch as the case would then be one which is "properly before a court having general criminal jurisdiction", the court may, in its discretion, sentence or commit the juvenile offender in accordance with the criminal laws of this State or deal with the juvenile in the manner prescribed by the juvenile law.

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JUVENILE AND DOMESTIC RELATIONS—Authority of Juvenile Court

as to corporal punishment. P-239a

Honorable W. V. Birchfield,
The Trial Justice of Smyth County.

October 10, 1950.

This is in reply to your letter of September 22, in which you state that §63-303 of the Code, which provided for corporal punishment of minors under sixteen years of age, was expressly repealed by the "Juvenile and Domestic Relations Court Law" (Chapter 383 of the Acts of Assembly of 1950). You desire my opinion as to whether or not a trial justice, at his discretion, still has the right to direct corporal punishment.

Section 63-303, to which you refer, reads as follows:

"When any minor under sixteen years of age is convicted of a misdemeanor, the trial justice or the judge before whom such conviction is had, may, in lieu of the punishment otherwise provided by law, permit the parent or guardian of such infant, or some other person to be selected by him, to administer to such minor corporal punishment as, in the opinion of the trial justice or judge, shall seem adequate; and the trial justice or judge may designate some suitable person to see such punishment administered." (Italics supplied)

In my opinion the effect of the above-quoted section, which was first enacted as Chapter 833 of the Acts of Assembly of 1897-98, at which time the courts had the authority to sentence minors to jail without consideration of the aggravated nature of the offense, was simply to enlarge the scope of punishments already prescribed for misdemeanors committed by minors under the age of sixteen years. Therefore, the repeal of §63-303 simply prohibits corporal punishment of minors under sixteen years of age, as a sentence, and limits their punishment when convicted of a misdemeanor of an aggravated nature to the usual sentence provided by law for all misdemeanants.

This office has previously ruled that courts under the authority of §53-272 of the Code, which provides for the suspension of sentences under such conditions as may be determined, may, in appropriate cases, suspend a sentence upon the condition
that the defendant be whipped. I am of the opinion that the repeal of §63-303 in no way changes this ruling.

Section 1 of the Juvenile and Domestic Relations Court Law (§16-172.1 of the Code of 1950 provides that “this law shall be construed liberally and as remedial in character,” and that

“A child coming within the purview of this law, whose custody the court assumes, shall be considered a ‘ward of the State’; and for his or her minority shall be subject to such watchful care, custody, or discipline, supervision, guardianship and control as may be conducive to the welfare of the child and the best interests of the State.”

When the above section is considered together with paragraph (1) of §42 of the Juvenile and Domestic Relations Court Law (paragraph (1) of §16-172.44 of the Code of 1950), which provides that if a juvenile and domestic relations court finds that a minor is within the purview of this law it may “take custody and place the child or minor on probation, under such conditions as the court shall determine,” it is my opinion that the juvenile court has the authority to order a minor, who is a “ward of the State” to be disciplined with corporal punishment as a condition of probation. This conclusion is not only based on the statutory authority of the juvenile court to place a minor on probation upon such conditions as it may determine, but also on the fact that §1 of the Juvenile and Domestic Relations Court Law clearly indicates that the State and Juvenile courts stand in loco parentis, and thus have the same right in respect to punishment of a child as the natural parents. See, Carpenter v. Commonwealth, 186 Va. 851, in which the Supreme Court of Appeals reaffirmed the well established doctrine that a parent has the right to administer such reasonable and timely punishment as may be necessary to correct faults in his growing children.

Therefore, it is my conclusion that the courts in the State have not been deprived of their statutory power of placing a defendant on probation upon the condition that he be administered corporal punishment, and that the repeal of §3-303 [only prohibits] the courts from administering corporal punishment in lieu of the usual sentences or punishments provided by law.

JUVENILE AND DOMESTIC RELATIONS—Carrying child in patrol wagon—What is "aggravated offense"—How and when child taken custody—Placing child in jail—Records of crimes by children. F-239

August 23, 1950.

HONORABLE EUGENE A. LINK,
Commonwealth’s Attorney of Danville.

This is in reply to your letter of August 14, 1950, in which you ask my opinion on four questions involving the Juvenile and Domestic Relations statutes.

Your first question is whether a police car with the lettering “Danville Police Department” on the outside door is a police patrol wagon within the meaning of §16-172.62 which prohibits the transportation of children under the age of fourteen years in such vehicle.

The pertinent language of §16-172.62, which is the codification of the Act of the General Assembly of 1950, reads as follows:

“No child if his age is known or alleged to be such shall be transported or conveyed in a police patrol wagon, or confined in any police station, ***.”

This 1950 Act repealed certain sections of the Code, among which was §63-248.
Section 63-248 of the Code dealing with the arrest of children read, in part, as follows:

"* * * nor shall any such child be transported, conveyed or ridden in a police patrol wagon, or other vehicle, usually used for the transportation or conveyance of adult prisoners.* * *" (Italics supplied)

It is my opinion that, by removing the underscored portion of §63-248 from the law, the Legislature has manifested an intent to limit the prohibition on the transportation of children to police patrol wagons as such and, therefore, the prohibition does not apply to police cars such as you describe.

Your second question reads as follows:

"Under Section 16-172.60, titled 'When and How a Child May Be Taken Into Immediate Custody', Sub-Section 4 states, 'When there is good cause to believe that a child has committed an offense which if committed by an adult would be a felony of a serious and aggravated nature,' the question arises as to what felonies would be considered of serious and aggravated nature. Are they those felonies which carry the sentence of 20 years and up, or would it be any felony, such as housebreaking or storebreaking, which carry lesser punishment than 20 years. In further regard to this section. Does it give authority to any police officer to pick up juveniles for committing misdemeanors on information, or does the misdemeanor have to be committed in the officer's presence as stated in sub paragraph 2 of this section? We had a case which involved shoplifting, whereby the clerk of a local store saw a 16 year old boy take a dress from a rack and put it in a hand bag, and after being pursued through the store, he was caught by the clerk and an officer was called, to place him under arrest. Since the dress sold for less than $50.00 it will be classified as a misdemeanor. The officer upon arresting him was informed by the Juvenile Court that he had no authority under the new law to place him under arrest since this misdemeanor was not committed in the presence of the officer."

In the case of Mickens v. Commonwealth, 178 Va. 273, 16 S. E. (2d) 641, which was a rape case, the Supreme Court was dealing with §1910 of the Code of 1919 as amended. That portion of the statute under consideration read as follows:

"Unless the offense is aggravated or the child is of an extremely vicious or unruly disposition, no court, judge, or justice shall sentence or commit a child etc. * * *"

In arriving at a determination of whether the offense was aggravated the Court did not rely solely upon the type of offense itself, but said that the evidence in the particular case must establish the aggravated nature of a felony. It is my opinion, therefore, that the classification of the offense as "serious or aggravated" must be determined not so much by the type of offense alone as by a combination of this factor with the manner in which the offense was committed. In Mickens Case, supra, the Court did not treat rape as an aggravated offense per se but set forth the manner in which the crime was committed, and concluded that the offense was aggravated. When the purpose and intent of this law is kept in mind I believe the most useful guide would be in each case to decide whether the offense committed and the manner of commission make it imperative to the public interest that the child be taken into custody or whether the public interest in the welfare of the child overrides the need for arrest.

As to when a child may be arrested for a misdemeanor, §16-172.60 reads, in part, as follows:

"No child may be taken into immediate custody except:

* * *
“(2) When in the presence of the officer who makes the arrest, a child has violated a city, town, or county ordinance or a State or federal penal law and the officer believes it necessary for the protection of the public interest.” (Italics supplied)

This section sets forth two requirements. It is written in the conjunctive. Not only must the offense, if a misdemeanor, be committed in the officer's presence but also he must believe the taking of the child into immediate custody to be necessary to protect the public interest. I do not see how this section could be construed as giving officers authority to arrest for misdemeanors committed out of their presence.

As to what a police officer may do in a case such as you set forth in your second question, I call your attention to §16-172.23 which provides in subsection (i) that any child who violates any State or Federal law, or municipal or county ordinance is brought under the control and custody of the juvenile court and §16-172.30 provides the manner in which proceedings shall then be conducted. Section 16-172.30 reads as follows:

"Whenever any person informs the court that any child or minor is within the purview of this law or subject to the jurisdiction of the court hereunder, except for a minor traffic violation or violation of the game and fish law, the court shall require an investigation which may include the physical, mental and social conditions and personality of the child or minor and the facts and circumstances surrounding the violation of the law. The court may then proceed informally and make such adjustment as is practicable without a petition or may authorize a petition to be filed by any person and if any such person does not file a petition a probation officer or a police officer shall file it; but nothing herein shall affect the right of any person to file a petition if he so desires. In case of violation of the traffic laws, or game and fish laws the court may proceed on any summons issued without the filing of a petition."

Section 16-172.32 provides the method of taking custody of the child and reads as follows:

"After a petition has been filed and after such further investigation as the court directs, unless the parties hereinafter named voluntarily appear, the court shall issue a summons reciting briefly the substance of the petition or the charge upon which it is alleged that the child is within the purview of this law and requiring all proper or necessary persons to appear personally before the court at a time and place stated. If the person so summoned shall be other than a parent or guardian of a child, then the parent or parents or the guardian or both shall be notified of the pendency of the case, the charge, and of the time and place appointed for the hearing, if their address be known. "If it appears that the child is in such condition or surroundings that this welfare requires or there is other good reason that his custody be immediately assumed by the court the judge may order by endorsement upon the summons or other process issued, that the officer serving or executing the same shall at once take the child into custody."

It would also appear that if arrest of the child is imperative a warrant may be issued for his arrest under the provisions of §16-172.61 if he is between the ages of fourteen and eighteen.

Your third question deals with §16-172.63, and reads, in part, as follows:

"*** My thoughts along this line would be, that when a child over 14 years of age has committed a capital felony and is arrested at night, when there are no places of detention for juveniles set aside, as in our city, and when the Juvenile Court is not available or open, that the officer would have the right to lodge him in a cell away from other vicious criminals, where he would not come in contact with same. I would like to have your opinion on this matter, as to whether I am right in contending that under such circum-
stances the law enforcement officer would have the right to place such juvenile in jail for safe keeping until the Juvenile Court opened the next morning. If not, would you suggest how he should be handled, and to what extent custody means in this connection."

The answer to this question is found in §§16-172.62, 16-172.64, 16-172.65. The first of these sections provides in part that:

"* * * A child fourteen years of age or older may, with the consent of the judge or the juvenile probation officer, be placed in a jail or other place of detention for adults, but in a room or ward entirely separate from adults." (Italics supplied).

The italicized language in my opinion clearly rules out the possibility of a police officer placing a child in jail without the consent of the judge or juvenile probation officer.

Sections 16-172.64 and 16-172.65 contemplate that "suitable detention facilities reasonably accessible to each court" shall be provided and conducted as an agency of the city or county for that purpose, and I do not believe that the absence of such facilities would permit children to be lodged in jail without the consent of the judge or juvenile probation officer.

In cases such as yours where a special place of detention has not yet been set up, it would seem that a practical solution might be reached in the case of children fourteen years of age or older by the judge or juvenile probation officer consenting in advance to the placing of such children in a portion of the jail set apart from the adults. This, of course, is of no help in connection with children under the age of fourteen.

Your final question reads as follows:

"In regard to Section 16-172.29, this section states that the Police Departments or Sheriffs of the County, as the case may be, shall keep separate records as to violations of law committed by juveniles, and the Division of Motor Vehicles shall keep separate records as to the violation of the motor vehicle law, committed by juveniles, etc. As to the first part of this paragraph, whereby it states that the Police Department of any city shall keep separate records as to violations of law committed by juveniles, the question arises as to whether it means violation of any criminal law, and if so, does the record include the taking of fingerprint prints by the Police Department of such juvenile?"

To properly arrive at an answer to this question it is my opinion that reference must be made to the purpose and intent of the juvenile laws. The Legislature set forth their purpose and intent in §16-172.1. That section reads as follows:

"This law shall be construed liberally and as remedial in character; and the powers hereby conferred are intended to be general to effect to beneficial purposes herein set forth. It is the intention of this law that in all proceedings concerning the disposition, custody or control of children coming within the provisions hereof, the court shall proceed upon the theory that the welfare of the child is the paramount concern of the State and to the end this humane purpose may be attained, the judge shall possess all necessary and incidental powers and authority, whether legal or equitable in their nature.

"A child coming within the purview of this law, whose custody the court assumes, shall be considered a 'ward of the State'; and for his or her minority shall be subject to such watchful care, custody, discipline, supervision, guardianship and control as may be conducive to the welfare of the child and the best interests of the State."

It is my opinion that one of the paramount concerns of the juvenile law is the rehabilitation of the individual child. The Legislature has obviously concluded that there is far greater chance of accomplishing this purpose if the record of the child's
wrongdoings are kept private. Since §16-172.1 provides that this law is to be liberally construed, it is my opinion that all records of all violations by juveniles of criminal laws including the fingerprint records should be kept separately, in order that the child may, as far as possible, escape the stigma which normally accompanies conviction and, hence, be given the opportunity to grow into a law-abiding citizen without having to overcome the burden that publicity concerning his wrongdoing would create.

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**JUVENILE AND DOMESTIC RELATIONS—Child under 18 may not be transported in patrol wagon.**  
Honorable James H. Montgomery, Jr.,  
Associate Judge of Juvenile and Domestic Relations Court.  
September 11, 1950.

This is in reply to your letter of September 1, 1950, which reads, in part, as follows:

"I notice in your opinion dated August 23 that the first question asked you was whether a police car is a police patrol wagon within the meaning of Sec. 16-172.62 which prohibits the transportation of children under the age of 14 years in such vehicle. I believe that the statute prohibits the transportation of any juvenile under the age of 18 in a police patrol wagon and is not limited to those under the age of 14 years. I wonder if this is your interpretation of the statute, * * * ."

It seems clear from reading the provisions of §16-172.61 which are incorporated by reference into §16-172.62 and, indeed, from the latter portion of §16-172.62 that your interpretation of the statute is correct; that is, that the statute prohibits the transportation of any juvenile under the age of 18 in a police patrol wagon.

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**JUVENILE AND DOMESTIC RELATIONS—Contributing toward delinquency of minor—1950 Act.**  
Honorable O. Raymond Cundiff,  
Judge, Juvenile and Domestic Relations Court of Lynchburg.  
September 11, 1950.

This is in reply to your letter of September 6, 1950, which reads as follows:

"I would like your opinion concerning prosecutions of persons under Section 18-6, of the 1950 Code of Virginia, who are charged with violating that part of said Section which provides, . . . 'or who shall induce, cause, encourage or contribute toward the dependency, neglect or delinquency of such child . . . '.

"Since the 1950 Legislature changed the Juvenile and Domestic Relations Court law, eliminating the charge of a child as being 'dependent, neglected or delinquent', all children are charged under the general provision of coming within the purview of the Juvenile and Domestic Relations Court law.

"I would like to know, in view of the fact that a child cannot be adjudicated to be a dependent, neglected or delinquent child, whether or not a person could be convicted under Section 18-6 of contributing toward their dependency, neglect or delinquency."
It is my opinion that the amendment of the Juvenile and Domestic Relations Court law was not intended and does not operate to change the effect or interpretation of §18-6. While it is true that, under the amended Juvenile law, a child is not to be adjudicated a delinquent, it is my opinion that this is a procedural change adopted for the benefit and welfare of children and that a person may still be charged with inducing, causing, encouraging or contributing toward the dependency, neglect or delinquency of a child.

**JUVENILE AND DOMESTIC RELATIONS—Court hearings are private.**

_Honorable Charles H. Funk,_
Commonwealth's Attorney of Smyth County.

This is in reply to your request for my opinion as to whether members of the press should be allowed to be present at and report proceedings in the Juvenile and Domestic Relations Court.

Section 16-172.28 of the Code, which is a part of the new Juvenile and Domestic Relations Court statute adopted by Chapter 383 of the Acts of Assembly of 1950, reads as follows:

"Every juvenile court shall keep a separate docket or order book for the entry of its orders in cases arising under this law and the trial of all such cases shall be held at a different time from the hearing of other cases in such courts. The general public shall be excluded from all juvenile court hearings and only such persons admitted as the judge shall deem proper. The presence of the child in court may be waived by the judge at any stage of the proceedings. The records of all such cases shall be withheld from public inspection but the record shall be, at reasonable times, open to those persons including an attorney representing the child or his parents as the judge decides, in his discretion, have direct interest therein."

You are therefore correct in your understanding that hearings in the Juvenile and Domestic Relations Court are supposed to be private and that only those directly interested and the necessary court officers and witnesses should be present. In my opinion this section requires that members of the press as well as other members of the general public be excluded from all Juvenile Court hearings.

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**JUVENILE AND DOMESTIC RELATIONS—Father may not be required to pay fine of son.**

_Honorable A. Sidney Johnson,_
Civil and Police Justice for Radford.

This is in reply to your letter of July 24, 1950 in which you ask my opinion as to what steps may be taken by you to force a father to pay a fine which has been levied against his fourteen year old son for operating a motor vehicle without first obtaining a license.

It is my opinion that the parent cannot be forced to pay this fine.

Section 16-172.44 of the Code of Virginia of 1950, as amended, provides the manner in which a court having jurisdiction to hear cases involving a minor child may proceed. Subsections (8) and (9) of the statute read as follows:
"(8) In case of traffic violations the court may suspend an operator's license or require restitution in accordance with provisions of this law, or it may impose the penalties which are authorized to be imposed on adults for such violations.

"(9) The court may impose a fine not exceeding fifty dollars as a disciplinary measure upon a child or minor of working age found by the court to have violated a State or Federal law or local ordinance. All sums so ordered to be paid may be paid by the child or minor in monthly or weekly installments; such child or minor may also be required to make restitution or reparation for damages resulting from his wrongful conduct."

Subsection (9) has no bearing on the immediate problem at hand, but I have set it forth here because the provision there made for the payment of fines in installments seems to indicate that the fine is collectible only from the child and not the parent.

I know of no statute authorizing the courts to force the parent of a child to pay a fine levied against the child. In the absence of such a statute the common law rule that a parent is only liable for the debts of his child contracted for "necessaries" would apply. I do not believe a fine could be considered a "necessary."

In this particular case my opinion is bolstered by the fact that under the provisions of §46-382 the parent is liable for a fine himself if he knowingly permitted the minor to operate the car without a permit and if the parent were made to pay the fine of the child he would, in effect, receive double punishment.

JUVENILE AND DOMESTIC RELATIONS—Procedure when both Judge and substitute disqualify themselves for case. F-151

June 7, 1951.

Honorable Louis F. Jordan,
Judge, Juvenile and Domestic Relations Court of Waynesboro.

This is in reply to your letter of June 1, 1951, in which you state that in a matter pending before your court both you and your substitute have disqualified yourselves. Since you have no associate judge you inquire what procedure should be followed to obtain a judge to try the case.

Section 16-172.9 of the Code of Virginia of 1950, as amended, reads as follows:

"The judge or judges of each city or county who have authority to appoint the several juvenile judges shall by proper order of record appoint, upon the recommendation of the judge of the juvenile and domestic relations court, as a substitute judge of such court, a discreet and competent person and may at any time revoke the appointment and make a new appointment in like manner in the event of revocation or of the resignation, death, absence or disability of the substitute judge. * * *

In my opinion it would not be improper in the case put by you to consider the substitute judge as disabled. If he is so considered then, of course, Judge Quesenbery may make another appointment which appointment he may revoke after disposition of this case which would remove the "disability" of the present substitute judge.

I realize, of course, that a somewhat strained construction is being placed on the word "disability" in order to arrive at this result, but a fair reading of this whole section coupled with the absence of any specific provision to cover a situation such as you present leads me to the conclusion that no violence is being done to the intent of the Legislature by such construction.
This is in reply to your letter of March 1, 1951, which reads as follows:

"There has been some confusion in this locality over the rights of newspapers to publish matters that are to be tried before our Juvenile and Domestic Relations Court. I would appreciate your advice as to the effect of Section 63-264 of the 1950 Code of Virginia on the publication of juvenile matters."

Section 63-264 of the 1950 Code of Virginia was repealed by the Act of the General Assembly found in Chapter 383 of the Acts of 1950. At its 1950 session, the General Assembly wrote a new juvenile and domestic relations court law. The first section of that law, which is found in the 1950 Supplement to the Code as §16-172.1, provides that the law shall be construed liberally and that the intention and purpose of the law is that the court shall proceed upon the theory that the welfare of the child is the paramount concern of the State. With this provision in mind, I call your attention to §§16-172.28 and 16-172.29, which are also contained in the 1950 Supplement to the Code, and which are as follows:

"Every juvenile court shall keep a separate docket or order book for the entry of its orders in cases arising under this law and the trial of all such cases shall be held at a different time from the hearing of other cases in such courts. The general public shall be excluded from all juvenile court hearings and only such persons admitted as the judge shall deem proper. The presence of the child in court may be waived by the judge at any stage of the proceedings. The records of all such cases shall be withheld from public inspection but the record shall be, at reasonable times, open to those persons including an attorney representing the child or his parents as the judge decides, in his discretion, have direct interest therein.

"The police departments of the cities of the State, and the police departments or sheriffs of the counties, as the case may be, shall keep separate records as to violations of law committed by juveniles and the Division of Motor Vehicles shall keep separate records as to violations of the motor vehicle law committed by juveniles and such records shall be withheld from public inspection and shall be exhibited only to persons having a legal interest therein and with the express approval of the judge or Commissioner of Motor Vehicles."

It is my opinion that the clear purpose of these sections is to prevent the publication of details of proceedings in the juvenile and domestic relations court for the obvious purpose of protecting children who come within the purview of the law from the stigma which naturally attaches to one involved in such proceedings.
when such information is obtained from sources other than the police or court records or presence at the trial.

I am enclosing a copy of an opinion rendered on March 6, 1951 to the Honorable Ligon L. Jones, Attorney for the Commonwealth for Hopewell, Virginia. In that opinion I set forth §§16-172.28 and 16-172.29 which provide, as you point out in your letter, for the withholding of records concerning juvenile cases from public inspection and for the exclusion of the public from such hearings.

In the last sentence of my letter to Mr. Jones, I stated:

"It is my opinion that the clear purpose of these sections is to prevent the publication of details of proceedings in the juvenile and domestic relations court for the obvious purpose of protecting children who come within the purview of the law from the stigma which naturally attaches to one involved in such proceedings."

I continue to be of that opinion; however, your inquiry requires a somewhat more complete answer.

You inquire how far a court clerk or other officer may go in giving information as to what has taken place in a closed hearing. In my opinion this is a matter which could best be handled by the judge of the court who could instruct the officers of his court regarding the purpose of the law and his desires in the premise.

As to the right of a newspaper to publish such information as it may obtain from sources other than the court records or presence at the hearing, there does not appear to be any express legislation prohibiting such action and, therefore, the decision of whether such material will be published is one of policy with the respective newspapers.

JUVENILE AND DOMESTIC RELATIONS—Taking married woman away from home is no offense unless neglect of children involved. F-239

December 26, 1950.

HONORABLE LOUIS F. JORDAN,
Judge of the Juvenile and Domestic Relations Court of Waynesboro.

This is in reply to your letter of December 21, 1950, in which you ask whether, in my opinion, an act involving taking a married woman away from her husband and children under circumstances calculated to disrupt the home constitutes a criminal offense regardless of neglect of children. You refer to Part III of Chapter 383 of the Acts of 1950, §21b, paragraphs 7 and 9.

The portions of the 1950 Act to which you make reference are contained in the 1950 Supplement to the Code in §16-172.23 which, in so far as material to this opinion, reads as follows:

"The judges of the juvenile court elected or appointed under this law shall be conservators of the peace within the corporate limits of the cities and the boundaries of the counties for which they are respectively chosen and within one mile beyond the corporate limits of such cities.

"Except as hereinafter limited they shall have within the corporate limits of a city or the boundaries of a county in which they sit exclusive original jurisdiction, and within one mile beyond the corporate limits of said city concurrent jurisdiction with the juvenile court or courts of the adjoining county or counties over all cases, matters and proceedings involving:

* * * *

"7. The prosecution and punishment of persons charged with ill-treatment, abuse, abandonment or neglect of children or with any violation of law
which causes or tends to cause a child to come within the purview of this law, or with any other offense against a child except murder and manslaughter, provided, that in prosecution for other felonies over which the court shall have jurisdiction, such jurisdiction shall be limited to that of examining magistrate.

"Any violation of law the effect of which is to cause or contribute in any way to the disruption of marital relations or a home."

This section does not in itself create any offense but rather confers on the Juvenile and Domestic Relations Courts jurisdiction over offenses which have a tendency to affect juveniles or marital relations.

It is my opinion, therefore, that in order to impose a criminal penalty on a person for taking a married woman away from her husband and children under circumstances calculated to disrupt the home, we must find such act defined as a criminal offense independently of the section cited. For example, if a man takes a married woman away from her home under such circumstances and has sexual intercourse with her, the Juvenile and Domestic Relations Court is given jurisdiction over the offense of adultery by virtue of the sections cited, but the act is made criminal by another provision of law.

I am aware of no provision of law which makes it a crime to merely take a married woman away from her home even though it tends to disrupt marital relations unless, of course, the neglect of children is involved.

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**JUVENILE AND DOMESTIC RELATIONS—Warrant for arrest of minor authorized when imperative—Aggravated offense.**  

_F-239_

January 25, 1951.

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

This is in reply to your letter of January 19, 1951, from which I quote as follows:

"Has a Justice of the Peace authority to issue a warrant of arrest for a juvenile between the age of fourteen and eighteen years of age, if such process is imperative? 16-172.62 Acts of 1950.  
"Is operating a motor vehicle while under the influence of intoxicants, appearing in a public place while drunk and other aggravated misdemeanors imperative?"

Section 16-172.62 of the Acts of 1950 to which you refer is found in the Code of Virginia §16-172.61, and reads as follows:

"No warrant of arrest shall be issued for any child known or alleged to be under the age of fourteen years except by the judge of a juvenile court or a judge of a court of record or for a child known or alleged to be between the ages of fourteen and eighteen years except when use of such process is imperative."

I am advised of no limitation on the power of a justice of peace which would prevent his issuing a warrant of arrest for a child between the ages of fourteen and eighteen years if, as required by §16-172.61, such process is imperative.

Whether such process is imperative in a particular case is a question of fact.
It must, therefore, be resolved by the justice on the basis of all of the information in a particular case. In the opinion to Mr. Link, dated August 23, 1950, a copy of which I previously forwarded to you, I stated:

“When the purpose and intent of this law is kept in mind I believe the most useful guide would be in each case to decide whether the offense committed and the manner of commission make it imperative to the public interest that the child be taken into custody or whether the public interest in the welfare of the child overrides the need for arrest.”

I regret that I cannot be more specific, but I feel that the purpose and intent of the juvenile law is such that the justice who is called upon to issue a warrant for a child should determine whether the public safety and welfare demands the arrest of the child in a particular case to such an extent as to override the public interest in the welfare of the child which, under the theory of the juvenile law, is adversely affected by such arrest.

LIBRARIES—Payment of salaries—Pamunkey Regional Library. F-217

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

January 17, 1951.

This is in reply to your letter of January 10, 1951, which reads as follows:

“The Pamunkey Regional Library was organized under the law of the State of Virginia providing for regional libraries and operates for Hanover and King William Counties. The trustees appointed according to the law pertaining to the regional libraries operate the library and issue checks drawn upon me for the expenses.

“The school law provides for the payment of salaries without a meeting of the School Board and the Regional Library wishes to follow the same practice and issue checks for salaries on the first of each month without waiting for a meeting of the library board.

“I would appreciate a ruling from you as to whether or not such procedure would be proper and if I should honor checks drawn for salaries in pursuance of any resolution that might be adopted by the Pamunkey Library Board of Trustees without a meeting of that board at the time that the checks are drawn.”

Section 42-9 of the Code of Virginia reads, in part, as follows:

“The management and control of a county free library system or a regional free library system shall be vested in a board of five trustees. The trustees shall, immediately after appointment, meet and adopt such by-laws, rules and regulations for their own guidance and for the government of the county free library system or regional free library system as may be expedient. They shall have control of the expenditures of all moneys credited to the county free library fund or the regional free library fund.”

In my opinion the power given the board of trustees of a regional free library system to manage and control the system, to adopt regulations for the government of the system, and to control expenditures, is broad enough to permit the adoption of the plan desired by a regulation duly passed by the board.
REPORT OF THE ATTORNEY GENERAL

LICENSE—Attorney at law in Martinsville. F-190

January 5, 1951.

HONORABLE IRVIN W. CUBINE,
Commonwealth's Attorney for the City of Martinsville.

This is in further reference to your letter of December 9 in which you ask if an attorney whose office is on the Courthouse Square in the City of Martinsville is subject to the local license tax imposed by the City on attorneys maintaining their offices and practicing their profession in the City. It appears that the County of Henry owns the land constituting the Courthouse Square, but you state that the County does not have exclusive jurisdiction over this land. It further appears that this attorney engages in private practice not only in the Circuit Court of Henry which is located on the Courthouse Square, but also in the Circuit Court of the City of Martinsville, which court uses the Henry County courthouse, and that he also practices in the Trial Justice Court of Martinsville.

Under the above circumstances, I can conceive of nothing which would render this attorney exempt from the local license tax imposed upon attorneys at law generally. The mere fact that the County of Henry owns the land on which this attorney's office is located is not controlling, since the City and County have concurrent jurisdiction over this land.

LOTTERIES—What constitutes—Consideration. F-123

August 8, 1950.

HONORABLE JOSEPH C. HUTCHESON,
Commonwealth's Attorney for Brunswick County.

I am in receipt of your letter of August 3, from which I quote as follows:

"The voluntary firemen of Alberta, Virginia have been holding an Annual Firemen's Carnival for the past few years, which consists of the usual concessions and forms of entertainment that are normally employed at such functions.

"In connection with this year's Carnival it proposes to give away prizes, that will be drawn by lot, at the Carnival, from tickets that will be distributed throughout this section, without charge to the holder or without requirement that the holder be present when the drawing is held. The only thing that will be required of the holder is to fill out a blank ticket with his name, address and telephone number, and deposit it at one of the depositories that will be designated on the reverse side of the tickets. The members of the Carnival will have the tickets gathered from the depositories and placed in a receptacle that will be used from which the tickets will be drawn to ascertain the winners of the prizes."

The ticket is designated "Registration Card" and printed thereon is the following: "This card entitling you to an equal chance on all prizes is our absolute gift to you. We do not expect nor will we accept any consideration whatsoever either directly or indirectly from anyone for registering." Also printed on the card will be the name of a local business or other firm. The card has printed on its face the dates on which the Carnival will be held, viz., September 28, 29, 30, 1950. Until September 27 the holder is given the option of depositing the card in a box at any
one of three separate places. After September 27 the holder is instructed to bring
the card to Registration Headquarters, Alberta, Virginia.

You request my opinion as to whether or not a drawing for prizes under these
circumstances constitutes a lottery in violation of law.

It is well settled that any scheme or device which embraces the three constituent
elements of prize, chance and consideration is a lottery. Under the facts submitted
the elements of prize and chance are abundantly present. The only question for
determination is whether or not the element of consideration is present.

The object of giving away free prizes, the winner to be determined by lot, is
to stimulate patronage at the Carnival. It could have no other purpose than to
augment the public attendance with the hope and expectation of deriving pecuniary
benefit. The advertised fact that free prizes will be given away as an “absolute gift”
and that drawings will be held every night, with a grand award for the final night,
is an appeal to the gambling instinct designed to draw those holding chances to
attend the actual drawings and awards which will take place at the Carnival. The
fact that the tickets are not purchased by the holder and that the holder need not
be present when the winner is announced as a result of the drawing is not deter-
minative of the element of consideration. While the question is not free from doubt,
it is my opinion that under the decision of Maughs v. Porter, 157 Va. 415, the
scheme described embraces all of the constituent elements of a lottery.

In view of the opinion expressed, your second question relating to the name of
the firm being printed on the ticket, with or without cost to the firm, becomes im-
material. This circumstance does not add to or detract from the elements necessary
to constitute a lottery.

LUNACY COMMISSION—Cost borne by State for child previously com-
mitted to State Board of Welfare. F-231

August 4, 1950.

HONORABLE RICHARD W. COPELAND,
Director, Department of Welfare and Institutions.

This is in reply to your letter of August 1st in which you refer to the fact
that it is sometimes necessary to hold a commission to determine whether a child
previously committed to the State Board of Welfare and Institutions because of
delinquency shall be committed to a State hospital or colony for the insane or feeble-
minded. You request my opinion as to whether, under Section 37-75 of the Code of
Virginia as amended, the cost of such commission should be paid by the State.

Section 37-75 was amended by Chapter 585 of the Acts of 1950 to provide that
the cost shall be “paid by the State if the person committed is confined in any State
supported institution at the time of his commitment.” It is my opinion that this pro-
vision is applicable to delinquent children committed to the State Board of Welfare
and Institutions and who, at the time of their commitment, were being maintained in a
receiving home, a boarding home or one of the State industrial schools. The object
of the amendment was to require the State to pay the cost of the commission when-
ever a person had been committed to the State and was then being supported at the
expense of the State.

This is clearly applicable to delinquent children who are being held in a receiv-
ing home or in one of the State industrial schools. It is my opinion that it is also
applicable in cases where the children have been placed in a boarding home at the
expense of the State and still subject to the jurisdiction and control of the State
Board of Welfare and Institutions.
MARRIAGE—Ceremony in Virginia performed by foreign diplomatic agent is of doubtful validity. F-233

February 27, 1951.

HONORABLE CARTER O. LOWANCE,
Acting Secretary of the Commonwealth.

This is in reply to your letter of February 15, 1951, in which you enclosed an inquiry from Pierre Dupont, Consul for France. I quote the enclosure as follows:

"The French Foreign Office has requested from this Consulate information about the law in relation to marriages in the different states under my consular jurisdiction.

Among the various questions figures the problem of the validity of marriages performed according to French law by diplomatic agents or career consuls and uniting two French nationals residing temporarily or permanently in the United States.

"I wish to explain that according to the French civil Code marriages between two French nationals residing in foreign countries may be performed by French diplomatic agents or career consuls."

"I would be most grateful to have an authoritative statement as to whether such marriages, valid according to French law, would likewise be so considered by the Commonwealth of Virginia (if so, under what provisions), or if, on the contrary, it is imperative that marriages taking place in the Commonwealth of Virginia, regardless of the nationalities of the parties involved and of the laws of their countries, if aliens, be performed in compliance with the law regulating marriages in the Commonwealth of Virginia in order to be considered valid."

Title 20, Chapter 2, of the Code of Virginia, 1950, deals with the subject of marriage and sets forth the requirements for marriages performed within this State. None of those provisions authorize the performance of marriage in the manner set forth above.

Section 20-13 of the Code of Virginia, 1950, reads as follows:

"Every marriage in this State shall be under a license and solemnized in the manner herein provided."

While the precise question presented by the French Consul does not appear to have been decided by our Court of Appeals, §20-13 has been considered by the Court and, in the case of Offield v. Davis, 100 Va. 250, 40 S. E. 910, the Court said:

"We are therefore of opinion that the enactment of that statute wholly abrogated the common law in force in this State on the subject of marriages, and that no marriage or attempted marriage, can be held valid here, unless it has been shown to have been under a license, and solemnized according to our statutes." (100 Va. 250, 263)

In view of this pronouncement by our Court of Appeals, I am of the opinion that a marriage performed in the manner inquired of would be of doubtful validity in so far as this State is concerned.

For the convenience of the French Consul, I am sending him direct a copy of this letter and also a copy of Title 20, Chapter 2 of the Code of Virginia of 1950 which may be of interest and assistance to him.
REPORT OF THE ATTORNEY GENERAL

MARRIAGE—License to persons on Federal Reservations. F-223

September 18, 1950.

HONORABLE WILLIAM HODGES BAKER,
Clerk of the Court of Hustings for the City of Portsmouth.

This is in reply to your letter of August 29, 1950, which deals with the interpretation to be given §20-30 of the Code of 1950. Section 20-30 of the Code was enacted into law as Chapter 277 of the Acts of Assembly of 1930. That Act reads as follows:

"CHAP. 277.—An ACT to provide for issuing marriage licenses to persons on Federal reservations within Virginia and to legalize marriages performed on said reservations.
"Approved March 24, 1940.
"1. Be it enacted by the general assembly of Virginia, That the clerks of the circuit courts of any county or their deputies and the clerks of the corporation courts of any cities or their deputies, be and they are hereby authorized to issue marriage licenses in conformity with the law now governing the same, to any persons desiring to be married on any of the government reservations of this State lying within their respective counties and which said reservations was before the acquisition thereof part of the political territory of this State, and any marriage ceremony performed on such reservation shall be legal to all intents and purposes as if performed in any county or city of the State, if the person performing the ceremony was qualified to so act.
"All marriages heretofore solemnized within the limits of any such reservation are hereby ratified and legalized to all intents and purposes as if performed in any county or city of the State.
"2. An emergency existing this act shall become effective from its passage."

Reference to the title of the act reveals that the Legislature had in mind two purposes, first, giving authority to the clerks to issue licenses to persons on Federal reservations within Virginia and, second, legalizing marriages performed on such reservations.

It is my opinion, therefore, that the intent of the Legislature was to make the Federal reservation a part of the county or city in which it lay in so far as the issuance of marriage licenses and the performances of marriages are concerned.

Under this view of the Act, it is my opinion that if a female gives as her place of residence a Federal reservation within the State, then only the clerk of the city or county in which such Federal reservation lies may issue the license and when issued by such clerk the marriage may be performed anywhere within the State, including all Federal reservations. If, on the other hand, the female gives as her place of residence some place outside the State, then the license must be issued by the clerk within whose county or city, including Federal reservations therein, the marriage is to be performed.

MARRIAGE—Requirement for license—Statement from physician that physical examinations have been made and reports filed. F-223

July 26, 1950.

HONORABLE E. O. RUSSELL,
Clerk, Loudoun County.

This will reply to your letter of July 20th from which I quote in full as follows:

"Will you kindly give me an answer at once to the following questions.
"1. If an applicant for the issuance of a marriage license qualifies in
every other respect, presents to me a copy of his serological test taken at a
naval or army base, can I issue the license based on that, or must I send him
to some physician, who will issue the blue card (form VD 32).

"2. Under the same condition if there is presented to me a copy of a
serological test taken in a laboratory, recognized by the State of Virginia,
can I issue the license without sending the party to some physician for the
blue card."

Section 20-1 of the Code of Virginia pertaining to pre-marital syphilis tests
and examinations provides as follows:

"It shall, on and after the first day of August, nineteen hundred and
forty, be unlawful for the clerk of any court to issue a marriage license until
there shall have been filed with him, by or on behalf of each of the two
persons for whom the license is desired, a statement signed by a physician,
stating, without disclosing any medical findings, that as to such person such
test, or tests and examination have been made, and such medical history ob-
tained, as are required by this chapter to determine whether there is evidence
of syphilis, and that the information required by Section 20-3 as to each such
test, examination and medical history has been filed with or transmitted to
the State Department of Health by the physician. A standard serological test
shall be made as to each such party for whom the marriage license is de-
sired."

The above quoted language is very clear, and in my opinion the statement from
the examining physician is necessary to comply with the statute. The act provides
that after the tests and examinations are made that a report of the test be made to the
Virginia Department of Health. Of course, there is no responsibility on the Clerk to
see that such a report is made. However, from the above quoted section, there is a
clear responsibility on the Clerk to see that the statement from the physician sets
forth such a fact. Therefore, I am of the opinion that the presenting of a copy of a
serological test to the Clerk, unaccompanyed by a statement from the examining
physician, is not sufficient to comply with the provisions of the statute.

Your attention is also called to Section 20-7 of the Code, which provides that
the physician's statement can be made by others than private physicians.

MEDICINE—Requirements to practice. F-134

September 22, 1950.

COLONEL ASHER W. HARMAN,
State Director of Selective Service.

This is in reply to your letter of September 20, 1950, (AWH-9-20-50) which
reads as follows:

"The organization of the Selective Service System within the state pro-
vides that medical examiners be appointed for each local board from qualified
physicians recommended by the Governor.

"The Medical Society of Virginia has raised a question about one of
our medical examiners. It informs us that the particular man is not currently
a member of the Medical Society of Virginia and that he is not carried in the
roster of physicians registered annually by the Virginia Board of Medical
Examiners.

"It is requested that I be informed concerning the requirements imposed
by the laws of Virginia upon doctors of medicine in order to be licensed to
practice medicine within the Commonwealth."
Section 54-274 of the Code of Virginia of 1950 provides that it shall be unlawful for any person to practice medicine or any other school or branch of the healing arts in the State "without a valid unrevoked certificate or license authorizing such practice issued by the Board of Medical Examiners."

Section 54-315.1 of the Code provides that every certificate to practice medicine, etc., shall expire on the thirtieth day of June of each year and shall be renewed annually by application for renewal to the said Board. Section 54-315.2 requires that on or before September first of each year the Board shall prepare a list of names and addresses of all persons to whom certificates of renewal have been issued.

It would appear, therefore, that one who is not carried on the roster of physicians registered annually may not legally practice medicine in this State unless, of course, he has in fact renewed his certificate to practice and his name has been omitted from the list through inadvertence.

MOTOR VEHICLES—Authority of cities and towns, to require license of residents—What constitutes residence. F-149

June 1, 1951.

HONORABLE JOHN H. DANIELS,
Member of the House of Delegates.

This is to acknowledge receipt of your letter of May 23 in which you inquire as to whether or not a school teacher who lives in the corporate limits of Keysville for a period of nine (9) months out of the year has to purchase a Keysville license tag for her automobile. You state that she resides and votes in another county.

