OPINIONS

OF THE

ATTORNEY GENERAL

AND

REPORT

TO THE

GOVERNOR OF VIRGINIA

From July 1, 1951 to June 30, 1952

Commonwealth of Virginia
Division of Purchasing and Printing
Richmond
1952
Letter of Transmittal

November 19, 1952.

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 statutes, 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)

<table>
<thead>
<tr>
<th>Name</th>
<th>County</th>
<th>Official Title</th>
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<tbody>
<tr>
<td>J. Lindsay Almond, Jr.</td>
<td>Roanoke City</td>
<td>Attorney General</td>
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<tr>
<td>G. Stanley Clarke</td>
<td>Henrico</td>
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<td>D. Gardiner Tyler</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>
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<td>Frederick T. Gray</td>
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<td>Thomas M. Miller</td>
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<td>H. Coleman McGehee, Jr.</td>
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<tr>
<td>Nerhea S. Evans</td>
<td>Charlotte</td>
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<tr>
<td>Louise W. Poore</td>
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<td>Eleanor W. Tilley</td>
<td>Smyth</td>
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<td>Mabel G. Hurt</td>
<td>Tazewell</td>
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<td>Madge V. Howell</td>
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<tr>
<td>Anne Pitt</td>
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<td>Receptionist</td>
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### ATTORNEYS GENERAL OF VIRGINIA

From 1776 to 1950

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<td>Edmund Randolph</td>
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<td>James Innes</td>
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<td>Robert Brooke</td>
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<td>Philip Norborne Nicholas</td>
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<td>James Robertson</td>
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<td>Sidney S. Baxter</td>
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<td>Willis P. Bocock</td>
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<td>John Randolph Tucker</td>
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<td>Charles Whittlesey</td>
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<td>James C. Taylor</td>
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<td>Raleigh T. Daniel</td>
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<td>James G. Field</td>
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<td>Frank S. Blair</td>
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<td>Rufus A. Ayers</td>
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<td>A. J. Montague</td>
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<td>William A. Anderson</td>
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<td>Samuel W. Williams</td>
<td>1910-1914</td>
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<td>John Garland Pollard</td>
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<tr>
<td><em>J. D. Hanks, Jr.</em></td>
<td>1918-1918</td>
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<tr>
<td>John R. Saunders</td>
<td>1918-1934</td>
</tr>
<tr>
<td><strong>Abram P. Staples</strong></td>
<td>1934-1947</td>
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<tr>
<td>***Harvey B. Apperson</td>
<td>1947-1948</td>
</tr>
<tr>
<td>****J. Lindsay Almond, Jr.</td>
<td>1948-1948</td>
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**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.**
CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES


CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES

1. Davis, Dorothy E. et als. v. County School Board of Prince Edward County. From United States District Court for Eastern District of Virginia. Segregation in public schools.

CASES DECIDED IN THE SUPREME COURT OF APPEALS OF VIRGINIA


3. Boone, James O. v. Standard Accident Insurance Company and C. F. Joyner, Jr., Commissioner, Division of Motor Vehicles. From Circuit Court of Roanoke County. Suspension of operation privileges. Held there was no insurance coverage.


13. Dillon, Walter Buford v. C. F. Joyner, Jr., Commissioner, etc. From Circuit Court of Franklin County. Suspension of driving privileges. Affirmed.
16. Hundley, Joseph Richard v. C. F. Joyner, Jr., Commissioner, etc. From Circuit Court of Franklin County. Suspension of operation privileges. Affirmed.
30. Perdue, Troy Lewis v. C. F. Joyner, Jr., Commissioner, etc. From Circuit Court of Franklin County. Suspension of driving privileges. Affirmed.
### CASES PENDING IN THE SUPREME COURT OF APPEALS OF VIRGINIA


2. **Commonwealth of Virginia, ex rel. C. F. Joyner, Jr., Commissioner, Division of Motor Vehicles v. James Edward Willis.** From Hustings Court City of Roanoke. Suspension of operation privileges.

3. **Noblett, Herman C. v. Commonwealth.** From Corporation Court City of Lynchburg. Indecent exposure.


### CASES DECIDED BY 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. Appeal from a judgment of District Court dismissing action as to V. M. I. Affirmed.