Your attention is invited to Sections 46-64 and 46-65 of the Code of Virginia. These sections read as follows:

"Except as hereinafter otherwise provided, incorporated towns and cities and counties having a population in excess of two thousand inhabitants a square mile according to the last preceding United States census, may levy and assess taxes and charge license fees and taxes upon vehicles, except license fees and taxes upon vehicles used by a dealer or manufacturer for sales purposes, and except vehicles used by common carriers of persons or property operating between cities and towns in this State and not in intra-city transportation. Such license fees and taxes shall be charged, imposed and assessed in such manner, on such basis, and for such periods, as the proper authorities of such counties, incorporated towns and cities may determine, and subject to proration for fractional periods of years in the same manner as prescribed in Section 46-176, but the amount of the license fees and taxes imposed by any such county, city or town on any class of vehicles shall not be greater than the amount of the license tax imposed by the State on vehicles of like class."

"No such county, city or town shall impose any taxes or license fees upon any vehicle on which similar taxes or fees are imposed by the county, city or town of which the owner of such vehicle is a resident; nor shall more than one county, city or town impose any such license fee or tax on the same vehicle. Nor shall any such county, city or town impose taxes or license fees upon any vehicle belonging to any person who is not a resident of such county, city or town, when used exclusively for pleasure or personal transportation and not for hire, or for transporting into and within such county, city or town, for sale in person or by his employees of wood, meats, poultry, fruits, flowers, vegetables, milk, butter, cream or eggs produced or grown by him, and not purchased by him for sale, or for both such purposes, provided, that such vehicle is not used in said county, city or town in the conduct of any business or occupation other than those herein set out."

You will note that the towns have the authority to impose automobile license taxes and fees on residents of said towns, and they also have the authority, with
certain limitations, to exact taxes from such parties who use their vehicles within the town. I think that in this particular instance, the question is whether or not the person is a resident within the meaning of this act. Although she may maintain her domicile and vote elsewhere in the State, I do not think that would preclude her from actually maintaining a residence in Keysville.

The intent of this legislation is to permit the cities and towns to collect automobile license fees from those individuals who use the streets of such cities and towns constantly. In other words, the cities and towns must maintain the streets at their expense and it is only fair that the people who use those streets for their vehicles contribute toward the maintenance thereof. You will note, however, the statute limits the exaction of this tax to one locality, which means that this party could not be forced to purchase Keysville tags and also tags issued by another city, town or county.

MOTOR VEHICLES—Authority of Trial Justice to suspend sentence for driving while permit revoked. F-75b

February 21, 1951.

HONORABLE HAROLD B. SINGLETON,
Member House of Delegates.

This is in reply to your letter of February 16, 1951, which reads, in part, as follows:

"At the request of one of my constituents, I am asking you to give me your opinion as to whether or not under 46-211 of the Code, the Trial Justice, the Police Justice, or Judge, may suspend the jail sentence."

"46-211 of the Code reads as follows:

"46-211. Penalty for driving while license suspended.—If any person shall drive any vehicle upon any highway while his license is so suspended, or while so forbidden to drive or operate a motor vehicle in this state, he shall be punished by imprisonment in jail for a period not less than two days nor more than six months, and there may be imposed in addition thereto a fine of not more than $500.00.""

Section 53-272 of the Code of Virginia reads as follows:

"After a plea, a verdict or a judgment of guilty in any court having jurisdiction to hear and determine the offense, with which the prisoner at the bar is charged, if there are circumstances in mitigation of the offense, or if it appears compatible with the public interest, and in any case after a child has been declared delinquent or dependent, the court may suspend the imposition or the execution of sentence, or commitment, and may also place the defendant on probation under the supervision of a probation officer, during good behavior, for such time and under such conditions of probation as the court shall determine. 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 any such sentence."

"The power conferred upon the trial courts by this section is very broad and, in the case of Richardson v. Commonwealth, 131 Va. 802, 109 S. E. 160, the Supreme Court of Appeals held this statute to be highly remedial and subject to liberal construction."

There appears to be nothing contained in §46-211 which would preclude the suspension of imposition or execution of sentence under §53-272, and I am aware of no other provision of law which would render it inapplicable. The word "shall" which
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appears in §46-211 is contained in a great many criminal statutes and I am not advised that it has been construed as being mandatory to the extent of making such suspension impossible.

MOTOR VEHICLES—Careless and Reckless Driving—Passing vehicle while going in same direction without giving signal may be careless and reckless driving.  F-353

HONORABLE GLEN M. WILLIAMS,
Attorney for the Commonwealth for Lee County.

September 1, 1950.

This will acknowledge receipt of your letter dated August, 1950, in which you present the following inquiry:

"Section 75 of the Motor Vehicle Code of Virginia reads that 'Every driver who intends to start, stop, or turn or partly turn from a direct line' shall give a signal. Section 61(6) reads that a failure to give this signal constitutes reckless driving. Do the words 'partly turn from a direct line' apply to a situation where there is a line of cars proceeding in the same direction and one car decides to pass another car? Must he then give a left hand turn signal to indicate to the car behind him that he is going to be in the left lane of the traffic and pass the car ahead? Would the failure to give a signal in this kind of a situation constitute reckless driving?"

Section 46-233 of the 1950 Code of Virginia provides as follows:

"Every driver who intends to start, stop, turn or partly turn from a direct line shall first see that such movement can be made in safety and whenever the operation of any other vehicle may be affected by such movement shall give a signal as required in §§46-234, 46-235 or 46-237, plainly visible to the driver of such other vehicle of his intention to make such movement."

Section 46-209 provides as follows:

"A person shall be guilty of reckless driving who shall:

(6) Fail to give adequate and timely signals of intention to turn, partly turn, slow down or stop, as required by §§46-233 to 46-237; * * *

I am of the opinion that the words "partly turn from the direct line" apply to a situation such as you describe, and if in making such turn the operation of any other vehicle may be affected, the signal shall be given and failure to give the same would constitute careless and reckless driving.

MOTOR VEHICLES—Dealers' tags—Permissible use of.  F-149

HONORABLE R. E. DYCHE,
Trial Justice of Alleghany County.

July 18, 1950.

This is in reply to your letter of July 12, 1950, which reads as follows:

"Will you please give me a ruling on the following question before the 28th of July, 1950? :"
"An automobile dealer has been charged by the State Police with improper use of a Dealer's Tag. The facts in the case are as follows: He is a licensed dealer in the City of Norfolk, Va., and of course, the use of his Dealer's Tags to sell automobiles in that City is legal, but he has interests in stores in several other localities other than in Norfolk handling automobile parts. His Norfolk store is the headquarters for storing parts for all stores. Can he deliver automobile parts from his Norfolk storage house to other stores on his Dealer's Tags?"

The law dealing with the use of motor vehicle dealer's license plates is found in Section 46-105.1 of the Code of 1950. The portion of the section pertinent to this discussion reads as follows:

"Such dealer's license plates may be used on motor vehicles, trailers and semi-trailers owned by, or assigned to, duly licensed motor vehicle dealers of this State when operated on the highways of this State by such dealers or their duly authorized representatives. Dealers' tags shall not be used on motor vehicles for the use or operation of which dealers charge or receive compensation such as wrecking cranes or other service motor vehicles."

It is my opinion that a motor vehicle bearing dealer's license plates may be used by the dealer in the conduct of his personal business, or any business of the dealer so long as no compensation is received for the use of the vehicle on which the tags are placed.

I am enclosing a copy of an opinion rendered March 17, 1949, to the Honorable I. R. Dovel, Commonwealth Attorney of Luray, Virginia, in which a similar view was expressed.

MOTOR VEHICLES—"Drunken Driving" offense need not take place on highway. F-353

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

This is in reply to your letter of July 22, 1950, which reads as follows:

"In your opinion, is it a violation of Section 18-75 of the Code for a person, while intoxicated, to drive an automobile over or along the paved driveway of a filling station which borders on and is contiguous to a public highway?

"Said statute makes it an offense to operate an automobile while intoxicated, but puts no limitation on the place of operation."

Section 18-75 of the Code of Virginia of 1950 provides as follows:

"No person shall drive or operate any automobile or other motor vehicle, car, truck, engine or train while under the influence of alcohol, brandy, rum, whiskey, gin, wine, beer, lager beer, ale, porter, stout or any other liquid beverage or article containing alcohol or while under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature."

As you have pointed out in your letter, this statute makes no reference to the place in which the prohibited acts must take place in order to constitute the offense.

In 5 American Jurisprudence, at page 918, the following general rule is set forth:
"** * * under a statute prohibiting the operation of a motor vehicle while in an intoxicated condition, it is not required, and is not an element of the offense, that the driving be done on a public highway."

The same rule is found in 61 Corpus Juris Secundum at page 722 in these words:

"** * * * a statute which provides that no person shall operate a motor vehicle while in the prohibited condition does not require, as an element of the offense, that the driving should be done on a public highway. Under such a statute commission of the offense in a private place has been held to be within its terms."

It is my opinion that it would be a violation of this statute to operate a motor vehicle within the territorial jurisdiction of this State while intoxicated, regardless of whether such operation took place on a highway or otherwise.

This conclusion is bolstered by the fact that the Legislature in other instances, for example, the reckless driving statutes and speeding statutes, include as an element of the offense the provision that the act must take place "upon a highway" and it would appear that had the Legislature intended to so limit the "drunken driving" statute they would have done so in this same manner.

MOTOR VEHICLES—License—Required of equipment of volunteer fire department. F-61

April 23, 1951.

HONORABLE A. L. MARCHANT,
Commonwealth Attorney of Mathews County.

This is in reply to your letter of April 17, 1951, from which I quote as follows:

"Question has recently been raised here as to whether or not two trucks owned by the Volunteer Fire Department have to have license tags to go on the highway.

"I asked one of the gentlemen in the Division of Motor Vehicles License Bureau about this the other day and he told me that he thought the license were necessary and from the wording of the law I am inclined to agree with him.

"However, I know as a fact the Volunteer Fire Departments in this section of Virginia, even though the trucks are not owned by the counties, they have never had a license. To require a license of these volunteer departments would be a considerable hardship upon them because I know from my experience in trying to raise funds for the local department and operate it that it is such a job to secure sufficient funds to purchase and maintain the equipment.

"I would appreciate your views on this subject as to whether or not you think under the law these trucks must have license tags to operate on the highway and if the Motor Vehicle Commissioner has authority under the law to waive requirement that they have such license tags."

The conclusion which you have reached is undoubtedly correct. The license requirements in the Motor Vehicle Code are certainly broad enough to cover these vehicles and there appears to be no exception or exemption provided.

I know of no authority in the Commissioner of Motor Vehicles to waive the license requirement.
A bill was introduced at the last session of the General Assembly to relieve volunteer fire companies from the payment of a fee for a license. However, even that bill contemplated that such vehicles were to be properly registered and number plates issued. The bill was not passed by the General Assembly.

I have great respect and admiration for the volunteer fire companies in this State. Their courageous and unselfish efforts save huge amounts of property and prevent untold human suffering each year. Having such respect for these organizations and fully realizing the difficulties which confront them from a financial standpoint, I am, nevertheless, forced to reply to your inquiry that I know of no method by which they can be made exempt from the Motor Vehicle Licensing Laws without further action by the Legislature.

For your information I am enclosing a copy of the bill introduced at the last session of the General Assembly referred to above.

MOTOR VEHICLES—Maximum length of vehicles. F-353

September 6, 1950.

COLONEL C. W. WOODSON, JR.,
Superintendent, Department of State Police.

I am in receipt of your letter dated August 30, 1950, which I quote as follows:

"Several members of the Virginia Highway Users Association have recently requested our interpretation of the provisions of Title 46, Section 328 of the Code of Virginia, 1950, relative to the maximum length of vehicles. This section provides in pertinent part as follows:

"The actual length of any combination of vehicles coupled together shall not exceed a total of forty-five feet, exclusive of coupling;***"

"Some members of the Association have taken the view that, in determining the length of the tractor-trailer or tractor-semi-trailer combinations under the provisions of this section, the distance between the rear of the cab of the tractor and the front of the trailer or semi-trailer are to be excluded.

"This office has interpreted the phraseology 'exclusive of coupling' to apply to a tongue or draw-bar used in connection with a four-wheel trailer; and has further taken the view that the phraseology 'exclusive of coupling' does not apply to a tractor-truck and semi-trailer combination, since the fifth wheel is taken up in the over-lap of the semi-trailer over the tractor truck.

"I shall appreciate an opinion from you as to what future course we should pursue."

The words "exclusive of coupling" were first enacted into law by the 1932 General Assembly of Virginia. At that time, the highways of this State were used to a great extent by combination of vehicles, unlike the present day tractor-trailer truck. In my opinion, the phraseology in question was intended to apply to devices such as you mentioned; specifically, tongue or draw-bars. The actual coupling mechanism (fifth wheel) now employed on tractor-trailer trucks constitutes the distance to be exempt from the total length measurement. Since this distance is taken up in the over-lap of the semi-trailer and tractor, there is nothing further to be excluded. I can see no reason for construing the law to mean exclusion of the distance between the rear of the cab and the front of the trailer.

I am, therefore, of the opinion that the law should continue to be enforced with the understanding that you exhibit in your letter, and consistent with this opinion.
HONORABLE H. N. Houser,
Trial Justice of Wythe County.

I have your letter of December 14, 1950, with further reference to Section 46-338.1 of the 1950 Code of Virginia amended. I am sorry that the opinion dated August 11, 1950, addressed to General J. A. Anderson, copy of which was sent to you, did not fully satisfy your inquiry.

You ask specifically as follows:

"As you see the question with me is whether or not, in calculating the penalty on the operator should I add the several overloads and apply the penalty on that total, or treat each overload as separate and complete in itself."

I am of the opinion that each overload should be treated separately and the penalty invoked accordingly.

HONORABLE WILBUR J. GRIGGS,
Clerk, Circuit Court of the City of Richmond.

This is to acknowledge receipt of your letter of September 16th which reads as follows:

"On September 14, 1950, there was filed in this office a Petition for Refund of penalties imposed and collected under the Motor Vehicle Code for the overloading of trucks running over our highways, amounting to the sum of $504.00, under Sections 2-193 and 8-752 of the Code of Virginia, 1950.

"Part of Section 8-752 provides: "* * * And when a person has any other claim against the Commonwealth, redress may be obtained in such court by a petition or by a bill in chancery, according to the nature of the case.* * *"

"Two questions have arisen in connection with this suit: (1) whether this suit is a law or chancery suit; and (2) Should a writ tax be collected thereon.

"Your early reply will be very greatly appreciated."

The questions raised will be answered seriatim:

(1) From what you state this is a proceeding under the provisions of Chapter 34, Title 8 of the Code of Virginia, for the purpose of securing a refund of penalties imposed and collected under the provisions of Section 113-a of "The Motor Vehicle Code" as re-enacted and amended by Chapter 510, Acts of 1948. You say that the plaintiff has proceeded by petition. As the specific procedure is set forth in the above mentioned Chapter, I do not think that this case is governed by the Rules of Practice applicable to actions at law recently promulgated by the Supreme Court of Appeals of Virginia, effective February 1, 1950. Rule 3:1 states, in part: "In matters not covered by these rules, the established practices and procedure in such actions at law are continued." I take it from that language that this proceeding, which is brought under a particular chapter of the Code, would be an exception, and the said rules would not apply. As the plaintiff has elected to proceed by petition and not by a bill
in chancery; and, further, since the nature of the proceeding is not such as to
indicate that it is proper for it to be brought in a Court of Chancery, I am of the
opinion that this proceeding is an action at law.

(2) Section 58-71 of the Code provides that a writ tax be imposed upon the in-
stitution of an action. I am of the opinion that the tax prescribed there should apply
in cases of this nature.

MOTOR VEHICLES—Police may stop drivers and require them to display
license certificates. F-353

HONORABLE LOUIS LEE GUY,
Member House of Delegates.

February 28, 1951

This will acknowledge receipt of your letter dated February 23, 1951, which
I quote as follows:

"It has come to my attention that recently the Police in this locality have been
setting up 'check points' at various locations chosen by them and then pro-
ceeding to stop drivers of all vehicles passing those 'check points' to inter-
rogate them regarding the registration cards, driver's license, etc. concerning
that motor vehicle. The individuals thus stopped are apparently chosen by
chance, that is, they stop all those passing a certain point between certain
hours, and they are not chosen in any way with regard to the manner in
which they were operating an automobile or with regard to the apparent
condition of the automobile.

"According to local newspapers, in one such recent instance, approximately
1900 drivers were stopped and not over 75 were found to be delinquent with
regard to the papers for the machine they were operating. Stated another
way, this means that approximately 1825 law abiding individuals were stopped
without the Police having even a 'suspicion' that they were in any way in
default in their legal obligations.

"Will you please advise me whether or not in your opinion there is any
statute, rule, regulation, or other authority in law, to either State or City
police to require these people to stop and submit to interrogation and the dis-
play of their credentials."

The pertinent provisions of Section 46-375 of the 1950 Code of Virginia are as
follows:

"Every person licensed as an operator and every person licensed as a
chauffeur shall write his usual signature with pen and ink in the space pro-
vided for that purpose on the license certificate issued to him immediately
upon receipt of such certificate and such license shall not be valid until the
certificate is so signed.

"The licensee shall have such license in his immediate possession at all
times when driving a motor vehicle and shall display the same upon demand
of any person charged with the duty of enforcing the motor vehicle laws of
this State. * * *

Under the statute law of the State, it is clear that sheriffs, State police, officers
appointed by the Motor Vehicle Commissioner, and city police are charged with
the duty of enforcing the motor vehicle laws.

In view of the foregoing, I am of the opinion that Section 46-375 of the 1950
Code of Virginia is authority for either State or city police to require the operator
of a motor vehicle to stop and display his license certificate.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES — Reckless driving — penalty — "Drunken Driving" — Penalty—Driving while permit revoked—penalty—Suspension of sentence.

F-75b

HONORABLE HORACE T. MORRISON,
Attorney for the Commonwealth for King George County.

July 11, 1950.

This is in reply to your letter of July 5, from which I quote as follows:

"Section 46-211 of the Code of 1950 provides that if any person drive any vehicle upon any highway while his license is suspended, etc., he shall be punished by imprisonment in jail for not less than two days nor more than six months and there may be imposed a fine of not more than $500.00.

"This section specifically refers to Section 46-210 governing the penalty for reckless driving—but it seems to have been intended to cover other cases where the license is suspended. I would, therefore, like to have your opinion on the following points:

"(1) Does this section also apply where the suspension results from a conviction for driving under the influence of alcoholic beverages?

"(2) Upon conviction for driving on a suspended permit is the jail sentence mandatory? If so, can the Court suspend any jail sentence so imposed?"

Section 46-210 is the section dealing with the penalty for reckless driving and authorizes the court to suspend the license of a person convicted or, if the person had no license, to direct that he shall not operate a motor vehicle for the period set forth in the statute. Section 46-211 then follows in this language:

"If any person shall drive any vehicle upon any highway while his license is so suspended or while so forbidden to drive or operate a motor vehicle in this State, he shall be punished by imprisonment in jail for a period not less than two days nor more than six months and there may be imposed in addition thereto a fine of not more than five hundred dollars."

In my opinion, Section 46-211 is applicable only to those persons whose licenses are revoked or who are forbidden to drive under the provisions of Section 46-210, which deals only with reckless driving.

However, I call your attention to Sections 18-75 through 18-78, which deal with persons convicted of driving while intoxicated. Section 18-77 provides for an automatic loss of the right to drive for the time specified upon a conviction of that offense. Section 18-78 provides that, if any person so convicted shall, during the time for which he is deprived of his right to do so, drive a motor vehicle, he shall be guilty of a misdemeanor. Since no punishment is prescribed in this section, the punishment for this offense would be governed by Section 19-265.

In answer to your second question, it is my opinion that, if a sentence is imposed upon a conviction under Section 46-211, it must include a jail sentence, although a fine may be imposed in addition. The language of the section, in my opinion, precludes the imposition of a fine alone. However, it is my opinion that neither the imposition of sentence nor the execution thereof is mandatory, if the court desires to exercise its discretion, given by Section 53-272, to suspend the imposition or execution of sentence. This latter section applies to convictions under Section 46-211 as well as to other offenses.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Revocation of driving privileges for various offenses.
F-149
October 30, 1950.

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

This is to acknowledge receipt of your letter of October 23rd in which you refer me to Section 46-416 of the Code, which directs and empowers the Commissioner of the Division of Motor Vehicles to revoke driving licenses upon receiving notices of conviction for certain offenses, including that of manslaughter and drunken driving; and you ask this question: "Please advise whether or not anyone other than the Commissioner has the authority to revoke a driver's license of a driver who has been convicted of manslaughter or driving drunk (two of the offenses specified in Section 46-416)"?

Upon the conviction of a person under the provisions of Sections 18-75 and 18-76 of the Code (for drunk driving), the conviction itself operates to deprive the person of the right to drive a motor vehicle. Such person may be lawfully licensed to drive a motor vehicle at that time or he may not be lawfully licensed; but from the date the conviction becomes final, his right to operate a motor vehicle automatically stands revoked.

The provisions of Section 46-416 are invoked by the Commissioner when he is advised of the conviction of a resident of Virginia of drunk driving in a foreign state. They are likewise invoked for the purpose of revoking the driving license and registration privileges issued to a resident of Virginia upon his conviction in the courts of Virginia of drunk driving or the other offenses enumerated in that section. I know of no other authority that would have the right to act under the provisions of Section 46-416 except the Commissioner; but on the other hand, the Court could direct such a person to surrender his license upon his final conviction under the provisions of Sections 18-75 and 18-76 of the Code, supra.

Upon the conviction of a person of voluntary or involuntary manslaughter, resulting from the operation of a motor vehicle, there is no automatic deprivation of the driving privileges as in the case of drunk driving. Therefore, such a person's driving and registration privileges are revoked by virtue of Section 46-416 of the Code; however, the Commissioner's actions under this section are purely mandatory, no discretion being exercised whatsoever.

MOTOR VEHICLES—Suspension of jail sentence for second or third offense of drunken driving. F-75b
July 12, 1950.

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

This is in reply to your letter of July 5, in which you request my opinion as to whether a Trial Justice or Court may suspend a jail sentence of a person convicted for a second or third offense of driving while intoxicated.

You call attention to the fact that Section 18-77 of the Code, which deals with convictions for such a subsequent offense, provides that: "The Court may, in its discretion, suspend the sentence during good behavior of the person convicted," while Section 53-276, which is the statute dealing generally with the suspension of sentences, provides that: "Nothing in this Article shall be construed as permitting the suspension of a jail sentence imposed upon a person convicted of a second or subsequent offense under the provision of Sections 18-76 and 18-77."

While the language of Section 53-276 would imply that sentence should not be suspended in the type of case referred to, it is my opinion that this power may be exercised as provided by Section 18-77.
First, the language of the two sections are not directly in conflict. Section 53-276 refers to the provisions of "this Article"; that is to say, Article 2 of Chapter 11 of Title 53, in which that section is contained. Section 18-77 is in Title 18 of the Code.

Second, if the two sections were considered as being in conflict, reference should be had to the respective dates of the enactment of the statutes from which the sections of the Code were taken. See the cases cited in the note to Section 1-13 of the Code. Sections 18-75 through 18-79 were taken from an Act originally passed in 1934. See Chapter 144 of the Acts of 1934. That Act originally prohibited the suspension of sentence in cases of a second or third offense. Sections 53-272 through 53-276 were taken from an Act originally passed in 1918. That Act was amended in 1938, at which time there was inserted the provision that nothing therein should be construed as authorizing the suspension of sentence of persons convicted of subsequent offenses under the 1934 Act relating to driving while drunk. Subsequently, however, in 1940, the 1934 Act was amended to remove the prohibition against suspension of sentence and the sentence now appearing in Section 18-77 authorizing such suspension was added. Since that enactment was subsequent to enactment of the prohibition now contained in Section 53-276, it is my opinion that it should be taken as the latest expression by the General Assembly. Apparently the Commission on the Code Recodification did not notice the inconsistency and failed to delete the provision from Section 53-276.

Third, as you point out, Section 1-7 of the Code gives precedence and effect to Acts passed between January 14, 1948, and February 1, 1950. What is now Section 18-77 was again amended by Chapter 193 of the Acts of 1948, which was enacted on March 11, 1948. While it was amended for another purpose, the language authorizing the suspension of sentence was contained in that enactment.

It is my opinion, therefore, that a Trial Justice or Court would have the power to suspend a jail sentence under the circumstances mentioned by virtue of Section 18-77.

MOTOR VEHICLES—Taxicabs—Rights of taxis licensed in other jurisdictions to carry passengers in Virginia. F-85

April 11, 1951.

HONORABLE CHARLES R. FENWICK,
Member of State Senate.

This is to acknowledge receipt of your letter of March 28 in which you say that a group of taxicab operators from Arlington called upon you and inquired as to the reciprocity extended by Virginia to the taxicab operators of the District of Columbia. In your letter you propound the following questions:

"(1) Can a District cab come into Virginia without passengers and pick up passengers in Virginia destined for the District of Columbia or any part of Virginia?

"(2) Can they come to a Government installation, such as the Pentagon, with or without passengers, assume a position on a taxi stand and pick up passengers either for the District or to other places in Virginia?"

As you know, the honoring of tags issued by a foreign jurisdiction is a question of reciprocity existing between the two states. Certain privileges are extended by our statutes on condition that like privileges are extended the citizens of Virginia by the foreign jurisdiction. (Article 6, Chapter 3, Title 46, Code of Virginia). The Governor, with advice of the Reciprocity Board, has authority to enter into agreements with the other states (Section 46-22, Code of Virginia). In many instances,
formal agreements have been executed. Although the District of Columbia does not enter into formal reciprocal agreements, the Commissioners of the District of Columbia, through their designated agent, can extend to the residents of a state similar privileges which are extended to residents of the said District by other jurisdiction. The Commissioners or their designated agent shall, from time to time, ascertain such privileges and cause their (his) findings to be promulgated. (Section 40-303 Code of the District of Columbia).

Under date of September 24, 1947, the Commissioner of the Division of Motor Vehicles wrote to the Director of the Department of Vehicles and Traffic of the District of Columbia (designated agent of the Commissioners) that the Virginia Reciprocity Board met and set forth just what reciprocity would be extended to the residents of the District of Columbia by Virginia, provided similar privileges would be extended by the District of Columbia to residents of Virginia. Under date of October 15, 1947, the Director of Vehicles and Traffic of the District of Columbia notified our Commissioner of the Division of Motor Vehicles that the proposals of the Reciprocity Board on September 24, 1947, would be recognized effective immediately. The following is an excerpt from the said letter of September 24, 1947, which concerns the operation of taxicabs within the two jurisdictions:

"Taxicabs registered in Virginia carrying passengers into the District of Columbia and taxicabs registered in the District of Columbia carrying passengers into Fairfax and Arlington Counties or the City of Alexandria, Virginia, will be permitted on discharge of passengers to pick up return passengers to their respective jurisdictions, subject, however, to the following special provisions:

a. Taxicabs registered in one jurisdiction and entering the other jurisdiction for the discharge of passengers, will return immediately and directly to their respective jurisdiction of registration without cruising or parking or the soliciting of passengers to their own jurisdiction.

b. Taxicabs registered in one jurisdiction and entering the other jurisdiction for the purpose of discharging passengers will not be permitted to pick up or transport passengers intrastate.

c. Taxicabs registered in one jurisdiction will be permitted to enter the other jurisdiction to pick up passengers on telephone calls or by pre-arrangement.

d. Taxicabs registered in one jurisdiction and entering the other jurisdiction will not be permitted to pick up on the return trip a greater number of passengers than the law or regulations of the jurisdiction in which the passengers are picked up, permit.

e. Taxicabs registered in one jurisdiction and entering the other jurisdiction for the purpose of discharging passengers may, on the return trip, pick up and transport only passengers destined for the jurisdiction in which such taxicabs are registered.

f. Taxicabs operating under this arrangement will not be construed as engaging in or soliciting transportation intrastate within the two jurisdictions and will be required to register only in the jurisdiction in which the taxicab's principal business is conducted."

The answer then to question number one would be that the operator of a District of Columbia cab which comes into Virginia without passengers cannot pick up passengers in Virginia destined for any point within Virginia. The said cab, if it is called by a person in Virginia, can come into Virginia to pick up the passenger who called him and carry that passenger back to the District of Columbia.

The answer to question number two would be that a District cab coming to a
government reservation, such as the Pentagon, with or without passengers, can assume a position at the taxi stand and pick up passengers destined for the District of Columbia only.

I am advised by the Division of Motor Vehicles that within the last few days the Circuit Court of Arlington County convicted certain District of Columbia taxicab operators who were operating their taxicab business in Virginia. May I suggest that you check with that Court and ascertain just what the questions presented in those cases were and the actual decision rendered by the court.

NOTARY PUBLIC—Authority as conservator of peace; no authority to release person by taking recognizance. F-246

November 9, 1950.

Honorable Ligon L. Jones,
Commonwealth's Attorney for the City of Hopewell.

This is in reply to your letter of October 31, 1950, from which I quote as follows:

"Will you please advise me your opinion as to whether a notary appointed under Section 47-1 can lawfully hold himself out to the public as a 'conservator of the peace', or as a 'peace officer'?"

"You are also familiar with that portion of Section 18-9 providing that 'every conservator of the peace shall arrest without a warrant for felonies * * * breaches of the peace * * * misdemeanors * * * committed in his presence'; and with Sections 18-10 and 18-11 which provide for the conservator of the peace issuing warrants upon complaints and requiring recognizance; and also section 18-16 providing that conservators of the peace may require recognizance without process or further proof where a person makes an affray, etc., in the presence of the conservator."

"I would appreciate your opinion as to whether or not a Notary appointed under Section 47-1 may, in cases where he makes an arrest without warrant for a felony, breach of the peace or other misdemeanor committed in his presence, lawfully release such person from custody by permitting and taking from the arrested person a recognizance conditioned for the personal appearance before the trial justice court or other court having jurisdiction to try the offense for which the arrest was made."

In answer to your first question, this office has previously ruled that a notary public is only a conservator of the peace "while in the performance of the duties of his office." That opinion is not free from all doubt, however, as our Supreme Court, in the case of Withers v. Commonwealth, 108 Va. 837, indicated that the phrase quoted above which appears in §18-9 of the Code applies only to county surveyors and that the other persons named in the section are conservators of the peace at all times. However, in a more recent case, Hall v. Commonwealth, 179 Va. 652, the Supreme Court affirmed the action of a trial court in refusing to instruct the jury that a notary public is a conservator of the peace at all times, whether in the performance of his duties or not, and, hence, entitled to carry a concealed weapon. Our statutes, of course, provide that conservators of the peace may carry concealed weapons, but the Supreme Court said "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." In the light of this latter case and the considerable advance that has been made in the organization of courts and police facilities since the enactment of §18-9, it is
my opinion that a notary public should be considered a conservator of the peace only while in the performance of those duties normally performed by a notary public.

As to the power of a notary public to release persons from custody by taking recognizance, it is my opinion that a notary does not have such power at any time, and that the Legislature never contemplated their having any such power.

The sections of the Code to which you make reference which would seem to confer such power on a notary public were enacted into law as a part of Chapter XI of Chapter 311 of the Acts of Assembly of 1877-78. Section 18-10 of the Code of 1950 reads as follows:

“If complaint be made to any such conservator that there is good cause to fear that a person intends to commit an offense against the person or property of another, he shall examine on oath the complainant, and any witness who may be produced, reduce the complaint to writing, and cause it to be signed by the complainant; and if it appear proper, such conservator shall issue a warrant, reciting the complaint, and requiring the person complained of forthwith to be apprehended and brought before him or some other conservator.”

This section was originally §2-3 of the previously mentioned act of 1877-78. Section 16 of the same chapter (XI) of that act reads as follows:

“In all cases arising under this chapter, the justice before whom the person or persons so arrested shall be brought, shall examine into the case and dispose of the same according to law; and if he think the person so apprehended should be bound over to keep the peace and be of good behavior, he shall order him or her to enter into recognizance to that effect, in the manner now prescribed by law, and in default thereof such person may be committed to jail.”

It is my opinion that §16 clearly reveals that it was the intention of the Legislature that any person arrested under the said Chapter XI should be brought before a judicial officer. In the light of this, it is my opinion that the true meaning of §18-10 of the Code is that, if the complaint be made to a conservator of the peace, who is also a judge or justice, he shall require the person named in the complaint to be brought before himself, but if not a judge or justice he shall require the person to be brought before a conservator who is a judge or justice.

The confusion which exists was brought about when §16 of the act was carried over into the Code of 1887. At that time, the word chapter in §16 was changed to preceding section. By this change in the wording of §16 all connection between it and the earlier sections of the chapter was lost, so that in the Code of 1950 §16 is found as §15-572 and makes no reference at all of the powers of a notary public. However, it is my opinion that this change in the language of the act, which was apparently made as a purely mechanical operation in codifying the law, could not and did not operate to bestow upon a notary public such judicial powers as would appear to vest in him.

Even had the history of these sections failed to throw light on this problem, I am convinced that it was never contemplated that a notary public should have such broad powers as are apparently given him under the sections you mentioned. The Legislature has never provided any procedure whereby a notary public would account for funds in his hands, nor prescribed any fee for such services by a notary public, nor provided for any such procedure as is followed by all judicial officers, including justices of the peace. It is my opinion that, just as the Supreme Court said, “It was never intended that all Notaries Public in the State could go at all times armed,” it was likewise never contemplated that an independent system for the disposition of criminal matters by notaries public should be superimposed upon our regular court system.
NOTARY PUBLIC—Effect of enlistment in Navy. F-246

December 28, 1950.

MRS. THELMA YOUNG GORDON,
Secretary of the Commonwealth.

This is in reply to your letter of December 22, 1950, in which you enclose a letter from Mr. Graham Haynie of Roanoke, Virginia relative to the effect of enlistment in the Navy on one's status as a Notary Public.

Two questions are presented by the letters:

(1) Does enlistment in the Navy by a Notary Public forfeit his title to office or position or vacate the same?
(2) May a Notary Public appointed for the City of Roanoke continue to act as such while in the Navy outside the City of Roanoke or Roanoke County?

In my opinion both questions must be answered in the negative.

Section 2-27.1 of the Code of 1950, as amended, reads as follows:

“No State, county or municipal officer or employee shall forfeit his title to office or position or vacate the same by reason of engaging in the war service of the United States; and any such officer or employee who voluntarily or otherwise enters such war service may notify the officer or body authorized by law to fill vacancies in his office, of such fact, and thereupon be relieved from the duties of his office or position during the period of his war service; and the officer or body authorized to fill vacancies shall designate some suitable person to perform the duties of such office as acting officer during the period the regular officer is engaged in war service, and during such period the acting officer shall be vested with all the powers, authority, rights and duties of the regular officer for whom he is acting.”

In my opinion, under the provisions of this section, a Notary Public does not forfeit his title to office merely by reason of entry into the Armed Forces and, if he does not care to avail himself of the proviso concerning relief from duty, he is under no obligation to do so inasmuch as no particular handicap or inconvenience to the Commonwealth will result by his continuing to hold office while away on military or naval duty.

It is clear under the provisions of Title 47 of the Code of 1950 that unless a notary is appointed for the State at large he may only act within the city or county for which he is appointed or counties or cities contiguous thereto. This office has previously expressed this view. I conclude, therefore, that a notary public who enlists in the Armed Forces could continue to act as notary public only while within the territorial limits in which he could previously act.

NURSE EXAMINERS, STATE BOARD OF—May permit Licensed Attendant Nurses to qualify as practical nurses. F-294

March 6, 1951.

MRS. KATHERINE R. GARY, R. N.,
Assistant Secretary, State Board of Nurse Examiners.

This is in reply to your request on behalf of the State Board of Nurse Examiners that this office render an opinion as to whether the Licensed Attendant
Nurses may transfer and qualify as practical nurses under the Code of Virginia.

You state that there are a number of "Licensed Attendants" who were trained under a program approved by the State Board of Examiners of Nurses, satisfactorily completed a fifteen to eighteen months' course in technical and practical nursing under a program approved by the State Board of the Examiners of Nurses, and passed the required examinations. You further state that the State Board no longer continues the operation of training centers for "Licensed Attendants."

Section 54-348 of the Code states as follows:

"An applicant who desires to be licensed as a registered practical nurse shall furnish satisfactory evidence that she is at least eighteen years of age, is of good moral character, is in good physical and mental health, has completed at least the elementary grades in school or the equivalent thereof, and has successfully completed a period of not less than nine months of training under a program approved by the State Board of Examiners of Nurses."

The various requirements set forth by this section would have to be substantially complied with. The applicant should furnish satisfactory evidence that she is at least eighteen years of age, is of good moral character, is in good physical and mental health, has completed at least the elementary grades in school or the equivalent thereof, and has successfully completed a period of not less than nine months of training for practical nursing under a program approved by the State Board of Examiners of Nurses. In connection with this latter requirement the facts appear that those persons desiring to transfer from "Licensed Attendants" to registered practical nurses have been trained under a program of technical and practical nursing approved by the State Board for periods in excess of nine months, which were from fifteen to eighteen months duration. It would be my view that such a course giving training in practical nursing with the approval of the State Board would be a substantial compliance with this latter qualification.

Section 54-343 provides as follows:

"The Board shall adopt rules and regulations for the examination of applicants for certificates to practice nursing of the sick in accordance with the provisions of this article; and may amend, modify and repeal such rules and regulations from time to time."

This section expressly gives broad authority to the State Board who may amend, modify and repeal rules and regulations relating to the examination of applicants in accordance with Article 1, Chapter 13, Title 54, Code of Virginia.

The facts also indicate that the applicants for transfer have successfully completed examinations equivalent to those required to be taken by registered practical nurses. It would be my opinion that, with the approval of the State Board, successful completion of the examinations formerly given to "Licensed Attendants" could be accepted as a satisfactory completion of the State Board examination for practical nurses.

Furthermore, it would be my recommendation that, in accordance with the broad authority granted to the State Board, rules or regulations be adopted by that Board to the effect that (1) evidence of a satisfactory completion of the former State Board examination for "Licensed Attendants" shall be for all purposes accepted as satisfactory completion of the State Board examination requirement for practical nurses; and (2) that the successful completion of the "Licensed Attendants" course in practical nursing for attendants for the sick under the program approved by the State Board of Examiners of nurses for at least nine months duration shall be accepted as a successful completion of the nine months training requirement for qualification as a registered practical nurse.
OFFICERS—Deputy treasurer must be resident of county he serves. F-130

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.

August 1, 1950.

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

"I have been requested by a county treasurer to seek your opinion as to whether a deputy treasurer appointed under the provisions of Section 15-485 of the Code of Virginia, 1950, has to be a legal resident of the county for which the treasurer is elected. The treasurer informs me of the following circumstances:

"He has one office assistant who has been in his employment since 1946. She was formerly a legal resident of the treasurer's county but moved to an adjacent county and established legal residence there although she has continued to work in the treasurer's office—but as an office employee rather than as a deputy.

"The person concerned is over twenty-one years of age and votes in the county in which she resides.

"The treasurer is aware of the fact that circumstances may arise through sickness or otherwise whereby he would be required to be absent from his office and would be unable to sign checks in payment of county obligations during such absence.

"The treasurer wishes to know whether he can legally appoint the aforementioned person—even though she is not a legal resident of his county—as his deputy and, with the consent of the Board of Supervisors, empower her to sign warrants and perform such other duties as he is allowed to delegate to a deputy during his absence. Your opinion with respect to this matter will be very much appreciated."

In a letter dated July 5, 1950, addressed to Honorable E. Hugh Smith, Judge, I expressed the opinion that a deputy treasurer is an officer within the meaning of Section 15-485 of the 1950 Code of Virginia. A copy of this opinion is enclosed.

Section 15-487 provides, in part, as follows:

"* * * Every county officer shall, at the time of his election or appointment, have resided six months next preceding his election or appointment, either in the county for which he is elected or appointed, or in the city wherein the courthouse of the county is, * * *"

Having reached the conclusion that a deputy treasurer is a county officer, it is clear from the foregoing section that such officer is required to reside in the county for which he is appointed or in the city wherein the courthouse of the county is located.

OFFICERS—How vacancy in office of Mayor filled. F-60b

HONORABLE R. S. WEAVER, JR.,
Trial Justice of Victoria.

August 1, 1950.

This is in response to the inquiry submitted by you and Mr. G. R. Marshall, Treasurer-Clerk of the Town of Victoria.

The facts stated, insofar as here material, are as follows:
At the election on June 13, 1950, Honorable Edward L. Gee was reelected to the office of Mayor for a term of two years to begin on September 1, 1950. Mr. Gee died on July 19, 1950, without having qualified for the new term to which he had just been elected.

The Town Council desires my opinion as to the proper procedure to pursue in selecting Mr. Gee's successor for the term beginning on September 1st. Section 25 of the Charter of the Town of Victoria provides that:

"In case a vacancy shall occur in the office of Mayor, the vacancy shall be filled by the appointment by the Town Council of anyone eligible to such office."

Section 15-423, Code of 1950, insofar as pertinent, reads as follows:

"A vacancy in the office of Mayor may be filled by the Council from the electors of the Town."

Upon the failure of a duly elected Mayor to qualify for that office on or before the day on which the term to which he has been elected begins, the office shall be deemed vacant. At present there is no vacancy in the office for the term to begin on September 1st.

Under both the charter and Code provisions cited, authority is vested in the Council to fill the vacancy in the office of Mayor from the electors of the town when that vacancy comes into existence on September 1, 1950. The only qualification prescribed is that the person elected or appointed by the Council be from the electors of the town.

ORDINANCES—Dogs running at large—Publication of intention to propose.

F-95

March 14, 1951.

Honorale William R. Blandford,
Commonwealth's Attorney for Powhatan County.

This is in reply to your letter of March 7, 1951, which reads as follows:

"The Board of Supervisors of Powhatan County enacted a law prohibiting dogs from running at large in Powhatan County in conformity with Section 29-194 of the Code of Va. In so doing they did not give a notice of an intention to propose this law for passage as is specified in section 15-8 of said Code which gives the general powers of Boards of Supervisors.

"Does section 15-8 apply as far as the notice is concerned when a Board of Supervisors passes the law as specified in section 29-194 of the said Code?"

Section 29-194, which was enacted in 1934, is an "Enabling Act" which authorizes the governing body of the various counties in their discretion to prohibit the running at large of dogs during such months as they may designate. It does not contain any provision dispensing with compliance to the usual formalities required in the enactment of ordinances. This office has heretofore ruled in analogous cases that the board of supervisors should comply with the provisions of the last paragraph of §15-8. See page 18 of the opinions of the Attorney General, 1941-42.
PAINT LAWS—Use of words “state inspected and approved” in advertisement unlawful. F-4

April 9, 1951.

Mr. Rodney C. Berry,
State Chemist.

This is in reply to your recent letter in which you requested my opinion as to whether or not an advertisement, inserted in a newspaper to promote the sale of house paint, which contains the words “State Inspected and Approved”, would be a violation of the Virginia Paint Law.

The Virginia Paint Law, as enacted by the General Assembly of 1950, is found as Chapter 5.1 of Title 59 of the Code of Virginia. The provisions pertinent to your inquiry read as follows:

“Section 59-61.2. Definitions.—For the purpose of this chapter:

"(11) The term ‘labeling’ means all labels and other written, printed or graphic matter—
(a) Upon the paint, paint oil or turpentine or any of its containers or wrappers;
(b) Accompanying the paint, paint oil or turpentine at any time; or
(c) Pertaining whatsoever to the paint, paint oil or turpentine.

“(12) The term ‘misbranded’ shall apply—
(a) To any paint, paint oil or turpentine—
(i) * * *
(ii) If its labeling bears any reference to registration under this chapter, *[italics supplied]*

“Section 59-61.3. Prohibited Acts.—It shall be unlawful for any person to distribute, sell or offer for sale within this State or, except with authority of the Commissioner, to deliver for transportation or transport in intrastate commerce or between points within this State through any point outside this State any of the following:

(1) * * *
(3) Any paint, paint oil or turpentine which is misbranded; * * *.”

In my opinion the term “labeling” as defined above includes an advertisement of the kind to which you refer since it clearly pertains to the paint which the dealer offers for sale. Furthermore, since the State approves no paint, I am of the opinion that the words, “State Inspected and Approved” must necessarily be a reference to the registration required under the Virginia Paint Law.

It follows then that the use of such words constituted “misbranding” as that term is defined in the Law and that the advertisement under consideration here has been used in violation of Section 59-61.3 quoted above.

PARDON, PROBATION AND PAROLE—Prisoner serving life sentence may not receive any credit for blood donations, etc. F-75b

July 3, 1950.

Honorable Richard W. Copeland,
Director, Department of Welfare and Institutions.

This is in reply to your letter of June 12 in which you requested my advice as to whether or not, under the provisions of Section 53-220 of the Code, the State
Board of Welfare and Institutions in an appropriate case, may, with the consent of the Governor, allow any credit on the term of confinement of a prisoner serving a life sentence by commuting such sentence to a term of a specific number of years. Section 53-220 of the Code is as follows:

"The State Board, with the consent of the Governor, may allow to any prisoner under its control who renders assistance in preventing the escape of another prisoner or in the apprehension of an escaped prisoner, or who gives a blood donation to another prisoner, or who voluntarily or at the instance of the prison officials renders other extraordinary services, or who while in the prison system suffers bodily injury, a credit upon his term of confinement of such period of time as the Board in its discretion determines for each such service or injury. Any credit allowed under the provisions of this section shall also be considered as reducing the term of imprisonment to which the prisoner was or is sentenced for the purpose of determining his eligibility for parole."

It is my opinion that the above-quoted section is applicable to prisoners who are confined for a specific number of years and, as a practical matter, could not be applied when a prisoner is serving a life sentence.

As you know, persons sentenced to life imprisonment are not eligible for parole. Therefore, I am of the opinion that the only recourse open to the prisoner in question would be an application for a pardon directed to the Governor.

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PENITENTIARY—Prisoners as witnesses in civil cases. F-75—F-293

MR. FRANK W. SMYTH, JR.,
Superintendent, Virginia State Penitentiary.

November 9, 1950.

This is in reply to your letter of October 23, 1950, which reads as follows:

"Quite frequently the question arises at this institution as to releasing felon prisoners who are wanted in the various courts of Virginia as witnesses in civil cases.

"The law seems to be clear as to the procedure for releasing felon prisoners as witnesses in criminal cases, but there is some question in my mind as to the procedure for the release of inmates from the Penitentiary in civil cases.

"I would like to refer you to Chapter 14, Sections 53-301 and 53-302. This seems to be perfectly clear as to criminal cases. Chapter 9, Section 19-236 has reference to witnesses in criminal as well as civil cases, and refers to Section 8-294 and 8-296 through 8-303, which applies in criminal as well as civil cases in all respects.

"I would like to have an opinion, in consideration of all the statutes quoted above, as to my authority in releasing prisoners as witnesses in civil cases, and who should bear the cost, transportation, and so forth, for transporting the prisoners from the Penitentiary to the Court and returning them to the institution.

"The question has arisen as to whether the cost should be borne by the individual having the summons issued, or whether it should be borne from the criminal expense fund."

Sections 8-300 and 19-236 to which you refer read as follows:

"Whenever the Commonwealth or a defendant in a criminal prosecution
in any court of record in this State shall require as a witness in his behalf, a convict or jail prisoner in the penitentiary, or on the State farm, or in a State convict road camp, the clerk of such court, on the application of such defendant or his attorney, or the attorney for the Commonwealth, shall issue a summons for such witness and place it in the hands of the sheriff of the county, or sergeant of the city, as the case may be, who shall go where such witness may then be, serve him with such summons, and carry him to the court to testify as such witness, and after he shall have so testified and been released as such witness, carry him back to the place whence he came, for all of which service such officers shall be paid out of the criminal expense funds in the State treasury such compensation as the court in which the case is pending may certify to be reasonable."

"Sections 8-294 and 8-296 to 8-303, inclusive, shall apply to a criminal as well as a civil case in all respects, except that a witness in a criminal case shall be obliged to attend, and may be proceeded against for failing so to do, although there may not previously have been any payment, or tender to him of anything, for attendance, mileage, or tolls."

Since it is apparent that §8-300 applies to criminal cases as originally enacted, the only possible purpose for that section having been included in the provisions of §19-236, in my opinion, was to make it apply to civil cases also. Following this reasoning, it is my conclusion that you are authorized to release prisoners as witnesses in civil cases and that the costs incident to their travel may be paid out of the criminal fund. However, I believe it would be proper for the court in a civil case to require the party requesting the presence of such witness to advance such costs in order that the State may be reimbursed.

This conclusion is bolstered by the fact that the statutes governing the use of depositions in civil cases make no provision for the use of the deposition of convicts, and it is my opinion that a defendant in a civil action should have some method of presenting to the court the testimony of a convict if such testimony is material to the case.

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PENSIONS—Confederate veterans—Divorced daughter of not eligible for.

F-191

Honorable Henry G. Gilmer,
State Comptroller.

I am in receipt of your letter of August 3 which was delivered by you on August 10.

You state that you have under consideration an application for pension from a lady who is a daughter of a Confederate Veteran, has a living husband from whom she has been divorced and who is physically incapacitated to provide any support whatever.

Quoting from your letter, your request is as follows:

"The question we submit to you for your opinion, in view of the fact that the applicant is divorced, could she be considered a widow by a liberal interpretation of the law, and therefore entitled to the Confederate pension. The practical application of this feature of the Confederate pension law up until several years ago was interpreted to apply to needy maiden Confederate daughters, but the law was amended to include Confederate daughters who had become widows."

The current Appropriation Act, page 1345, provides:

" * * * for relief of needy Confederate women of Virginia, including
daughters of Confederate soldiers who are now widows, born not later than December 31, 1883." (Italics supplied)

It seems clear from the language quoted above that a daughter of a Confederate soldier is not included for relief unless she is a widow.

Webster defines a widow as a woman who has lost her husband by death. This is accepted as the legal definition and is supported by the overwhelming weight of authority.

It is equally well settled that, while an absolute divorce puts an end to the marital relationship, it does not make the divorced wife a widow, in legal contemplation.

I am of the opinion that in view of the facts stated by you the applicant cannot qualify as a widow under the quoted provisions of the Appropriation Act.

PHARMACY—Assistant Pharmacist from out-of-state not eligible for pharmacists' examination. F-198

MR. LINWOOD S. LEAVITT,
Secretary, Board of Pharmacy.

This is in reply to your letter of August 29, 1950, which reads as follows:

"The Board of Pharmacy has a request from a resident of North Carolina inquiring if a Registered Assistant Pharmacist of North Carolina is eligible for examination in Virginia as Registered Pharmacist.

"This applicant cannot meet today's standards for the Registered Pharmacist examination; however, an opinion is requested as to the eligibility of out of State Registered Assistant Pharmacists under Chapter 388, Section 1686, approved March 25, 1930, Acts of Assembly."

Chapter 388, §1686 of the Acts of Assembly of 1930 now appears as §54-425 of the Code of 1950, which reads as follows:

"Every person who is the holder of a certificate as a registered assistant pharmacist, issued prior to March first, nineteen hundred and thirty-five, shall be admitted to the registered pharmacist examination. After March first, nineteen hundred and thirty-five, the Board shall not issue an original certificate to any person as a registered assistant pharmacist; provided, however, that nothing in this section shall prevent any person who was registered as an assistant pharmacist prior to March first nineteen hundred and thirty-five, from continuing to practice as a registered assistant pharmacist."

The specific question raised by your letter is whether a person holding a certificate as a registered assistant pharmacist prior to March 25, 1930, in some state other than Virginia, may be admitted to the examination for registered pharmacists in Virginia.

It is my opinion that this question must be answered in the negative.

It should be noted that legally registered out-of-state pharmacists may be registered in Virginia "* * * provided that the applicant for such license shall present satisfactory evidence of qualifications equal to those required from licentiates in this State, and that he was registered or licensed by examination by the board of pharmacy in such other state, and that the standard of competence required in such other state is not lower than that required in this State."

No such proviso is included in §54-425 which deals with assistant pharmacists. The Legislature, by Chapter 464 of the Acts of 1924, had done away with all the alternative methods of qualifying for the registered pharmacy examination and had
provided that graduation from a school of pharmacy approved by the Board was the sole means of qualifying for the examination, and it is my opinion that the 1930 Act (§54-425) was enacted as a "grandfather's clause" to prevent undue hardship on persons in this State who had begun the two-year period of apprenticeship as assistant pharmacists which, under the old law, was an alternative method of qualifying for the registered pharmacy examination. I do not believe that the Legislature intended registered assistant pharmacists in other states to be entitled to take the Virginia pharmacy examination with no showing that the requirements for such certificate were equal to those in this State which required two years experience under a registered pharmacist.

It is, therefore, my opinion that persons registered as assistant pharmacists in other states are not eligible to take the registered pharmacist's examination.

PHARMACY AND DRUG ACT—Unlicensed employee of retail druggist may not compound medicines. F-134

Mr. F. W. McIntosh,
Inspector for Board of Pharmacy.

This is in reply to your letter of June 27, 1950, which reads as follows:

"As an Inspector for the State Board of Pharmacy I will be glad if you will give an opinion as to whether or not Section 1690 of the Pharmacy and Drugs Act of this state, grants to an employee of a Retail Druggist, the privilege of selling, compounding or manufacturing in the regular course of business, any pharmaceutical preparations, or any patent or proprietary preparations that conform to the requirement of this chapter, and the sale of which is not in conflict with any of its provisions.

"Does this section in any way conflict with the enforcement of Section 1682, sub-section (a) of the aforementioned act?"

Section 1682(a) of the Code of 1942 which you refer to as Section 1682(a) of the Pharmacy and Drug Act is found in the Code of 1950, as Section 54-475, and reads as follows:

"Except as prescribed in this chapter it shall be unlawful for any person to practice as a pharmacist, or assistant pharmacist, or to engage in, carry on, or be employed in the dispensing, compounding or retailing of drugs, medicines or poisons within this State; the possession by any person in any place other than a private home or a place of storage, of a miscellaneous stock of bulk pharmaceuticals, drugs, or medicinal preparations not in original packages shall be prima facie evidence that such person is practicing pharmacy."

The other section of the Pharmacy and Drug Act referred to in your letter (§1690) is now Section 54-480.1 of the Code of 1950. The provisions contained in that Code section first appeared in our law as a part of Section 19 of Chapter II of Chapter 291 of the Acts of Assembly of 1908. Said section originally read as follows:

"Nothing in this act shall be construed to prevent or interfere with any retail druggist or wholesale dealers, or manufacturing concern or their employees from selling, compounding or manufacturing in the regular course of business, any pharmaceutical preparations, or any patent or proprietary preparations that conform to the requirements of chapter one of this act, and the sale of which is not in conflict with section twenty-one of chapter two,
or section one of chapter three of this act; or of chapter four of this act; or prevent the employment, by registered pharmacists of apprentices or assistants for the purpose of being instructed in pharmacy, but such apprentices or other unregistered employees or assistants shall not be allowed to prepare or dispense prescriptions or to sell or furnish medicines or poisons, except in the presence of and under the personal direction of a registered or registered assistant pharmacist." (Italics supplied).

In 1948, the portions of this section which have not been italicized were repealed. With modifications in language which are immaterial to this discussion the italicized language became Section 54-480.1 of the Code of 1950. When Section 19 of the 1908 Act is read in its entirety it can be readily seen that the italicized portions of the section did not authorize employees of retail druggists to compound, manufacture or sell pharmaceutical preparations because the latter part of the section specifically dealt with such employees and provided that they might perform such acts only under the personal supervision of a registered pharmacist. It is also clear that the italicized portion did not exempt employees of a retail druggist from the operation of the other provisions of the Pharmacy and Drug Law, because the remaining portion of the section is not in the form of an exception to the italicized portion but is an addition to it. The addition dealt specifically with employees of retail druggists.

In 1908 when this section became law it was impossible for one to become a registered pharmacist or registered assistant pharmacist in Virginia without two years practical experience in pharmacy under the supervision of a registered pharmacist. It was this requirement which necessitated the addition in Section 19 which refers to employees or apprentices in retail drug establishments. Later, however, the requirement of an apprenticeship was removed and, it is my opinion that the purpose of the Legislature in repealing the addition to Section 19 was to take away from a retail druggist the privilege of allowing unregistered employees and apprentices to compound and sell pharmaceutical preparations under the supervision of a registered pharmacist. In any event, since the italicized portion of the section did not apply to employees of a retail druggist when it was enacted, the repeal of the addition to the section would not operate to make the italicized portion now relate to employees of retail druggists.

I am, therefore, of the opinion that the employees of a retail druggist are not privileged to sell, compound or manufacture pharmaceutical preparations or patent or proprietary preparations by the terms of Section 54-480.1, and that the section is not in conflict with the provisions of Section 54-475.

PHYSICIANS—Advertising, unprofessional conduct. F-182

Dr. K. D. Graves,
Secretary-Treasurer, Board of Medical Examiners.

This is in reply to your letter of July 15, from which I quote as follows:

"An individual who is licensed by this Board runs paid advertisements in the newspaper in which he does not himself make extravagant claims but publishes letters purporting to be from individuals who make these claims for him. The statements are grossly improbable and extravagant and have a tendency to deceive or defraud the public and to impose upon credulous or ignorant persons. The gist of the matter is that he does not himself make the statements but publishes them over the signature of various individuals who no doubt wrote the letters, and signs his name to the advertisement thereby
carrying with it the implication that he endorses these extravagant statements as to his ability to treat certain diseases.

"Will you kindly inform us whether in your opinion this is a violation of the law?"

Section 54-316 of the Code of 1950 provides that the State Board of Medical Examiners may suspend or revoke any certificate or license held by any person who is guilty of unprofessional conduct as defined by Section 54-317 of the Code. Subsection (5) of Section 54-317 provides that a practitioner shall be considered guilty of unprofessional conduct if he:

"Issues, publishes, broadcasts by radio or otherwise, or distributes or uses in any way whatsoever advertising matter in which grossly improbable or extravagant statements are made, or which have a tendency to deceive or defraud the public or to impose upon credulous or ignorant persons, or in which mention is made of venereal diseases, disorders of the genito-urinary organs or chronic ailments;"

It is noted that the above-quoted provision applies to any practitioner who publishes or "uses in any way whatsoever advertising matter in which grossly improbable or extravagant statements are made." The individual in question, according to the facts set forth in your letter, clearly appears to be guilty of unprofessional conduct as defined by subsection (5) of Section 54-317, since, in my opinion, the fact that he publishes letters over the signature of various persons who wrote the letters is immaterial.

Therefore, I am of the opinion that the Board would be justified in instituting proceedings in accordance with Section 54-319 of the Code in order to suspend or revoke the license of this individual.

PINE TREE LAWS—Act applies to all lands where loblolly or shortleaf pine occur. F-220

May 10, 1951.

MR. GEORGE W. DEAN,
State Forester.

This is in reply to your letter of April 24, 1951, which reads, in part, as follows:

"The General Assembly of 1950 amended Chapter 4, Article 6, with the intent of requiring that pine seed trees be left standing on all acres where loblolly and/or shortleaf pine, either singly or together occurred. Through an oversight in drawing the amendments or through failure to delete somewhere along the line of legislative procedure, the words 'predominate as aforesaid' in Section 10-76 were retained in the revision.

"My query is, 'Do the words, predominate as aforesaid, mean that fifty-one percent or more of the trees on any acre must be loblolly or shortleaf pine before the Act is effective?"

Section 10-76 of the Code of 1950, as amended, reads as follows:

"Every landowner who cuts, or permits to be cut, or any person who is responsible for cutting, or actually cuts, or any person who procures another to cut, for commercial purposes, timber from one acre or more of land on any acre on which loblolly pine (Pinus taeda), or shortleaf pine (Pinus echinata), singly or together, occur, shall reserve and leave uncut and uninjured not less than four conebearing loblolly or shortleaf pine trees from
fourteen inches or larger in diameter on each acre thus cut and upon each acre on which loblolly and shortleaf pine, singly or together, *predominate as aforesaid*; provided that where there are not present four conebearing loblolly or shortleaf pine trees fourteen inches or larger in diameter on any particular acre, there shall be left uncut and uninjured in place of each cone-bearing loblolly or shortleaf pine tree of this required diameter class not present two such conebearing trees of the largest diameter less than fourteen inches in diameter. Such pine trees shall be for the purpose of reseeding the land and shall be healthy, windfirm, and of well developed crowns, evidencing seed bearing ability by the presence of cones in the crowns." (Italics added)

The 1950 Amendment to this Act substituted the word "occur" (seventh line of the section as copied here) for the phrase "predominate and represent fifty per centum or more of the total number of trees present thereon."

The words "predominate as aforesaid" which occur later in the Act are ambiguous now that the quoted phrase has been removed from the Act.

A fair reading of the entire section and consideration of the obvious purpose of the 1950 Amendment leads me to conclude that no effect can now be given the words "predominate as aforesaid" and that those words should be construed as meaning "occur as aforesaid."

PINE TREE LAWS—Commonwealth's attorney should enforce forfeiture.
F-220

MR. GEORGE W. DEAN,
State Forester.

November 30, 1950.

This is in reply to your letter of November 22, 1950, which reads in part as follows:

"During the past four months there have been before the Dinwiddie trial justice court three persons charged with violation of the Pine Seed Tree Act, Title 10, Chapter 4, Article 6, as amended by the 1950 General Assembly. The trial justice found each person guilty and fined each one $25.00. It is my understanding that the fines have not yet been paid. Upon inquiry the trial justice advises that he cannot collect the forfeiture since it is a civil matter, and the Commonwealth Attorney advises that he cannot collect it since he is not bonded to do so.

"Is there any action that may be taken which will insure that the convicted defendants will pay the forfeitures?"

Section 10-79 of the Code of 1950 reads as follows:

"Any person violating any of the provisions of this article shall forfeit to the Commonwealth the sum of two dollars and fifty cents for each such seed tree cut from the land on which it is required by this article to be left, which forfeiture may be recovered on the complaint of any person before the trial justice of the county in which such land is located. It shall be the duty of the Commonwealth's attorneys for the several counties to institute and prosecute proceedings for the recovery of forfeitures under this article."

It is my opinion that inasmuch as the Trial Justice is authorized to impose this forfeiture he is also authorized to accept payment of the forfeiture if voluntarily made. However, if the defendant refuses to make the payment the statute provides that it is the *duty* of the Commonwealth's Attorney to institute proceedings for the recovery of the forfeiture. Since the amounts involved in the cases presented are in
excess of twenty dollars such proceedings should be brought in the Circuit Court. This latter point was discussed in my letter to you under date of October 2, 1950. I know of no requirement that the Commonwealth's Attorney be bonded to institute and prosecute the proceedings for the recovery by this forfeiture. The Commonwealth's Attorney would not himself receive the payment but would only take the necessary steps to see that payment is made to the Court.

PINE TREE LAWS—Enforcement of forfeiture by Trial Justice. F-220

Mr. George W. Dean,
State Forester.

October 2, 1950.

This is in reply to your letter of September 22, 1950, signed by S. G. Hobart, in which you request certain information with respect to the enforcement of the forfeiture for the destruction of seed pine trees which is provided for by §10-79 of the Code.

Under date of August 16, 1950, an opinion was rendered to you to the effect that such forfeiture should be enforced by a civil action.

The question now presented is whether, in such proceeding, the defendant is entitled to a trial by jury.

Section 19-299, which was set forth in my earlier opinion, provides that in such cases recovery may be had by warrant if limited to an amount not exceeding twenty dollars, and if not so limited by action of debt, action on the case, or by motion.

Section 19-302, which also refers to proceedings for the recovery of such forfeitures, reads as follows:

"In every such action or motion except where the recovery is limited to an amount not exceeding twenty dollars and upon every presentment, indictment or information, a jury shall be impaneled to try the facts, if an issue of fact be made by the pleadings or if a jury be demanded by the defendant. In every case wherein a jury is so impaneled they shall ascertain the amount of the fine, unless it be fixed by law. Judgments shall be entered for the amount so ascertained."

The reason for the insertion of the twenty-dollar limitation in the two statutes referred to above becomes apparent when consideration is given to the provisions of §16-12 which section sets forth the jurisdiction of the trial justice courts. In so far as is material to this opinion, §16-12 reads as follows:

"Any claim * * * to any debt, fine or other money, * * *, shall if the amount of such claim does not exceed twenty dollars when the claim is to a fine, * * * be cognizable by a trial justice. * * *." (Italics added)

The Supreme Court of Appeals of Virginia, in the case of Western Union Tel. Co. v. Pettyjohn, 88 Va. 296, held that a pecuniary forfeiture, similar to that under consideration here, is a "fine" within the meaning of §16-12 and that, therefore, a trial justice has no jurisdiction over an action to enforce such forfeiture in an amount exceeding twenty dollars.

It is, therefore, my opinion that cases involving a forfeiture of twenty dollars or less, under §10-79, may be tried on a warrant before the trial justice and, of course, without a jury. In those cases in which the forfeiture would be in excess of twenty dollars the action should be brought in the Circuit or Corporation Court, and the defendant would be entitled to a jury trial as provided in §19-302.
This is in reply to your letter of August 11, 1950, which reads as follows:

"In the enforcement of Section 10-76 of the Virginia Code as amended by the 1950 General Assembly, the question has arisen on several occasions as to whether the warrant which the State Forester or his agent procures in the enforcement of this law should be a criminal action or a civil action. Your opinion on this matter will be appreciated and will enable us to proceed properly in procuring these warrants."

Section 10-76 of the Code to which you refer is found in Article 6 of Chapter 4 of Title 10 of the Code.

Section 10-79 of the Code is found within the same Article, Chapter, and Title, and reads as follows:

"Any person violating any of the provisions of this article shall forfeit to the Commonwealth the sum of two dollars and fifty cents for each such seed tree cut from the land on which it is required by this article to be left, which forfeiture may be recovered on the complaint of any person before the trial justice of the county in which such land is located. It shall be the duty of the Commonwealth's attorneys for the several counties to institute and prosecute proceedings for the recovery of forfeitures under this article." (Italics supplied)

The procedure to be followed in recovering "fines" due the Commonwealth is outlined in Chapter 13 of Title 19 of the Code, and those sections pertinent to this opinion are as follows:

"§19-298. Word 'fine' construed.—Wherever the word 'fine' is used in this chapter it shall be construed to include pecuniary forfeiture, penalty, and amercement." (Italics supplied)

"§19-299. Fines to be to State; how recovered; in what name.—When any statute imposes a fine, unless it be otherwise expressly provided or would be inconsistent with the manifest intention of the General Assembly, it shall be to the Commonwealth and recoverable by presentment, indictment, or information. When a fine without corporal punishment is prescribed, the same may be recovered, if limited to an amount not exceeding twenty dollars, by warrant, and if not so limited, by action of debt or action on the case, or by motion. The proceedings shall be in the name of the Commonwealth. No action, suit or proceeding of any nature, however, shall be brought or had for the recovery of a fine or costs due the Commonwealth or any political subdivision thereof, unless within twenty years from the date of the judgment imposing the fine." (Italics supplied).

You will observe from the underscored portions of the two sections above that in the event the forfeiture involved were for an amount in excess of twenty dollars it would be recoverable by a civil action (debt, action on the case or motion) and it is, therefore, my opinion that, if the amount involved were twenty dollars or less, the warrant on which it is recovered should be a civil warrant.
REPORT OF THE ATTORNEY GENERAL

PINE TREE LAW—Forfeitures for violation go to Literary Fund. F-220

HONORABLE CHARLES H. WILSON,
Commonwealth Attorney for Nottoway County.

This will reply to your letter of October 27th from which I quote as follows:

“As Attorney for the Commonwealth I am in possession of check of W. S. Ellis in the sum of $20.00, for violation of Pine Tree Seed Act on timber that Ellis cut on the property of William Warriner, Crewe, Virginia. I forwarded this check to Mr. Robert P. Brierley, District Forester, Farmville, Virginia, and he returned the check to me.

“I shall appreciate it very much if you will advise the proper disposition of said check.”

The Pine Tree Seed Act as originally passed was repealed by Chapter 498 of the Acts of 1948, and was again amended by Chapter 46 of the Acts of 1950. (Code Sections 10-75 through 10-83). The forfeiture of $2.50 for each such seed tree cut was changed to $10.00 for each such seed tree by the 1950 amendment. The act makes no provision for the disposition of the forfeiture which is provided for in Section 10-79.

Section 134 of the Constitution of Virginia provides in part as follows: “The General Assembly shall set apart as a permanent and perpetual literary fund; * * * the proceeds of * * *; of all property accruing to the State by forfeiture, * * *.”

There appears to be no question but that the $20.00 check is a forfeiture. I am, therefore, of the opinion that the check should be paid into the State Treasury to the credit of the Literary Fund.

PROCESS—Service of—Who to serve. F-85

HONORABLE ROBERT L. DEHAVEN,
Sheriff of Frederick County.

This is in reply to your letter of August 17, 1950, which reads, in part, as follows:

“1. Is it legal for all law enforcement officers to serve subpoenas for witnesses in criminal cases?

“2. Is it legal for all law enforcement officers to serve capias pro fine?

“3. Or, are services on the above confined to civil officers only?”

Section 19-236 of the Code of 1950 provides that the provisions of §8-296 shall apply to criminal cases. Section 8-296 in turn provides that a summons may be issued to compel the attendance of witnesses and that such summons shall be directed as prescribed by §8-44. The pertinent portion of §8-44 reads as follows:

“Process from any court, whether original, mesne, or final, may be directed to the sheriff or sergeant of any county or city. It shall, if returnable to rules, be issued before the rule day to which it is returnable, and may, except when otherwise provided, be executed on or before that day. If it appear to be duly served and good in other respects, it shall be deemed valid although not directed to any officer, or if directed to an officer, though executed by some other person. * * *.” (Italics supplied)

It would seem that, while a summons to compel attendance of a witness must
be directed to the sheriff or sergeant of any county or city, it may be validly served by some other person.

As to your second question, §19-322 of the Code provides:

"Any writ of fieri facias or capias pro fine on a judgment for a fine may be directed to the sheriff or sergeant of any county or city, who shall be entitled to a commission of five per cent, on the amount collected to be paid by the defendant as other costs are paid."

A capias pro fine is a form of process from a court, and it is my opinion that the provisions of §8-44 which make service by "some other person" valid apply to this type of process also. This conclusion is bolstered by the language of §19-328 which reads, in part, as follows:

"Every sheriff or other officer receiving money under a writ of fieri facias or capias pro fine shall ***." (Italics supplied)

PUBLIC OFFICERS—Eligibility—Must be qualified to vote. F-33

HONORABLE E. BLACKBURN MOORE,
Speaker, House of Delegates.

May 16, 1951.

This is in reply to your letter of May 14, 1951, which reads as follows:

"One of the members of the Board of Supervisors of Clarke County recently died and the Judge wishes to appoint some one for the unexpired term and of course there will be a candidate for the regular term.

"A resident of this County, Hobson McGehee, did not pay his 1950 poll tax before May 5th., and had declared his residence in Mississippi for the year 1950, in which state he made out and filed his income tax report. He made out a non-resident income tax report for the state of Virginia. He did not move his registration from Berryville, Virginia. He is still registered here. He is assessed for the year 1951 in the state of Virginia and wants to qualify for 1951. The question I would like an answer from you is, is there any way that he can qualify to run for member of the Board of Supervisors of the county in the August primary of 1951? Is he eligible to be appointed to fill the unexpired term of a deceased member of the Board? Mr. McGehee has been living most of the time since last August of 1950 in the County of Clarke."

Section 32 of the Constitution of Virginia, which sets forth the qualifications of officers in the State, reads in part as follows:

"Every person qualified to vote shall be eligible to any office of the State, or of any county, city or town or other subdivision of the State, wherein he resides, except as otherwise provided in this Constitution, ***." (Italics added)

You point out in your letter that Mr. McGehee did not pay his poll tax before May 5 and he is, therefore, not qualified to vote in either the August primary or the November general election. (Constitution, §21). Since he is not at this time qualified to vote, it would appear that he cannot meet the qualifications for office set forth in §32 of the Constitution, and is, therefore, ineligible either for election or appointment to office until such time as he becomes fully qualified to vote.
PUBLIC OFFICERS—Federal civilian employee may not serve on Board of Supervisors. F-249

HONORABLE RICHARD C. RICHARDSON,
Commonwealth's Attorney for New Kent County.

I am in receipt of your letter of May 28 in which you ask if a Federal civilian employee at Fort Eustis under the civil service may at the same time hold office as a member of the Board of Supervisors. In my opinion §§2-26 and 2-27 of the Code require your question to be answered in the negative. Section 2-29 of the Code makes certain exceptions to the prohibitions contained in §2-27 against officers and employees of the United States holding constitutional State and local offices, but none of these exceptions seems to cover the case you put.

PUBLIC OFFICER—Member of Highway Commission may not serve on School Trustee Electoral Board. F-249

HONORABLE GEORGE S. ALDHIZER, II,
Member of the House of Delegates.

I am in receipt of your letter of May 14th from which I quote as follows:

"Will you kindly advise me whether a member of the State Highway Commission is eligible to serve as a member of a school trustee electoral board.

"In other words, may one person serve in both capacities at the same time?"

Section 22-60 of the Code, dealing with the appointment of a School Trustee Electoral Board, provides that it shall be composed of three resident qualified voters "who are not county or state officers". A member of the State Highway Commission is appointed by the Governor for a term of four years, subject to the confirmation of the General Assembly. He is required to give bond and the General Powers of the Commission are prescribed by statute. It is my opinion that a member of the Commission is clearly a state officer and, in view of the quoted provision of section 22-60, not eligible to be appointed as a member of a School Trustee Electoral Board.

PUBLIC OFFICERS—Substitute trial justice may be candidate for Commonwealth's attorney. F-100b

HONORABLE HENRY S. HATHAWAY,
Substitute Trial Justice of Reedville.

I am in receipt of your letter of May 28th from which I quote as follows:

"I am at this time Substitute Trial Justice of Lancaster and Northumberland Counties. I anticipate becoming a candidate for the office of Commonwealth Attorney of Northumberland County, subject to the primary to be held August 7, 1951."
"I would like to have your opinion as to whether or not I may be a candidate for Commonwealth Attorney at the same time that I am Substitute Trial Justice for Lancaster and Northumberland Counties."

In view of Section 15-486 of the Code a person may not hold the office of Attorney for the Commonwealth and that of Substitute Trial Justice at the same time. However, I know of no statute which would prohibit you from becoming a candidate for the office of Attorney for the Commonwealth while you are holding the office of Substitute Trial Justice.

PUBLIC OFFICERS—Superintendent of Welfare Board may seek election to board of supervisors, if elected he vacates former office. F-249

January 9, 1951.

HONORABLE CLIFTON C. SIMMS, Treasurer for Grayson County.

This is in reply to your letter of January 4, 1951, from which I quote as follows:

"Will you please give me a ruling on the following question:
"Would it be legal for a man who is actively serving as Superintendent of the Welfare Board to enter into a political race to run for Supervisor in the District where he lives?"

The answer to your question must be in the affirmative. The mere fact that a person holds one office does not make it illegal for him to seek election to another; however, it is my opinion that should such person be elected to the Board of Supervisors and qualify for that office, he would vacate his office of Superintendent of Public Welfare under the provisions of §15-486 of the Code which reads as follows:

"No person holding the office of county treasurer, sheriff, attorney for the Commonwealth, county clerk, commissioner of the revenue, superintendent of the poor, county surveyor, or supervisor shall hold any other office, elective or appointive, at the same time, except:
"(1) That of a city or town attorney, notary public, commissioner in chancery, commissioner of accounts, local registrars of deaths and births, or member of any commission or board appointive by the Governor,
"(2) That a commissioner of the revenue of a county may also be commissioner of the revenue of a town located in the county, and a county treasurer of a county may also be treasurer of a town located in the county,
"(3) That game wardens may be employees of the federal forest reserve,
"(4) That a county surveyor may, at the same time, hold the office of county surveyor of another county or of oyster inspector and
"(5) That any deputy sheriff of a county may hold the office of town sergeant of any town within such county.

"If any person shall be elected or appointed to two or more offices except as herein provided, his qualification in one of them shall be a bar to his right to qualify in any of the offices enumerated, and if any person while holding any of such offices shall be appointed or elected to any other office, his qualification in such office shall thereby vacate any of the above offices he then holds, except as provided above." (Italics supplied)
I am in receipt of your letter of March 23, from which I quote in part as follows:

"I am writing to request your opinion with respect to the authority of a local board of public welfare to earmark local funds appropriated in lump sum for the operation of the programs administered by the local board. We have recently had inquiries from two or three localities with respect to this matter.

"Section 63-105 of the Code deals with the responsibility of local governing bodies to appropriate funds for public assistance including cost of administration. Sections 63-135 and 63-136 vests certain authority and responsibility in the State Board of Welfare and Institutions and the Commissioner of Public Welfare in event of failure on the part of local authorities to provide for the administration of old age assistance. These sections have been made applicable to Aid to the Permanently and Totally Disabled pursuant to the provisions of Section 63-220.1, enacted by the General Assembly of 1950. There are comparable sections with respect to aid to dependent children and aid to the blind. See Sections 63-157, 63-158, 63-199, 63-200 of the Code.

"Budget estimates covering the total operations of the local departments of public welfare are submitted annually by the local boards of public welfare and are reviewed by the State Department of Welfare and Institutions, except the estimates pertaining to aid to the blind, which are reviewed by the Secretary of the Virginia Commission for the Blind. Following such adjustments as may be indicated, the budgets are approved by the Commissioner of Public Welfare and by the Secretary of the Commission for the Blind. If local funds are appropriated in an amount sufficient to provide in full for the approved budget, the question I am raising does not occur. If, however, the local governing body appropriates an amount less than that approved by the Commissioner and the Secretary and if it later appears that the funds appropriated are insufficient and the local governing body fails to appropriate additional funds as needed, the question arises as to whether the local board of public welfare may allocate from the local appropriation sufficient funds to provide for the payment of general relief and foster care of children at a given rate for the entire twelve month period. There is, as you know, no provision for direct payment by the State Treasurer for these purposes as is provided with respect to old age assistance, aid to dependent children, aid to the permanently and totally disabled and aid to the blind. A local board of public welfare has remaining in its local appropriation approximately $1800 to cover estimated requirements of approximately $5500 for the remainder of this fiscal year. $1800 is more than sufficient to take care of the estimated local share of general relief and foster care for the remainder of the year but it is barely sufficient to provide one month's operation of the total program. The chairman of the local board of public welfare has asked whether his board has authority to use for general relief and foster care so much of the funds as now remain in the local appropriation as may be necessary for these programs, provided the expenditures for these programs are within the allocations approved by the Commissioner. The budget approved by the Commissioner and the Secretary called for local funds amounting to approximately $25,000. The board of supervisors appropriated $18,000 initially and $600 subsequently."

Under the circumstances, as stated by you, existing in the county to which you refer, relating to the local appropriation for the public welfare program, I can understand how it would facilitate the carrying out of this program if the local
The board of public welfare could take the action you suggest, that is, to use the remainder of the local appropriation for general relief and foster care and then invoke the provisions of Sections 63-136, 63-158 and 63-200 of the Code to secure sufficient local funds to provide assistance to the aged, dependent children and the blind. However, these sections may not be invoked unless the Board of Supervisors has failed or refused to appropriate the necessary funds for these categories of assistance. Section 63-136 deals with assistance to the aged and is as follows:

"For so long as such failure or refusal shall continue the State Board shall authorize and direct the Commissioner, under rules and regulations of the State Board, to provide for the payment of assistance in such county or city out of funds appropriated for the purpose of carrying out the provisions of this chapter. In such event the Commissioner shall at the end of each month file with the State Comptroller and with the board of supervisors, council or other governing body of such county or city a statement showing all disbursements and expenditures made for and on behalf of such county or city, and the Comptroller shall from time to time as such funds become available deduct from funds appropriated by the State, in excess of requirements of the Constitution of Virginia, for distribution to such county or city, such amount or amounts as shall be required to reimburse the State for expenditures incurred under the provisions of this section. All such funds so deducted and transferred are hereby appropriated for the purposes set forth in §63-109 and the first paragraph of §63-110 and shall be expended and disbursed as provided in §63-111."

Sections 63-158 and 63-200 dealing with aid to dependent children and to the blind are similar.

This office has heretofore ruled that a Board of Supervisors does not have to appropriate at one time such local funds as may be called for by the public assistance budget prepared by the local board of public welfare, and that the Board cannot be charged with non-compliance with the public assistance Act until the funds appropriated by it for expenditure under the Act become exhausted. I quote below from an opinion given to Dr. William H. Stauffer, Commissioner of Public Welfare, under date of September 30, 1938:

"In my opinion, the Act does not make it mandatory upon the Board of Supervisors to appropriate at one time such local funds as may be called for by the budget prepared by the local board of public welfare. It is true that Section 64 makes it mandatory upon the Board of Supervisors to appropriate such sums as shall be sufficient to provide for the payment of public assistance, including cost of administration.' But I do not think that this means that the Board of Supervisors is required to accept as a finality, for the purpose of making an appropriation, the budget submitted by the local board of public welfare. By way of illustration, let us suppose that the local board adopts a budget calling for an appropriation of $10,000 from county A. The Board of Supervisors of County A is perfectly willing to appropriate sufficient funds to meet the requirements of the Act, but think that possibly the amount of money provided for in the budget of the local board of public welfare will not be necessary or, for other reasons, does not deem it advisable to make the full appropriation at one time. I am of the opinion that the Board of Supervisors may make an appropriation of a less sum than $10,000. Until this lesser sum has been exhausted, I do not think that the Board has failed to comply with the provisions of Section 64 of the Act.

"If, however, the Board does not appropriate the amount required by the budget of the local board of public welfare, and the amount which it does appropriate becomes exhausted so as to result in the Board of Supervisors not providing a 'sufficient' sum as required by the Act, then I am of the opinion that the Board should make an additional appropriation to provide this 'sufficient' sum and, if it does not do so, it will result in a non-compliance..."
with the requirements of the Act such as to authorize invoking of the provisions of Sections 25, 35 and 55 of the Act.

"Summarizing, I do not think that the Board of Supervisors can be charged with non-compliance with the Act until in any year the funds appropriated by the Board for expenditure under the Act have become exhausted and there is need for the expenditure of additional funds."

I concur in the opinion given to Dr. Staufffer and must conclude, therefore, that in the case you put the local board of public welfare must exhaust the local appropriation before Sections 63-136, 63-158 and 63-200 can be invoked. This means that I do not think that the local board of public welfare can allocate the remainder of the local appropriation to general relief and foster care and then take the position that the county is guilty of non-compliance.

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PUBLIC WELFARE—Local boards—Reports to governing body of county mandatory and may not be omitted even with consent of such body. F-231 July 18, 1950.

Mr. H. S. Morgan,
Superintendent, Lunenburg County Department of Public Welfare.

I am in receipt of your letter of July 14 relative to Chapter 371 Acts of Assembly 1950.
I quote from your letter as follows:

"At a meeting of the Board of Supervisors of this county, held at Lunenburg Courthouse today, the Board discussed the above Act and it appears to be the concensus of the Board members that the Board does not care for the monthly reports such as are required in the above mentioned Act.

"The Clerk of the Board, Mr. J. T. Waddill, Jr., has suggested to me that I write to you with reference to this matter and ask you whether it is mandatory or optional, should the Board of Supervisors state in writing that they did not want the monthly report such as the Act requires, and allow the records to remain in the Welfare Office and accessible to the Board of Supervisors."

This Act has been codified and appears in the 1950 Cumulative Supplement to the Virginia Code as Sections 63-67.1, 63-67.2 and 63-67.3.