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


3. **The Virginia State Conference of Branches of the National Association for the Advancement of Colored People, J. M. Tinsley, as its President and individually, et als. v. The City of Richmond, Virginia, Sherwood Reeder, City Manager, and Jesse A. Reynolds, Director of Recreation and Parks of the City of Richmond, Virginia, John S. Battle, Governor of the Commonwealth of Virginia, J. Lindsay Almond, Jr., Attorney General of the Commonwealth of Virginia, and T. Gray Haddon, Commonwealth Attorney for the City of Richmond, Virginia.** Segregation at Mosque. Petition dismissed and injunction denied.

### CASE PENDING IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

1. **Corbin, Mahatma N. v. County School Board of Pulaski County.** Segregation in public schools.

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


6. Boone, James O. v. Standard Accident Insurance Co. and C. F. Joyner, Jr., Commissioner, etc. Circuit Court of Roanoke County. Suspension of operation privileges. Held there was no insurance coverage.


8. Branham, Floyd, Jr. v. C. F. Joyner, Jr., Commissioner, etc. Circuit Court of Wise County. Motion of Commissioner to dismiss proceeding sustained.


12. Cavalier Vending Machine Co. v. State Board of Pharmacy. Circuit Court City of Richmond. Suit for injunction on ground that statute prohibiting sale of prophylactics through vending machines is unconstitutional. Pending.


19. Commonwealth of Virginia, ex rel C. F. Joyner, Jr., Commissioner, etc. v. B. M. Miller, Trial Justice of Rappahannock County. Circuit Court City of Richmond. Trial Justice exercised power beyond his authority in staying action of Commissioner. Writ of prohibition awarded.


31. Duncan, Ralph v. Commonwealth of Virginia, ex rel Division of Motor Vehicles. Circuit Court of Craig County. Appeal from Commissioner's decision in refusing to issue operator's license. Relief granted.
42. Green, Alice G. v. Commonwealth. Corporation Court City of Winchester. Intangible personal property tax. Refund denied.
43. Hancock, Claude William v. C. F. Joyner, Jr., Commissioner, etc. Circuit Court of Roanoke County. Suspension of driving privileges. Dismissed.
47. Johnson, Riley Lawrence v. Commonwealth of Virginia, ex rel C. F. Joyner, Jr., Commissioner, etc. Circuit Court of Pulaski County. Suspension of operation privileges.


55. Mitchell, Tyler Bernard v. C. F. Joyner, Jr., Commissioner, etc. Circuit Court of City of Martinsville. Appeal from Commissioner's decision in refusing to issue operator's license. Pending.


63. Peters, James Edison v. C. F. Joyner, Jr., Commissioner, etc. Circuit Court of Floyd County. Suspension of operation privileges. Appeal dismissed.


70. Roots, James Elwood v. C. F. Joyner, Jr., Commissioner, etc. Circuit Court of Stafford County. Suspension of operator's privileges. Commissioner's order withdrawn. Dismissed.


72. Smith, Clifton D. v. C. F. Joyner, Jr., Commissioner, etc. Circuit Court of Washington County. Suspension of driving privileges. Pending.


77. Thorne, Clayton Thomas v. Commonwealth, ex rel C. F. Joyner, Jr., Commissioner, etc. Circuit Court City of Alexandria. Appeal from Commissioner's decision revoking automobile dealer's license. Pending.

78. Tomlin, C. V. v. C. F. Joyner, Jr., Commissioner, etc. Circuit Court of Amherst County. Suspension of operation privileges. Judgment for Commonwealth.


**CASES PENDING OR TRIED BEFORE THE STATE CORPORATION COMMISSION**


**HABEAS CORPUS CASES**


and dismissed. Petition for appeal to the Supreme Court of Appeals pending.


13. **Nuckols, Richard Carleton v. W. Frank Smyth, Jr., Superintendent Virginia State Penitentiary.** Circuit Court of Augusta County. Remanded for retrial as having been sentenced three times for felonies.