Section 63-67.1 is as follows:

"Each local board of public welfare shall, on or before the fifteenth day of each month, furnish the governing body of its county or city with a detailed report covering the month preceding that in which such report is made, and shall include therein, (a) receipts; (b) disbursements and the source from which they were derived; (c) administrative expenses; and (d) a list of the applicants for public assistance and the persons to whom such assistance was granted, including the amount of money, property or services received by each recipient."

The requirements of this section are mandatory and do not vest any discretion in the local Board of Public Welfare as to furnishing the reports to the governing body, or as to the specified items to be included therein. A written statement from the governing body that it did not desire the reports to be furnished as required by law would not relieve the local Board of the duty imposed upon it.
This is in reply to your letter in which you requested my opinion with reference to the terms of office of the members of the local boards of public welfare in counties.

As you pointed out, Section 6(c) of the Virginia Public Assistance Act of 1938 provided that the members of each local board of public welfare "shall be appointed one for a term of one year, one for a term of two years, and one for a term of three years" and that "subsequent appointments shall be for a term of two years each." You further pointed out that Section 6(c) of this Act was twice amended by the General Assembly of 1942. Both amendments retained those provisions of the original act quoted above and the first, Chapter 212 of the Acts of 1942, added a sentence to the effect that one member of the local board of public welfare shall be a member of the board of supervisors. The second amendment, Chapter 396 of the Acts of 1942, added still another provision requiring the judge in making the appointments for terms beginning July 1, 1942 to so arrange the membership so that a member of the board of supervisors shall at all times be a member of the local board of public welfare.

The language of the original act concerning the one, two and three-year appointments and the subsequent appointments for a term of two years was thus carried over in both the amendments of 1942, and your specific question is whether these amendments required the reappointment of an entirely new board of public welfare.

I concur with your conclusion that the intent of the Legislature was to get a member of the board of supervisors on the local board of public welfare, and that the appointing judge was required only to so arrange the membership beginning with the appointments of July 1, 1942, in order to assure this result. As you pointed out, to do this it was not necessary to rearrange or reappoint the entire board, since a term of one of its members expired on June 30, 1942, thereby making it possible for the appointing judge to obey the mandate of the General Assembly by appointing a member of the board of supervisors to fill the 1942 vacancy.

Therefore, it is my opinion, not only for the reasons expressed above, but also in view of the fact that the amendments of 1942 did not provide for the termination of all terms of office as of July 1, 1942, that the appointing judge was not required to make three new appointments beginning July 1, 1942 for one, two and three years respectively.

As you know, the language of the original Act of 1938 concerning the first appointments to the local boards of public welfare is also found in the Code of 1950 as Section 63-56 and provides that the members of such local boards first appointed under the provisions of Title 63 shall be appointed for one, two and three-year terms. Thus, a question similar to the one discussed above could be raised because of the enactment of the new Code. However, for the same reasons stated above, I am of the opinion that it was not the intention of the Legislature, by the enactment of the Code of 1950, to terminate all prior terms of office and to require that the first appointments under the new Code be for one, two and three years respectively. The Code revisors were simply carrying over into the Code the language of the original Act as amended. Therefore, it is my opinion that an appointing judge would be justified in considering the first appointments under the new Code as subsequent appointments, which are for terms of two years.
I am in receipt of your letter of January 29, in which you ask if the claim of the State against the estate of a recipient of old age assistance for the amount of assistance advanced during the lifetime of the recipient, which claim is authorized by Section 63-127 of the Code, takes precedence over the dower right of the widow of the deceased recipient. The estate of the deceased recipient consists of real estate.

In my opinion, your question must be answered in the negative. The dower of a surviving widow in the real estate of her deceased husband is an interest in such real estate which may only be defeated by one of the modes provided by law. This dower is paramount to debts incurred by the husband during coverture. See 3 Michie's Digest Virginia-West Virginia Reports, page 876, et seq.

PURCHASES AND PRINTING—Disposition of surplus property; "Trade-in" of used articles. F-227

HONORABLE A. B. GATHRIGHT,
Director, Division of Purchase and Printing.

This is in reply to your recent letter pertaining to section 2-265 of the Code which provides for the disposition of State owned surplus property.

You request my opinion on the following questions:

(a) Are sales by barter, wherein the Division releases title to State owned surplus property in exchange for like or dissimilar articles having comparable value, permissible under the law?

(b) Does the Division of Purchase and Printing have authority to dispose of by gift, destruction or discard surplus property so reported to it by the head of a department, division, institution or agency where evidence is to the effect that it has no saleable value commensurate with the expense of offering it for sale?

(c) Under date of November 8, 1948 your office in response to our request defined surplus property as including “all surplus tangible personal property in the possession of a State department, division, institution or agency when such properties are deemed to be surplus”.

Is a piece of used property listed for trade-in purposes on a purchase requisition for new equipment automatically “surplus property” for disposition by the Division of Purchase and Printing by sale or transfer as it elects, or does this form of “consent” restrict the Division to disposal for trade-in purposes only?

(d) Does the Division have any responsibility in the enforcement of the surplus property law? Is it a duty of the Division to investigate information that State property has been disposed of contrary to the provisions of the subject statute?

The word, sale, in its broadest sense, has been defined as the transfer of property for valuable consideration. However, the precise legal import of the word is the passing of property rights for money. A “barter” differs from a “sale” in that a barter is always property for property while a sale is of property for money. See, Danville v. Sutherlin, 20 Gratt. 553, 596.

Since section 2-265 provides that the proceeds derived from the sale of surplus property shall be paid into the State Treasury, it is clear in my opinion that barters
or exchanges are not permissible thereunder, and that surplus supplies or equipment must be sold for money.

The answer to your second question must also be in the negative. While, as a practical matter, I can readily understand the desirability of disposing of certain surplus property by gift, destruction, or otherwise, under the circumstances mentioned by you, I am unable to find any authority for such disposition and can only suggest that this matter be brought to the attention of the legislature at its next session.

It is my opinion that section 2-265 of the Code is not applicable to property used for trade-in purposes when such property is being replaced by property of like kind. Surplus equipment, as those words are used in section 2-265, imports what might be termed "true" surplus equipment, i. e., property which remains where its need no longer exists. For example, if a State agency simply buys a new typewriter to be used in place of an old one, the replaced typewriter may eventually become truly surplus property. On the other hand, if the State agency trades in the old typewriter at the time of the purchase of the new typewriter and, accordingly, receives an adjusted purchase price, there is but a single transaction and there is no surplus property to be sold.

Since the proceeds derived from the sale of surplus supplies and equipment must be paid into the general fund of the State treasury and cannot be credited to the appropriation of the agency to which the used property belonged, I am also of the opinion that section 2-265 should not be construed as applying to property listed for trade-in or sale purposes on a purchase requisition for new equipment of like kind, when the disposition of such property by sale rather than by trade-in would be more advantageous. In other words, the State agency requesting the purchase under such circumstances should receive the benefit of the amount derived from the disposition of the used property regardless of the method used for its disposal. To hold otherwise would tend to kill the incentive of the particular State agency to realize the highest possible price for the used property, for the tendency would undoubtedly be to request a trade-in rather than a cash sale in order to prevent the depletion of the appropriation to such agency as much as possible.

In view of the conclusions reached above, it would be my suggestion that, when the Division of Purchase and Printing receives a purchase requisition with used property listed thereon for trade-in purposes and has reason to believe that a cash sale would be more advantageous, the State agency concerned be notified and consent be obtained to dispose of the used property in that manner.

While Section 2-265 makes it mandatory for surplus supplies and equipment to be sold by the Comptroller, it is also to be noted that no surplus supplies or equipment shall be sold without the consent of the head of the agency having them in possession or unless ordered by the Governor. Such provisions, in my opinion, do not impose any responsibility for the enforcement of the surplus property law and I find no other related sections which would impose such a duty on your division. It must be assumed that the General Assembly intends every State agency to be familiar with the laws enacted by it and expects them to follow any mandate that might be imposed thereby.

However, I do feel that when the Division of Purchase and Printing has reason to believe that a State agency is contemplating the sale of, or has sold, surplus supplies and equipment contrary to law, it is your duty to call its attention to section 2-265 or to notify the Comptroller of its non-compliance, as the case may be.

RECORDATION—Agricultural chattel deed of trust may include automobile or truck if used as farm equipment. F-90a

HONORABLE H. B. McLemore, Jr.,
Clerk, Circuit Court of Southampton County.

January 24, 1951.

This is in reply to your letter of January 19th from which I quote the follow-

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"Please advise me whether or not a writing purporting to be an Agricultural Chattel Deed of Trust but which includes an automobile or a truck, in addition to crops and/or farm equipment and machinery, should be docketed in the Agricultural Chattel Deed of Trust Book.

"I contend that a deed of trust like the one described above should be recorded in the Miscellaneous Lien Book since an automobile or truck, in my opinion, does not come under the classifications mentioned in Section 54-44 of the Code. I also charge a recordation tax on the instrument when recorded in Miscellaneous Lien Book, but would like to know if I am correct in doing this."

Plainly Agricultural Chattel Deeds of Trust embraced within the provisions of Chapter 6 of Title 43 of the Code should be docketed in the Agricultural Chattel Deed of Trust Book mentioned in Section 43-53. The question of whether any particular instrument comes within the scope of the chapter must, of course, be determined by the facts in each particular case. Section 43-44 of the Code provides that any person may give as security "* * * chattel deed of trust on livestock, poultry, farm machinery, farm equipment * * *".

I can easily conceive of a situation where an automobile or a truck could be classified as farm machinery or equipment depending upon their use. If you have before you for docketing an instrument purporting to be an Agricultural Chattel Deed of Trust and you know of no facts which would indicate to you that the instrument is not what it purports to be, I am of the opinion that you would be entirely justified in docketing the instrument in the Agricultural Chattel Deed of Trust Book even though a part of the security consists of an automobile or truck.

If the instrument is docketed in the Agricultural Chattel Deed of Trust Book no regulation tax should be imposed. See the opinion of this office given to you under date of September 18, 1946.

RECORDATIONS—Deed embracing both real estate and personalty index in miscellaneous lien book. F-90

Honorable Thomas P. Chapman, Jr.,
Clerk, Circuit Court of Fairfax County.

I am in receipt of your letter of February 12, in which you ask for a construction of Section 17-61 of the Code as it relates to certain deeds of trust which have been offered for recordation. These deeds of trust are primarily given to secure loans on real estate, but they also embrace what are apparently certain items of personal property as security for the debt. As between the parties the instruments provide that these items of personal property shall be deemed to be fixtures and a part of the realty therein conveyed.

Your inquiry deals with the following proviso in Section 17-61:

"* * * provided, that if a deed, deed of trust, mortgage, contract or other writing conveys, relates to or affects, both real and personal property, it shall be recorded in the deed book only, but shall be indexed in the general index book and the book of miscellaneous liens."

Since the deeds of trust convey real estate, they are manifestly recorded in the deed book, but you desire my opinion on whether or not they shall be indexed in the miscellaneous lien book. It is my opinion that, where deeds of trust embrace property which is personal property as a matter of fact and of law, they should be also indexed in the miscellaneous lien book. Whatever effect the agreement between the parties to any particular instrument may be as between themselves, I do not think that the agreement can have the effect of converting personal property into real property within the meaning of the quoted language of the statute. I can see
how the rights of creditors who are not parties to the instrument might be seriously affected if a particular deed of trust embraced personal property if the instrument was not indexed in the miscellaneous lien book.

RECORDATION—Discharge of members of Armed Forces—No charge regardless of residence. F-356a

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

This is in reply to your letter of September 11, 1950, in which you ask whether the discharge of a veteran is to be recorded only in the county or city from which such veteran was inducted or whether it may be recorded in any other county.

You call my attention to an opinion rendered to you on June 26, 1946, by the former Attorney General, the Honorable Abram P. Staples, and an opinion rendered by me on April 10, 1950 to Honorable E. O. Russell, Clerk of Loudoun County, and also to §§17-91 and 17-92 of the Code of 1950 which you believe should be read together.

Sections 17-91 and 17-92 of the Code of 1950 read as follows:

"§17-91. When the honorable or dishonorable discharge of any person who served in the armed forces of the United States, or its associates, during World War II and who was a resident of the county or city at the time of his induction is presented, the clerk shall record the information contained therein in the proper spaces provided for such purpose in the book known as 'Induction and Discharge Record World War II'. If the induction record of the veteran presenting a discharge for recordation is not already recorded, the clerk shall ascertain this information and record it along with the discharge.

"§17-92. 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."

You will observe that, in spite of their relative positions in the Code, §17-92 was enacted into law by Act of Assembly of 1934 and §17-91 was not enacted until 1944.

This later provision, §17-91, is part of an act the purpose of which was to provide in each county and city a complete induction and discharge record of the residents of the county or city participating in World War II.

This Act is in no way inconsistent with the provisions of §17-92 which is not limited in its application to World War II, nor to residents of the particular county. It is, therefore, my opinion that, under the provisions of §17-92, the record of discharge of a veteran may be recorded free of charge in any circuit or corporation court regardless of the residence of the veteran at the time of induction. When such discharge is presented to the clerk by a person who was a resident of the county at time of induction the provisions of §17-91 also become applicable and if the induction record is not already recorded, the clerk shall ascertain this information and record it along with the discharge.

I believe this opinion is consistent with the effect of the enactments following World War I. I call your attention to §17-85 which provides for the recordation of discharges from that war in any court in which deeds are admitted to record if upon his entry into service the veteran was a resident of Virginia.
REPORT OF THE ATTORNEY GENERAL 235

RECORDATIONS—Tax—Deed or Deed of Trust on church site is exempt. F-90

HONORABLE W. CARY CRISMOND,
Clerk of Circuit Court of Spotsylvania County.

September 8, 1950.

This is in reply to your letter of September 2nd regarding charges for recording deeds, deeds of trust and orders appointing trustees for churches. You state that it is your policy to be as lenient as possible in assessing charges in cases of churches and you ask whether, under the law, you may make no charge for recording such documents as are mentioned by you when presented for recordation by a church.

It is not clear whether you are referring to the recordation taxes or your fees for services rendered. I call your attention to the fact that Section 58-64 of the Code provides that the recordation tax does not apply to any deed conveying land as the site for a church nor to a deed of trust or mortgage given to secure debts or indemnify sureties and conveying lands used as the site of a church. I find no provision providing for a similar exemption when the instrument offered for recordation by a church does not involve land used as the site for a church.

In the case of fees payable to the Clerk for his services it is my opinion that, since any excess fees above the amount of the annual allowance to which a clerk is entitled and the expenses incurred authorized by the Compensation Board are payable into the State Treasury for the benefit of the state and the locality, these governmental units have an interest in the fees chargeable for clerk's services and for this reason a clerk would not be authorized to waive such fees.

RECORDATIONS—Transfer of interest agreement. F-221

HONORABLE C. T. GUINN,
Clerk of the Circuit Court of Culpeper County.

November 21, 1950.

This will acknowledge receipt of your letter of November 16, 1950, in which you ask the proper place for the filing or recording of the attached "Transfer of Interest Agreement."

The "Transfer of Interest Agreement" is a memorandum of agreement concerning the transfer of interests in an automobile, and makes reference to a "Security Instrument (conditional sales contract, lease, chattel)." While the "Transfer of Interest Agreement" refers to a conditional sales contract, it does not purport to be such and does not set forth the terms of the conditional sale.

Section 55-88 and subsequent §§55-90 of the Code of Virginia provide for the recording of conditional sales agreements in the "Conditional Sales Book" but require that a description of the terms of the reservation or condition be part thereof. Section 17-61 provides as follows:

"All deeds, mortgages, deeds of trust, homestead deeds and leases of personal property, bills of sale, and all other contracts or liens as to personal property not mentioned in §§43-27 and 55-88 to 55-90, which are by law required or permitted to be recorded, all mechanics' liens, all other liens not directed to be recorded elsewhere and all other writings relating to or affecting personal property which are authorized to be recorded shall, unless otherwise provided, be recorded in a book to be known as miscellaneous liens; provided that if a deed, deed of trust, mortgage, contract or other writing conveys, relates to or affects, both real and personal property, it shall be recorded in the deed book only, but shall be indexed in the general index book and the book of miscellaneous liens." (Italics supplied)
In my opinion the "Transfer of Interest Agreement" should be recorded in the book of miscellaneous liens.

It would be my opinion that the "dealer", lienor, would add more protection to his lien by also having the original "Security Instrument" (conditional sales contract) recorded in the Conditional Sales Book. However, we, of course, do not pass upon the legal sufficiency of his lien, nor is it our position to do so.

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RETIREMENT SYSTEM—Beneficiaries of members not entitled to increased benefits under 1950 Act. F-243a—F-188

MAJOR FRANK P. EVANS, Director, Virginia Retirement System.

This is in reply to your letter of August 15, 1950, which reads as follows:

"Chapter 450, Acts of Assembly, 1950 reads in part as follows:

"'Any State employee or teacher who has retired, or who retires before July one, nineteen hundred fifty, and who was a member of the Virginia Retirement System shall, after such date, be entitled to receive and shall be paid the same allowances that he would have been entitled to receive had he retired on or after June one, nineteen hundred fifty; provided that this section shall not operate to extend his period of creditable or membership service. Each person shall have his service retirement allowance or disability retirement allowance as the case may be computed as if he had retired under the Virginia Retirement Act as amended and in force on July one, nineteen hundred fifty. The difference between the amount each such former member has been receiving and what he will receive as provided herein, shall be paid from funds appropriated for such purpose. No such retired member shall be paid any increase because of this section for any period prior to July one, nineteen hundred fifty.'"

"You will note that the first line of the Chapter reads 'Any State employee or teacher who has retired or who retires * * *'. Under the Virginia Retirement Act, certain employees have retired under Options 2 and 3 of the Virginia Retirement Act, but are now deceased and their named beneficiaries are being paid an allowance as provided in 51-107, Code of 1950.

"At a meeting of the Board of Trustees of the Virginia Retirement System held August 14, I was instructed to ask your opinion as to whether the language in Chapter 450, Acts of Assembly, 1950, applied to the designated beneficiary of a deceased retired employee."

As I understand the operation of Options 2 and 3, provided in §51-107 of the Code, a member of the System may elect to receive monthly during his or her lifetime a reduced retirement allowance and designate a beneficiary who will, upon the death of the member, receive the reduced monthly retirement allowance (option 2) or one-half of the reduced monthly retirement allowance (option 3) during the life of the said beneficiary.

The question raised by your letter is whether the 1950 Act which increases the retirement allowances of employees or teachers who retired prior to July 1, 1950, also increases the allowance of the beneficiaries of employees or teachers who, having elected to receive benefits under Options 2 or 3, retired and died prior to July 1, 1950. The title to the 1950 Act referred to reads as follows:

"AN ACT to provide certain benefits for retired former State employees and teachers; and to appropriate funds."
Paragraph 2 of the said Act begins in these words:

"There is hereby appropriated out of the general fund of the State treasury for each year of the biennium beginning July one, nineteen hundred fifty, the sum of sixty-five thousand dollars on account of retired State employees and the sum of eighty-five thousand dollars on account of retired teachers which shall be transferred to the credit of the Virginia Retirement System, and expended as in this act provided. * * *"

Nowhere in the Act or its title is reference made to the beneficiaries of members. We must assume that the Legislature was aware of the provision in §51-107 for Options 2 and 3 and, having failed to make provision for such beneficiaries as might exist under those options, I am of the opinion that Chapter 450 of the Acts of Assembly of 1950 cannot be construed to include such persons.

It is indeed an unpleasant task to be required to render an opinion the effect of which will be to deny to the beneficiaries of deceased members of the Virginia Retirement System an increase in monthly benefits; however, the complete absence of any mention of such beneficiaries in the Act leaves no other course which can be followed in good conscience.

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RETIREMENT SYSTEM—When membership compulsory. F-243a

MR. CHARLES H. SMITH,
Director, Virginia Retirement System.

December 4, 1950.

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

"The Board of Trustees of the Virginia Retirement System has directed me to request an opinion with respect to the application of Section 51-54 of the Virginia Retirement Act.

"The question is whether an employee first entering the service of an employer, (Section 51-52) that is an employer having been approved as such by the Board of Trustees of the Virginia Retirement System, and the employee belonging to a trade or class of worker covered under a local pension system (Section 51-55) which elected not to be covered by the Virginia Retirement System would be compelled to become a member of the Virginia Retirement System rather than be permitted to become a member of the local pension system of his co-workers?"

Section 51-53 of the Code provides that membership in the retirement system, as provided in Section 51-52 of the Code, shall be optional with such officers and employees in service on the date the employer is approved by the Retirement Board for participation in the retirement system. Section 51-54 then makes membership compulsory for all employees entering the service of such employer thereafter.

The following pertinent language is also found in Section 51-52:

" * * * Notwithstanding anything to the contrary, employees of such employer who are members of any retirement, pension or benefit fund partially or wholly supported by public funds shall not be entitled to become members of the retirement system on that part of his compensation covered by such fund except as provided under Section 51-55."

Because of the above quoted provision of Section 51-52 it is my opinion that the compulsory membership provision of Section 51-54 is not applicable to an employee in the service of an employer, who has in operation a local pension system..."
of the kind described above, when such an employee is eligible to participate in the local system and, in fact, does so participate therein.

However, if the employee to whom you refer fails to participate in the local pension system which is partially or wholly supported by public funds, I am of the opinion that Section 51-54 would be applicable and that it would be mandatory for the employee to participate in the Virginia Retirement System.

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**REVENUE BONDS—Hospital—Only revenue can be used in payment.**

_Honorable T. Moore Butler,_

Commonwealth’s Attorney for Alleghany County.

March 30, 1951.

This is in reply to your letter of March 26, from which I quote as follows:

“Several years ago a hospital commission was established by the County of Alleghany and the Town of Covington, Virginia. Said commission was created under what is now Chapter 14, Title 32, of the 1950 Code of Virginia.

“The local hospital commission desires to borrow the sum of Fifty Thousand Dollars ($50,000.00) and they desire an opinion as to how they can legally do so. It appears that the commission has the right to issue bonds payable from the revenues of the hospital. However, the commission would like an opinion as to how they can encumber hospital property to secure the payment of said bonds since the law provides that the property of the commission shall be exempt from foreclosure.

“The two governing bodies are in accord on this matter. Perhaps you will suggest some way by which the governing bodies can underwrite the loan. In that event can the Board of Supervisors lay a levy for this purpose?”

Section 32-285 of the Chapter to which you refer provides that bonds issued “under this Chapter shall be payable only from the revenues and receipts of the hospital or health center for the acquisition, establishment or construction of which the bonds were issued.” The Chapter under which your commission is operating plainly provides that the bonds issued thereunder shall be revenue bonds. I, therefore, know of no way by which the commission can encumber the hospital property to secure the payment of these bonds, nor is any authority given to the Board of Supervisors to lay a levy for the purpose of paying these bonds. Since your commission was established and is operating under the provisions of the Chapter to which you refer, I must confess that I can point you to no way by which it can underwrite the loan other than the method prescribed in the law.

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**SANITATION COMMISSIONS—Authority to require abutting landowner to connect to system.**

_Honorable R. Dhu Coleman,_

Member House of Delegates.

April 12, 1951.

This will acknowledge receipt of your letter of March 28 requesting my opinion as to whether or not Weber City Sanitation Commission can enforce the provisions of §6(13), Chapter 523 of the Acts of Assembly of 1948. You also request information as to the enforcement and procedure of this section.

Section 6(13) as aforesaid provides:
"To require the abutting property owners to connect with any water system which may be owned or operated by the Commission."

It is my opinion that the Commission could enforce the aforesaid section in an appropriate case. In somewhat analogous situations, statutes and ordinances in certain other states requiring connection to sewer lines have been upheld as a legitimate exercise of the police power. Section 1565, revised Volume 4, McQuillin Municipal Corporations.

Section 6(2) of the Act allows the Commission to institute suits. Moreover, §6(16) allows the Commission to "...do and perform any and all acts or things necessary, convenient or desirable for the purposes of the Commission or to carry out the powers expressly given in this act."

No particular case has come to the attention of this office whereby action has been taken in this State to enforce the exact section in question. However, it would be my view that, in a proper situation and where the matter cannot be settled out of court, an injunction suit could be instituted in the circuit court having jurisdiction over the district and the abutting property owner in order to seek enforcement of this section.

SCHOOLS AND SCHOOL BOARDS—Appointing agent to authorize payment of claims. F-203

December 26, 1950.

MR. WILLIAM S. MUNDY, JR.,
Chairman, School Board of the City of Lynchburg.

This is in reply to your letter of December 13, 1950, in which you request my opinion as to whether the School Board of the City of Lynchburg may appoint an agent to examine and approve claims and order or authorize payment thereof and thereby relieve the School Board itself of the necessity of considering and directing payment of many bills, either prior to the examination and approval by the agent or subsequent thereto.

You state that the School Board is of the opinion that §22-97(13) of the Code of 1950 provides for such procedure.

The second paragraph of the section cited reads as follows:

"The board may, in its discretion, appoint an agent and a deputy agent to act for the agent in his absence or inability to perform this duty by resolution spread upon the record of its proceedings to examine and approve such claims and, when approved by him or his deputy to order or authorize the payment thereof. A record of such approval, order or authorization shall be made and kept with the records of the board. Payment of each such claim so examined and approved by such agent or his deputy shall be ordered or authorized by a warrant drawn on the treasurer or other officer of the city charged by law with the responsibility for the receipt, custody, and disbursement of the funds of the city. The warrant shall be signed by such agent or his deputy and countersigned by the clerk or deputy clerk of the board, payable to the person or persons, firm or corporation entitled to receive such payments; provided, however, that when the agent appointed by the board is the division superintendent of schools and the division superintendent and clerk is one and the same person, all such warrants shall be countersigned by the chairman or vice chairman of the board; provided further that when the deputy agent and deputy clerk is one and the same person the warrant shall be countersigned by either the clerk or the agent of the board. There shall be stated on the face of the warrant the purpose or service for which such payment is made and also that such warrant is drawn pursuant to authority delegated to such agent or his deputy by the board on the .......... day of.................... The warrant may be converted into a negotiable check
in the same manner as is prescribed herein for warrants ordered or authorized to be drawn by the school board. The board shall require such agent and his deputy to furnish the city a corporate surety bond conditioned upon the faithful performance and discharge of the duties herein assigned to each such official. The board shall fix the amount of such bond or bonds and the premium therefor shall be paid out of the school funds of such city."

It is my opinion that it was the intent and purpose of the Legislature in enacting this section to provide for just such a system as that about which you inquire, and that the School Board is correct in believing it has the authority to appoint an agent to perform such services for the Board.

SCHOOLS AND SCHOOL BOARDS—Attendance in schools of children not having reached seventh birthday is discretionary with parents. F-203

November 14, 1950.

HONORABLE DOWELL J. HOWARD,
Superintendent of Public Instruction.

This is in reply to your letter of November 10, 1950, which reads, in part, as follows:

"Section 22-218 permits a school board to enroll pupils who have reached their sixth birthday on or before September 30, of any year. Section 22-251 requires that every parent, guardian, or other person in the Commonwealth having control or charge of any child or children who have reached their seventh birthday and have not passed their sixteenth birthday shall send such child or children to a public school etc.

"If a parent or guardian enters a child in school under the discretionary provisions of Section 22-218, are the provisions of the Compulsory Attendance Act, Section 22-251, applicable and enforceable before the child reaches the age of seven?"

Section 22-251 of the Code of 1950 reads as follows:

"Every parent, guardian, or other person in the Commonwealth, having control or charge of any child, or children, who have reached the seventh birthday and have not passed the sixteenth birthday, shall send such child, or children, to a public school, or to a private, denominational or parochial school, or have such child or children taught by a tutor or teacher of qualification prescribed by the State Board and approved by the division superintendent in a home, and such child, or children, shall regularly attend such school during the period of each year the public schools are in session and for the same number of days and hours per day as in the public schools."

Section 22-251 is a criminal statute made such by §22-256, which provides that a violation of §22-251 shall be a misdemeanor. Being a criminal statute it must be strictly construed. I do not believe that a strict construction of the statute would permit a conclusion that a child who has not reached his seventh birthday but who has been voluntarily entered into the primary schools under the discretionary provisions of §22-218 comes within the provisions of §22-251.

It is, therefore, my opinion that when a local school board agrees to admit into the primary grades children who have reached their sixth birthday on or before September 30 of a particular year, it is entirely discretionary with the parent or guardian of such a child whether he will be entered, and having entered such a child in school and until his seventh birthday, it remains discretionary with the parent or guardian whether they will continue to compel the child to attend school.
REPORT OF THE ATTORNEY GENERAL.

SCHOOLS AND SCHOOL BOARDS—Attendance in schools of married women and mothers of illegitimate children. F-203

HONORABLE DOWELL J. HOWARD,
Superintendent of Public Instruction.

This is in reply to your letter of September 22nd from which I quote as follows:

"The Phenix High School for Negroes at Hampton has 28 girls out of school, largely due to the fact that they are married or they are the mothers of illegitimate children. Several of them are now asking for re-admission to the school. The faculty and a representation of the P.T.A. of the school have requested that the superintendent refuse them admission on the basis that the problem has grown to such proportion as to affect the welfare of the school.

"So far as I can find there is no legal basis for refusing admission to these students. I am convinced that there is no legal reason for failing to admit a married girl if she is within the legal school age. I will appreciate it greatly if you will give me your opinion of this case."

As you indicate in your letter, the statutes contain no specific provision that students of school age may be refused admittance to public schools simply because they are married or are the mothers of illegitimate children. Section 22-230 of the Code provides that the principal, or the teacher where there is no principal, may, for sufficient cause, suspend pupils from attending the school until the case is decided by the School Board, and Section 22-231 provides that it shall be the duty of the School Board to suspend or expel pupils when the welfare and efficiency of the schools make it necessary.

I agree with you that the mere fact that a girl is married would not bring her within the provisions of these sections nor would the fact that she is the mother of an illegitimate child necessarily do so. It may be that in some cases the situation would justify action under these sections but this is in my opinion a matter which would depend upon all the facts in each individual case which should be considered on its own particular merits.

While the sections referred to authorize the School Board to suspend or expel pupils, it is my opinion that if in an appropriate case the admission of a given pupil would be detrimental to the welfare and efficiency of the school, the School Board would be authorized in refusing to admit the pupil in the first instance at the start of a school term. Such action would be equivalent to the expulsion of the student from the school system.

SCHOOLS AND SCHOOL BOARDS—Authority of Rockbridge County Board and Lexington Town Board. F-203

HONORABLE DOWELL J. HOWARD,
Superintendent of Public Instruction.

This is in reply to your recent letter concerning the authority between the School Board of Rockbridge County and the Town School Board of Lexington. I quote your letter as follows:

"Under the law, the town school board is represented by a member on the county school board. The county school board, including the town representative, exercises certain overall authority in regard to policy which affect both the county and the town schools. In many cases, the county and town operate under an agreement by which county pupils attend the town schools on a tuition basis. As a result, two questions have arisen and we would like to have your opinion."
I cite two illustrations to clarify the point in question:

1. The two school units are so closely interrelated that the transportation system which serves the county schools also transports county children to the town schools. The question of keeping children in after school has presented a problem. Does the county school board, which has a representative from the town board, have authority to act on this matter for both town and county schools?

2. The question of setting up the school calendar and deciding upon certain holidays etc., also presents complications. The two units have to work close together due again to bus service. Which board should have authority in regard to such matters?

The Town of Lexington was made a special school district in 1874 when its charter was adopted. Following is the language of the Legislature:

"The Town of Lexington shall constitute a school district, and the Mayor and Council shall levy a sufficient tax for the purpose of supporting the public schools in said town. * * *" (Acts of Assembly 1874, Chap. 273).

This appears to be the full extent of the charter in dealing with schools.

It is clear from reading Sections 22-43 and 22-43.1 of the Code of 1950 as amended, that the Legislature does not favor special school districts; in fact, with certain exceptions, of which Lexington is one, all special town school districts are abolished by Section 22-43.

It is my opinion that where a decision must be made by either the County Board or the Town Board which will unavoidably affect both school systems the County Board should make this decision.

My opinion is predicated on the fact, revealed by your letter, that the Town School Board is represented on the County Board. The question immediately arises as to the purpose of such representation if the Town District cannot be affected by the action of the County Board.

I do not intend necessarily that this answer shall be applied to the two specific questions set forth in your letter. It is, of course, highly desirable that the Town Board and County Board work in close harmony and arrive at an answer to their differences whenever possible. However, if, in the final analysis, a solution cannot be found and a decision binding both boards is necessary then such decision should be made by the County Board.

SCHOOLS AND SCHOOL BOARDS—Authority of school board to employ counsel. F-203

Honorable Dowell J. Howard,
Superintendent of Public Instruction.

This is in reply to your letter of May 14, 1951 in which you request my opinion as to whether the Prince Edward County School Board may legally employ counsel to represent the board in the matter raised by a petition recently filed with the board. This request is made on behalf of Mr. T. J. McIlwaine, Superintendent of Schools for Prince Edward County, and I am sending a copy of this letter to him for convenience.

Section 15-504 of the Code of 1950, as amended, reads in part as follows:

"On application of the board of supervisors, board of public welfare, or school board, the circuit court may designate such attorney, who may be the attorney for the Commonwealth or trial justice of such county, to represent either or all such boards in matters requiring the services of an attorney, such
attorney so designated to be paid such compensation by the county or school board or by the board of public welfare, as requisite, as the court prescribes."

From the provisions of this section it would appear that the School Board should apply to the Judge of the Circuit Court for permission to employ counsel and for directions as to compensation of such counsel.

SCHOOLS AND SCHOOL BOARDS—Authority to expend funds to enlarge town sewage facilities for school use. F-203

March 14, 1951.

DON P. BAGWELL, Esq.,
Attorney for the School Board of Halifax County.

This is in reply to your recent letter in which you state that the Halifax Training School will require new and additional sewerage disposal facilities in the near future. You desire my opinion as to whether or not the Halifax County School Board has the authority to make a small capital outlay for the purpose of enlarging the existing plant facilities of the sewerage system owned by the Town of Halifax in consideration for which the Town will enter into a long-term contract for the disposition of the school's sewerage.

It appears that the sewer main of the Town of Halifax passes near the school property in question and it has been determined that a septic tank system is very undesirable and that it will be less expensive and more desirable to provide the additional facilities necessary to connect with the Town system.

Under section 22-72 of the Code county school boards have the authority to provide for the equipping of necessary school buildings and appurtenances, and, accordingly, has the authority to provide adequate sewerage facilities. Therefore, it is my opinion that the Halifax County School Board may enter into a contract with the Town of Halifax for the purpose of securing rights and privileges deemed advantageous, since it will receive good and valuable consideration for its payment.

My conclusion is based on the assumption that it will not be necessary for the School Board to borrow the money for the contemplated capital expenditure.

SCHOOLS AND SCHOOL BOARDS—Bond issue—Investment of proceeds made by governing body not School Board—May invest in U. S. Bonds as long as war exists. F-103

November 14, 1950.

HONORABLE J. F. WYSOR,
Treasurer for Pulaski County.

This is in reply to your letter of November 10, 1950, in which you inquire as to the power of the County to invest in United States Treasury bonds "currently not eligible for bank investment" maturing in 1967. You state that the money to be invested in such securities was raised by a bond issue for construction of school buildings and that due to a price rise as a result of the Korean situation, construction of schools will be delayed for several years. In all probability construction will be commenced prior to 1967 and, therefore, the United States bonds would have to be sold on the open market which could conceivably result in a loss.

Chapter 15 of the Acts of Assembly for the extra session of 1942 to which you refer, is now found as §15-22 of the Code of 1950, and reads as follows:

"So long as a state of war exists between the United States and any
foreign power the board of supervisors of any county or the council of any city or town may by resolution or ordinance direct the treasurer of such county, city or town, or the custodian or manager of any sinking fund, to purchase out of any moneys available in the general fund, or in any sinking fund, or any special fund of such county, city or town, bonds or other evidences of debt of the United States of America, or of the State or any political subdivision or institution thereof, the amount of such purchases to be prescribed in the resolution or ordinance directing the purchase of same. Any such treasurer or custodian of such funds shall comply with any such ordinance or resolution. Any bonds or other evidences of debt purchased under the provisions of this section shall be held by the treasurer, or other proper custodian thereof, until such time as the board of supervisors or council, by resolution or ordinance, directs the sale or other disposition thereof. No county treasurer, town treasurer, city treasurer or other custodian or manager of such funds shall be held liable for any loss of public money which may occur as a result of depreciation in the value of securities purchased pursuant to the provisions of this section.

"Nothing in this section shall be deemed to repeal any provision of any city or town charter prohibiting the investment of any sinking fund in the securities, investment in which is otherwise hereby authorized." (Italics supplied)

This office has ruled on a number of occasions that a state of war still exists inasmuch as wars are terminated by peace treaties and the treaties to end World War II have not yet been written.

The language of §15-22, which I have underscored, would seem to be extremely broad and would, in my opinion, include those bonds about which you inquire. Therefore, I am of the opinion that the County may lawfully invest in such securities. The section specifically provides that the treasurer shall not be liable for "any loss of public money which may occur as a result or depreciation in the value of securities purchased pursuant to the provisions of this section." It is apparent that the Legislature intended that the local governing bodies could lawfully run the risk of such loss.

You also inquire whether the School Board or the Board of Supervisors should direct you as to the placing of these funds. You will observe that the statute referred to gives the power to make such investments only to the governing body of the county and not to the school board. It is, therefore, my opinion that the proper procedure to be followed in this case would be for the School Board to officially request the Board of Supervisors to authorize the treasurer to make such investment. I enclose a copy of an opinion by the former Attorney General, the Honorable Abram P. Staples, rendered on February 3, 1944, to Mr. W. E. Kidd, Division Superintendent of Schools, Lovingston, Virginia, in which a similar view was expressed. This opinion may also be found at page 136, Reports of the Attorney General, 1943-44.

SCHOOLS AND SCHOOL BOARDS—Contracts in which member has interest—de minimis principle. F-203

HONORABLE DOWELL J. HOWARD,
Superintendent of Public Instruction.

This is in reply to your letter of June 16, in which you request my opinion upon a matter presented by a letter received by your department from Mr. C. J. M. Kyle, Division Superintendent of Schools for Orange County.

Mr. Kyle asks whether the Orange County School Board may purchase a certain tract of land from a corporation in which a member of the School Board owns one share out of a total of one hundred and seventy-one shares.
Section 15-504 of the Code provides that no paid officer of a county shall become interested, directly or indirectly, in any contract made with the county school board. This section contains a provision stating that the prohibition is not applicable to the depositing of funds in a bank in which a county officer may have a stock interest. This would indicate that in the case of other contracts a stock interest held by one of the named officers would give him an indirect interest in the contract so as to bring the contract within the prohibition. This would clearly be the case where his interest in the corporation is so large as to be controlling. However, I think that the ownership of a single share out of a total of one hundred and seventy-one is such a slight interest in the corporation as to be de minimis, particularly when the ownership of stock in a corporation does not give the stockholder a direct legal interest in contracts made by the corporation.

You may advise the Division Superintendent of the views herein expressed, but I think his attention should be called to the fact that a court may reach a contrary view. Since the Commonwealth's Attorney is the primary one to advise local school boards, this matter should be submitted to him for his consideration.

SCHOOLS AND SCHOOL BOARDS—Contracts—With member of Board of Supervisors—Independent functions for which school board not responsible. F-33—F-203

September 11, 1950.

HONORABLE JOSEPH A. MASSIE, JR.,
Commonwealth’s Attorney for Frederick County.

This is in reply to your letter of September 6th from which I quote as follows:

"1. A member of the Board of Supervisors of Frederick County, Virginia together with his family, manufacture and sell ice cream. The title to the real estate on which the business is located and the license to do business is in the name of the wife of the said Supervisor. They have several sons who assist their Father and Mother in running the business and are paid by salary. The Father is the general manager of the business.

"2. The County School Board of Frederick County, Virginia has just recently opened for the school term 1950, a new consolidated County High School. From the funds designated for the purpose of building and equipping this school, certain funds were used to equip a specially designed section of the school as a cafeteria for the students. The County School Board, through its Superintendent, has employed a person to run the cafeteria and has started an account in the name of the school from which account the Principal of the school pays the expenses incident thereto. All funds used in the running of the cafeteria are expended from this sum by the principal and all funds received in the cafeteria are deposited with this school account. The person running the cafeteria does the ordering and County school trucks are used to pick up the supplies, some of the supplies being Federal surplus foods. It is the intent of the School Board and the school Principal to make the cafeteria pay for itself. It is a non-profit making department of the school. Should the cafeteria fail to make a profit for any particular week when the accounts are settled, the Principal of the school would have to pay the bills from the general fund which he administers. The Principal of the school has the authority to hire and fire any personnel of the cafeteria.

"3. The member of the Board of Supervisors engaged in the manufacturing and selling of ice cream desires to sell ice cream to the cafeteria of the Consolidated County High School. Would the selling of ice cream by the said member of the Board of Supervisors to the Cafeteria in the said school violate Section 15-504 of the Code of Virginia, and any other statutes in decided cases pertinent to this subject?"
Section 15-504 provides that no supervisor 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 County School Board. While, in the instance described by you, the title to the real estate on which the building is located and the license to do business is in the name of the wife of the supervisor, I judge from your letter that the supervisor himself is directly interested in the business which his family conducts. It would clearly seem that he would have such an indirect interest at least in the contracts made by the business which would prohibit his concern from selling ice cream to the cafeteria of the consolidated high school if it can be said that the County School Board is operating the cafeteria. The operation of cafeterias in 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 the school board simply acts as sponsor and assumes no direct financial responsibility for the operation though it may provide space and equipment for the cafeteria.

In those cases where the school board itself assumes no direct responsibility for the operation of the cafeteria and is not financially obligated to pay for supplies purchased by the individual who operates the cafeteria as an independent function pursuant to an agreement or understanding with the school board, it is my opinion that a contract with such individual is not a contract with the school board and does not give rise to a claim against the school board which would come within the prohibition of Section 15-504.

However, if the school board itself is directly responsible for the operation of the cafeteria and any contract made by the person operating it, it is my opinion that a supervisor may not sell supplies to be used in the cafeteria. It is not entirely clear from your letter just what the situation is with respect to the Consolidated County High School in Frederick County. Since you state that the County School Board, through its Superintendent, has employed a person to run the cafeteria and has started an account in the name of the school from which the expenses of the cafeteria will be paid, it would seem that the County School Board itself is assuming a direct responsibility, but since the situation is not entirely clear on this point I do not think I should express a final opinion upon the particular case presented by you.

SCHOOLS AND SCHOOL BOARDS—Contracts with officers and teachers.
F-203

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.

September 20, 1950.

This is in reply to your letter of September 15, 1950, which reads as follows:

"One phase of our duty in connection with auditing the counties is that of determining that the funds of the counties have been disbursed in accordance with the provisions of law. It is not clear to us whether there is any conflict in the provisions of Sections 15-504 and 22-213 of the 1950 Code of Virginia.

"Under the provisions of Section 708 of the Michie Code of 1942, it is unlawful for certain officers and teachers to be interested in contracts, except by permission of the State Board of Education. The State Board of Education in some instances has exercised the discretion permitted it by this Section. Chapter 286 of the Acts of Assembly of 1948 amended and re-enacted Section 2707 of the 1919 Code of Virginia. The effect of the re-enactment of Section 2707 by the 1948 Acts, amongst other things, was to place the same restrictions on officers and agents of county school boards as existed on persons acting on behalf of the supervisors."
"We should appreciate your reviewing these two Sections and advising us as follows:

1. Did the amendment and re-enactment of Section 2707 by the Acts of Assembly of 1948 nullify the permissive authority given to the State Board of Education by Section 708 of the Michie Code of 1942?

2. Would authority given in specific instances by the State Board of Education (prior to the amendment and re-enactment of Section 2707 of the 1919 Code of Virginia by the 1948 Acts of Assembly) continue after amendment of this Section?"

Section 708 of the Code of 1942 is now §22-213 of the Code of 1950. Under the provisions of this section certain persons are forbidden to have any pecuniary interest in contracts relating to schools and the furnishing of supplies, equipment, etc., to schools without permission of the State Board of Education. Those persons forbidden to so act by this section are "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."

Section 2707 of the Code of 1919 as amended in 1948 is now §15-504 and, in so far as material to this opinion, reads 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, 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."

The first clause in §15-504 lists the persons who may not become interested in certain contracts made by or with certain other persons. The list contained in this first clause does not include members of the State Board, division superintendents of schools, members of school boards, principals or teachers specifically; hence, unless such persons are covered by the term "paid officer of the county" they are not covered by this section. It becomes immediately apparent then that members of the State Board, principals, teachers, and members of school boards serving without compensation are not covered. The only specific mention of officers and agents of county school boards in this section is found in the listing of persons with whom those included in the first list cannot make contracts. In short, this section does not prohibit a school officer or employee from contracting with the school board unless it does so by the term "paid officer of the county."

Assuming that the term "paid officer of the county" does include some of the persons named in §22-213 (for example, paid members of the school board) the problem presented is whether the Legislature, by amending §15-504 to include officers and agents of the county school boards as persons with whom "paid officers of the county" may not contract, thereby repealed the provisions of §22-213, which permits contracts between school officials and school boards if permission of the State Board be first obtained.

This problem has been previously dealt with by this office and, in an opinion to Mr. R. C. Hayden on February 2, 1950, we indicated that the 1948 amendment probably modified the provisions of §22-213.

Pursuant to your request, we have considered the effect of the 1948 amendment to §15-504 on a case in which a person has in good faith acted on consent of the State Board and entered into a contract with a local school board. As a result of
this review of these sections, we have reached the conclusion that there is grave doubt as to the correctness of our former views.

As I have previously mentioned, regardless of what construction we should reach, there are certain persons such as principals, teachers, members of the State Board and unpaid members of school boards who could enter into contract with county school board for they are not covered by the term "paid officer of the county." With this in mind, we see that a conclusion that the 1948 Amendment to §15-504 in any way affects the provisions of §22-213 results in a partial repeal of the provisions of §22-213 the extent of which depends entirely upon what persons are included in the term "paid officers of any county."

At its 1950 session, the Legislature re-enacted §22-213 without amendment as a part of the Code of 1950.

It is a generally accepted principal of statutory construction that where the same subject matter is dealt with in two statutes, one general, the other specific, the specific law governs. It is also generally recognized that repeal by implication is not favored.

With these considerations in mind, it seems reasonable to assume that had the Legislature intended, in 1948, to nullify the permissive authority given the State Board in §22-213 it would have amended or repealed the provisions of that section; or would at least have made reference to the specific officers barred from making contract with school boards who had previously been allowed to make such contracts with permission of the State Board. It seems unreasonable to assume that the Legislature would have left this apparent conflict in the law to be determined by definition of the term "paid officer of the county."

Therefore, it is my present conclusion that, inasmuch as §22-213 was re-enacted without amendment in 1950, there is sufficient doubt as to the effect of the 1948 Amendment to §15-504 that we cannot adhere to our former ruling that §22-213 has been modified by that amendment, and that we must conclude that the provision of §22-213 exists in the law as an exception to the provision of §15-504.

SCHOOLS AND SCHOOL BOARDS—Declaring vacancy in office of members of county school board. F-203

December 27, 1950.

Mr. R. C. Sutherland, 
Secretary, School Trustee Electoral Board of Clintwood.

This is in reply to your letter of December 16, 1950, relative to whether or not a suit would have to be instituted in a circuit court to declare the office of a member of the Dickenson County School Board vacant under certain circumstances. It further appears that the member in question moved from Dickenson County to Detroit, Michigan in the month of August, 1950.

Section 22-68 of the Code of Virginia provides:

"Each member of the county board at the time of his election shall be a bona fide resident of the magisterial district or town from which he is elected, and if he shall cease to be a resident of such district or town, his position on the county school board shall be deemed vacant, except in counties where magisterial districts have been abolished, in which case he may be appointed at large, but he must be a bona fide resident of that county and upon his ceasing to be a resident of that county his position on the county school board shall be deemed vacant."

It would appear that the above section would be applicable to the problem presented, and the essential point then to determine would be whether or not the member "ceased to be a resident of such district." The word resident, of course, should be given its lawful meaning which contemplates more than a temporary
change of address. In determining whether or not (legal) residence had ceased, the evidentiary facts would control. Your letter does not state any further facts other than that the person moved to Detroit, Michigan.

Assuming that it could be established by all of the facts and circumstances that he ceased to be a resident, I would be of the opinion that a suit would not have to be instituted, and that the School Trustee Electoral Board could declare the office vacant without court action and proceed to fill the vacancy.

However, it would be possible for the member in question to institute suit for reinstatement or for the remainder of his compensation at a later date, should he desire to make a court test of the matter.

I am not advised whether or not the member has been requested to resign, and if this has not been done, it would appear to be a possible solution.

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SCHOOL AND SCHOOL BOARDS—Deferring sale of school bonds after election. F-203

Mr. R. C. Hayden,
Assistant Superintendent of Public Instruction.

This is in reply to your letter of December 20, 1950, from which I quote as follows:

"The people of Montgomery County have recently voted bonds for the purpose of constructing new school buildings. In view of the present emergency and the uncertainty as to school construction prices, the School Board desires to know your opinion with reference to the following questions:

1. Can the School Board legally defer the sale of these bonds until such time as it appears that school construction can be accomplished at a reasonable cost?
2. If such a delay is legal, is there any limit to how long the Board can wait until disposing of the bonds?
3. Is it legal for the Montgomery County Board of Supervisors to lay a levy in anticipation of school construction and accumulate such money for school construction purposes?
   a. What legal limits are there in reference to the laying of such a levy?"

In answer to the questions numbered 1 and 2, it is my opinion that, for good cause, the School Board may defer the sale of the bonds and that such deferment may continue for as long as that cause exists. This authority on the part of the Board is found in §22-174 of the Code of 1950 which reads as follows:

"After the issuance of such order by the court or judge, the bonds authorized at the election may be issued by the county school board. The bonds shall be issued in the name of the county. Separate issues of bonds may be authorized, by resolution or resolutions of the county school board adopted subsequent to the election, for each of such school improvements, or in the discretion of the county school board, one consolidated issue of bonds may be authorized by resolution of the county school board for all of the school improvements; provided, however, that any portion of the consolidated issue may be sold and delivered from time to time in such amounts and of such maturities as may be determined by resolution of the county school board." (Italics supplied)
It is my understanding that the order which the court enters following the election on a bond issue does not specify any date for the sale of such bonds; however, in the event the order should include such a provision the Board should petition the court to amend the order before deferring the sale.

It does not appear practical or necessary to set forth the various conditions which might constitute "good cause" for deferring the sale of bonds; however, the reasons set forth in your letter do, in my opinion, constitute such cause.

This office has previously considered the problems presented in questions 3 and 3a, and I enclose a copy of an opinion rendered to the Honorable Philip P. Burks, Treasurer of Bedford County, on February 10, 1949, which contains my conclusions on those subjects.

SCHOOLS AND SCHOOL BOARDS—Disposal of proceeds from sale of schools built by magisterial district when schools are now under county-wide system. F-252

April 3, 1951.

HONORABLE OTIS B. CROWDER,
Treasurer of Mecklenburg County.

This is in reply to your recent letter regarding the sale of school real estate and the disposition to be made of the proceeds of such sales. I regret that several very pressing matters, including the preparation of a large number of criminal briefs for the April session of the Supreme Court of Appeals, has caused a considerable delay in responding to your inquiry.

I quote your letter as follows:

"Some several years ago our County School Board took over the operation, maintenance and building of new buildings on a county basis—in other words they did away with the magisterial districts as far as these functions are concerned and we have had a uniform county tax rate for the said purposes.

"Four of our eight districts still owe quite a sizeable sum for old bond issues and loans from the Literary Fund and every year a district school tax is levied to take care of the debt payment in these districts.

"Every now and then the school board will sell some real estate (land and buildings) located within the districts that have outstanding indebtedness, and probably a part of the indebtedness was incurred for the purpose of constructing the very building sold.

"Now, I would like to have your opinion as to whether or not the proceeds from the sale of real estate within a district that has indebtedness must be credited to the debt fund of the district, or may the treasurer credit the proceeds from the sale of the district's property to the county school operating or building fund, if so instructed by the school board."

I am enclosing a copy of an opinion rendered on June 10, 1948, to Honorable William Archer Royall, Commonwealth's Attorney for Tazewell County, in which I pointed out that the Supreme Court of Appeals of Virginia said in the case of Henrico v. City of Richmond, 177 Va. 754, that:

"* * * This leaves no room for doubt that the State literary loans are county obligations which must be repaid by county levies laid on a county-wide basis * * * ."

On May 18, 1949, in an opinion to Honorable R. E. Boucher, Commonwealth's Attorney for Washington County, I said that a literary fund loan is a county obliga-
tion incurred by the school board representing the county at large, and that while the question is not free from doubt the better practice would seem to be to make a levy to repay such loans countywide.

If this practice were followed it would, of course, be immaterial as between the county as a whole and the particular district what disposition is made of the proceeds from the sale of school real estate.

I call your attention to the provisions of §22-114 which are as follows:

"The loans made under this chapter, including interest thereon, shall constitute a specific lien on the schoolhouse and addition thereto, for the erection of which such loan was made, as well as the lots where the buildings are situated. All such buildings shall be kept fully and adequately insured for the benefit of the Literary Fund of the Commonwealth of Virginia, and the policy, or policies of insurance, shall be kept in the office of the State Treasurer."

It would appear that, since a literary fund loan constitutes a specific lien on the buildings constructed with the proceeds thereof, the debt should be satisfied out of the proceeds of the sale inasmuch as the county is unable to pass good title to the property until the lien is satisfied.

SCHOOLS AND SCHOOL BOARDS—Division of proceeds of levy between county and town. F-197

HONORABLE RALPH E. BOUCHER,
Attorney for the Commonwealth for Washington County.

This is in reply to your recent letter regarding the distribution of school funds between the Town of Abingdon and Washington County.

Your first question is whether, in computing the amount due the Town under Chapter 1 of the Acts of Assembly of 1947, the average daily attendance of the town district should include the total attendance or whether there should be excluded from such calculation those pupils who reside in the county but outside the town and for which the county pays tuition.

I am enclosing a copy of an opinion to your predecessor Honorable Roby C. Thompson dated May 22, 1947, and a copy of an opinion to Honorable David Goodman dated March 10, 1950, both of which throw some light on this problem.

In the opinion to Mr. Thompson it was ruled by the former Attorney General, the Honorable Abram P. Staples, that pupils coming from outside the town district should be counted in determining average daily attendance. The opinion to Mr. Goodman clearly indicates that the same result would occur under the 1950 school construction bill except for a special provision in the bill requiring the opposite result. I find no such special provision in the Act of 1947 and must conclude, therefore, that in computing the average daily attendance of the town district for the purposes of that Act, the pupils coming in from outside should be included.

Your second question deals with the division of proceeds of a special levy laid for the purpose of retiring a Literary Fund Loan which Washington County incurred in order to construct a part of the Washington County Technical School which is located outside the town of Abingdon. This office has recently held that, under the provisions of §22-141, in such cases the county treasurer should pay over to the town treasurer its pro rata amount of such levy derived from the taxable property within the town district.
SCHOOLS AND SCHOOL BOARDS—Eligibility of member of Virginia Commission of Blind to serve on School Board. F-249

HONORABLE A. FLEET DILLARD,
Chairman, Virginia Commission for the Blind.

This is in reply to your letter of July 14th in which you requested my opinion as to whether or not you may serve as a member of the school board of Essex County in view of the fact that you are at the present time a member and chairman of the Virginia Commission for the Blind.

Section 22-69 provides that no State or county officer shall be chosen or allowed to act as a member of a county school board, and it is generally understood that an individual who is vested with some portion of the functions of the government to be exercised for the benefit of the public and whose duties are fixed by law is an officer.

Appointments to the Virginia Commission for the Blind are provided for in Chapter 8 of Title 63 of the Code of 1950 and it can be seen from an inspection of that chapter that the terms of office of the members are fixed; that the duties and powers of its members are prescribed; and that the members perform a public function for the Commonwealth. Therefore, it is my opinion that you, as a member of the Virginia Commission for the Blind, are a State officer and are thereby prohibited from serving as a member of the school board by Section 22-69.

SCHOOLS AND SCHOOL BOARDS—Literary Fund loans; require fee simple title. F-203—F-199

HONORABLE RAYMOND J. BOYD,
Commonwealth's Attorney for Russell County.

This is in reply to your letter of August 26th in which you state that the Swannanoa Corporation and the Clinchfield-Coal Corporation have offered to convey certain lands to the County School Board of Russell County, upon which the School Board proposes to erect a school building at a cost of approximately $200,000.00, for which it will be necessary for the School Board to borrow construction funds from the Literary Fund.

You further state that the grantors propose to include the following restriction in the deed:

"This conveyance is made upon the express consideration and restriction that said lot shall be used only for public school purposes, and this restriction is for the sole benefit of Swannanoa and/or Clinchfield, its successors and assigns, which shall have the right to enforce said restriction by appropriate legal proceedings."

You ask whether it would be proper and legal for the School Board to accept this conveyance and expend public money in the construction of a school building on the land so long as the use of the lot is subject to the foregoing restriction.

Since it will be necessary to secure a loan from the Literary Fund to construct the proposed building, it will be necessary that a Certificate of the Commonwealth's Attorney or other Attorney at Law be submitted with the application for the loan showing that the School Board has a fee simple unencumbered title to the land on which the building is to be erected. See Section 22-110 of the Code. Loans made from the Literary Fund are made a specific lien on the building and land by Section 22-114 of the Code.
It is my opinion that a Literary Fund loan could not be obtained for the erection of a school building situated on the land in question if the restriction referred to is contained in the deed since the restriction could operate as an encumbrance upon the title to the property and defeat the lien created by Section 22-114.

SCHOOLS AND SCHOOL BOARDS—Literary Loans—Division of proceeds of levy to repay between town and county. F-197

March 6, 1951.

Honorable H. Prince Burnett,
Commonwealth's Attorney for Grayson County.

This is in reply to your letter of February 21, 1951, from which I quote as follows:

"* * * We will consider the Carroll county wide levy to repay a literary loan, granted for the purpose of constructing school buildings. As I take it, the levy would have to be on property lying within the Town of Galax on the Carroll County side, then my question is, would the County authorities be required to pay back to the Town of Galax the amount of the tax collected on property lying within the Town, since none of the school buildings to be constructed from money borrowed would be used for the construction of any buildings within the Town, the Town of Galax erecting and maintaining its school properties?"

Section 22-141 of the Code of Virginia, 1950, reads, in part, as follows:

"Where a special town school district is located partly in each of two adjoining counties and operated by a town school board created or constituted by the charter of such town, it shall be the duty of the county treasurer of each of said counties to set up and keep separate books and accounts showing the amount of county school taxes levied upon property located in such parts of their respective counties as lie within the corporate limits of said town, and showing also their collections on such levies, and the said county treasurers shall periodically pay the amounts of said levies so collected by them, respectively, into the treasury of said town, if and when the town treasurer shall be properly bonded; and the said county treasurers shall also promptly pay to the town treasurer, if and when properly bonded, the following State school funds received by them, for the respective counties:"

It is my understanding that the Town of Galax meets the requirements fixed by this provision of law and that, therefore, the County Treasurers should pay over to the Town Treasurer the amount collected on school levies within the town.

SCHOOLS AND SCHOOL BOARDS—Member of Board of Supervisors cannot be teacher. F-33

September 7, 1950.

Honorable Lloyd M. Robinette,
State Senator.

This is in reply to your letter of August 28th, in which you request my opinion as to whether Mr. L. A. Maness, a member of the Board of Supervisors of Lee County, may be employed as a teacher in the public schools of the County.
As you point out, on December 17, 1947, the late Harvey D. Apperson, then Attorney General, expressed the view that Mr. Maness, who had already been employed as a teacher for the school term 1947-48 when he was elected as a member of the Board of Supervisors to take office on January 1, 1948, could properly finish out his term as a teacher for the period covered by his then existing contract. However, Mr. Apperson in his opinion stated as follows:

"There is no statutory provision prohibiting school teachers from being members of the board of supervisors. However, the board of supervisors does have to fix the tax levy in order to raise the money to pay for the operation of the schools in the county. If a school teacher was a member of the board of supervisors that would put him in the position of having to vote upon a tax levy, part of the proceeds of which would be paid to him in his position as school teacher. It is my opinion that public policy would oppose any one man holding these two positions, because of the conflicting interests involved."

Mr. Apperson's view that Mr. Maness could finish out his term under his existing contract was based upon the fact that the tax levy to raise the money for school expenses for the year 1947-48 had already been passed before he became a member of the Board of Supervisors and would not come before that Board after Mr. Maness became a member.

I agree with Mr. Apperson's views that the position of teacher paid by the county and the position as a member of the Board of Supervisors, which passes upon the school budget and levies the taxes for school purposes, are incompatible for the reasons set forth in the quoted portion of his opinion. I also call your attention to Section 15-504 of the Code which provides that no supervisor shall become interested in any contract made by any person acting on behalf of the supervisors or the county school board or become interested in any claim against his county.

It is my opinion, therefore, that it would be improper for Mr. Maness to be employed as a teacher in the county schools for the coming term if he retains his position as a member of the Board of Supervisors.

SCHOOLS AND SCHOOL BOARDS—Member of school board who is coal dealer may sell coal to school "in regular course of business." F-203

HONORABLE DOWELL J. HOWARD,
Superintendent of Public Instruction.

January 26, 1951.

This is in reply to your letter of January 18, 1951, requesting my opinion as to the authority of the State Board of Education under the provisions of §22-213 of the Code. Section 22-213 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, or in supplying books, maps, school furniture or apparatus to the public schools of this State, or to sell or write or solicit insurance on any school building; or act as agent for any other publisher, book seller, or dealer in any such school furniture or apparatus, or directly or indirectly to receive any gift.
emolument, reward, or promise of reward, for his influence in recommending, or procuring, the use of any book, map, school furniture, or apparatus of any kind in any public school of this State, nor shall the board or the division superintendent employ any of its members in any capacity. Any such officer, principal or teacher who shall violate this provision, besides being removed from his office or post, shall be deemed guilty of a misdemeanor. 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. Any contract of sale made in violation of this section shall be void, and if the claim or bill arising out of such a transaction be paid, the amount paid, with interest, shall be recovered by action or suit instituted by the Commonwealth’s attorney of the county, in the circuit court of such county, or by the Commonwealth’s attorney of the city in the corporation court of such city. But the prohibitions of this section shall not apply to a merchant who, in the regular course of trade and without employing agents to solicit such business, sells either books selected and adopted by the State Board, or supplies used in the schools and by the pupils.”

The specific problem presented by your letter is whether, under the provisions of the last sentence of this section, a member of a school board who is regularly engaged as a coal dealer may sell coal to the School Board on a competitive bid basis without first obtaining permission of the State Board. You make reference to an opinion rendered by the Honorable Abram P. Staples, former Attorney General, on January 2, 1946. That opinion was rendered to the Honorable Julius Goodman of Christiansburg, Virginia, and reads, in part, as follows:

“I call your attention to the following provision in section 708 of the Code:

‘But the prohibitions of this section shall not apply to a merchant who, in the regular course of trade and without employing agents to solicit such business, sells * * * supplies used in the schools * * *.’

‘If, therefore, the School Board member about whom you write is a merchant and sells coal in the regular course of business, I am of opinion that he may sell coal to the School Board; and I know of no prohibition against such School Board member selling coal to the Board of Supervisors for the use of the county generally.’

In the case of Commonwealth v. Barrow, 118 Va. 257, the Supreme Court of Appeals of Virginia held that this statute is highly penal and must, therefore, be strictly construed and that nothing should be considered a violation of the statute which is not clearly covered thereby.

It might be argued that submitting sealed bids for contracts on such an item as coal is not covered by the exception in the last sentence of §22-213. However, under the rule of construction announced by the Court in the Barrow Case, it is my opinion that the view expressed by my predecessor is sound and should be followed. Therefore, it is my opinion that a member of a school board who is regularly a coal dealer may sell coal to the School Board if he does so in the regular course of trade and without employing agents to solicit such business, and that this practice is not subject to the permission of the State Board.
SCHOOLS AND SCHOOL BOARDS—New London academy—Concerning management of. F-203

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

I have your letter of January 29, in which you ask several questions dealing with the management and operation of the New London Academy, which is a school located in Bedford County and supported jointly by Bedford and Campbell Counties. This school occupies a somewhat unique status and its operation is largely controlled by Chapter 475 of the Acts of 1926. Some of your questions are more practical than legal, but I shall do the best I can with them from such study as I have been able to make.

Your first question is: “Is it necessary that a copy of the budget of the Board of Managers of New London Academy be submitted to the School Boards of Bedford and Campbell Counties and to the Boards of Supervisors of Bedford and Campbell Counties?”

This inquiry should, I think, be answered in the affirmative. Certainly the School Boards of the two Counties are entitled to all pertinent information relative to the expense of operation of the School, and it would appear that the Boards of Supervisors are entitled to this information also, which they can obtain in the manner that I shall indicate in my reply to your second question.

You next ask: “Is it necessary that the budget for New London Academy be set up in the budget of the County School Boards of Bedford and Campbell Counties item by item, or is it proper that the amount estimated to be necessary to operate New London Academy be setup as a lump in the budgets of the respective School Boards?”

It seems to me that the best method to be pursued by the two County School Boards in making up their budgets is for each Board to include in its budget submitted to the Board of Supervisors under the appropriate items set up in the annual budget form its part of the expense of the New London School. There can be attached to the budget as an exhibit for the information of the Board of Supervisors a copy of the budget which has been submitted by the Board of Managers of the School. The method I suggest I think is preferable to simply setting up a lump sum in each budget for the support of the School.

Your third question is: “Who is the fiscal agent for the Board of Managers of New London Academy? Is this matter in the discretion of the Board of Managers, or is it governed by Section 22-133.1 of the Code of Virginia, providing for a fiscal agent wherever two or more counties are involved, as provided for in that section?”

This question is not in terms answered either by the Act of 1926 or by general law. However, Section 3 of the Act of 1926 provides that the Board of Managers of the New London School shall expend the funds of the School by checks or warrants authorized by the said Board and signed by the Chairman and Clerk, respectively. Section 7 of the Act provides that each of the two County School Boards shall pay to the Board of Managers its proportionate part of the expense of the School, one-half not later than October 1, of each year, and the balance after February 1, of each year. The Act does not say who shall be the fiscal agent of the Board of Managers, and so I think that the selection of such fiscal agent is a matter within the discretion of the Board. Since the Treasurers of the Counties are the fiscal agents for School Boards generally, I should think it would be in accord with general public policy for the Board of Managers to select the Treasurer of one of the two Counties as its fiscal agent, but, as I have indicated, this is a matter within the discretion of the Board.
Your last question is: "Should a report of the school activities of New London Academy and an accounting of its stewardship be made through the report of the respective School Boards of the respective Counties, or should such report be made directly to the State Board of Education?"

While the State Board of Education has general control over the conduct of the School, it appears to me that Section 6 of the 1926 Act contemplates that the School shall be under the primary jurisdiction of the Division Superintendent of Schools of either Bedford or Campbell County, as the Board of Managers may determine. I see no necessity, therefore, for a direct report of the activities of the School to be made to the State Board of Education unless the Board so requests. Normally the State Board may secure such reports as it desires from the Division Superintendent of Schools in charge.

SCHOOLS AND SCHOOL BOARDS—Proper items for expenditure of "Battle" school funds. F-206

HONORABLE DUVAL RADFORD,
Member House of Delegates.

This is in reply to your letter of December 18, 1950, from which I quote as follows:

"A question has arisen as to a construction of the Acts approved February 11, 1950, being Chapter 14, page 12 of said Acts, title to which was as follows: 'AN ACT to provide for State aid to counties and cities in the construction of public school buildings; to appropriate funds therefor; and to provide the terms and conditions for the expenditure of the funds appropriated.'

"The question is whether or not funds appropriated under this Act can be used for the grading of the building site and improvements placed thereon and also, for the construction of a well in order to obtain water for said new construction.

"The question has also arisen in the construction of a new school on a new building site whether or not any of the funds appropriated by the afore-said Act could be used for things which were incidental to the new school such as the grading of an athletic or playfield for the children attending said school."

I have given much consideration to your questions and have reached the conclusion that the test to be applied in deciding whether a particular item is a proper one for which to use funds appropriated under the 1950 act referred to is whether or not the particular item is a school building, a part of a school building or directly related to the construction of a school building. Reference to the particular items mentioned in your letter will perhaps clarify that statement.

It is my opinion that the cost of preparing a site for a building is a proper item for which such funds could be used, because such work is required in order to construct the building. So, too, is the cost of constructing a well to supply water for the building an item of cost for an integral part of the building. However, improving the surrounding property by placing shrubbery thereon or grading an athletic or playfield is not essential to the building and, in my opinion, should not be included as an item for which such funds may be expended.

I realize, of course, that these latter items are highly desirable and, indeed, even essential to a well-rounded educational program. However, in reading the entire act I am left with the impression that the desire of the Legislature was to provide buildings as such; in other words, to provide school-room facilities. There-
I somewhat reluctantly conclude that such items as shrubbery and athletic fields should not be secured with the funds provided under the act. I might also advise that I have discussed this matter with Mr. Dowell J. Howard, Superintendent of Public Instruction, and his interpretation of this act concurs with the views expressed herein.

SCHOOLS AND SCHOOL BOARDS—Property—Court approval not required for purchase of. F-252

ALLEN SOWDER, ESQ.,
Attorney at Law.

I am in receipt of your letter of April 7, in which you state that the School Board of Montgomery County is purchasing real estate for school purposes and that you have been engaged by the Board to perform the necessary legal services for the examination of title, etc. You desire my opinion as to whether or not it is necessary for the court to approve the purchase of such real estate.

From such examination of the statutes as I have been able to make I can find no such requirement.

SCHOOLS AND SCHOOL BOARDS—Special Assistant U. S. District Attorney ineligible to serve on school board. F-249

MR. WILLIAM S. MUNDY, JR.,
Chairman School Board of Lynchburg.

I am in receipt of your letter of March 26, from which I quote as follows:

"On behalf of the School Board of the City of Lynchburg I am requesting your opinion as to whether or not an attorney at law, appointed a Special Assistant to the United States Attorney and receiving compensation on a per diem basis from the United States government, for services rendered more or less regularly, but not as an exclusive and full time occupation, is eligible to serve as a member of the School Board of the City of Lynchburg.

"We are aware of Sec. 22-90 prescribing the qualifications of members of the board and of Sec. 22-92 expressly listing certain offices which disqualify a member. However, we are uncertain whether there are, or may be other provisions of the constitution or statutes affecting qualification for membership on the board, in addition to the provisions of these sections."

A member of a school board is a constitutional officer. (Section 133 Virginia Constitution).

Section 2-27, Code 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, trust or emolument under the government of the United States, or who is in the employment of that government or receives from it any emolument whatsoever. The acceptance of such office or employment under the Federal Government ipso facto vacates the incumbency of the State, county or city office.

There are certain exceptions embraced by section 2-29. None of these exceptions, however, are applicable to the situation here presented. The Federal office described
by you and the circumstances related as attendant thereupon is clearly embraced by Section 2-27.

I am of the opinion that the acceptance of the office or post of Special Assistant to the United States District Attorney as related in your inquiry would render the appointee ineligible to serve as a member of the school board of the city of Lynchburg.

SCHOOLS AND SCHOOL BOARDS—State Board—Authority over payment for textbooks by local boards.  F-228

June 26, 1951.

HONORABLE DOWELL J. HOWARD,
Superintendent of Public Instruction.

This is in reply to your letter of June 22, 1951, from which I quote as follows:

"I shall appreciate it therefore if you will advise me if the State Board of Education has the authority to adopt the following regulation:

"'The School Board may provide by resolution, for the issuance of warrants drawn on the Textbook Fund in payment of amounts due publishers and for freight and/or drayage. All such warrants so authorized shall be signed by the Chairman of the School Board and countersigned by the Clerk of that Board, and presented to the School Board for approval at the next meeting of the Board held subsequent to the issuance of such warrants.'"

Section 22-315 of the Code of Virginia, 1950, reads in part as follows:

"The State Board shall see that all pupils attending the public schools are properly supplied with adopted textbooks, that the accounts of local school boards with the publishers are accurately kept and payments made by such boards for all books purchased on the due date; ***."

In exercising its power to see that payments are made for books purchased on the due date, which would, I believe, include freight or drayage as an incidental cost of the books, it is my opinion that the State Board of Education may adopt the suggested regulation.

SCHOOLS AND SCHOOL BOARD—Superintendent of schools or clerk of school board may serve as clerk of joint committee.  F-203

February 8, 1951.

HONORABLE J. GORDON BENNETT,
 Auditor of Public Accounts.

This is in reply to your letter of January 30, 1951, which reads as follows:

"A question has been raised regarding the employment of the superintendent of schools as executive officer or as clerk of a jointly owned school (created under authority of Section 22-7 of the Code of Virginia), and of the clerk of a school board serving as clerk of the joint committee for control of such a school.

"We should appreciate your opinion with respect to the following questions in connection therewith:
1. Is a joint committee for control of a jointly owned school prohibited under the provisions of Sections 15-504 or 22-213 from employing with compensation—

(a) A superintendent of schools of one of the participating localities as executive officer of such a school or as clerk for the committee.

(b) A clerk of the school board of one of the participating localities as clerk of the joint committees for control.

I have previously had occasion to review §§15-504 and 22-213 and have concluded that in so far as contracts between school employees and officials and the school boards are concerned they are governed by §22-213 rather than §15-504. In my opinion none of the provisions of §22-213 are applicable to the two situations outlined in your letter.

SCHOOLS AND SCHOOL BOARDS—Temporary loans for school construction. F-199

MRS. MARK REGAN, Chairman, School Board for the City of Falls Church.

This is to acknowledge receipt of the recent letter signed by you and Mr. Irvin H. Schmitt, Superintendent of Schools for the City of Falls Church, from which I quote as follows:

"By a vote of the people in an election held November 19, 1949, the City of Falls Church was authorized to issue bonds in an amount of $700,000 to purchase sites, repair, improve and construct school buildings. Subsequently, the bonds were sold and bids taken for construction of a high school and an elementary school. On November 29, 1950, a contract was entered into for the construction of a high school at a firm price of approximately $680,000, and a ninety day option was taken on a bid to build an elementary school at approximately $140,000. The latter bid is very favorable, and in view of the impending limitations upon building construction and rising prices, the School Board is under a form of duty not to let the option expire. Inasmuch as more time is required to vote upon and issue bonds than is vouchsafed the School Board, the only possibility of accepting the advantageous and, perhaps, irretrievable opportunity (if not now accepted) is to finance the construction by short term loans.

"Section 22-120 of the Code of Virginia provides as follows:

"The School Board * * * of any city, which may find it necessary to make a temporary loan or loans, is hereby authorized to borrow a sum, or sums, of money not to exceed one-half of the amount produced by the * * * school levy laid in such * * * city for the year in which such money is so borrowed * * *. Such loans shall be evidenced by notes or bonds negotiable or non-negotiable as the board determines. Such loans shall * * * be repaid within one year of their date. No such loans shall be negotiated * * * without the approval of the tax-levying body."

"It appears that under the foregoing authority, as the School Board, by resolution adopted January 11, 1951, proposes to do, a temporary loan in the amount of $100,000 may be negotiated by the School Board with the approval of the City Council, payable in July, 1951, and thereafter, a new loan of
approximately $150,000 (one-half of the proposed school levy for 1951-1952) may be negotiated, to be repaid within twelve months. With the repayment of the latter loan, the cost of construction of the school building would be discharged, thereafter, and for three or four years, the School Board budget would provide for temporary loans to make up the deficit caused by the cost of constructing the building. These temporary loans would be made for lesser amounts each succeeding year by applying the annual surplus (i.e., the funds provided to carry operations on in the first months of the new fiscal year until taxes are received in the Fall), which has heretofore been in an amount of $40,000 to $60,000 annually."

I know of no reason why the loans to which you refer may not be made under the provision of Section 22-120 of the Code which is set forth above, and it is my opinion that they will be legal and proper if the specific conditions provided by the section in question are observed.

SCHOOLS AND SCHOOL BOARDS—Town of Virginia Beach is a local educational agency. F-203

HONORABLE DOWELL J. HOWARD,
Superintendent of Public Instruction.

May 17, 1951.

I am in receipt of your letter of May 10th from which I quote below:

"The Congress of the United States under Public Law No. 815 (81st Congress), has made available certain funds for the construction of school facilities in areas affected by Federal activities and for other purposes. Item 12 of this Law reads as follows:

"The term "local educational agency" means a board of education or other legally constituted local school authority having administrative control and direction of free public education in a county, township, independent, or other school district located within a State. Such term includes any State agency which directly operates and maintains facilities for providing free public education."

"The United States Office of Education has raised a question concerning the authority of the town school board for Virginia Beach as an administrative unit. We have cited Section 22-43 of the Code of 1950 and we have also advised that the State Board of Education at its meeting on July 15, 1930, approved the town school board for Virginia Beach for operation. However, they have asked us to secure an opinion from your office as to the authority of the Town of Virginia Beach, in the light of Section 12 of Public Law 815, to apply for such Federal funds, and to expend same if a Federal grant is made for the purpose of aiding the locality in the construction of school facilities."

You have advised me that the necessary steps have been taken pursuant to Section 22-43 of the Code, including the passage of the necessary ordinance by the Town Council with the approval of the State Board, to qualify the Town of Virginia Beach as a separate school district to be operated as such under the School Board of the Town.

I am, therefore, of the opinion that the School Board of the Town of Virginia Beach is a local educational agency having administrative control and direction of free public education within the town. It is certainly recognized as such under Virginia law.
REPORT OF THE ATTORNEY GENERAL

SCHOOLS AND SCHOOL BOARDS—Trustees Electoral Board—Deputy Treasurer ineligible for appointment. F-249

July 5, 1950.

HONORABLE E. HUGH SMITH,
Judge of Twelfth Judicial Circuit.

This is in reply to your letter of June 30, in which you ask if a deputy treasurer may be appointed as a member of a County School Trustee Electoral Board.

I agree with you that the statutes dealing with the compatibility of offices are often confusing. As you point out, the first paragraph of Section 15-486 provides that “No person holding the office of county treasurer, sheriff,” etc. “shall hold any other office, elective or appointive, at the same time” with certain exceptions not pertinent here. No mention is made in this paragraph of the deputies of the specified officers, but in the qualifying sub-paragraphs it is provided that deputy sheriffs may hold certain offices.

Prior to the amendment of this section to include the reference to deputy sheriffs, this office had ruled that, since deputy sheriffs were not mentioned in the prohibiting clause, that clause was not applicable to them. See the enclosed copy of an opinion rendered to the Honorable James H. Price, Governor, on April 2, 1940. However, the amendment of this section to provide an exception for deputy sheriffs would indicate that the Legislature construed the prohibiting clause as embracing the deputies of the officers named. This action of the Legislature was probably prompted by what the Supreme Court said in Credit Company v. Commonwealth, 155 Va. 1033, which indicated that the Court felt that the policy of the law was not only to prohibit the regular county officers named from holding other offices, but also to prohibit their deputies from doing so.

Aside from Section 15-486, there is also Section 22-60, which provides that the School Trustee Electoral Board shall be composed of three resident qualified voters “who are not county or state officers”. Since Section 15-485 provides for the appointment of deputy treasurers and prescribes their duties and states that, before any such deputy shall enter upon the duties of “his office”, he shall take the oath provided for county officers, it would clearly appear that a deputy treasurer is an officer and, therefore, prohibited by Section 22-60 from serving on the School Trustee Electoral Board. Some doubt is cast upon this view because Section 22-69, which deals with County School Boards, expressly mentions deputies as among those prohibited from serving on the School Boards, while Section 22-60, which deals with School Trustee Electoral Boards, does not specifically mention deputies.

Upon a consideration of all of the pertinent statutes and of the comments used by the Court in Credit Company v. Commonwealth, supra, it is my opinion that, while the matter is not free from all doubt, a deputy treasurer should be considered ineligible for appointment as a member of the School Trustee Electoral Board.

SCHOOLS AND SCHOOL BOARDS—Use of schools as voting places discretionary with board. F-252—F-100

October 24, 1950.

Mr. E. S. Bishop,
Secretary, Montgomery County Electoral Board.

This is in reply to your letter of October 16, 1950, from which I quote as follows:

“The Superintendent of Schools of Montgomery County has objected to the use of one room of a four-room school building as a voting place because it means closing the school for that day. This is the only public building available and in this precinct the elections have been held in a school building.
for about fifty-two years. It is the opinion of the citizens involved that the school building is the proper place to conduct the elections. Since the Governor of Virginia has declared Election Day a legal holiday, we can see no reason for objections to the closing of the school and using it for voting purposes."

I believe your question is governed by §22-164 of the Code of Virginia, which reads as follows:

"The school board or the division superintendent subject to the approval of the board, may provide for, or permit, the use of school building and grounds out of school hours during the school term, or in vacation, for any legal assembly, or may permit the same to be used as voting places in any primary, regular or special election. The board shall adopt rules and regulations necessary to protect school property when used for such purpose."

You will observe that the language of the section is that the school board or division superintendent, subject to the approval of the board, may permit the use of schools as voting places. It would appear from the above that this matter lies within the discretion of the school board.

I am unable to find any other provision of law which would alter this conclusion.

SCHOOLS AND SCHOOL BOARDS—Use of school property by other organizations. F-252

March 8, 1951.

HONORABLE T. STOKELEY COLEMAN,
Commonwealth’s Attorney for Spotsylvania County.

This is in reply to your letter of March 6, 1951, which reads as follows:

"The School Board of Spotsylvania County, Virginia, has received a request from the Veteran’s Class at Spotsylvania High School for permission to conduct a general auction at regular intervals on the school property charging commissions therefor which go for the benefit of the Veteran's Class. The School Board has consented to this providing it meets the requirements of the law, and has asked me to ascertain this and report to them. I would appreciate your advice in the matter."

I am not familiar with the nature of the "Veteran's Class" to which you make reference, and you do not set forth the details of the auction which is to be held. However, I call your attention to the broad discretionary power regarding the use of school property which is vested in the school board by virtue of §§22-164.1 and 22-164.2 of the Code. These sections were enacted at the 1950 session of the General Assembly and are contained in the Supplement to the 1950 Code of Virginia. They are as follows:

"The school board of any county, city or town is authorized to permit the use of, upon such terms and conditions as it deems proper, such portions of the school property under their control as will not impair the efficiency of the schools. Such permits shall be made under rules and regulations of the school board and the board may authorize the division superintendent to permit use of the school property under such conditions as it deems proper. The superintendent shall report to the board at the end of each month his actions under this section."

"Each such permit may contain, among other matters, provisions (1)
limiting the use of the property while classes are in session, and (2) an undertaking by the lessee to return the property so used in as good condition as when leased, normal wear and tear excepted."

In the light of these sections, I see no legal objection to the use inquired of on the basis of the facts presented by your letter.

SCHOOL TRUSTEE BOARD—Appointment of. F-203

HONORABLE DOWELL J. HOWARD,
Superintendent of Public Instruction.

August 14, 1950.