EXTRADITION HEARINGS CONDUCTED AND REPORTS SUBMITTED PURSUANT TO REQUEST OF THE GOVERNOR

July 3, 1951 M. S. Harrelson Jan. 29, 1952 Joe Blevins
July 24, 1951 Alva William Mitchem Jan. 29, 1952 Denver Moore
Aug. 1, 1951 Ralph H. Gibson Jan. 29, 1952 Joseph Clarence Palmore
Sept. 10, 1951 Howard Seaboy Tickle Feb. 11, 1952 Charles Dillard West
Sept. 11, 1951 Charles Raymond Beader Feb. 19, 1952 Percy Junius Harris
Sept. 24, 1951 Charles Botts Feb. 29, 1952 J. A. Kenneth Fletcher
Sept. 24, 1951 Warren J. Gray March 1, 1952 Eddie Johnson
Oct. 3, 1951 George Lewis March 12, 1952 John Thomas Rushing
Oct. 8, 1951 Marion Willis March 25, 1952 Barton Grundy
Oct. 19, 1951 Samuel Solomon Apr. 7, 1952 Thomas Lee Payne
Nov. 8, 1951 Woodrow Covington May 12, 1952 Donald Scavella
Nov. 8, 1951 George Gray, Jr. May 26, 1952 Francis McKeever
Nov. 19, 1951 Melvin Hiller June 16, 1952 Merriel T. Peacock
Nov. 23, 1951 Dewey C. Dillard June 18, 1952 D. L. Landrum
Dec. 17, 1951 James L. Kennedy June 19, 1952 George Chapman
Jan. 15, 1952 Howard Russell Silcox

REVOCATIONS OF PARDONS
HUSTINGS COURT CITY OF RICHMOND

HONORABLE R. DNU COLEMAN,
Member of House of Delegates.

I am in receipt of your letter of September 13, from which I quote below:

"Section 4-97 of the Code of 1950 provides that the governing body of each city and town shall have authority to adopt ordinances effective in such city or town, prohibiting the sale of beer and wine, etc., between the hours of 12:00 P.M. of each Saturday and 6:00 A.M. of each Monday, etc.

"Section 4-97 in the third paragraph further provides as follows: 'On and after the effective date of any ordinance adopted pursuant to the provisions of this section, the provisions of such ordinance shall have like effect upon the sale of beverages as defined in Section 4-99, etc.'

"Section 4-98 of the Code provides as follows: "The provisions of this chapter shall not apply to the manufacturing, selling, offering for sale, etc., of beer, lager beer, ale, etc., containing not more than three and two-tenths per centum of alcohol by weight, except as otherwise provided by Section 4-39."

"The sale of beer containing more than 3.2 per centum of alcohol and wine has been prohibited by referendum in Scott County.

"I would like, therefore, to have your opinion as to the validity of an ordinance of an incorporated town in Scott County prohibiting the sale of beer containing not more than 3.2 per centum of alcohol and other alcoholic beverages within the corporate limits of said town between 12:00 P.M. on each Saturday and 6:00 A.M. of each Monday, in view of the provisions of the third paragraph of Section 4-97 and Section 4-98."

You have presented the situation very clearly and I conclude that such an ordinance as you describe would be valid. While Section 4-97 of the Code does not in terms authorize the Board of Supervisors to prohibit the sale on Sunday of beer containing not more than 3.2 per centum of alcohol by volume, it does provide that where a Board adopts an ordinance prohibiting the sale of beer and wine on Sunday such ordinance shall also have the effect of prohibiting the sale of 3.2 per centum beer on that day. Upon the theory that a statute granting a greater power will also be construed to grant a lesser power of the same general nature, I am of opinion that your Board has the authority to adopt the suggested ordinance. If this were not true, we would have the rather unusual situation of the Board of Supervisors of a County which has not prohibited the sale of beer and wine having the authority to prohibit the sale of 3.2 per centum beer, while the Board of Supervisors of a County which has prohibited the sale of beer and wine would not have such authority.

I do not think that the provision in Section 4-98 of the Code to which you refer is of any significance here. The provision in Section 4-97 dealing with 3.2 per centum beer constitutes a specific exception to the general statement in Section 4-98.
REPORT OF THE ATTORNEY GENERAL

ACTS OF ASSEMBLY—Amendment by reference to number assigned by Code Commission; Correction of errors by Commission. (F 63) 132

HONORABLE JOHN B. BOATWRIGHT, JR.,
Director, Division of Statutory Research and Drafting.

I have your letter of November 28, in which you ask for my opinion on the following question:

"In those cases in which an Act of the General Assembly of 1950 was incorporated in the Code of Virginia and assigned a section number and it is now desired to amend such Act, should the title of the amendatory bill refer to the 1950 Act or the section assigned in the supplement to the Code? Also, in this connection, what is the proper practice to follow when the General Assembly assigned a section number and the Act was incorporated in the supplement to the Code with a different section number?"