This is reply to your letter of August 1, 1950, which reads as follows:

"Section 22-60, Code of 1950, reads as follows:

"School trustee electoral boards.—In each county there shall be a board, to be known as the school trustee electoral board, which shall be composed of three resident qualified voters, who are not county or State officers, to be appointed by the circuit court of each county or the judge in vacation, within thirty days after the first day of July, nineteen hundred and fifty and every four years thereafter. The members of the trustee electoral board shall each receive a per diem of two dollars for each day actually employed, to be paid out of the county school fund. Any vacancy occurring within the term of the appointees shall be filled by the circuit court, or by the judge in vacation, within thirty days thereafter."

"I shall appreciate it very much if you will advise me as to the procedure to be followed in the event that the appointment is not made within the thirty day period. Does the incumbent serve until his successor is appointed or is the office automatically considered to be vacant? If the vacancy occurred as the result of the death of the incumbent and the appointment is not made within the thirty day period but is made sixty days after the first day of July is the appointment legal and are the actions taken by the Trustee Electoral Board valid?"

In answer to your first question, it is my opinion that in the event an appointment is not made within the thirty-day period prescribed the incumbent would hold over until the appointment is made. This rule is well established in America. In McQuillin on Municipal Corporation, Vol. I, §507, it is stated thusly:

"* * * the American courts early adopted the doctrine that, in the absence of express provision and unless the legislative intent to the contrary is manifest, municipal officers hold over until their successors are provided. Thus, failure to appoint or elect a successor at the end of a defined period does not usually work a vacancy where the officer is to hold until his successor is elected or appointed and qualified. Therefore, the time an officer holds over the designated period is as much his term of office as that which precedes the date at which the new election or appointment should be held or made.

"This doctrine is true, it has been held, even though there is no express provision of law to that effect. However, it has often been promulgated by precise provisions in municipal charters and has been incorporated in state systems by constitution and statute. It finds its fundamental basis in consideration of public convenience and necessity, * * *."
As to your second question, I do not believe that the failure to make the appointment within the time prescribed by the statute would invalidate the appointment when made. There is no method prescribed for filling vacancies on the school trustee electoral board except by appointment by the judge of the circuit court. Therefore, if it were held that failure to fill, within thirty days, a vacancy caused by death invalidated a later appointment, we would be confronted with a situation in which such failure to appoint would create a vacancy which could not be filled until a new term commenced.

It is, therefore, my opinion that, while the appointment should be made within the time prescribed by law, an appointment made at a later time would be effective and, consequently, the actions taken by the board would be valid.

SEALS—Unlawful use of State Seal; advertising. F-4

January 24, 1951.

Mrs. Thelma Young Gordon,
Secretary of the Commonwealth.

This is in reply to your letter of January 16, 1951 in which you inquire whether it would be proper for the State Planters Bank and Trust Company to replace their present seal for further use.

An impression made by the present seal of the bank was enclosed and examination of that impression reveals that it consists of a reproduction of the lesser seal of the Commonwealth surrounded by a border in which is contained the words “State Planters Bank and Trust Company, Richmond, Va.”

On March 8, 1940, in an opinion to the then Secretary of the Commonwealth, Raymond L. Jackson, the former Attorney General, Abram P. Staples, said “ * * * in my opinion, sections 4392b-4392h of the Code apply to the seal of Virginia and copies thereof, as well as the complete State flag. * * *.”

Sections 4392b-4392h, referred to by the former Attorney General are contained in the Code of 1950 as §§18-354-18-360.

Section 18-355 reads, in part, as follows:

“No person shall, in any manner, for exhibition or display:

“(1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this State, or authorized by any law of the United States or of this State:

“(2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed, any such word, figure, mark, picture, design, drawing or advertisement:”

In my opinion the seal now in use by the bank clearly violates the provisions of §18-355(2).

SEARCH WARRANTS—Authority of clerk of trial justice court to issue; copy to be given owner; authority of trooper to seize pinball machine in his view. F-381

November 8, 1950.

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

This is in reply to your letter of October 30, 1950, in which you request my opinion on several questions relating to search warrants.
Your first question is whether the Clerk of the Trial Justice Court is authorized to issue and sign a search warrant the same as a trial justice.

Section 19-28 of the Code of Virginia of 1950 reads as follows:

"If there be complaint on oath, supported by the affidavit required by §19-30, that personal property has been stolen, embezzled, or obtained by false pretenses, and that it is believed to be concealed in a particular house or other place, a justice of the peace, a trial justice, other than a civil and police justice, or a judge of a court of record having jurisdiction of the trial of criminal cases to whom complaint is made, if satisfied that there is reasonable cause for such belief, shall issue a warrant to search such place for the property."

Freedom from unlawful and burdensome searches has long been regarded one of the most sacred rights of free people and, therefore, the power to issue warrants to search has been carefully guarded and, in the absence of any statute expanding the provisions of §19-28, I would be forced to the conclusion that only those persons named in that section may issue such process. However, §16-61 of the Code, which lists the powers and duties of the clerk of a trial justice court, reads as follows:

"Such clerk shall be a conservator of the peace within the territory for which the trial justice for whom he is clerk was appointed and may within the jurisdiction, territorial and otherwise, of such trial justice, issue warrants and processes, original, mesne and final, both civil and criminal, issue abstracts of judgments and subpoenas for witnesses, and grant bail in misdemeanor cases. He shall have authority to take affidavits and administer oaths and affirmations, to take depositions, in the same manner as a notary public and to take acknowledgments to deeds or other writings for purposes or recordation. Such clerk shall keep the docket and accounts for such trial justice and shall discharge such other duties as may be prescribed by the trial justice."

(Italics supplied)

It is my opinion that the portion of this section which I have italicized confers upon the clerk of the trial justice court authority to issue warrants, which is co-extensive with that of the trial justice in all respects. The clerk is further authorized to take affidavits which authority is, of course, a prerequisite to the issuance of a search warrant. I, therefore, conclude that the clerk of a trial justice court may issue a search warrant.

You next inquire whether such warrants should be issued in duplicate and a copy handed the owner and, if the owner does not question the officer's authority but permits the search, whether the warrant must be shown to him. Section 19-31 of the Code sets forth those things which a search warrant shall command and reads, in part, as follows:

"Every search warrant shall be directed to the sheriff, policeman or constable of the county or corporation in which the place to be searched is and shall command him to search the house, place, vehicle, baggage or thing designated, either in day or night, seize the property mentioned in such affidavit, and bring the same and the person in whose possession the same are found before a trial justice or court having jurisdiction of the offense in relation to which such search was made, ***." (Italics supplied)

Section 19-72.1 of the Code reads as follows:

"Except as provided in §46-193, any process issued against a person charged with a criminal offense shall be in duplicate and the officer serving such process shall leave a copy with the person charged."

It is my opinion that, inasmuch as a search warrant must command that the person in possession of the things sought be brought before the court, such warrant
comes within the meaning of §19-72.1 and, therefore, a copy should be left with such 
person.

Even in the absence of §19-72.1, I would be inclined to advise, as a matter of 
policy, that an officer making a search should serve the owner or occupant of the 
premises with a copy of such warrant in order to prevent resistance by force and 
put the occupant on notice that his premises are being lawfully searched and that 
the officers are not trespassers. This procedure should be followed whether the 
occupant objects to the search or not.

Your final question relates to the power of a State Trooper to seize without a 
search warrant a pinball machine which is in his view in a public place and is being 
used in violation of the laws of the Commonwealth. Section 18-294 provides that 
such machine may be seized under a proper search warrant. However, §52-20 pro-
vides that such an officer may make an arrest without a warrant for a misdemeanor 
committed in his presence, and it is my opinion that the officer making such arrest 
could also seize such evidence as is obtainable without a search. However, if a search 
is necessary a warrant should be secured. In line with this opinion, I am enclosing 
a copy of an opinion rendered Mr. W. M. Price, Sheriff of Bland County on April 
18, 1950.

SECRETARY OF COMMONWEALTH—Acceptance of service of process 
on a partnership.  F-68

MRS. THELMA Y. GORDON, 
Secretary of the Commonwealth.

April 12, 1951.

This will acknowledge receipt of your letter of April 11 wherein you request 
my opinion as to whether or not, pursuant to §54-140 of the Code of Virginia, the 
Secretary of the Commonwealth should accept service of process in the name of 
individual partners or in the name of the contracting partnership firm. 

Section 54-140 provides:

"Before any nonresident person or any foreign corporation, shall bid on 
any work in this State, such nonresident person or any foreign corporation 
shall, by written power of attorney, appoint the Secretary of the Common-
wealth and his successor in office the agent of such nonresident person or any 
foreign corporation upon whom all lawful process against or notice to such 
nonresident person or any foreign corporation may be served, and who shall 
be authorized to enter an appearance in behalf of such nonresident person or 
any foreign corporation. Upon the filing of such power of attorney the pro-
visions of §§13-214 to 13-216, with reference to service and notice, and judg-
ments, decrees and orders entered therein, shall be applicable as to such non-
resident person or any foreign corporation."

It is to be noted that that section uses the term “nonresident person.” According-
ly, it would appear advisable for each member of the partnership to sign the power 
of attorney.

Moreover, §8-59.1, providing for service upon partnerships, states:

"Process against, or notice to, a copartner or partnership, may be served 
upon a partner, and it shall be deemed service upon the partnership and upon 
each partner individually named in the action, provided the person served is 
not a plaintiff in the suit, and provided the matter in suit is a partnership 
matter."

It further appears that this latter section expressly makes service upon one 
partner binding upon each named member and the partnership.
With regard to your acceptance of service in any particular matter, the terminology used in the process and also the manner in which the power of attorney is signed should be given consideration. However, it would be my view that it would be proper for you to accept service of process in the name of the individual partner or partners whose signatures are affixed to the power of attorney. It could also be noted in the acceptance that the partner or partners trade as a certain firm.

SECRETARY OF COMMONWEALTH—Fees for additional process.  F-68

MRS. THELMA Y. GORDON,
Secretary of the Commonwealth.

May 21, 1951.

This is in reply to your letter of May 18 in which you request my opinion on the following question:

"Section 13-216 of the Code lists the fees to be paid the Secretary of the Commonwealth when service is made on the Secretary of the Commonwealth for foreign corporations, companies and societies.

"For a number of years it has been the practice in this office to require a fee of $2.50 for each process served when there were separate defendant corporations. The fee of 50¢ was required when an extra paper was served in a case where the same plaintiff requested that additional notice be served on the same defendant.

"We have recently been requested to obtain an opinion from you as to whether or not it would be proper to require a fee of $2.50 for the first process served and 50¢ for each additional process served when separate corporations were involved as defendants."

In my opinion §13-216 of the Code supports the practice of your office. It seems to me to be reasonably clear that the "additional process" to be mailed, for which a fee of fifty cents may be charged, refers to such process on the same defendant.

SELECTIVE SERVICE ACT—Duty of clerks to record certain induction records—World War II not terminated.  F-116

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

July 26, 1950.

This is in reply to your letter of July 24, 1950, which reads, in part, as follows:

"In view of the fact that the Draft Boards are again active with the registration and induction of young men into the Armed Forces, is it still necessary for the Clerk to secure the induction records from the Draft Board and record those in the Induction Record Book?"

The duties imposed upon the clerks of the Circuit and Corporation Courts, to which you refer, are found in §§17-88 to 17-91 of the Code of Virginia of 1950. These duties are with reference to the recordation of certain information concerning residents of the clerk's county or city who "under the Selective Service Act or by voluntary action, have been or shall hereafter during the continuation of the present World War II be inducted into the armed forces of the United States."
As you indicate in your letter, this office has previously ruled that "a treaty terminates a war" (Report of the Attorney General, 1945-46, page 164, and 1948-49, page 275). Therefore, since all the treaties necessary to end World War II have not been entered into, a technical state of war still exists.

It is, therefore, my opinion that the duties imposed upon the clerks by the aforementioned Code sections are still in effect and should be complied with by the clerks.

In this connection it is pertinent to note that the language " * * * hereafter during the continuation of the present World War II * * *" was retained by the Legislature when the Code of 1950 was adopted and this seems a clear indication that the Legislature considered World War II as not yet having been terminated.

SHERIFF—Duty to execute distress warrants to collect taxes.  F-136

HONORABLE C. G. AVERY,  July 5, 1950.
Treasurer of Charles City County.

This is in reply to your letter of June 29, in which you ask whether a county sheriff is required by law to execute distress warrants issued for the purpose of the collection of taxes as he would a distress warrant for the recovery of debts other than taxes.

I am enclosing a copy of a previous opinion of this office given to the Honorable G. M. Weems, Treasurer of Hanover County, on June 16, 1939, dealing with the construction of Sections 378, 394 and 403 of the Tax Code (now Sections 58-1001 through 58-1005, 58-991, and 58-1014 through 58-1020, respectively, of the Code of 1950) as they affect the problem presented by your letter.

You will note that, if the procedure allowed by Sections 58-1001 through 58-1005 is followed by the Treasurer, no distress warrant is issued, but the action is taken on the tax bill itself by the officer in whose hands the bills are. Unless the governing body has placed the bills in the hands of the sheriff under Section 58-991, it is not incumbent upon the sheriff to make the levy.

Of course, if the governing body acts under Section 58-1016 and institutes proceedings authorized by Section 58-1014 for the collection of taxes by the same remedies allowed for the enforcement of demands between individuals, the sheriff would be required to execute the regular warrant or other process issued in due course.

SHERIFFS—Part-time deputy may also be a special county policeman.  F-249

HONORABLE VALENTINE W. SOUTHALL,  March 2, 1951.
Commonwealth's Attorney for Amelia County.

This will acknowledge receipt of your letter of February 27, requesting my opinion as to whether or not a deputy sheriff can also be a special county policeman. Your letter calls attention to the opinion rendered by former Attorney General, the Honorable Abram P. Staples, to Judge J. G. Jefferson, Jr., dated January 18, 1944, to the effect that a part-time deputy could be so appointed as a special county policeman. You also call attention to §15-563 of the Code of Virginia, which provides as follows:

"Before any person shall be appointed as policeman under the preceding section, he shall be a qualified voter and an actual resident of the county for
which he is appointed and shall make written application for such appoint-
ment to the circuit court or the judge thereof in vacation. Such application
shall state applicant's full name, age, place of residence, occupation and by
whom regularly employed. A part-time deputy of the sheriff may be appointed
as such policeman."

The opinion referred to above, deciding the question presented by your letter
in the affirmative, was rendered prior to the 1944 amendment to the former Code
section, 4797. The Legislature expressly amended that section to the effect that
"a part-time deputy sheriff may be appointed" as a special policeman. It is my
opinion that the former opinion is to be upheld and that the act of the Legislature
is to be given the effect of its express language. Accordingly, it is my view that a
part-time deputy sheriff may also be appointed a special policeman pursuant to

SHERIFFS—Sales—Purchases of property sold by deputy. F-136

HONORABLE SAM N. SAMPLE,
Sheriff for Russell County.

I quote below from your letter of December 4th:

"Would you render an opinion on the question of whether one of my
deputies can purchase effects sold at an execution sale by another one of
my deputies? Proper construction of Title 8-427 of the 1950 Code is desired.
In other words, it is my understanding that any officer cannot purchase at
his own sale, but I would like to know whether the above title and section
prohibits one deputy purchasing at another deputy's sale when both are
deputies under the same sheriff."

The section to which you refer reads as follows:

"No sheriff, sergeant, city or town constable or high constable or any
deputy of any such officer shall, directly or indirectly, purchase effects sold
under a writ by such officer or deputy." (Section 8-427, Code of 1950).

The language of the section is such that it is difficult to give you a categorical
answer to your question which is free from all doubt. However, I remind you that
when a deputy sheriff is conducting a sale under a writ he is conducting it for his
principal, the sheriff, and so it is in reality the sheriff's sale. When this fact is
considered along with the obvious policy of the statute it is my opinion that the
legislative intent is that a deputy sheriff shall not purchase property sold by another
deputy at a sale conducted for the same principal.

SHERIFFS AND SERGEANTS—Accepting private employment in off-duty
hours. F-136

MR. W. S. MUNDY,
City Sergeant of Radford.

This is in reply to your letter of October 19th in which you ask whether or not
you, as City Sergeant, may accept private employment from the hour of four P.M.
until twelve midnight "in addition to holding job and duties of office as City Sergeant".

From my examination of the statutes I can find nothing that can be said to prevent you as City Sergeant from accepting private employment or that requires you to devote your entire time to discharging the duties of your office. In saying this I assume that you would have no duties in your private employment which would interfere with the performance of or be inconsistent with the duties of your office as manifestly this would be contrary to public policy.

If you do decide to accept private employment and be compensated therefor I am sure you would desire to report the matter to the State Compensation Board as it might be that this agency would wish to take this fact into consideration in fixing your public compensation and in authorizing the employment of your deputies.

SHERIFFS AND SERGEANTS—Compensation for travel when officer does not report to office at start of day.  F-114

May 3, 1951.

HONORABLE DABNEY K. HALL,
Sheriff of Pittsylvania County.

This is in reply to your letter of April 13, 1951, in which you enclosed a copy of a letter from Honorable L. McCarthy Downs, Chairman of the Compensation Board of Virginia.

I quote your letter as follows:

"It is my position that with the installation of short-wave radio equipment, my men are on official duty as soon as they report in each day which is usually at their residences. When they report, I give them directions as to what they shall do that day and usually forward court papers to them for service by mail or by personal contact. I do not require them to report for duty at the Sheriff's Office in Chatham nor are they relieved from duty at that point. It thus seems to me that they are in an official status at any time that they are on official business, and that this is certainly true with respect to trips to and from their residences when they are on official business at all times from the time they leave home until they return, and that is the way I interpret the quoted portion of the letter referred to."

Mr. Downs' letter reads, in part, as follows:

"* * * You will also please bring to the attention of your deputies that in making up statement of travel they must not include travel from home to the Sheriff's Office and back home, or if they are out serving a paper and their next destination is their home, unless the distance from wherever they are to their home is further than from their home to the Sheriff's Office, only the distance in excess should be shown. The Sheriff's Office is the point from which your deputies begin to show mileage traveled on official business, unless they start from their homes to actually begin their day's work and their destination is not the Sheriff's Office. * * *"

As I understand your respective positions, it appears that you feel the deputies are entitled to reimbursement for mileage computed just as though their homes were their office and Mr. Downs agrees except that when the deputy leaves home to go to the Sheriff's Office he is not entitled to mileage, and upon his return home on the last trip of the day he cannot count the total mileage to his home but only such portion of the actual mileage as he would have been required to travel to get back to the Sheriff's Office.
As I read Mr. Downs' letter, the effect of it is to prevent a deputy from receiving compensation for mileage for going from his home to the sheriff's office or on the last trip of the day to receive compensation for more mileage than would be required to carry him back to the sheriff's office. In my opinion, Mr. Downs' interpretation is correct and should be adhered to. To hold otherwise would, in effect, allow the officer to receive compensation for traveling between the sheriff's office and home which, I think, clearly is not contemplated by the law.

SHERIFFS AND SERGEANTS—Expenses; automobile police radio equipment. F-385

October 25, 1950.

HONORABLE W. CARRINGTON THOMPSON, Attorney for the Commonwealth for Pittsylvania County.

This is in reply to your letter of October 20, 1950, from which I quote as follows:

"The 1950 General Assembly amended §14-87 of the Code of Virginia to include among the expense items of sheriffs and sergeants:

"'... maintenance costs of automobile police radio equipment...'

"A question has arisen as to the proper interpretation of the above quoted language. Pittsylvania County has this year purchased mobile radio equipment for the sheriff and his deputies and this includes a main transmitter near the Court House, together with mobile units on five cars.

"It is my information that the State Compensation Board has taken the position that the State will reimbursement its proportionate share for the maintenance cost of the mobile units but not for the main station. This, to me, appears to be a rather narrow and unrealistic interpretation. I do not pretend to be a radio engineer but I cannot see how the equipment would be of much value without its main transmitter or station to co-ordinate the activities of the various mobile units. It would certainly appear to me to have been the intention of the Legislature to include the maintenance cost of the entire system rather than attempt to segregate the items when the radio equipment operates as an entirety and would be practically useless and prohibitive in cost if there were nothing but mobile units.

"I would therefore appreciate your official opinion as to whether or not the above quoted language of §14-87 of the Code of Virginia does not include maintenance of the main station as well as the mobile units on each vehicle."

Prior to the amendment of §14-87 of the Code, I had occasion on April 1, 1949, to render an opinion on a similar inquiry to the Honorable S. Page Higginbotham. That opinion may be found at page 214 of the Report of the Attorney General, 1948-49, and a copy is enclosed for your convenience.

The conclusion arrived at by me at that time was that, in view of specific provisions of law relating to radio and teletype systems, it was doubtful that the Compensation Board could consider the cost of maintaining local radio equipment as normal operating expenses of the sheriff's office.

Unless the language in the amendment to §14-87 can be construed to include radio equipment other than the mobile units, it is my opinion that the reasoning contained in the opinion to Mr. Higginbotham is controlling.

I cannot escape the conclusion that the word "automobile" contained in the amendment precludes a construction of the statute which would include the main transmitter. Had the Legislature intended to include such equipment as the main
It is my opinion that §14-87 was amended with the purpose in mind of covering mobile units and that the Legislature intended the already existing provisions of law to cover the main system.

SHERIFFS AND SERGEANTS—State will participate in cost of automobile police radio equipment only. P-385

HONORABLE S. PAGE HIGGINBOTHAM, Attorney for the Commonwealth for Orange County.

This is in reply to your letter of October 30, 1950, which reads, in part, as follows:

"By the newspapers I have noticed that your office has ruled that the State shall share in the maintenance cost of automobile police radio equipment, but shall not share in the maintenance cost of office police radio equipment.

"I would like to be advised as to whether or not, if the Compensation Board agreed to pay the State's portion of the maintenance cost of office police radio equipment, would such payment by the State be illegal.

"I am of the opinion that such payment by the Compensation Board would not be illegal, since the language of Section 14-87 of the Code of Virginia as amended by the Acts of Assembly of 1950 provide for 'all expenses incurred', 'office facilities and supplies', and also provide 'any other expense incident to his office.'

"It is clear to me that the cost of maintenance of office police radio could be allowed under any of the above 3 mentioned categories. This would seem to be particularly true, since an office radio is a necessary item of equipment to make effective automobile police radio equipment, and in that light, I do not see how anyone could conclude that police radio equipment in an office would not be a proper expense of the Sheriff's office."

On April 1, 1949, in a letter addressed to you, I expressed the opinion that under the existing statutes it was doubtful whether the Compensation Board could consider the cost of maintaining local radio equipment as normal operating expenses of the Sheriff's office to be paid in part by the State.

Subsequent to that opinion, the Legislature amended §14-87 of the Code of Virginia to read as follows:

"Each sheriff and each sergeant, and each full-time deputy of either, shall keep a record of all expenses incurred by him including expenses for traveling, telephone, telegraph, clerical assistance, office facilities and supplies, bond premiums, cook hire, maintenance cost of automobile police radio equipment, and any other expense incident to his office. Each such full-time deputy shall file a monthly report with his principal, showing in detail the expenses incurred by him."

In answer to an inquiry from the Honorable W. Carrington Thompson I rendered, on October 25, 1950, the opinion to which you refer. I enclose a copy of that opinion for your convenience. In the letter to Mr. Thompson I advised him that the amendment to §14-87 should not be interpreted in such a manner as to include the expense of radio equipment other than automobile radio equipment as an expense of which the State should bear a portion.
In answer to your specific question, I do not believe that the amendment to §14-87 in any way alters the situation with reference to office radio equipment and, therefore, I must adhere to the opinion expressed in my former letter to you. Indeed, if anything, the amendment to §14-87 would strengthen that conclusion. It is a recognized rule of statutory construction that general legislation must give way to specific legislation. The Legislature having given consideration to the use of radio equipment by sheriffs and sergeants and having limited the State’s participation in the expense for such equipment specifically to “automobile police radio equipment”, it can scarcely be argued that it was contemplated that other types of radio equipment could be included under such general items as “expense incident to his office” and the like.

SHERIFFS, SERGEANTS AND CONSTABLES—Sheriffs—Authority to hire special clerk—Expenses of sheriff’s office must be approved by Compensation Board. F-136

HONORABLE N. C. BAILEY, Member of House of Delegates.

This is in reply to your letter of June 29, in which you request my opinion as to whether or not, under Section 14-87, as amended by Chapter 59 of the Acts of the General Assembly of 1950, relating to the expenses of sheriffs and sergeants, a sheriff could employ a special clerk to look after the calls which come through on automobile police radio equipment.

Section 14-87 to which you refer reads as follows:

“Records of expenses of sheriffs and sergeants and their full-time deputies. —Each sheriff and each sergeant, and each full-time deputy of either, shall keep a record of all expenses incurred by him including expenses for traveling, telephone, telegraph, clerical assistance, office facilities and supplies, bond premiums, cook hire, maintenance cost of automobile police radio equipment, and any other expense incident to his office. Each full-time deputy shall file a monthly report with his principal, showing in detail the expenses incurred by him.”

While I do not feel that the expenses in hiring the special clerk to which you refer could be properly included as part of the maintenance cost of the automobile police radio equipment, it is my opinion that such an expense could be included in the language “any other expense incident to his office.”

You understand, of course, that all expenses incurred in maintaining a sheriff’s office must be approved by the Compensation Board, and whether or not a special clerk is needed is a question to be determined by the Board after a consideration of all of the circumstances surrounding the expenses of the office in question.

Therefore, as the Compensation Board is under no obligation to approve the hiring of this special clerk, I would suggest that the matter be submitted to the Board before such an expense is incurred by the Sheriff.

SOCIAL SECURITY—Participation by subdivisions of State. F-161a

HONORABLE JOHN S. BATTLE, Governor of Virginia.

This is in reply to your recent inquiry relating to what action may now be taken to enable such of the political subdivisions of the State as may so desire to avail
themselves of the expanded provisions of the Federal Social Security Act as contained in the “Social Security Act Amendment of 1950” so as to have their employees included in the insurance coverage provided thereby.

As you know, under the original Social Security Act the term “employment” did not include services rendered in the employ of a state or any political subdivision thereof. This is also the case in the Amendments of 1950. However, it is provided in the 1950 Amendments that the Administrator of the Social Security Act at the request “of any State, enter into an agreement with such State for the purpose of extending the insurance system established by this title to services performed by individuals as employees of such State or any political subdivision thereof”. The requirements of such an agreement are contained in section 218 of the Amendments. Among these requirements are that the State will pay to the Secretary of the Treasury the taxes imposed upon the employers and employees by Sections 1400 and 1410 of the Internal Revenue Code; that the State will comply with such regulations as may be promulgated by the Administrator relating to payments and reports and such other regulations as he may promulgate to carry out the purposes of the section; that if the State does not make the payments provided for under the agreement the Administrator may deduct such amount plus interest from payments due the State under any other provision of the Social Security Act; that the agreement may include any one or more of the political subdivisions of the State as may be designated therein. There are other requirements specified in the section but those I have mentioned would appear to be sufficient for the purposes of this communication.

The terms of the agreement are quite broad and you will observe that the entire responsibility for carrying it out is placed upon the State and not upon the political subdivisions whose employees are sought to be covered. Of course, the taxes which would have to be paid to the Secretary of the Treasury by the State would be paid by the political subdivision and its employees designated in the agreement but nevertheless the State is in effect made responsible for the collection of these taxes.

My information is that the Federal Administrator has not yet promulgated the regulations which would constitute a part of the agreement and so, of course, we have no way of knowing at this time what these regulations will be.

The section does not specify what officer or agency shall execute the agreement on the part of the State and I cannot find in our constitution or statutes any provision which gives to any officer or agency authority to enter into such an agreement as I have outlined. It is my opinion, therefore, that no such authority exists and that legislative action is necessary. I can well appreciate the advantages to some of the political subdivisions to avail themselves of the provisions of the amendments but I do not believe there is any doubt of the fact that legislative sanction is necessary. Meantime I am informed that the Council of State Governments has drafted a form of Bill which may be presented to the Legislatures to authorize the States to enter into an agreement with the Administrator.

STATE BOARD OF EDUCATION—Authority to grant easement over State owned property. F-228

September 29, 1950.

HONORABLE DOWELL J. HOWARD,
Superintendent of Public Institution.

I am in receipt of your letter of September 27, requesting my opinion as to the authority of the State Board of Education to grant an easement or right of way to a public service corporation to lay, maintain, operate and remove a pipe line for the transportation of gas through certain property owned by the Commonwealth.

This office has had frequent occasions to pass upon substantially this same
question in relation to other State agencies and institutions. The only general grant of authority in this respect of which I am aware is embodied in Section 10-21.1 of the Code of Virginia, applicable solely to the Department of Conservation and Development. The General Assembly has not seen fit to confer this authority upon other State agencies and institutions.

It is my opinion, however, that the Board, with the consent of the Governor, would have authority to grant this easement subject to action thereon by the General Assembly at its 1952 session. The Board has authority of an implied nature to manage the property, and it is my opinion that this carries with it authority to grant such a temporary permit or easement under the conditions above specified.

I have examined the proposed contract submitted with your letter and see nothing objectionable thereto within the limitations of this opinion.

STATE POLICE—Campaigning for elective office; can draw retirement pay and serve as sheriff, F-353b

February 21, 1951.

Mr. David T. Robertson,
Sheriff of Appomattox County.

This is to acknowledge receipt of your letter dated February 7, 1951, which I quote as follows:

"It would be greatly appreciated if you will give me your opinion on the following questions:

"Can a member of the Virginia State Police force, while still being employed by the State of Virginia, legally campaign for the office of sheriff in this state?

"Can a member of the Virginia State Police force, after being retired therefrom under the State Police Retirement System, qualify for the office of Sheriff in this state and continue to draw his retirement pay?"

I am not aware of any law which would prohibit a member of the Virginia State Police force, while still employed by the State of Virginia, from legally campaigning for the office of sheriff in this State. However, I am informed that the Department of State Police has a policy prohibiting such practice.

In answer to your second inquiry, I call your attention to the pertinent provisions of the Virginia Retirement System, Section 51-134 of the Code of Virginia, as amended by the 1950 Acts of the General Assembly, which is as follows:

"* * * If, within five years after ceasing to be employed as a State police officer, provided he has not been paid his accumulated contributions, the member accepts employment in a position in the State service not covered by this chapter but covered under the Virginia Retirement Act, he shall be entitled to credit for his previous creditable service under this chapter, and his accumulated contributions shall thereupon be transferred to his credit in the employee annuity savings funds of the Virginia Retirement Act and his future retirement rights shall be as set forth in such act."

Section 51-31, paragraph (5), of the 1950 Code of Virginia, as amended, reads, in part, as follows:

"‘State employee’ means any person who is regularly employed on a salary basis in the service of, and whose compensation is payable, not oftener
than semimonthly, in whole or in part, by the Commonwealth or any department, institution or agency thereof, except *(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, ***(

It will be seen from the foregoing that a sheriff is not covered by the terms of the Virginia Retirement Act.

In view of the plain language of the statutes involved, I am of the opinion that a member of the Virginia State Police force, after being retired therefrom under the State Police Retirement System, can qualify for the office of sheriff in this State and continue to draw his retirement pay.

TAXATION—Army disability retirement pay not part of gross income. F-274

September 11, 1950.

MR. NELSON F. RICHARDS,
Director, Division of War Veterans' Claims.

This is in reply to your letter of September 1st regarding the inclusion of army disability retirement pay as a part of gross income for state income tax purposes.

Prior to its amendment in 1950 Section 58-78 of the Code of Virginia, which was taken from Section 24 of the former tax code, provided that pensions received from the United States or this state on account of military or naval service in armed forces, whether such service was rendered by the recipient of the pension or by a relative of blood or marriage, were not to be included in computing gross income for state income tax purposes, but there was no provision for the exclusion of retirement pay whether the retirement was for length of service or for disability. In view of this fact the state income tax law has consistently been construed to provide an exemption only in the case of true pensions and not in the case of retirement pay, whether for disability or otherwise, which are in the nature of compensation for services rendered rather than in the nature of a gratuity. Whether any payment by the Federal Government to former members of the armed services was excludable depended upon whether it was made under the statute providing for a pension or under the statutes dealing with retirement pay.

I call your attention to the fact that Section 58-78 was amended in 1950 so as to provide that, in addition to pensions, "amounts received as pensions, annuities, or similar allowances for personal injury or sickness resulting from active service in the armed forces of the United States or of this state" should also be excluded from gross income. This language was taken from the federal income tax statute as was the case with a number of other modifications made in the state income tax law and was apparently designed to make the state practice conform to the federal. Since this language has, under the federal law, been construed to allow the exclusion of disability retirement pay from gross income, it is my opinion that it should be construed in the same manner when used in the state law, particularly in view of the fact that it was obviously designed to provide for the exclusion of payments other than true pensions which had already been excluded.

The 1950 amendment is applicable for the first time to the taxable year 1950 and, therefore, may not be used until the calendar year 1951, at which time the reports for the taxable year 1950 will be made.
TAXATION—Capitation Tax—Commissioner of Revenue must assess in spite of fact person has consistently refused to pay. F-100c

March 30, 1951.

HONORABLE E. B. PENDLETON, JR.,
Treasurer of Louisa County.

I have your letter of March 26, from which I quote below:

"We have listed in Louisa County by the Commissioner of Revenue the names of 4,450 persons who are assessed with capitation taxes but who have not paid any one of the past three years. This, of course, is in addition to the list of persons who have paid one or more years, and includes the names of both white and colored.

"This list of persons who do not pay their capitation taxes and who for the most part never expect to pay, entails a considerable amount of clerical work and expense to the County and results in no revenue whatever, either for the County or State.

"It is our desire to work closely with our Commissioner of Revenue and have him place on his assessment books only the names of those persons who have paid their capitation tax for at least one of the past three years, and those who may otherwise qualify, such as those persons who have recently become of age, new-comers to our County, and service men and women who are in the Armed Forces or who have received their discharge. This would mean a considerable saving to our County in both time and money. Persons who are not assessed by the Commissioner for capitation taxes, but who so desire, could be assessed here in our office.

"I will greatly appreciate your advising me if this procedure is allowable by law with the approval and resolution from our Board of Supervisors."

Section 58-864 of the Code places upon the Commissioner of the Revenue the duty to "assess all persons of full age residing" in his county or city. In view of this provision, I do not think that the mere fact that the names of a number of persons appear on the assessment books who have been assessed with capitation taxes, but who have not paid the same for a given period, would justify the Commissioner of the Revenue in omitting these names from the books. If the Commissioner has knowledge that any of such persons have died or moved away from the county or are not assessable with capitation taxes for other reasons, then those persons can, or course, be omitted.

I can see how some money could be saved by following the procedure you suggest, but in view of the law I do not think that non-payment of the taxes involved, standing alone, constitutes a valid reason for the Commissioner of the Revenue to fail to make the proper assessments.

TAXATION—Caretaker living on property owned exclusively by U. S. not subject to State personal property tax but subject to State income tax. F-79

December 22, 1950.

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

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

"Question has arisen as to the jurisdiction of this county to tax personal property owned by caretakers for the Cold Harbor National Cemetery, which
REPORT OF THE ATTORNEY GENERAL

I understand is owned by the United States Government. I understand that the caretakers live in federal owned dwellings on federal owned property."

I assume for the purpose of this opinion that the Federal Government has exclusive jurisdiction over the property to which you refer or at least the Commonwealth of Virginia has not reserved concurrent jurisdiction for purposes of taxation. In the case of Standard Oil Company v. California, 291 U. S. 242; 54 S. Ct. 381, 78 L. Ed. 775, the Supreme Court made it clear that a State is without power to impose any taxes on persons or their property or on any land over which the Federal Government exercises exclusive jurisdiction.

Therefore, it is my opinion that the caretakers to which you refer are not subject to the personal property tax. However, they are liable for the Virginia income tax since the so-called “Buck” Act, 4 U. S. C. A., Section 106, provides that "no person shall be relieved from liability for any income tax levied by any State * * * by reason of his residing within a federal area or receiving income from transactions occurring or services performed in such area; ***".

TAXATION—Carnivals—County may tax. F-196

June 26, 1951.

HONORABLE GEORGE F. ABBITT, JR.,
Commonwealth's Attorney for Appomattox County.

I am in receipt of your letter of June 16, from which I quote as follows:

"The Board of Supervisors of Appomattox County tells me to obtain from you an opinion on the following problem:

"First, the Board desires to know whether or not they can pass a resolution prohibiting the showing of a Carnival at a particular place in Appomattox County.

"Second, if they are unable to do this they desire to know if they can put a county tax in any amount they desire on Carnivals that show in any particular place, rather than in general places in the County.

"Third, they wish to know if they can place a license tax on Carnivals at any limit they desire that shows in Appomattox County."

In connection with your first question, I may say that it is well settled that whenever it is necessary for the preservation of the general welfare of the community a business may be prohibited, but to justify such drastic procedure the business should be inherently injurious of the public health, safety or morals. You will find a discussion of the principles involved in 11 American Jurisprudence, pages 1055 et seq. 1, of course, do not know, nor do you state in your letter, what there is about a carnival that makes it inherently injurious to the public health, safety of morals at any particular place in Appomattox County, nor the factual situation before your Board of Supervisors which the Board considers to justify it in prohibiting the showing of a carnival at a particular place. Therefore, it is necessarily impossible for me to give you a categorical answer to the first question you ask. I believe, however, that if you will consider the principles announced in the text above cited, you will have no difficulty in advising your Board.

Replying to your second question, I will state that if the purpose of the Board in imposing a different rate of tax on a carnival showing in any particular place is in reality to prohibit a carnival from showing, then, I think the answer to your second question is really contained in my discussion of your first question. Unquestionably, the amount of a license tax may be made to depend upon the value of the privilege granted, but your letter does not state any facts which tend to
show the privilege of conducting a carnival in one place in Appomattox County is any more valuable than the privilege of doing the same in another place in the County.

In connection with your third question, I will state that §§58-283 of the Code expressly authorizes a county tax on carnivals, and I do not think that the board of supervisors in imposing the tax is limited to the amount of the State tax.

I regret that I cannot be more specific in my answers to your questions, but they are broad in their scope and there is such a dearth of the facts which may be before your Board that I can do no more than point you to the principles involved.

TAXATION—Cost of advertising for collection of taxes treated as expense of Treasurer's Office. F-270

Mr. S. W. Cotten,
City Superintendent City of Harrisonburg.

This is in reply to your letter of January 5, 1951, from which I quote as follows:

"Will you please give me a ruling on the following problem which we have here in the City of Harrisonburg?

"From time to time the City Treasurer and the City Tax Collector insert advertisements in the local newspaper concerning the collection of State Taxes. I am sure you are familiar with the fact that two-thirds of the expenses of the office of the City Treasurer are paid by the city and one-third by the state. However, any advertisements concerning City Taxes are paid 100% by the city; therefore, it appears that the order naturally follows that advertisements concerning State Taxes should be paid wholly by the state."

I have made an extensive search of the Code and can find no provisions dealing specifically with the cost of advertising concerning collection of State taxes. Having failed to find any such statute, I am of the opinion that such costs must be treated just as any other expense of the City Treasurer's Office. Section 14-77 of the Code sets forth the proportion of the expenses of the treasurers to be borne by the State and the locality. This proportion is not uniform throughout the State, instead it varies from place to place depending upon whether the treasurer collects or disburse local taxes or revenues. I gather from your letter that the duties of the Treasurer of the City of Harrisonburg are such that under the provisions of §14-77 the City pays two-thirds and the State one-third of the expenses of the office. In my opinion the cost of such advertising should be borne just as any other expense.

TAXATION—County may not impose license tax on moving pictures without express authority. F-205

Honorable W. Cary Crismond,
Clerk of Circuit Court of Spotsylvania County.

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

"Each summer, the people of this county are plagued to death with these one-horse moving picture shows, consisting of a truck with tent and benches.
"Your attention is invited to the words "or any other show" in paragraph 1 of Section 153a of the Tax Code of Virginia.

"Would the above shows be covered by this section or would they be covered by Section 156 of this Code?

"Would you advise the Board of Supervisors of this County, whether they have the authority to levy a tax on this type of show, or whether they do not. These shows are not for charitable, benevolent or educational purposes."

Section 153a of the Tax Code of Virginia is found in the Code of 1950 as Section 58-283 and reads as follows:

"The board of supervisors or other governing body of each and every county in this State may impose a license upon every person, firm, company or corporation which exhibits in such county performances in a side show, dog and pony (or either) show, trained animal show, carnival, circus and menagerie or any other show, exhibition or performance similar thereto.

"Every person, firm, company or corporation which exhibits or gives a performance or exhibition of any of the shows, carnivals, circuses, menageries or exhibitions above described in this section without the license required, shall be fined not less than fifty dollars nor more than five hundred dollars for each offense. The authorities of a county shall not allow any such performance to open until the license required is exhibited to them."

It is true, as you point out, that the words "any other show" appear in the section but this phrase is qualified by the words "similar thereto." I am of the opinion that this latter phrase limits the type of show which may be taxed under this section to those similar in nature to the types listed. A moving picture does not fit into this category.

Even if the words "similar thereto" did not appear in the section it is doubtful that the section would cover moving picture shows. Under the principle of ejusdem generis the phrase "any other show" would be limited in its construction to those similar to the types listed. The principle of ejusdem generis is a rule applied in construing statutes. It is founded upon the reasoning that if the Legislature had intended general words (such as "any other show") to be construed in an unrestricted sense it was unnecessary for the Legislature to have listed certain specific classes (such as "side show, dog and pony show etc."). In other words when general language follows the enumeration of a list of specific things such language must be construed to include only such things or objects as are of the same kind as those specifically mentioned.

Therefore, applying this rule, the phrase "any other show" in the statute must be restricted to shows similar in nature to those listed.

I might add that this provision was enacted into law as Chapter 48 of the Acts of Assembly of 1936 and the title to this act did not include the term "moving pictures."

The tax to be imposed on moving picture shows is set forth in Section 58-270 of the Code of 1950.

In the absence of express authority of law a county may not impose a license tax of this kind. This is, of course, borne out by the fact that the Legislature deemed it necessary to pass an act expressly conferring upon counties the authority to levy a tax on carnivals and similar shows.

I call your attention to Sections 15-10, 58-266.2 and 58-266.3 of the Code of 1950 which sections confer upon counties within certain classifications various powers. Unless a county fits the classification set forth in one of the above sections it is my opinion that its governing body has no authority to impose a license tax on moving pictures.
HONORABLE H. BRUCE GREEN,
County Clerk of Arlington County.

This is in reply to your letter of December 4, 1950, in which you request advice on twelve questions. I shall answer five of the inquiries in this letter. The answers to the seven questions regarding elections are contained in the chart which is attached hereto.

1. What is the period within which dog tags must be purchased in 1951:
   A. Section 29-185 of the Code provides that the license tax on dogs shall be due and payable on or before January first and not later than January 31st of each year for any dog four months old or older. With reference to dogs becoming four months of age after January first or coming into the possession of a person after that date see the latter portions of Section 29-185.

2. What is the period within which Virginia automobile license tags must be purchased in 1951?
   A. Licenses will go on sale on March 15, 1951, and the 1950 license may not be used after April 15, 1951.

3. What is the last day for filing State Tax Returns in 1951?
   A. Section 58-108 of the Code provides that individual income tax returns shall be made on or before the first day of May in each year except that such returns, if made on the basis of a fiscal year, shall be made on or before the 15th day of the fourth month following the close of such fiscal year.
   Section 58-837 provides that the personal property return shall be made on or before May first of each year.

4. What are the times set for automobile inspections in 1951?
   A. These dates are officially set by proclamation of the Governor upon request of the Superintendent of the Virginia State Police. The dates have not been officially proclaimed but I am advised by Captain Groth, of the Virginia State Police, that present plans call for inspections to be held from May 1st to June 15th and from October 1st to November 15th in 1951. Captain Groth advises that there is little likelihood that there will be any change in these plans.

5. What is the date in 1951 on which the 1950-51 hunting and fishing licenses expire?
   A. Section 29-66 of the Code reads as follows:
   "Licenses shall run and be valid from July first of each year to June 30th of the following year.***"

HONORABLE JENNINGS L. LOONFY,
Clerk, Circuit Court of Buchanan County.

I am in receipt of your letter of January 19th in which you state the following case:

"One T. L. Jones owned 100 acres of coal which he sold to John Smith in the year 1920. John Smith did not put his deed on record until recently.
This 100 acres of coal was assessed in the name of T. L. Jones, thereafter up to and including the year 1929, and thereafter T. L. Jones was not assessed further with this tract of coal, but there was an assessment in the name of D. T. Jones beginning with the year 1930, up to and including 1946 with the exact number of acres and the exact location, apparently the same property. A check of the records does not disclose any conveyance or passing of title in any way to D. T. Jones. In other words there is no record of where D. T. Jones ever owned this tract of coal. The taxes in the name of D. T. Jones are delinquent and unpaid on said assessment. Since it appears the Commissioner of Revenue, in making the assessment for the said years 1930 to 1946 inclusive, made an error by assessing in the name of D. T. Jones, instead of T. L. Jones. I would like an opinion from you as to whether or not the taxes assessed and unpaid in the name of D. T. Jones is a valid lien against said tract of coal and whether or not a suit could be maintained, if instituted, to collect these taxes in the name of D. T. Jones. T. L. Jones never conveyed the coal property to anyone subsequent to the above mentioned conveyance to John Smith in 1920.

Your question can best be answered by referring you to Section 58-815 of the Code, reading as follows:

"No assessment of any real estate, whether heretofore or hereafter made, shall be held to be invalid because of any error, omission or irregularity by the commissioner of the revenue or other assessing officer in charging such real estate on the land book unless it be shown by the person or persons contesting any such assessment that such error, omission or irregularity has operated to the prejudice of his or their rights."

In view of this section I know of no reason why a suit could not be successfully maintained to enforce the lien for the taxes provided no person contesting the assessment can show that his rights have been prejudiced. Should the assessment be challenged, then the question of whether the contestant's rights have been prejudiced would be a matter for the court to determine.

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**TAXATION — Exemptions — Benevolent Association — Masonic Lodge.**

F-277

**December 13, 1950.**

**Honorable Clifton C. Simms,**
Treasurer, Grayson County.

This is in reply to your letter of December 7, which I quote as follows:

"In 1948 under the State Law the Board of Supervisors of Grayson County ordered a general reassessment of all real estate and buildings in the County. In so doing they picked up a building owned by the Masonic Lodge #129 A. F. & A. M. in the town of Independence. The Masons erected this building which they have for their meeting hall, also an apartment and Store which they rent. It is proper to collect taxes from this fraternal organization or is it tax free?"

Section 183 of the Constitution, subsection (f), exempts from taxation buildings, with the land they actually occupy and the furniture and fixtures therein, belonging to a benevolent association and used exclusively for lodge purposes or meeting rooms by such association. This provision, in my opinion, covers the building you describe.
However, I call your attention to section 58-16 of the Code, which provides, in effect, that where the property of a benevolent association is not used exclusively for lodge purposes or meeting rooms, then the assessing officers shall only assess for taxation that portion of said property which is not used for such purposes. If you will read section 58-16 of the Code, I do not think there will be any difficulty about arriving at the value of that part of the property which is subject to taxation.

TAXATION — Exemptions for charitable hospitals — Shenandoah County Memorial Hospital. F-83

Honorable Raymond A. Rudy, Commissioner of Revenue, Shenandoah County.

I refer to our recent correspondence relative to the liability to local taxation of the property of the Shenandoah County Memorial Hospital, Incorporated.

If the Hospital is exempt from taxation the exemption is to be found in paragraph (e) of Section 183 of the Constitution reading as follows:

“(e) Real estate belonging to, actually and exclusively occupied and used by, and personal property, including endowment funds, belonging to Young Men's Christian Associations, and other similar religious associations, orphan or other asylums, reformatories, hospitals and nunneries, conducted not for profit, but exclusively as charities, also parks or playgrounds held by trustees for the perpetual use of the general public.”

The quoted provision is controlling and if the hospital cannot qualify thereunder there is nothing the Board of Supervisors can do to declare it exempt.

The problem before you, therefore, is the determination of the question as to whether the hospital is "conducted not for profit, but exclusively as" a charity.

You were good enough to send me a copy of the charter of the corporation and, from paragraph 8 thereof, it is plain that the hospital is not to be conducted for the profit of the members of the corporation and that any profits which may be realized are to be used for the betterment of the facilities offered and for the increase of the service rendered by the corporation. The troublesome question is whether the hospital is conducted exclusively as a charity. The courts have been rather liberal in favor of the exemption of a hospital in passing upon this question. For example: It is held that where a hospital is conducted primarily for charity the fact that it accepts pay from patients who are able to pay their way will not destroy the exemption. However, from the charter I gather that the institution is incorporated as a general hospital to be conducted as a business charging for the services rendered. It is true that it has authority to provide clinics for the treatment and medical attention of poor and indigent persons but this does not appear to be its dominant purpose. Indeed you have advised that "it is not a charitable hospital" and "does not even have a charitable ward".

From a consideration of the charter and the facts stated by you I feel that it would be pressing the constitutional provision too far to hold that the Shenandoah County Memorial Hospital is conducted exclusively as a charity.

I should be glad if I could advise you to the contrary for I realize that the persons interested would be glad if the exemption could be found but the facts before me do not enable me to go this far. Merely as a suggestion you might consider the advisability of having the matter passed on by the Circuit Court of the County in an appropriate proceeding. Then there would be an opportunity for a full presentation of all the facts.
HONORABLE OTIS B. CROWDER,
Treasurer of Mecklenburg County.

I am in receipt of your letter of January 21, in which you raise the following question:

"The question has arisen as to whether or not I have the authority to collect taxes on tangible personal property from people living on property owned by the United States Government.

"While Buggs Island Dam is under construction, we have many such people—and it seems to me they should pay taxes the same as the rest of our people; however, I would appreciate your opinion on this matter."

The answer to your question depends upon whether or not the United States has exclusive jurisdiction over the Buggs Island area. If it does have such exclusive jurisdiction, then I am of opinion that the tangible property of residents of this area is not subject to local taxation. If, however, the State has concurrent jurisdiction, then, according to a previous opinion of this office, the tangible personal property of residents of the area is subject to local taxation. If the lands in question have been acquired by the United States since June 23, 1932, the State very probably has concurrent jurisdiction thereover unless it has ceded exclusive jurisdiction to the United States. This latter fact can be ascertained by examination of the records in the Clerk's office at Boydton to determine whether a deed ceding exclusive jurisdiction has been executed by the State.

For your information I enclose copy of an opinion of this office under date of June 23, 1939, to the Delinquent Tax Collector at Roanoke, Virginia.

HONORABLE JOHN TABB DUVAL,
Commonwealth's Attorney for Gloucester County.

This will acknowledge receipt of your letter of February 2, 1951, in which you inquire whether or not a realtor is required to obtain a license in all counties and cities in which he operates within the meaning of §58-398, Code of Virginia. Section 58-398 provides, in part, as follows:

"A real estate agent in a county or in an incorporated town or in a city of not more than fifteen thousand inhabitants shall pay the sum of twenty-five dollars; if in a city of more than fifteen thousand inhabitants, he shall pay fifty dollars."

Section 54-766 provides for regulatory licenses issued by the Virginia Real Estate Commission as opposed to license for revenue issued in accordance with §58-398.

Section 58-240 relating to selling in general throughout the State provides:

"No person shall be allowed the privilege of selling throughout the State under one license, except by special provision of law."
REPORT OF THE ATTORNEY GENERAL

In construing the applicable statutes it would be my opinion that a realtor having one place of business may, in that county or city wherein it is licensed, transact business involving realty situated in other localities without securing additional licenses under §58-398.

I am informed that it has been the policy of the State taxing authorities to require an additional license if the entire transaction and closing takes place in a locality other than the one wherein the realtor is licensed. This appears to be a proper interpretation, although the wording of §58-398 does not leave the matter entirely free from doubt. With regard to situations where it is not entirely clear, an examination would have to be made into the incidents of each transaction in order to make a final determination.

TAXATION—License tax on attorneys by town. F-190

Honorable Harold B. Singleton,
Member of House of Delegates.

This is in reply to your letter of July 17, 1950, in which you ask my opinion as to the legality of a tax of $25.00 imposed on all attorneys by the Town of Amherst. The tax in question is uniform on all attorneys making no distinction between those attorneys who have just begun to practice and those who have been practicing a number of years. Such a distinction is made in the imposition of the State license tax. Therefore, in certain instances the tax imposed by the Town of Amherst is greater than the State tax.

Section 58-371 of the Code of 1950 reads as follows:

"Every practicing attorney at law, in addition to being licensed, sworn and admitted to prosecute or defend actions or other proceedings in the courts of this Commonwealth, shall obtain a revenue license; and no person shall act as attorney at law or practice law in any court of this Commonwealth without a separate revenue license. A revenue license to practice law in any county or city shall authorize such attorney to practice in all the courts of this State without additional license. Every attorney at law who has been licensed for less than five years shall pay fifteen dollars; and every attorney who has been licensed and who has practiced for five years and more, twenty-five dollars; provided, that no attorney at law shall be required to pay more than fifteen dollars whose receipts for the preceding year were less than five hundred dollars."

Section 58-266.1 of the Code provides in part as follows:

"In addition to the State tax on any license, as hereinbefore and hereafter provided for in this chapter, the council of a city or town may, when anything for which a license is so required is to be done within the city or town, impose a tax for the privilege of doing the same and require a license to be obtained therefor; and in any case in which they see fit they may require from the person licensed a bond, with sureties, in such penalty and with such condition as they may deem proper or make other regulations concerning the same."

Section 58-371 has not been construed to relieve an attorney at law from the necessity of securing a State revenue license even though he has already secured a town or city license. The purpose of the italicized provision in the section is to take those engaging in the practice of law out of the provision of Section 58-245.
which provides that every license granting an authority to engage in any business or profession shall designate the place of business or profession at some specified house or other definite place within the county or city of the commissioner granting it and that those engaged in any business or profession elsewhere than at such house or definite place "unless expressly authorized elsewhere or otherwise by law" shall be held to be without license. The italicized portion of Section 58-371 simply relieves an attorney who has secured a State license in one city or county from securing a State license elsewhere even though he may practice in courts of other localities. It has not been construed to prevent cities and towns from imposing a local license tax under the provision of Section 58-266.1.

It is therefore my opinion that under the provisions of this latter section the Town of Amherst has authority to impose a license tax on attorneys and it has been held that the power to license a particular occupation involves necessarily the defining and determination of the extent and duration of the grant or license. See Roche v. Jones, 87 Va. 484.

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TAXATION—Machinery and tools used in manufacture or mining; what constitutes. F-65

Mr. G. L. Gordon, Jr., Commissioner of Revenue for Stafford County.

October 4, 1950.

This is in reply to your letter of September 29th, which I quote as follows:

"I am writing to request a clarification as to just what is the scope of the term, 'Machinery and tools used in a manufacturing or mining business,' as used in Section 58-412. Would this include, for instance, a truck used to haul raw materials or finished products, a company owned automobile used by a supervisor in connection with his work, a company automobile used by a salesman, an office typewriter or does it simply mean machinery that is used solely in the actual process of manufacturing?"

I do not think that I can give you any satisfactory general statement as to what is included within the term "Machinery and tools used in a manufacturing or mining business". The taxability, either as capital by the state or as tangible personal property by the locality, of any particular articles or implements would require an examination of the particular equipment in question and the operations in which they are used.

While it may be that the phrase in question, which applies to certain property not includible in the capital of a manufacturer or mining business taxable by the State but reportable as tangible personal property taxable by the localities, should not be taken to mean only machinery used in the actual process of manufacturing, it is my opinion that it does not include the trucks, automobiles or office typewriters described in your letter.

In Roanoke v. Michaels Bakery Corp., 180 Va., 132, the Supreme Court of Appeals of Virginia held that delivery trucks, office furniture and fixtures were not taxable as tangible personal property but were properly assessable as a part of the capital of the bakery. While the Court did not go into the question of what constitutes "machinery and tools used in a manufacturing business", it is apparent that the Court did not consider the articles mentioned as coming within that category. It is my opinion that the articles mentioned by you fall directly within the decision of the Michaels Bakery Corporation case.
HONORABLE T. ROY ADAMS,
Commissioner of the Revenue of Charlotte County.

I am in receipt of your letter of January 24 relative to the liability to State and local taxation of certain property under the direction and control of the Trustees of the National Gallery of Art if and when said property is located within the County of Charlotte. You enclose a letter to you from J. Kent Early, Esq., in which he raises the same question. I quote below from Mr. Early's letter:

"The Trustees of the National Gallery of Art, Washington, D. C. (a bureau in the Smithsonian Institution) which was authorized, created and established by Public Resolution No. 14 of the 75th Congress (Chapter 50—1st Session—H. J. Res. 217) of the United States of America, considers it advisable in view of the unsettled conditions in the world now existing and the possibility of war, to provide a place outside the City of Washington for the storage and safe-keeping of the works of art owned outright by the Gallery and certain other works of art not owned by the Gallery but in its possession and custody on loan and under its control. It is the belief of the Trustees that the likelihood of the destruction of the aforementioned property, or of damage thereto, would be less if the same was not in Washington in the event of hostilities. It is for this reason alone that the removal and storage of this property out of Washington will be temporary and the same will be returned thereto and again placed on exhibition as soon as world conditions, in the opinion of the trustees, become sufficiently settled to justify this action.

"The Trustees of the Gallery are contemplating leasing *** some fifteen or twenty acres, *** located in Charlotte County, Virginia. If present tentative plans are consummated, the Gallery will have constructed on this land one or more buildings for the storage of the aforementioned property, and will design, equip and furnish said buildings with the idea of affording said works of art maximum care and protection.

"*** The Trustees of the Gallery are unwilling to proceed further with the aforementioned plan until it is ascertained whether the property mentioned, if moved from the National Gallery of Art, in Washington, D. C. to Charlotte County, Virginia, and temporarily stored in Charlotte County, Virginia, would be subject to state or local taxation in Virginia. The Gallery will expect to pay taxes on the real estate it leases and also on all buildings it has constructed thereon, but the Trustees do not feel under the circumstances related that state or local taxes in Virginia should be assessed against or imposed on the works of art brought from the National Art Gallery and temporarily stored for safe-keeping in Virginia.

"The Smithsonian Institution and the National Gallery of Art are both non profit organizations. Ownership of both is indirectly, in my opinion, vested in the United States Government. I am enclosing a small book which contains a copy of the Joint Resolution of Congress creating the National Gallery of Art and providing for its maintenance. The Book also contains the By-Laws for the Trustees of the Gallery. I believe you will agree with my conclusion after reading the Joint Resolution and By-Laws that the National Gallery of Art is a non-profit organization and is owned, in reality, by the United States Government. You will note from reading Section 4(a) of the resolution that the faith and credit of the United States is pledged to provide the funds for the up-keep of the Gallery, its administrative expenses and cost of operation, including the protection and care of works of art acquired by it. The same section also provides that the works of art shall be exhibited regularly to the general public free of charge, thereby showing that it is a non profit organization and one established, conducted and operated only for the benefit of the public at large."
The Trustees of the National Gallery of Art was established by Congress in 1937 as a bureau in the Smithsonian Institution and the composition of the board was provided for. 20 U.S.C.A., §§71-75 inclusive. The site for the Gallery was appropriated by Congress and the Smithsonian Institution was authorized to permit the A. W. Mellon Educational and Charitable Trust to construct thereon for the Institution a building designated as the National Gallery of Art. Id. §71. Upon completion of the building the board was authorized to accept for the Smithsonian Institution as a gift from the Mellon Trust a collection of works of art to be housed and exhibited in the building. Id. §73. The faith of the United States was pledged that upon completion of the National Gallery of Art and the acquisition from the Mellon Trust of the collection of works of art, the United States would provide such funds as necessary for the upkeep of the Gallery, including the protection and care of the works of art it acquires so that they may be exhibited regularly to the general public free of charge. Id. §74.

It is too well settled to require citation of authority that neither a state nor one of its political subdivisions may tax the property of an instrumentality of the United States except by permission of Congress. I do not presume that anyone would seriously question the fact that the Smithsonian Institute is such an instrumentality. A consideration of the statute establishing the National Gallery of Art, especially the portions thereof to which I have referred, satisfies me that the Gallery is a nonprofit bureau of the Smithsonian Institution and, therefore, itself an instrumentality of the United States. My conclusion is that the property of the National Gallery of Art is not subject to taxation by the State of Virginia or by Charlotte County.

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**TAXATION—Personal Property—Procedure where owner resides outside jurisdiction where property located. F-261**

June 18, 1951.

HONORABLE HAROLD M. RATCLIFFE,
Commonwealth’s Attorney for Henrico County.

I have your letter of June 15 in which you ask the following question:

“We have had considerable difficulty dealing with residents of the County who are operating cars owned by their employers and house them in the County of Henrico where the operator resides. Also, with reference to persons who reside in Henrico County and rent automobiles by the year, the automobile being housed and kept in the County where the Lessee resides. In many instances the employer and Lessor are non-residents of the County and of the State of Virginia. The question is whether or not we should assess these automobiles in the name of the party who has possession thereof and who keeps them at his home in the County of Henrico.”

It is generally accepted that tangible personal property which is assessed as such should be assessed to the owner thereof, and that the situs of such property for taxation is the physical location of such property. In cases you mention, therefore, I am of opinion that automobiles should be assessed in Henrico County to the owners thereof.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Poll Tax—Treasurer’s list to contain names of persons having paid tax for all or any of three years preceding election. F-100c

HONORABLE C. C. LOUDERBACK,
Member State Board of Welfare and Institutions.

January 24, 1951.

This is in reply to your letter of January 20, 1951, in which you request my opinion as to whether a treasurer’s list as required by §38 of the Constitution of Virginia complies with the law if it contains only the names of those persons who have paid poll taxes for the three years next preceding that in which an election is held, or whether such list should include the names of those who have paid such taxes for one or more years.

This specific point was before the Supreme Court of Appeals of Virginia in the case of Zigler v. Sprinkel, 131 Va. 408. In that case the Court said:

"* * * we conclude that it is the duty of the treasurer of the city of Harrisonburg to put upon his list the names of all persons within his city who have been assessed with and personally paid, not later than six months prior to the general election in November, 1921, their State poll taxes for all or any of the years 1918, 1919 and 1920, unless it appears to said treasurer from the books and papers of his office that such persons have failed to so pay the taxes with which they have been assessed for one or more of the foregoing years. Persons thus delinquent should not be placed upon the list."

I know of no decision of the Supreme Court altering the views expressed in the Zigler Case.

TAXATION—Recordation—Amount of tax on lease for one year with options where consideration is based on volume of business. F-90a

HONORABLE HORACE ADAMS,
Clerk, Circuit Court of Prince Edward County.

August 3, 1950.

This is in reply to your letter of July 26th regarding a lease which has been offered for recordation in your office. The lease provides that it shall be for the period of one year with the option to renew for five additional periods of one year each. It further provides that an amount equivalent to one cent for each gallon of gasoline and other motor fuels sold during each month shall be paid as the rental on the property. You ask my opinion as to the proper method of computing the recordation tax to be charged on this transaction.

Section 58-58 reads as follows:

"On every contract relating to real or personal property, except as hereinafter provided, which is admitted to record, the tax shall be fifteen cents on every hundred dollars or fraction thereof of the consideration or value contracted for; provided, however, that the tax for recording a deed of lease for a term of years shall be taxed according to the provisions of this section, except that when the annual rental, multiplied by the term for which the lease runs, equals or exceeds the actual value of the property leased, then the tax for recording the deed of lease shall be based upon the actual value of the property at the date of lease."

In the case you put it appears that the consideration can only be determined by estimating the amount of gasoline and other fuels which will be sold during the
year. It is my suggestion therefore that you and the party offering the lease for recordation attempt to make a reasonable estimate of the gasoline that will be sold and compute the tax based upon the consideration that will be paid on that basis. The lease should be considered as a lease for one year since it was held in the case of James v. Kibler's Administrator, 94 Va. page 165, that a lease for one year with the option to renew for additional periods was only a demise of a present term of one year.

TAXATION—Recordation—Deed conveying same property conveyed by will and subjected to probate tax is subject to recordation tax. F-263

Honorable John H. Powell,
Clerk, Circuit Court of Nansemond County.

August 2, 1950.

This is in reply to your letter of July 24, 1950, which reads as follows:

"On July 6, 1950, I had presented to me the will of Mark R. Gregory, Sr., deceased, for probate, which was dated January 3, 1944. Upon the probate of that will the real estate, which was valued at $35,000.00, was included and a qualification tax was collected thereon.

"Today I have had presented to me a deed dated January 22, 1944, from Mark R. Gregory and wife to Luther Upton Gregory, the same person to whom the property was devised by the will. I understand that this deed was found among the papers of the deceased after the probate of the will. The grantee in the deed, Luther Upton Gregory, informs me that he never received the deed after it was written. Therefore, there are two questions that present themselves.

"First: In view of the fact that the deed was not delivered to the grantee during the lifetime of the deceased, would it actually become such a deed that can be recorded?

"Second: I have talked with the lawyer who drew this deed, and he is under the impression that this deed was delivered to the grantee and he supposed that the grantee re-delivered the deed to the deceased for safe keeping. In the event this fact is established, on what basis would I tax the deed after taking into consideration the fact that a tax has been collected on the probate at the rate of one dollar per one thousand dollars valuation?"

In answer to your first question, it is settled law that delivery is an indispensable requisite to the validity of a deed. (See Michie's Digest, Vol. 3, page 537, wherein numerous cases are cited). It is my opinion, therefore, that until it can be established that there has been a sufficient delivery of the document in question it does not become such a deed as may be admitted to record.

In the event it is established that there has been a delivery of this deed, the amount of tax to be charged on recording the deed is governed by Section 58-54 of the Code of 1950 which reads, in part, as follows:

"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 there are various deeds which are exempt from the recordation tax, I know of no exception which is applicable in the case you put and I am, therefore, of the opinion that the tax prescribed by this section would apply to this deed in spite of the probate tax which was previously collected.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Recordation—No exemptions on deed conveying church property except church site. F-90a

October 17, 1950.

HONORABLE ROBERT H. OLDHAM,
Clerk of the Circuit Court for Accomack County.

This is in reply to your letter of October 11, 1950, in which you request my opinion as to whether the recordation tax should be imposed on a deed of trust given on property owned by the trustees of a church and used as a home or manse.

You state that at the meeting of the Southeastern District Clerks Association the consensus of opinion was that such tax should be imposed on all deeds of trust given on church property other than a church site.

In a recent telephone conversation with you I expressed the offhand view that the constitutional and statutory exemptions in favor of church property might be broad enough to exempt such instruments from the recordation tax; however, I believe at that time I indicated that there was some doubt in my mind on the question and that before rendering a formal opinion I would like to study the matter more fully.

Pursuant to your request for this opinion, I have examined the statutes, the Constitution, and the decisions of the Supreme Court of Appeals of Virginia, and it is my opinion that the position taken by the clerks at the district meeting is correct, and that my previous expression on the subject was in error.

It is clear that a "deed of trust or mortgage given to secure debts or indemnify sureties and conveying land used as the site of a church" is not subject to the recordation tax. This exemption is expressly provided in §58-64 of the Code of 1950 in the language quoted.

The Constitution of Virginia, §183, reads in part as follows:

"Unless otherwise provided in this Constitution, the following property and no other shall be exempt from taxation, State and local, including inheritance taxes:

"(a) ** *

"(b) Buildings with land they actually occupy, and the furniture and furnishings therein and endowment funds lawfully owned and held by churches or religious bodies, and wholly and exclusively used for religious worship, or for the residence of the minister of any such church or religious body, together with the additional adjacent land reasonably necessary for the convenient use of any such building."

This exemption is likewise provided in §58-12 of the Code of 1950 in exactly the same language.

It was this broad exemption from taxation in favor of church property, including the residence of the minister, which I had in mind when I spoke with you. However, reference to the case of Pocahontas Collieries Company v. Commonwealth, 113 Va. 108, reveals that the Court has held that the recordation tax is not a tax on property but a tax on the civil privilege of availing oneself of the benefits and advantages of the registration laws of the State. Since §183 of the Constitution and §58-12 of the Code only exempt property from taxation, it follows that these provisions do not apply to the privilege (recordation) tax and there being no other provision of law granting such exemption, it follows that the recordation tax should be imposed on deeds of trust given on church property other than church sites.

Please accept my apologies for the erroneous view expressed.
TAXATION—Recordation tax—Deed of trust given to protect surety on bail bond subject to tax. F-90a

May 8, 1951.

HONORABLE BETSY N. JORDAN,
Clerk of the Corporation Court of Waynesboro.

This is in reply to your letter of April 21, 1951, which reads as follows:

"A deed of trust has been admitted to record in this office 'to secure, indemnify, and save harmless G. H. Branaman as surety on a bail bond of even date herewith, executed by John G. Farrar, Jr., in the Corporation Court for the City of Waynesboro, Virginia, payable to the Commonwealth of Virginia in the penalty of Five Thousand ($5,000.00) Dollars, conditioned according to law.' Will you please advise me if it is correct to charge the State Tax on the amount secured under this deed of trust? I have checked the Code on this point but am unable to find any section covering this point."

As I understand your letter, the deed of trust involved here was made by Mr. Farrar to secure G. H. Branaman. It is not a deed of trust to the Commonwealth. In my opinion the fact that the deed of trust was given to protect Mr. Branaman in his position as surety on a bail bond has no bearing on the matter, and the recordation tax should be imposed under the provisions of §58-55 of the Code just as in the case of any ordinary deed of trust.

TAXATION—Recordation tax—Value of property at date lease executed is controlling. F-90a

November 30, 1950.

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

This is in reply to your letter of November 15, 1950, in which you request my opinion as to amount of recordation tax to be charged on a certain lease offered for recordation in your County. The pertinent facts involved seem to be as follows:

On September 20, 1950, a lease was executed between the parties. Under the terms of the lease the lessee is to pay a rental of $36,000.00 for a ten year term of occupancy which term will commence on or about January 1, 1951. The lessor is to construct, at his expense, a building upon the land covered by the lease and the lessee is to enjoy the occupancy of this building. The value of the land embraced in the lease is between $3,000 and $4,000. On the date the lease was executed, the building mentioned was in process of construction.

It is my opinion that the value of the land and that portion of the building which had been completed as of September 20, 1950, should be used in computing the recordation tax unless, of course, that valuation would exceed $36,000.00 in which event $36,003.00 should be the computing base.

Section 58-58 of the Code of 1950 to which you make reference reads as follows:

"On every contract relating to real or personal property, except as hereinafter provided, which is admitted to record, the tax shall be fifteen cents on every hundred dollars or fraction thereof of the consideration or value contracted for; provided, however, that the tax for recording a deed of lease for a term of years shall be taxed according to the provisions of this section, except that when the annual rental, multiplied by the term for which the lease runs, equals or exceeds the actual value of the property
leased, then the tax for recording the deed of lease shall be based upon the actual value of the property at the date of lease."

While it is true, as you point out, that the "lease actually begins" on January 1, 1951, it is nevertheless a lease on September 20, 1950, when it was properly executed. Therefore, I must conclude that "the date of lease" is September 20, 1950, and the value of the property at that time should be used to compute the tax rather than the value on January 1, 1951.

I have considered the case of Virginia Public Service Co. v. Commonwealth, 179 Va. 371 to which you called my attention and quite agree with you that the case differs materially from the situation involved here; however, in writing the opinion Justice Gregory seems to have assumed that the term "at the date of lease" which appears in the statute means the date of execution of the lease.

I am not at all certain that it was the intent of the Legislature that a construction should be placed on the term "at the date of lease" which would lead to this result; however, in view of the rule of strict construction which is used in measuring the effect of tax statutes I believe no other conclusion is possible.

I have conferred with the State Tax Commissioner with regard to this problem and he concurred in the opinion herein expressed.

TAXATION—Secrecy of tax matters—Not violated by revealing whether person has secured a business license. F-270

Honorable Frank L. McKinney,
Commonwealth's Attorney for Halifax County.

I am in receipt of your letter of June 16, from which I quote as follows:

"One of the tax and revenue officers has asked me whether it is a violation of Section 58-46 dealing with secrecy of information in tax matters, to divulge to an inquiring taxpayer whether a certain person, firm or corporation has applied for and been granted a license to do business within the Town of South Boston.

"No information as to the transaction, property, income or business of the person is sought. The only information desired is whether the person has been licensed."

The section to which you refer prohibits any tax or revenue officer from disclosing 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 duties." I do not think it would constitute a violation of this prohibition for a tax officer merely to disclose to a person having an interest therein the simple fact as to whether a certain person, firm or corporation had secured a license to do business. I do not know of anything that I can add to this more or less dogmatic statement except that I do not think that the requested information reveals any facts relating to the transactions, property, income or business of the person, firm or corporation concerning whom the inquiry is made.
TAXATION—Soldiers' and Sailors' Relief Act—Failure to file tax returns.  
F-356a  
February 8, 1951.

HONORABLE C. R. KENNED,  
Treasurer of the City of Roanoke.

This is in reply to your letter of January 15, 1951 in which you inquire whether §573 of Title 50 of the United States Code Annotated, which is part of the Soldier's and Sailor's Civil Relief Act would relieve a person in the armed forces from the 10% penalty for failure to file tax returns by May 1, 1950.

A literal interpretation of that Act would not excuse the failure to file returns but only failure to pay the tax. However, the State Tax Commissioner, Mr. Morrissett, and I are both of the opinion that when the spirit of the legislation is kept in mind, no penalty should be imposed on members of the armed forces who fail to file their returns. A person who may have already been assessed should make application locally for exoneration, and this application forwarded to the State Department of Taxation for action.

TAXATION—State institution may pay assessments in nature of service charge.  
F-268i  
February 7, 1951.

DR. ROBERT P. DANIEL,  
President, Virginia State College.

I am in receipt of your letter of February 1, from which I quote as follows:

"Chesterfield County sometime ago installed new sewer lines financed by a bond issue. Several residences in Ettrick, in addition to two barracks, owned by the College, are connected with those lines. From the enclosed resolution you will note that a special assessment of $13 is made against each piece of property in Ettrick connected with these lines. I understand that this assessment is to clear the bond issue payments.

"Kindly inform me if the College officials will be violating any law in paying this assessment. We would not want to make the payment and have this payment questioned by the Comptroller or the Auditor on the basis of illegality. An early reply will be deeply appreciated."

I assume that the assessment to which you refer is in the nature of a service charge against the abutting landowners for the use of a sewer constructed by Chesterfield County. While the property of the State is exempt from taxation, this office has previously expressed the opinion that a charge for the use of facilities furnished by a locality which is imposed upon all other property owners may be paid by the State. In other words, it is my opinion that it would be entirely legal for your institution to pay the charge described by you.

TAXATION—Timber taxed in name of landowner unless deed of sale record- ed.  
F-220  
November 10, 1950.

HONORABLE C. G. AVERY,  
Treasurer of Charles City County.

I have your letter of October 30th from which I quote as follows:

"Section 58-804 of the Tax Code of Virginia states: 'That when the surface of the land is owned by one person and the standing timber trees thereon are owned by another, the relative value of each shall be determined
and the several owners assessed with the value of their respective interests.'

"The following tax question has arisen here: A tract of standing timber was purchased in 1949 but the land was not purchased. The timber deed conveying the timber to the purchaser was not recorded; however, the purchaser of the timber admits that he owned a specific amount of uncut timber standing on the land as of January 1, 1950.

"I should like to have your opinion as to whether or not this tax payer can now be assessed for taxes on the standing timber which he admits that he owned on January 1, 1950. If this property can be taxed as omitted or a supplemental assessment, would the assessed value of the land have any bearing on the value of the standing timber to be assessed, remembering that the value of the standing timber as of January 1, 1950 has definitely been determined?"

As you know, the Clerk of the Circuit Court is, by Section 58-797 of the Code, required annually to make out a list of all deeds for the partition and conveyance of land which have been recorded in his office within the year ending on December 31st next preceding. This is the list which the Commissioner of the Revenue uses in making up his land book. Section 58-803 of the Code. Further, Section 58-809 provides in effect that the Commissioner of the Revenue shall not charge land to a person "without evidence of record that such charge is proper". Once the Commissioner of the Revenue begins to depart from the official records by which the law contemplates he shall be guided much confusion will ultimately follow. It is my opinion, therefore, that the pertinent statutes should be strictly followed in the case you put and the land, including the standing timber, taxed to the owner of the record.

TAXATION—Tract of land lying in two counties assessed in respective counties according to acreage therein. F-261

Honorable A. Dunston Johnson,
Commonwealth Attorney for Isle of Wight County.

I am in receipt of your letter of April 5, from which I quote as follows:

"Some months ago a resident of this County purchased a one hundred twenty-five acre farm, seventy-five acres of which lie in Isle of Wight County and the remaining fifty acres lie in Nansemond County. The purchaser recorded his deed in both Counties. The Commissioner of Revenue of Isle of Wight County listed and assessed for taxation the entire tract of one hundred twenty-five acres in this County and the Commissioner of Revenue of Nansemond County listed and assessed for taxation the fifty acres lying in Nansemond County resulting in a double assessment on the fifty acres lying in Nansemond County.

"The Commissioner of Revenue of Isle of Wight County says that he has been under the impression that where a tract of land lies partly in two adjoining counties it should be assessed in the county in which the greater part thereof lies. This seems to have been the law under Section 2289 of the Code of 1919, but it seems that this provision has not been carried in the Code since that time. Apparently, this provision has been impliedly, if not expressly, repealed.

"I will appreciate your opinion as to how and where land lying partly in two adjoining counties should be listed and assessed for taxation and, if in both counties, how and what the Commissioner of Revenue of Isle of Wight County should do to remove from the land book that part erroneously assessed in Isle of Wight County."
Section 2289 of the Code of 1919, to which you refer, was repealed when the Tax Code of Virginia was enacted and so this section is no longer of any effect. It is my opinion, therefore, that the tract of land which lies in the two counties should be assessed in the respective counties, in accordance with the acreage lying in each county.

As to how the assessment made pursuant to the repealed Section 2289 should be corrected, I refer you to Section 58-814 of the Code.

TOLLS AND TOLL BRIDGES—Free use by students. F-201

HONORABLE F. E. KELLAM,
Judge, Twenty-Eighth Judicial Circuit.

November 21, 1950.

This will acknowledge receipt of your latter dated November 11, 1950, which I quote as follows:

"The authorities of Oceana High School, Oceana, Virginia, have asked that I write you with reference to the school buses carrying school children over the Chesapeake Ferry and James River bridges.

"The principal of the Oceana High School has certified that the school buses transporting the Oceana High School students on a visit to other schools with their band is an official trip authorized by the school authorities and under these conditions, I am writing to ask should they not have free transportation across the said ferry and bridge.

"Other parts of the state do not have to contend with these toll bridges and it certainly seems to me that something should be done to see that these buses with the students have free transportation.

"I would appreciate your advising me with reference about the same."

You, of course, are familiar with the provisions of Chapter 379, Section 22-277 of the 1950 Acts of the General Assembly wherein the former section of the Code was amended and re-enacted to make it unlawful to collect toll from a pupil using the facilities for daily use in going to or returning from immediate attendance upon any school, etc. This section, as amended and re-enacted, further provides that the certificate to be furnished by the principal of a school must certify that the pupil or student using such facilities daily for regularly attending such school, etc. The italicized language is the change made when this section was re-enacted.

In view of the language of the amended section, I am of the opinion that the principal of Oceana High School would be required to certify that the pupils of his school are using the toll facilities for daily regular attendance in going to and immediately returning from school, and unless such certificate can be given, the pupils would not be exempt from the payment of toll.

TOWNS—Authority of council to adopt ordinance regulating parking. F-60a—F-60

HONORABLE LITTLETON H. Mears,
Attorney for the Commonwealth for Northampton County.

July 18, 1950.

This will acknowledge receipt of your letter dated July 12, 1950, from which I quote as follows:

"Can you tell me whether the governing body or council of an incorporated town having less than 3500 inhabitants has the power to adopt ordinances in respect to the regulation of automobile parking and other mat-
ters for the regulation of traffic upon or in respect to a street or highway which passes through such incorporated town and which is under the control of the State Highway Commission?"

Your attention is called to Section 46-259 of the Code of Virginia (1950) which provides, in part, as follows:

"The council or other governing body of any city or town may, by a general ordinance, provide for the regulation of parking within its limits, including the right to install and maintain parking meters and to require the deposit therein of a coin of a denomination to be prescribed in such ordinance and to determine the time during which a vehicle may be parked and may authorize the city manager, the director of public safety, the chief of police or other designated officer within the city or town to put the regulations into effect, * * *.

I am of the opinion that the language of this section is broad enough to confer upon the governing bodies of any city or town, including those of less than 3500 inhabitants, power to adopt ordinances in respect to the regulation of automobile parking and other matters for the regulation of traffic upon and in respect to the streets or highways which pass through such towns even though the same are under the control of the State Highway Commission.

TOWNS—Failure of officer to take oath within time limits.  F-60

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

September 19, 1950.

This is in reply to your letter in which you state that the persons elected to the town council of St. Charles did not take the required oath of office until September 7, 1950, although technically their term of office began on September 1, 1950. You further state that for the past three terms no council has qualified by taking the oath on or before September 1. You desire my opinion as to whether a contract entered into by the old council "just prior to the time of the new council taking office" is valid, and whether the new council is a legally constituted body.

While your letter does not reveal whether the contract inquired of was entered into before or after September 1, 1950, it is my opinion that in either event it is a valid contract. To arrive at the conclusion it is, of course, necessary to establish that the old council was, prior to September 1, 1950, a legally constituted body and that after September 1, 1950 and until their successors qualified they may properly continue to discharge the duties of their offices. This latter principal is, as you point out, established in Virginia by the case of Johnson v. Mann, 77 Va. 265. We may establish the fact that the old council was a legally constituted body because by qualifying subsequent to September 1 on the year of their election and acting throughout the term they became "de jure" officers, or at least "de facto" officers. In either event, a contract entered into by them would be valid.

As to whether the newly elected council is entitled to hold office, it has often been held as stated in McQuillin on Municipal Corporations, Second Edition, Vol. 2, page 192.

" * * * a law providing merely that the oath shall be taken within a specified time may be directory only, and a failure to take the oath in time will not work a forfeiture of the office, and the officer does not lose his power, and is, at least, a de facto officer. In such case, the oath may be taken after the time named, and the officer is thereupon fully qualified and is an officer de jure. * * *."
Section 15-477 cited in your letter is, in my opinion, inapplicable to the instant case.

Section 15-477 reads as follows:

"If any such officer fail to qualify and give bond, as required by the preceding section, on or before the day on which his term begins, his office shall be deemed vacant; provided that if such officer at the time of his election is a member of the armed forces of the United States, in active service in the present war, he may qualify and give bond within sixty days after the end of the war in which he may be serving, or within sixty days after his discharge and return to civil life, whichever may last occur." (Italics supplied)

The act of qualifying referred to in this section is that of taking the oath prescribed by §49-1 of the Code (See §15-475 and §15-476) which is the oath required of "officers of the State." You will observe that this oath is not required by councilmen for §15-422 provides as follows:

"Every person elected a councilman of a town shall, on or before the day on which his term of office begins, qualify by taking and subscribing an oath faithfully to execute the duties of his office to the best of his judgment; and any person elected mayor shall take and subscribe the oath prescribed by law for State officers.

"Any such oath of councilmen and mayors may be taken before any officer authorized by law to administer oaths and shall, when so taken and subscribed, be forthwith returned to the clerk of the council of the town, who shall enter the same on record on the minute book of the council." (Italics supplied)

Since a councilman is not required to qualify as provided by §15-475 and §15-476, it is apparent that he is not one of the officers referred to in §15-477 which only covers officers qualifying under those sections.