Section 9-70 of the Code dealing with the Virginia Code Commission reads as follows:

"In so codifying the acts of nineteen hundred forty-eight session the Commission shall arrange the various acts and assign to them appropriate places and section numbers in the Code, and may create new titles, chapters and articles. The Commission may, when in its judgment it is appropriate, divide single acts and sections of acts into smaller sections for incorporation in the Code, and may arrange, place and number such smaller sections. Each codified section shall be given an appropriate catchline and a correct historical reference, and shall be properly indexed. Cross references shall be translated by use of the Code section numbers and other Code designations assigned. The Commission may correct unmistakable printer's errors and other unmistakable errors in nineteen hundred forty-eight Acts, and may make consequential changes in the titles of officers and agencies, and other purely consequential changes made necessary by the use in nineteen hundred forty-eight Acts of titles, terminology and references, or other language, no longer appropriate after the Code or any part thereof becomes effective."

Section 9-75 of the Code gives to the Commission the same authority with reference to codifying the Acts of the General Assembly subsequent to the session of 1948 as it has relative to the Acts of 1948. It seems to me that the language of Section 9-70 as to the authority of the Code Commission in assigning section numbers to the Acts of the General Assembly is plain and requires no interpretation. It is, therefore, my opinion that, where it is desired to amend an Act of the General Assembly of 1950 which has been assigned a section number or numbers by the Code Commission in the Supplement to the Code of 1950, the title of the amendatory bill should refer to the section number assigned in such Supplement. In the case where the General Assembly has assigned a section number of the Code to an Act of 1950 and the Code Commission in codifying the Acts of 1950 has assigned a different section number, I think the better view is that the Code Commission had such authority in the light of the statute which I have quoted. Certainly the section number is not a part of the law. However, out of an abundance of caution, in preparing an amendatory bill I would refer to the section number assigned by the Code Commission, but in the title and enacting clause of the bill I would designate the chapter of the Act of 1950 and also the section number assigned by the General Assembly.”
Your second question is:  

"In the preparation of a bill to amend an Act of the General Assembly of 1950 which has been carried into the supplement of the Code of Virginia, which text must be followed, that is, should the text of the 1950 Act or the text shown in the supplement be employed as guide to the proper insertion of asterisks and underscoring. There are a number of changes in some instances when Acts have been carried forward into the supplement; most of these appear to be changes in verbiage."

The Code Commission by Section 9-70 has authority to "correct unmistakable printer's errors and other unmistakable errors * * * and may make consequential changes in the titles of officers and agencies, and other purely consequential changes made necessary by the use * * * of title, terminology and references, or other languages, no longer appropriate after the Code or any part thereof becomes effective." In view of this authority, I would use the text shown in the 1950 Supplement to the Code as a guide to the proper insertion of asterisks and underscoring.

**ACTS OF ASSEMBLY—Title, effect of adoption of Code on defective title.**

*F 123* 207

**Honorable Charles G. Stone,**  
Commonwealth's Attorney for Fauquier County.

This is in reply to your letter of May 22 from which I quote as follows:

"Section 18-282 of the Code prohibits making, receiving or forwarding any bet or wager, directly or indirectly upon the result of any race which is to take place beyond the limits of the Commonwealth. I notice that this same statute years ago in Lacey v. Palmer, 93 Va., 159, 162, was held to be unconstitutional as to all offenses except pool-selling on horse races, because the act upon which this section is based was broader than its title.

"Inasmuch as the Code of 1950 was specifically adopted as such by the General Assembly in 1950, I am wondering whether the above holding of the Court would now be effective. It seems to me that the Legislative Act adopting the new Code would eliminate that constitutional objection."

Section 18-282 is originally found in the Acts of Assembly of 1895-96, page .576, and the case to which you refer was decided prior to the revision of the Code of 1919. Therefore, the action of the General Assembly in adopting the Code of 1919 would have the same effect on the constitutional question presented above as would the action of the General Assembly of 1950. In the recent case of *McClain v. Commonwealth*, 189 Va. 847, the Supreme Court, upon considering section 52 of the Constitution, which provides that a law shall embrace but one object, said:

"Also, it is well settled that the method of enactment, which, incidentally, was the same method as followed with respect to the Code of 1919, did not violate section 52 of the Constitution, providing that no law shall embrace more than one object which shall be expressed in its title. As was said in *Macke v. Commonwealth*, 156 Va. 1015, 159 S. E. 148, this constitutional provision was not intended to apply to a general Code revision, but its purpose was to prevent the concealment of the real object of a particular statute when separate acts are passed; and hence the adoption of a Code by general title is broad enough to cover any lawful enact-

Based on the *McClain* case and the *Macke* case, cited therein, I am of the opinion that what is now section 18-282 of the Code has been valid since the enactment of the Code of 1919.