It is, therefore, my opinion that the general rule stated in McQuillin, as quoted above, is applicable in this case and in view of the fact that the officers in question qualified before entering upon the discharge of their duties, thus bringing into effect the safeguards sought by the requirement of an oath, it does not appear that there has been any wrong done of which anyone may complain. Since the question is not completely free from doubt, it is suggested that it would be a better practice in the future for the newly elected councilmen to qualify fully prior to September 1.

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TOWNS—Unincorporated, vacating alleys in. F-252

HONORABLE RAYMOND J. BOYD,
Attorney for the Commonwealth of Russell County.

March 19, 1951.

This is in reply to your recent letter in which you stated that the School Board of Russell County is desirous of acquiring two parcels of land from certain coal companies, which parcels are designated as lots Nos. 94 and 96 of the Town of Dante. You further stated that the records reveal that the coal company caused the entire unincorporated Town of Dante to be subdivided and that the plat which has been duly admitted to record in the clerk's office discloses that an alley or right of way is included in the land which is proposed to be donated to the School Board.

You desire my opinion as to whether Section 15-766 is applicable for the vacating of alleys which have been dedicated to public use in unincorporated towns.
It is my opinion that Section 15-766 of the Code, as amended, is applicable only to cities and incorporated towns. However, I call your attention to Article 2, Chap. 23 of Title 15, which is known as the "Virginia Land Subdivision Act", and suggest that Section 15-793 thereof, as amended, would be applicable to the situation described by you.

TREASURERS—Levying on property for nonpayment of taxes—No bond required.  F-270–F-130

HONORABLE C. A. SINCLAIR,
Treasurer of Prince William County.

This is in reply to your letter of August 21st in which you request my opinion as to whether a County Treasurer may, upon levy for taxes, take into possession the property levied upon without having to execute bond.

I take it that you refer to the execution of a bond specifically in connection with property distrained for taxes. Section 58-1001 of the Code provides that any goods or chattels in the city or county belonging to the person or estate assessed with taxes or levies may be distrained therefor by the treasurer, sheriff, sergeant, constable or collector. The statutes do not require the execution of any bond in connection with such action. It is my opinion, therefore, that property may be distrained for taxes by the treasurer without the execution of a bond therefor.

TREASURERS—May accept check for taxes.  F-130

HONORABLE CHARLES A. REID,
Treasurer of Greenville County.

This is in reply to your letter of September 19, 1950, which reads as follows:

“Will you please advise me whether a county treasurer is charged with the responsibility of collecting taxes both county and state via cash. If it is permissible for county treasurers to accept checks and other negotiable instruments in payment of county or state taxes is the treasurer personally liable in the event the check or other negotiable instrument is returned by the bank or party on whom drawn? Is a county treasurer required to accept checks drawn on banks which do not remit at par?”

I know of no provision of law which would prohibit a county treasurer from accepting a check in payment of taxes either county or state, and I understand the practice of doing so is rather widespread, which is a natural result of the convenience which is afforded the taxpayer by this method of payment. I do not believe the treasurer would be personally liable in the event a check accepted for such taxes proved worthless since, actually, there has been no loss to the county or state—the taxpayer being as liable for the taxes as he was before giving the check. In connection with this I suggest, for your consideration, that until the check has been honored by the bank upon which it is drawn the debt of the drawer of the check is not in fact paid, and many businesses defer marking bills paid or issuing receipts for payments received by check until the expiration of a reasonable time within which the check should “clear.”

As to your last question, a check is not legal tender and there is no requirement that you accept in payment of taxes a check which, when converted to cash, will net less than its face value.
TREASURERS—Rights in regard to distraining property. F-273

HONORABLE CHARLES A. REID,
Treasurer for Greenville County.

January 5, 1951.

The questions presented in your recent letter relative to the authority of treasurers in distraining property for taxes are, in most instances, without judicial or statutory interpretation in this State, and have necessitated an examination of the general law relating to the subject in this and other jurisdictions. The questions shall be listed and discussed in accordance with their precedence in your letter.

(1) "* * * (Has) a county treasurer * * * a legal right to enter a home or any other type of building or structure for the purpose of making a levy on property situate therein or believed to be therein belonging to a person who has been assessed with taxes and which taxes were delinquent?"

Section 58-1001 of the Code of Virginia provides as set forth below but does not designate the location of the goods or chattels:

"Any goods or chattels in the city or county belonging to the person or estate assessed with taxes or levies may be distrained therefor by the treasurer, sheriff, sergeant, constable or collector. In all cases property subject to levy or distress for taxes shall be liable to levy or distress in the hands of any person for taxes thereon."

The right of unpermissive entry into a dwelling house or outbuildings connected therewith, sometimes referred to as the curtilage, is one of the most carefully guarded principles in English or American law. Accordingly, I do not advise the unpermitted entry of a treasurer into a dwelling where the door is shut. Section 58-1014 sets forth additional proceedings for the collection of taxes through institution of suit. After judgment an officer into whose hands an execution is placed may, in accordance with §8-422, break in the daytime the outer doors of a dwelling to make a levy. I deem it significant that the Legislature expressly made a provision for unpermissive entry into a dwelling under an execution, and has not made provision for such entry in connection with the summary proceedings for the collection of taxes. However, in order to give effect to §58-1001, allowing for distraint, I am of the opinion that a treasurer having a valid unpaid tax bill may enter a dwelling where the door is found standing open, or where permission of entry is granted, and he may also enter such buildings where the public is customarily accorded entry. In the case of Chambers v. Higgins, 169 Va. 345, 193 S. E. 531, property was distrained by the treasurer of Clifton Forge for taxes under former §378, now §58-1001, and levy was made upon chattels in the form of pool tables in a building there; the levy was upheld, although the right of entry was not in issue in this case.

It is to be noted that the statutory provisions, such as §58-1001 provide for the collection of taxes by way of distress are summary remedies which do not exist at common law. They are restricted in their operation and limited to the wording of the statutes. 61 Cor. Jur. page 1047, §1368. In connection herewith, it should be further pointed out that an officer proceeding under §8-422 armed with an execution would undoubtedly be immune from personal liability, as he was acting under authority of court. However, especially with regard to the entry of private dwellings, a treasurer or other officer proceeding under §58-1001 might become personally liable if he proceeded under an invalid tax bill or outside the authority granted by a strict construction of §58-1001.

(2) "* * * Would the treasurer have a legal right to enter an unlocked structure to make said levy when none of the occupants of the structure were at home or present nearby?"
It is my view that the right to enter unlocked structures other than dwellings would be in accordance with the principles set forth in the discussion of question No. 1 and that presence or absence of the taxpayer would not alter the situation.

(3) "Would * * * the deputy treasurer have the same legal rights to make a levy under the above circumstances?"

Section 15-485 provides as follows:

"The treasurer of any county or city, the sheriff of any county, the sheriff or sergeant of any city, any commissioner of the revenue, any county surveyor, any county clerk and the clerk of any circuit or city court may appoint one or more deputies, who may discharge any of the official duties of their principal during his continuance in office, unless it be some duty the performance of which by a deputy is expressly forbidden by law. The officer making any such appointment shall certify the same to the court in the clerk's office of which the oath of the principal of such deputy is filed and a record thereof shall be entered in the order book of such court. Any such deputy, before entering upon the duties of his office, shall take and prescribe the oath now provided for county officers. The oath shall be filed with the clerk of the court in whose office the oath of his principal is filed and such clerk shall properly label and file all such oaths in his office for preservation. Any such deputy may be removed from office by his principal. Such deputy may also be removed by the court as provided by §15-500." (Italics supplied).

In accordance with the underlined wording of the above-quoted statute, I am of the opinion that the deputy treasurer would have the same legal rights to make a levy as would the treasurer.

(4) "What responsibility does a treasurer have in notifying a person, firm or corporation which might have a lien or claim against the property which had been levied upon and which property was being purchased upon an installment plan, such as an automobile, furniture, electrical appliances, radio, etc.?"

This office has previously ruled, by letter of June 8, 1939, to the Honorable G. M. Weems, that the sale of property distrained for taxes pursuant to §378 (now §58-1001) may be had in accordance with the provisions of §2832 (now §8-422.1).

Your letter mentions articles of property subject to installment payments. Attention is directed to the fact that §58-1014 does not expressly include the property subject to conditional sales.

**TRIAL JUSTICE—Appealing from conviction by; after plea of guilty and payment of fine. F-353—F-85**

_Honorable H. M. Ratcliffe,_
Attorney for the Commonwealth of Henrico County.

This will acknowledge receipt of your letter dated August 23, 1950, requesting an opinion from this office. I quote your letter as follows:

"We should like to know whether in your opinion a person who pleads guilty to an offense and pays his fine can thereafter appeal. We are familiar with the fact that a person can appeal after pleading guilty in the Trial Justice Court but we can find no decisions on the question where he has plead guilty and paid his fine and, thereafter, within the ten day period attempts to appeal his case."
Your inquiry seems to be covered by the case of Gravely v. Deeds, 185 Va. 662, decided on November 25, 1946, in which case the Supreme Court said:

"* * * Payment of the fine and partial submission to a judgment of the trial justice do not of themselves constitute a waiver of the right to an appeal if proper steps are taken to perfect such an appeal within the period named."

In view of the plain language of the court in this case, I am of the opinion that a person who pleads guilty to an offense and pays his fine can thereafter appeal if proper steps are taken to perfect such an appeal within the period named.

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TRIAL JUSTICE—Appeals from in civil cases; bond required of plaintiff.
F-136a

Honorable William D. Prince,
Trial Justice of Sussex County.

November 8, 1950.

This is in reply to your letter of November 2, 1950, which reads as follows:

"In a civil case, appealed from the Trial Justice Court to the Circuit Court in which judgment has been given by the Trial Justice to the defendant and an appeal is noted and perfected by the plaintiff, is it required by law that the said plaintiff in perfecting the appeal post a bond, or cash, with the Trial Justice, which is to be transmitted to the Clerk of the Circuit Court, except when there is a counter-claim in the case?"

Section 16-80 of the Code of Virginia of 1950 reads, in part, as follows:

"And in all civil cases wherein judgment is rendered by a trial justice when matter in controversy is of greater value than twenty dollars, exclusive of interest and costs, or when the case involves the constitutionality or validity of a statute of this State, or of an ordinance or by-law of a municipal corporation, there shall be an appeal of right to the circuit court of the county, or the corporation court of the city, wherein the judgment was rendered, and all such appeals shall be tried and judgment rendered thereon, in accordance with the provisions of §16-32, but no such appeal shall be granted unless and until the party applying for the same shall give bond, with sufficient surety, to be approved by the trial justice, to abide the judgment of the court upon the trial of the appeal, if such appeal be perfected, except that when such appeal is proper to protect the estate of a decedent, an infant, a convict or an insane person or the interest of a county, city or town no bond shall be required. No surety in any such appeal bond shall be released by the appellant being adjudicated a bankrupt at any time subsequent to the judgment rendered by the trial justice, but such surety shall be entitled to make any defense on the trial of the appeal that the appellant could have made, except the defense of bankruptcy.

"In lieu of giving bond as hereinabove provided any such appellant may deposit with the trial justice, who shall issue his official receipt therefor, such sum of money as the trial justice may estimate to be sufficient to discharge such judgment as may be rendered by the appellate court on the trial of the appeal in which event the trial justice shall pay the money so deposited with him into the court to which such appeal is taken by paying the same to the clerk of the court who shall issue his official receipt therefor." (Italics supplied)
This section makes no distinction between appeals by the plaintiff and appeals by the defendant. Under its terms whichever party appeals must post bond with surety or money with the trial justice to discharge such judgment as may be rendered by the circuit court. The amount of such bond or money is determined by the estimate of the trial justice and, of course, in those cases in which the plaintiff appeals and there is no counter-claim or cross-claim, the security need be sufficient to cover only such costs as may be awarded against the plaintiff, if the trial justice be affirmed.

TRIAL JUSTICE—Assistant Police Justice may convene lunacy commissions when acting for a police justice. F-136c

HONORABLE OLIVER A. POLLARD, Commonwealth's Attorney, City of Petersburg.

This is in reply to your letter of July 5, in which you refer to the fact that under paragraph (7) of Section 37-1.1 of the Code the word "justice" or "trial Justice" as used in Title 37 of the Code, which deals with the commitment of persons to the State mental hospitals, includes "civil and police justices of cities." You ask whether this would include the assistant civil and police justice of the City of Petersburg, so that he would have the right to exercise the authority granted to the trial justice under Section 37-61.

I assume that the Civil and Police Justice of Petersburg was appointed under Chapter 3 of Title 16 of the Code and that the assistant or substitute Civil and Police Justice was appointed under Section 16-88. This last mentioned section provides that, in the event of the inability of the civil and police justice to perform the duties of his office by reason of sickness, absence, etc., the substitute civil and police justice shall perform the duties of the office during such absence or disability.

In my opinion, the purpose of paragraph (7) of Section 37-1.1 was to require that the persons given authority to convene commissions to inquire into the question of a person's mental competence should be those on whom judicial powers had been conferred. Since an associate civil and police justice, when sitting, exercises such powers to the same extent as the civil and police justice himself, it is my opinion that he is included in the definition of "trial Justice" used in Section 37-1.1 and, when acting in the stead of the civil and police justice, may exercise the authority granted by Section 37-61.

If the Civil and Police Justice Court of Petersburg is set up under a charter provision, a different result may obtain, but I imagine that, even if there is a charter provision, it would contain provisions similar to those contained in Section 16-88 referred to above.

TRIAL JUSTICE—Authority to issue abstract of judgment limited to two years. F-72

HONORABLE C. H. COMBS, Trial Justice of Buchanan County.

This is in reply to your letter of April 11, 1951, from which I quote as follows:

"Section 16-78 of the 1950 Code provides among other things that executions and abstracts of judgments may be issued at any time during a period of two years.

"I now have before me a request for an abstract of a judgment dated September 5, 1947 on which an execution has been issued and the judgment
is perfectly valid, but in view of the above section, I would like to know whether or not I have the right to issue an execution after two years from the date of judgment.

"Section 16-26 of the 1950 Code provides that the Trial Justice shall issue and certify abstracts at any time during his continuance in office. I do not see the distinction between the two sections."

You make reference to a recent opinion of this office on the subject. The opinion referred to is, I presume, contained in the letter to Honorable Robert D. Huffman dated August 29, 1949, in which it was said "the Trial Justice may only issue abstracts of judgment and execution for a period of two years from the date of judgment." This ruling was based on the provisions of §16-78 of the Code of 1950. Section 16-26, which provides that the trial justice shall certify and deliver an abstract of judgment at any time during his continuance in office, is, in my opinion, modified by the provisions of §16-78 which is a later enactment.

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**TRIAL JUSTICE—Salary—How paid when county and city have same Trial Justice and Juvenile and Domestic Relations Judge.**  F-136a

**Honorable J. Gordon Bennett,**
Secretary of Committee of Judges.

August 17, 1950.

This is in reply to your request for my opinion regarding the effect of Chapter 383 of the Acts of 1950 upon the compensation to be paid a trial justice who serves as such in a city and a county which have combined for the purpose of having a single trial justice. You ask whether a city council would have to provide a specific salary to be paid such trial justice for that portion of his duties which he performs as Juvenile and Domestic Relations Judge of the City.

Chapter 2 of Title 16 of the Code provides for the appointment of trial justices for each county of the State. Under Section 16-53, a city within any county may be combined with such county for the purpose of having a single trial justice for such combined city and county. Article 5 of Chapter 1 of Title 14, which embraces Sections 14-50 through 14-54, provides for the appointment of a committee of three circuit judges to fix the salaries of the trial justices of the counties of the State appointed under the provisions of Chapter 2 of Title 16. The provisions of said Article 5, including Section 14-53, which specifies that "the State shall pay all of the salaries of the trial justices * * * provided under the provisions of this article, out of the appropriations in the general appropriation act for criminal charges", clearly applies to trial justices appointed for a combined city and county. Not only is a trial justice for a combined city and county a trial justice "appointed under the provisions of Chapter 2 of Title 16", but Section 14-51, which prescribes the limits of trial justices' salaries that under Section 14-53 are to be paid entirely by the State, provides that, whenever a trial justice serves a county and city combined, the aggregate population of the combined political subdivision is to be used in determining the classification of such trial justice.

The Committee of Judges has, therefore, correctly construed the law as requiring the State to pay the entire salary of a trial justice who serves a combined county and city.

Chapter 383 of the Acts of Assembly of 1950 provided for a State-wide system of juvenile and domestic relations courts. By Section 4 it is provided that in counties and in cities of less than twenty-five thousand the Judge of the Juvenile and Domestic Relations Court shall be the same person as the trial justice of such county or city if he is otherwise qualified. This conforms to the provision contained in the trial justice law to the effect that the trial justice shall also be Judge of the Juvenile and Domestic Relations Court in each county and city in his territory.
While the first paragraph of Section 11 of Chapter 383 provides that the governing body of a city shall fix the salary of the Juvenile and Domestic Relations Judge appointed for a city, which salary is payable out of the treasury of the city, it is my opinion that this is applicable only when a separate Juvenile and Domestic Relations Court is established for the city and is not applicable in the cases where a trial justice appointed under the trial justice law to serve a combined county and city is, under the provision of Section 4 of Chapter 383 of 1950, designated to serve as Juvenile and Domestic Relations Judge for such county and city.

The last paragraph of Section 11 provides that the salaries of the Judges of Juvenile Courts in the counties shall be fixed and paid in full by the State as the salaries of trial justices are now fixed and paid. In my opinion, this provision requires that the salary of a trial justice serving for a combined county and city and, as such, designated as Juvenile and Domestic Relations Judge for such county and city, be fixed by the Committee of Circuit Judges and be paid entirely by the State just as has always been the case under the trial justice law prior to the adoption of Chapter 383 of the Acts of 1950.

TRIAL JUSTICE—Substitute—May convene lunacy commission only in absence or disability of Trial Justice. F-136c
HONORABLE R. T. WILSON,
Judge, Hustings Court of the City of Petersburg:

This is in reply to your letter of July 6th in which you request my opinion concerning the authority of a substitute Civil and Police Justice to serve on lunacy commissions under the provisions of Chapter 465 of the Acts of Assembly of 1950.

The Commonwealth's Attorney for the City of Petersburg on July 5th of this year asked a somewhat similar question regarding the powers of an associate Civil and Police Justice and I enclose herewith a copy of that opinion with the statement that the views expressed therein are, in my opinion, applicable to a substitute Civil and Police Justice.

As to whether or not a substitute Civil and Police Justice may act in this connection only during the time he is actually "substituting" may well depend upon the charter of the City of Petersburg. However, if the substitute justice is appointed under the authority of Section 16-88 of the Code I am of the opinion that he may hold lunacy commissions only during the absence or disability of the regular Civil and Police Justice.

I feel that the conclusion reached above is borne out by a comparison of Sections 16-55 and 16-56 of the Code which deal with the appointments of associate Trial Justices and substitute Trial Justices. There, it can be seen that an associate Trial Justice has concurrent jurisdiction with the Trial Justice and, under the views expressed in the enclosed opinion, would have the authority to hold lunacy commissions required by the new law to which you refer. By the same reasoning, a substitute Trial Justice would have no authority to act unless he was actually "substituting" for the Trial Justice "by reason of sickness, absence, vacation, interest, proceedings or parties before his Court."

UNFAIR SALES ACT—Interstate commerce transactions not covered. F-184
HONORABLE HOWARD W. SMITH, JR.,
Attorney for the Commonwealth for Alexandria.

Since my letter of acknowledgment, I have examined into the question as to whether the "Unfair Sales Act" was violated under the following facts set forth by your letter, which facts I quote as follows:
"A wholesaler whose place of business is in the District of Columbia takes orders by telephone and sells merchandise at less than cost to the wholesaler to a firm physically located in Virginia. The articles are delivered by the wholesaler to the place of business in Virginia and are paid for by check mailed from the business office of the retailer in Washington, D. C. to the address of the wholesaler in Washington, D. C."

A former opinion, which I enclose, rendered by the Honorable Abram P. Staples, then Attorney General, on August 26, 1938, in response to an inquiry from the Honorable James P. Reardon, deals with a set of facts analogous to those presented by your letter. It would further appear that the circumstances presented by your letter show such incidents as to place that particular transaction in the category of interstate commerce and, therefore, controlled by the former opinion referred to above. Accordingly, it is my opinion that the Unfair Sales Act does not apply to the problem which you present.

I might add that there has been very little judicial interpretation of the Unfair Sales Act in this State. However, there is now pending a suit in the Circuit Court of the City of Richmond which might place some light upon the matter upon its final determination.

VETERINARIAN—Requirements for admission to examination. F-147

HONORABLE ANDREW W. CLARKE,
State Senator.

This is in reply to your letter of June 26, concerning whether or not a certain person is eligible to now take the veterinary medicine examination in this State. The pertinent facts are as follows:

The individual in question received his academic training at the City College of New York and later attended Middlesex University at Boston, Massachusetts where he studied veterinary medicine for a period of four years. In January, 1947 he came to the City of Alexandria and became associated with a duly qualified veterinarian who had been licensed in this State. He was given official permission to become so associated, but at that time a certificate to practice veterinary medicine was not issued.

In accordance with the provisions of Section 1276 of Michie's Code of 1942 this person, in November, 1947, was permitted to take an examination given by the Board of Veterinary Examiners, which examination he failed. He immediately made application for a re-examination. However, another examination was not given until July, 1948, at which time Chapter 515 of the Acts of Assembly of 1948, which changed the qualifications for admission to the examination in question, was in effect. He was not allowed to take this examination because he could not meet the more stringent qualifications embodied in the new law.

Prior to 1948 it was the mandatory duty of the Board of Veterinary Examiners to give examinations for the practice of veterinary medicine and surgery to all persons who made application. See Section 1276 of Michie's Code of 1942. However, in 1948 the General Assembly saw fit to repeal Section 1276 and to enact what is now Section 54-788.1 of the Code of 1950. It is as follows:

"No person shall be qualified to be examined by the Board for a certificate to practice veterinary medicine or surgery in this State unless and until he shall have delivered to the secretary of the Board, with a fee of twenty-
It is my understanding that the Board has adopted as its approved list of veterinary schools those approved by the American Veterinary Medical Association, and since that Association does not recognize Middlesex University as an accredited veterinary school, the individual to whom you refer is not qualified to take the examination for the practice of veterinary medicine and surgery, even assuming that he received a diploma conferring the degree of veterinary medicine upon him.

In my opinion, the fact that the person in question made application to take the examination in 1947, and before the above section was enacted, is not material. After the November 1947 examinations, the Board, under the old law, owed the applicant no duty to hold another examination before the new law became effective, for both laws require only that the Board conduct examinations once each year. Furthermore, it should be pointed out that this individual had no vested right in the law as it existed in 1947, and every person in reliance on the continued existence of laws takes upon himself the risk of their being amended. 11 Am. Jur., Constitutional Law, §372.

It has been universally held that the right to regulate professions extends to those engaged therein, and no matter how long a person has been engaged in the practice of such profession, he does not have any vested right to continue. 11 Am. Jur., Constitutional Law, §275. Applying this principle of law to the facts of the instant case, it is clearly seen that a mere filing of an application to practice veterinary medicine and surgery would not give the applicant a vested right.

In conclusion, it is to be noted that the Legislature, by the enactment of Chapter 515 of the Acts of Assembly of 1948, (§§54-776—54-791, inclusive, of the Code of 1950), expressly exempted from examination all persons who on the day before the Act took effect were lawfully practicing veterinary medicine or surgery in this State. However, in its wisdom it did not see fit to exempt, from the more stringent requirement of the new law, those persons who had previously taken the examination but had failed to pass.

While I realize that the new Act may have worked hardships on certain individuals, they should seek redress in the Legislature for, in my opinion, it was the mandatory duty of the Board of Veterinary Examiners to refuse to permit the individual referred to above to take the examination given in July, 1948.

VIRGINIA MILITARY INSTITUTE—State cadets; discharging obligation. F-268b

October 24, 1950.

General R. J. Marshall,
Superintendent, Virginia Military Institute.

This is in reply to your letter of October 18, 1950, which reads as follows:

"One of our graduates, who was a State cadet, has asked us about fulfilling his obligation, and I would like to know if the Act, copy of which is attached and which was approved on March 31, 1942, is still operative.
If so and we are considered to be in a national emergency, we can give him a direct reply, because this young man, who is a reserve officer, has now been called to active duty. I do know that the local Selective Service Board is drafting men into the armed forces all the time now, and so I presume that a national emergency must exist, if it has that authority, but that is the question I would like to have answered."

The 1942 Act to which you refer is now included in the Code of Virginia of 1950 as §23-38, and reads as follows:

"Service by any person in any of the armed forces of the United States as an officer, private or nurse, or in any other capacity, regardless of length of service, in time of war or other declared national emergency, is a complete and final discharge of any obligation of such person to serve the Commonwealth as a teacher in the public schools, or in any other capacity, including any such obligation which has been reduced or computed into terms of a monetary obligation in lieu of such service, arising by virtue of any statute or of any contract entered into between such person and any State owned or State supported institution of higher learning, in consideration of any State scholarship awarded to or received by such person as a student in such institution; provided, that such service is terminated by an honorable medical discharge; provided, further, that such person shall have entered such service with the armed forces within four years after leaving such State owned or State operated institution."

This office has ruled on a number of occasions that, inasmuch as peace treaties have not yet been negotiated, World War II has not ended. Therefore, service in the armed forces at the present time constitutes service "in time of war" as required by the statute.

I do not know just what action you contemplate in this matter, but I call your attention to the conditions in the statute which require such service be terminated by an honorable discharge and that it be entered into within four years after leaving the institution. It is my opinion that the first of these conditions would make it impossible to determine that a person's obligation to the State is discharged until his service in the armed forces is terminated.

VIRGINIA POLYTECHNIC INSTITUTE—No authority to exempt graduate employees from tuition. F-268g

December 20, 1950.

Mr. S. K. Cassell,
Business Manager, Virginia Polytechnic Institute.

This is in reply to your letter of December 14, 1950, which reads as follows:

"Sometime ago one of the State auditors raised a question about a practice that has been followed here at V. P. I. of exempting graduate students who are full-time, College employees from paying the usual College graduate fees charged other students. In raising this question, the auditor referred to the provisions of Section 993 of the Virginia Code of 1942.

"The reason we have been exempting graduate students who are full-time employees of the College from paying the usual graduate fees is to try to induce our employees, particularly the young instructors, to take some part-time work which should enable them to become better qualified to do the work in which they are engaged. This has also been of some help in trying to interest qualified employees in accepting positions with the College. Many
of them are very much interested in opportunities to pursue their studies further in order to improve their standing.

"I shall appreciate your advising me whether or not we are permitted under the law to continue this practice of exempting the full-time employees of the College from paying the graduate College fees charged other students."

Section 23-128 of the Code of 1950 which deals with professors' salaries and fees of students reads as follows:

"Section 23-128. Professors' salaries; fees of students.—Each professor shall receive a stated salary, to be fixed by the board of visitors. The board shall fix the fees to be charged for tuition of students, other than those allowed scholarships under Section 23-31, which shall be a credit to the fund of the Institute. (Code 1919, Section 865)."

Section 23-31, referred to in the section quoted, strictly defines and limits the powers of the Boards of Visitors of the various State institutions, including Virginia Polytechnic Institute, to remit instructional charges and provides, in paragraph (5) (c), as follows:

"No educational institution named herein shall award any scholarship, or remit any special fees or charges, to any student at such institution except as authorized in this section."

While taking courses the professor would be a student within the meaning of the above paragraph and since Section 23-31 makes no provision for remission to such persons, it is my opinion that the language quoted expressly prohibits such action.

VIRGINIA POLYTECHNIC INSTITUTE—Personnel Act—Extension specialist is member of teaching staff. F-243

April 4, 1951.

HONORABLE HARRIS HART,
Director of Personnel.

Your letter of March 15 presents the question of whether or not an extension specialist employed in the Extension Division of the Virginia Polytechnic Institute is subject to the provisions of the Virginia Personnel Act in view of that part of Section 2-84 of the Code which states that the Act shall not apply to "the presidents, and teaching and research staffs of State educational institutions."

It is obvious that the question to be determined is primarily one of fact. The facts before me are those in the enclosures accompanying your letter, in two memoranda submitted by Dr. Walter S. Newman, President of V. P. I., and those brought out in a conference held on March 28 between you, Dr. Newman and the writer.

An extension specialist is an employee of the Extension Division of the College of Agriculture of V. P. I. Dr. Newman says that "it is his function to teach the Extension field force subject matter, procedures and methods of teaching this subject matter to rural people, effective use of such teaching aids as radio, news items, informational letters, et cetera. It is also his duty to assist the field personnel in the teaching of timely and pertinent information to rural people. * * * The role of extension specialists is to go to various points of the State to teach groups and individuals modern agricultural methods and to illustrate by demonstrations just as our faculty members do on the main campus. The specialists conduct many rather highly organized classes in short courses covering the same material as that covered at Blacksburg—bookkeeping, horticulture, tobacco culture, sheep raising, and 4-H Club work are common examples. * * * He is located at the college,
quartered with the resident teachers and research workers. ** All of them are accorded the benefits accruing to regular faculty members in planning their work, taking academic leaves, etc. ** They attend faculty meetings."

I do not think there can be any serious doubt as to the fact that these extension specialists are teaching within the broad definition of that term, that is, imparting knowledge or instruction to others. But I understand that the word "teaching" as used in the Personnel Act was construed by your predecessor "to mean the formal instruction given in a classroom of a State educational institution."

Virginia Polytechnic Institute is a State educational institution. Its Extension Division constitutes a large and important field of its activities. The division through its field force is required "to assist farmers in every possible way by teaching and demonstrating to them improved agricultural methods **."

It seems to me that when the functions of the Extension Division are considered the General Assembly has by its establishment in a very real sense made the whole State its classroom. As applied to the facts in this case, I think the better view is that the construction placed upon the word "teaching" in the past is too narrow and that these extension specialists are a part of the "teaching staff" of V. P. I.

VIRGINIA POLYTECHNIC INSTITUTE — Serving oleomargarine.

F-268g

October 27, 1950.

MR. S. K. CASSELL,
Business Manager, Virginia Polytechnic Institute.

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

"On July 1, 1950, the revised federal law on the use of oleomargarine states essentially that colored oleomargarine may be used in public eating places if it is served in triangular form, or may be used in square form if the patty underneath is identified by the letter 'M'.

"Colored oleomargarine has been served at the student dining halls for a number of years. Before the cafeteria counters were installed it was served in dishes, bulk and colored, but not cut. Since the cafeteria counters have been installed it has been served in squares but not on patties.

"Since our main dining hall is used to serve meals to students in attendance at V. P. I. who pay a fixed amount for board, is it classified as a public eating place under the terms of the federal law controlling the use of oleomargarine?

"It is our feeling that it is not so classified since these dining halls are not open to the general public but operated for the purpose of boarding the students attending V. P. I. However, we feel that it is desirable to get a ruling on this matter so as to avoid the possibility of violating the federal statute."

The federal law referred to by you is Public Law 459, 81st Congress, Chapter 61, Second Session, (H. R. 2023) passed March 16, 1950, and may be seen in the United States Code Annotated, Title 21, §§331, 342, 347 and 347B. Section 347 subsection (c) contains that portion of the law material to your inquiry and reads as follows:

"No person shall possess in a form ready for serving colored oleomargarine or colored margarine at a public eating place unless a notice that oleomargarine or margarine is served is displayed prominently and conspicuously in such place and in such manner as to render it likely to be read and understood by the ordinary individual being served in such eating place
or is printed or is otherwise set forth on the menu in type or lettering not smaller than that normally used to designate the serving of other food items. No person shall serve colored oleomargarine or colored margarine at a public eating place, whether or not any charge is made therefor, unless (1) each serving bears or is accompanied by labeling identifying it as oleomargarine or margarine, or (2) each separate serving thereof is triangular in shape."

It is my opinion that since your dining halls are not open to the general public but are operated as private dining halls for students attending V. P. I., they do not come within the meaning of the term "public eating place" in the federal law and, therefore, are not subject to the provisions thereof.

WAR AND WAR VETERANS—Authority of Division of War Veterans Claims to enter agreement concerning employment of members of Veteran's organization. F-356

HONORABLE HARRY F. CARPER, JR.,
Director, Division of War Veterans' Claims.

I am in receipt of your letter of April 9.
You desire my opinion concerning the request of the Veterans of Foreign Wars for the appointment of a member of the Division of War Veterans' Claims to be an accredited representative of the organization.
The request submitted to you by the Veterans of Foreign Wars lays down seven requirements which must be met by written agreement. You state the requirements to be as follows:

"1. That he be an employee or member of the V. F. W.
2. That he will review folders and represent V. F. W. claimants before rating boards.
3. That claims folders in which V. F. W. holds 2-P-22 will be called to the V. F. W. Service Office for his review.
4. That all correspondence and all office files in such cases be maintained in the V. F. W. Service Office files.
5. That correspondence with the veteran or Post Service Officer be conducted on V. F. W. stationery.
6. That in the handling of V. F. W. cases, same be handled in the V. F. W. Service Office in cooperation with Department Service Officer and in accordance with the high standards required by the V. F. W. National Rehabilitation Service. Such cases shall be open to the inspection of the Field Director to determine whether or not V. F. W. standards are being maintained.
7. Dual recognition, or V. F. W. recognition where a man is already recognized by another organization or organizations can be granted only under unusual circumstances, and requires the action of the National Welfare and Service Committee."

The Division of War Veterans' Claims is a State agency established, equipped and operated under the Attorney General and within the Department of Law. The broad base of its functions are prescribed by statute as follows:

"* * * to render adequate assistance to veterans of the armed forces of the United States, their widows, orphans and dependents, domiciled in Virginia, in matters of rehabilitation and in the preparation, presentation and prosecu-
tion of all lawful claims, by, or on behalf of, such veterans, their widows, orphans and dependents to obtain the benefit of their rights and privileges under various federal, State and local laws enacted for their benefit ** * **." (Section 2-93.1, Code of 1950).

The Division is fully empowered and equipped to render the functions embraced by the statute. In fact, it is expressly charged with the nondelegable duty to secure the benefits and protect the rights and privileges of all veterans and their dependents, irrespective of their affiliation with any organization. The Division has no right to give preference to any veteran's organization or to any veteran because of his membership therein or association therewith, nor to make distinction in the service rendered to nonaffiliated veterans.

Appointment of an employee of the Division, who in fact is an employee of the Commonwealth of Virginia, to be the accredited representative of the V. F. W. under the stipulations laid down by that organization would be tantamount to subsidizing the V. F. W. in the service which it renders to its members. Such a procedure finds no sanction in law and would be contrary to the established policy of the Division, as well as the policy of the Commission on Veterans' Affairs created by the General Assembly of Virginia.

For the foregoing reasons, I am of the opinion that you have no authority to enter into any agreement, written or otherwise, embracing the specifications and conditions set forth in your letter to me.

WELFARE AND INSTITUTIONS—Board of—Liability of member for excessive expenditure. F-231

HONORABLE JOHN J. WICKER, JR.,
Member Board of Welfare and Institutions.

This is in reply to your letter of July 22nd in which you requested my opinion as to whether or not the State Board of Welfare and Institutions is a "governing board" as these words are used in Section 42 of the Appropriation Act of 1950.

The pertinent part of Section 42, which deals with the creation of deficits, provides:

"** * * the members of any governing board of any State department, institution or other agency, or, if there be no governing board, the head of any State department, institution or other agency, making any such excessive expenditure—in the case of members of governing boards, who shall have voted therefor—shall be personally liable for the full amount of such unauthorized deficit, and, in the discretion of the Governor, shall be deemed guilty of neglect of official duty, and be subject to removal therefor."

As you pointed out, Title 63 of the Code of 1950 establishes the Board of Welfare and Institutions in the Department of Welfare and Institutions and Section 63-24 thereof defines its powers and duties in general by providing that the Board shall act in an advisory capacity to the Director of the Department of Welfare and Institutions. However, you further point out that "some Chapters of Title 53 of the Code appear to combine responsibility and authority in the Board, with the Director as the executive agent of the Board".

Section 63-5 of the Code provides in effect that the Director shall supervise the administration of those provisions of Title 63 dealing with general welfare and the provisions of Title 53 and Chapter 15 of Title 63, which deal with industrial schools and corrective institutions, unless otherwise provided.

While some sections of Title 53 of the Code do vest in the Board certain responsibilities and duties, such as custody and control of the real and personal
property of the Penitentiary, the authority to make rules and regulations for the safekeeping and conduct of convicts, etc., none of these responsibilities deal directly with the expenditures of appropriations made to the Department of Welfare and Institutions. Therefore, it is my opinion that the Board is not responsible in the matter of obligations and disbursements for construction or for personnel by virtue of any of the provisions of Titles 53 and 63 of the Code.

However, I call your attention to the fact that the title to real property, purchased or held for the benefit of the various industrial homes and corrective institutions, is vested in the Board, and it is conceivable that in this connection the provisions of Section 42 of the Appropriation Act of 1950 would be applicable. For example, if the General Assembly appropriated a certain sum for the purchase of land and the Board purchased this land for a consideration exceeding the appropriation made for that purpose, a member of the Board, who voted for such excessive expenditure, would be personally liable for the full amount of such unauthorized deficit.

Therefore, in the final analysis, I am of the opinion that whether or not the provisions of Section 42 of the Appropriation Act, quoted above, would be applicable to the members of the Board of Welfare and Institutions would depend upon whether the Board, in a given instance, was required by law to approve the expenditure of a certain appropriation or whether such approval was given in an advisory capacity. In other words, if a member voted to expend funds in excess of an appropriation, such member would be personally liable for the deficit created thereby only if his approval was mandatory before such an appropriation could be expended.

WELFARE AND INSTITUTIONS—Duty of State to bear expense of member of local board while he is acting as probation officer. F-231

HONORABLE RICHARD W. COPELAND,
Director, Department of Welfare and Institutions.

December 27, 1950.

This is in reply to your letter of December 15, 1950, seeking my opinion as to the interpretation of §16-172.80 of the Code of Virginia. Your particular problem is with regard to whether or not that section would "* * * require this department (Department of Welfare and Institutions) to reimburse members of local welfare staffs who, while acting as probation officers for the juvenile courts, are called upon to investigate cases for the courts and supervise children placed by the courts." Section 16-172.80 provides as follows:

"Under rules of the Department the traveling expenses incurred by a probation officer or other officer of the court when traveling under the order of the judge, shall be paid by the State Treasurer out of funds appropriated in the general appropriation act for criminal costs, on warrants of the Comptroller issued upon vouchers approved by the judge.

"Each juvenile probation officer shall also be paid all necessary traveling and other expenses incurred by him in the discharge of his duties hereunder, not to exceed, however, one thousand dollars during any fiscal year." (Italics supplied)

In accordance with §16-172.73 members of local welfare staffs, under certain circumstances, serve as probation officers. Section 16-172.73 provides as follows:

"Local superintendents of public welfare, or their assistants, in the various counties and cities, upon the certification of the court and with the approval of the local welfare board shall serve as probation officers for the court;

Under rules of the Department the traveling expenses incurred by a probation officer or other officer of the court when traveling under the order of the judge, shall be paid by the State Treasurer out of funds appropriated in the general appropriation act for criminal costs, on warrants of the Comptroller issued upon vouchers approved by the judge.

Each juvenile probation officer shall also be paid all necessary traveling and other expenses incurred by him in the discharge of his duties hereunder, not to exceed, however, one thousand dollars during any fiscal year." (Italics supplied)

In accordance with §16-172.73 members of local welfare staffs, under certain circumstances, serve as probation officers. Section 16-172.73 provides as follows:

"Local superintendents of public welfare, or their assistants, in the various counties and cities, upon the certification of the court and with the approval of the local welfare board shall serve as probation officers for the court;
and, when so serving, shall have the same powers and authority, duties and functions as other probation officers appointed and empowered under this law, provided however that, in the event that the local governing body has not made provision for a probation officer, in such case the local superintendent of welfare or one of his assistants shall serve, and no extra compensation shall be paid for such services." (Italics supplied)

Accordingly, it is my opinion that when local superintendents and their assistants serve as probation officers and travel under the order of the judge that their travel expenses "shall be paid by the State Treasurer out of funds appropriated in the general appropriation act for criminal costs on warrants of the Comptroller issued upon vouchers approved by the judge." It is my further view that any general rules of the Department of Welfare relating to travel and travel expenses should be observed in accordance with the wording of §16-172.80.

Section 16-155, providing for travel expenses of officers and witnesses, does not appear to be in conflict with the later statute, §16-172.80, and it does not appear necessary to distinguish these two statutes.

WELFARE AND INSTITUTIONS—No authority to enforce regulation requiring inmate to pay cost of property wilfully destroyed. F-231

April 24, 1951.

HONORABLE RICHARD W. COPELAND,
Director, Department of Welfare and Institutions.

This will acknowledge receipt of your letter of April 16, 1951 in which you request my opinion as to whether or not the State Board of Welfare and Institutions has authority to enforce the below stated regulation:

"When inmates wontonly and premeditatingly destroy State property, they should be required to pay such amount of the cost of replacing the destroyed property from their spend(ing) money as the Board deems proper. In no case is the amount to exceed the cost of the destroyed property."

It is my view that where payment of a civil claim is not voluntarily made the determination of legal liability is a function of the courts of this Commonwealth in accordance with established legal principles. The above regulation would transfer this power with respect to property damage claims against inmates to the State Board and would, in effect, leave the Board as a final judge of whether or not a certain inmate is liable to the Commonwealth for destroying State property. Moreover, in their determination of the cost or the value of the destroyed property, the Board would be the sole arbiter as to the amount to be assessed against the inmate. I find no authority for such an undertaking by the Board.

Accordingly, it is my opinion that, in the absence of statute, the State Board has no authority to enforce the above regulation.
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**ATTORNEY GENERAL OF VIRGINIA**

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