**ADMINISTRATIVE AGENCIES ACT—Not applicable to motor vehicle inspection manual. (F 353 b) 223**

*Colonel C. W. Woodson, Jr.,
Superintendent, Department of State Police.*

June 19, 1952.

This is to acknowledge receipt of your letter dated June 13, 1952, enclosing "official inspection procedure sheet" and "official inspection station manual". I quote your letter as follows:

"The General Assembly at its 1952 Session enacted a new statute for the regulation of administrative agencies, and there is considerable question in our minds as to whether or not the regulations promulgated by this department for the carrying out of the official inspection program, as required under Sections 46-318 and 46-323 of the Code of Virginia, places us in the category of affecting private rights, privileges, or interests.

"It is our contention that the regulations set up by this department solely concern internal management of the agency in the carrying out of the official inspection program.

"We, therefore, request that you review our official inspection procedure sheet, which is our printed set of regulations as required under Section 46-323 of the Code of Virginia, and also our official inspection station manual, which serves as a guide for our appointed stations and their mechanics, and then advise us whether or not, in your opinion, we are affected by the Act."

Chapter 703, Section 9-6.2(b) of the Acts of 1952 defines "rule" as follows:

"'Rule' means any regulation (including amendments and repeals) of general application and future effect affecting private rights, privileges or interests, promulgated by an agency to implement, extend, apply, interpret or make specific the legislation enforced or administered by it, but does not include regulations solely concerning internal management of the agency or of the State government, nor regulations of which notice is customarily given to the public only by markers or signs, nor mere instructions."

The Superintendent of State Police is empowered by the provisions of Section 46-317 of the Code of Virginia to compel owners or operators of motor vehicles to submit them to inspection, and Section 46-318 authorizes the Superintendent to designate, furnish instruction to and supervise official inspection stations and further provides

"* * * And the Superintendent shall adopt and furnish to such official inspection stations rules and regulations governing the making of inspections. * * *"
It is provided by Section 46-323 of the Code that the Superintendent shall promulgate regulations for the inspection of motor vehicles under this Title and shall furnish each official inspection station with a printed set of such regulations.

I have examined the "official inspection procedure sheet" and "official inspection manual" issued by your Department, pursuant to the provisions of the foregoing sections of the Code, and I have concluded that such rules concern only the internal management of your agency. I, therefore, concur with your view that such rules are not included under the definition of "rule" as defined by the aforementioned quoted section.

ANNEXATION—County must be left with sixty square miles of land and water.

(F 8) 128

February 7, 1952.

HONORABLE LEWIS A. McMURRAN, JR.,
House of Delegates.

You have requested by opinion as to the construction to be placed on certain language embodied in section 15-129 of the Code of 1950. That section in so far as here pertinent is as follows:

"In no annexation proceedings instituted by any city or town shall an area or portion of any county be annexed to any city unless, after the annexation of the area, there shall remain in the county at least as much as sixty square miles of unannexed territory."

It is a cardinal principle of statutory construction to endeavor to ascertain and give effect to the intention of the legislature and that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity. Words of a plain and definite import must be given that meaning ascribed to them by usual and common acceptation.

You desire my opinion as to the scope of the words "sixty square miles of unannexed territory." Shall this language as used in section 15-129 be restricted to land area in a county or shall the unannexed territory embrace the entire territorial confines of the remaining unannexed area including the surface of both land and water?

Webster's International Dictionary defines "territory" as:

"An extent of land and waters belonging to or under the jurisdiction or sovereignty of, a prince, state or government of any form."

In section 168 of the Virginia Constitution relating to taxable property we find the words "territorial limits." In Robinson v. Norfolk, 108 Va. 14, our Supreme Court of Appeals said:

"For the purposes of taxation, the Constitution has divided the State into counties and magisterial districts, cities and towns. Each of these subdivisions has its territorial limits fixed, each being distinct and separate from the other. What is meant by the words 'territorial limits' in section 168 of the Constitution is the actual boundaries of each of such subdivisions, as the same are fixed by law."

It would obviously seem to follow that all of the area, including both land and inland waters, within the territorial limits of a county, would of necessity be embraced by and constitute the territory of that county.

The inland waters of a political subdivision, except when otherwise regulated by statute, are under the jurisdiction of that political subdivision.
I am advised that the United States Department of Commerce, Bureau of the Census, in the area survey of 1940, in ascertaining the square miles embraced by a county, includes both land and water area. The area as thus determined is accepted as the basis for fund allocation purposes by the Department of Highways and the Federal Bureau of Public Roads.

In computing the “sixty square miles of unannexed territory,” the legislature might well have confined it to land area alone. It did not see fit to do so. It employed words of common usage and meaning and giving effect to the language used, I am of the opinion that “unannexed territory” embraces and includes both land and water area.

APPROPRIATIONS—Department of Agriculture—Item for purchase of equipment is broad enough to cover incidental structure for installation. (F 5 b) 62

HONORABLE PARKE C. BRINKLEY,
Commissioner, Department of Agriculture and Immigration.

This is in reply to your letter of August 29, 1951, from which I quote as follows:

“Our weights and measures section is authorized by law (Sec. 59-81) to make certain tests of devices upon request on a fee basis. They have for some years maintained a vehicle tank testing station on property owned by the Virginia Department of Highways at their equipment depot in Richmond.

“It is now proposed to install permanent facilities for testing vehicle-tank meters adjacent to the tank testing station. We have the authority to purchase the needed equipment out of our funds. It is impossible to install this equipment except in a concrete pit; it would also be very unwise to leave this equipment unprotected by shelter. The total cost of the pit and the shelter would amount to approximately $600.00. Funds are available for this expenditure from fees received for testing.”

You desire my opinion as to whether your Department has authority to proceed with building the pit and shelter. Inasmuch as you have already determined that you have the necessary authority to purchase the needed equipment, it is my opinion that the construction of the pit and shelter would be a mere incident to the installation of the equipment and could be done under the same authority which permits the purchase of the equipment.

APPROPRIATION ACT — Appropriation for operations cannot be used for capital outlay. (F 13) 214

MR. H. N. YOUNG,
Director, Virginia Agricultural Experiment Station.

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

“The last General Assembly appropriated $100,000 for the biennium beginning July 1, 1952, for investigation of tobacco diseases (Item 264, Appropriation Act, page 48). At the time we made our budget requests in September, 1951, we also asked for funds to erect certain capital structures in connection with this work. The funds for capital structures were not appropriated. This leaves us in the position of having $100,000...
presumably for operating funds. I say this because Item 264 comes in that section of the budget which is devoted to what is usually considered to be the operating funds part.

"The investigational work, which we propose to do in tobacco diseases, could be done much more effectively if we had available a greenhouse with temperature and humidity controls. This would enable us to create artificially certain climatic conditions indoors so that we might discover the effect of climatic variations upon the new strains of disease resistant tobaccos which we are in the process of developing. If it becomes necessary for us to wait for nature to furnish us with a wide variety of climatic conditions during the growing season, the period of waiting may last several years. By controlling temperature and moisture conditions inside, we may not only speed up our work but may make it more accurate and reliable.

"The purpose of this letter is to ask your opinion as to whether it would be legal for us to use a portion of the funds appropriated to Item 264 for the erection of such capital structures as we deem necessary to help us make our work more effective. The amount involved may run as high as $30,000."

I have given your inquiry careful consideration and must advise that, in my opinion, the appropriation to which you refer may not be used for capital outlay. This appropriation clearly seems to have been made for operational purposes, as evidenced by the fact that your request for an appropriation for certain capital structures in connection with the work was not complied with. The Appropriation Act of 1952 contains a separate division making appropriations for capital outlay, but no funds are provided in this division for the structures that you mention. I can see no escape from the conclusion that the General Assembly did not intend that the funds appropriated for investigation of tobacco diseases should be used for capital outlay purposes.

APPROPRIATION ACT—Student Loan Funds. (F 264) 164

Honorabe G. Tyler Miller, President, Madison College.

April 7, 1952.

I am in receipt of your letter of March 31, in which you direct attention to Sections 13 and 13-a of the Appropriation Act of 1952, dealing with the appropriations for making loans to students at the several State institutions. The parts of the sections which bear on your inquiry are the following from the second paragraph of Section 13:

"The said State students' loan funds shall be preserved from depletion by the said institutions; and together with the repayments and accretions thereto, shall be held and used for the purpose, and on the terms, specified in this act and no other; * * *.

And this provision from Section 13-a:

"Each institution to which appropriations for student loans are made under this act is authorized to employ not exceeding twenty-five per centum of the unobligated balances in such fund available to the institution as of June 30 of each fiscal year to establish a system of scholarships for graduates of Virginia high schools in accordance with the terms hereof * * *."
You then comment:

"As indicated, it would appear that the words 'shall be preserved from depletion' if interpreted in a narrow sense would prohibit the use of 'not exceeding twenty-five per centum of the unobligated balances in such fund' to establish a system of scholarships. However, in my opinion, it was clearly the intent of the General Assembly to authorize the use of not exceeding twenty-five per centum of the unobligated balances in the State students' loan fund of each institution for the scholarships described in Section 13-a of the Act. Although there does seem to be some contradiction in the language of the second paragraph of Section 13 and the provision in the first paragraph of Section 13-a for use of a portion of the unobligated balances, I feel that this was only an oversight through failure to change the wording of the second paragraph of Section 13 where it is stated that the State students' loan funds shall be preserved from depletion to conform to the authority granted in Section 13-a for additional use of these student loan fund balances for scholarships."

I agree with your conclusion that pursuant to Section 13-a the institutions involved may employ not exceeding twenty-five per centum of the unobligated balances in the students' loan fund available to them for establishing the system of scholarships specified in the section. As I construe the two sections, the conflict between them is more apparent than real. A section corresponding to Section 13 has been carried in the Appropriation Act for a number of years. Section 13-a is new with the 1952 Act and I assume was incorporated therein as a result of a recommendation in the report of the Virginia Advisory Legislative Council on "Student Aid Programs in State Supported Colleges", printed as Senate Document No. 4 at the 1952 session of the General Assembly. My view is that when the two sections are construed together, as they must be, the use of twenty-five per centum of the unobligated balances in the students' loan funds for a system of scholarships as authorized in Section 13-a is to be treated as an exception to the provision in Section 13 that these funds "shall be preserved from depletion." In short, my opinion is that Section 13-a is to be given effect.

ARREST—Members of Armed Forces; Officers having authority to arrest have authority to execute required military forms to secure person of offender. (F 353 b) 104

December 20, 1951.

LIEUTENANT GENERAL FRANKLIN A. HART,
United States Marine Corps Commandant.

This is to acknowledge receipt of your letter dated December 15, 1951, with extracts of Sections 0702, 0703, and 0704 from Naval Supplement, Manual for Courts-Martial, 1951, attached. You desire my views on the following inquiries:

"(1) Do Virginia State Troopers have authority to sign the agreement set forth in Section 0704, Naval Supplement?

"(2) If Virginia State Troopers do not have this authority, what officials may sign for the Governor?

"(3) How can this command obtain a certified list of Virginia Officials who have authority to act for the Governor of Virginia in this connection?"

The courts have held that because a soldier in time of war is under military law and answerable to a court-martial does not absolve from prosecution for

Title 50 Section 568(a) of the United States Code Annotated provides:

"Under such regulations as the Secretary of the Department may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial."

I assume that Sections 0702, 0703 and 0704 of the Naval Supplement to the Manual for Courts-Martial were prescribed pursuant to authority conferred by the Congress in the foregoing quoted section.

In reference to your first inquiry, you are advised that Virginia State Police are charged with the duty of enforcing the laws of the Commonwealth of Virginia. It is provided by Section 52-8 of the 1950 Code of Virginia as follows:

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

The sheriffs of Virginia have very broad powers relating to arrest of persons charged with the violation of criminal laws, which powers are enumerated by the general laws of the State.

It is obvious that an important element of an arrest is to deliver the offending person to the court for trial. Since this can only be done in the case of a violation of civil law by a member of the armed forces when the arrest is made on the military base by executing the agreement required by the laws of the United States, it seems clear that peace officer, enjoined with the duty of using his best efforts to enforce the criminal laws of this State as a necessary incident to his duties, would have implied authority to execute the required agreement. I am, therefore, of the opinion that the Virginia State Police have authority to sign the agreement set forth in Section 0704, Naval Supplement.

In view of this conclusion, it becomes unnecessary to answer your second inquiry.

Regarding your third and last inquiry, you are advised that the list you mentioned is not available. However, generally speaking, all State and local police officers, sheriffs, and their deputies, city sergeants and their deputies, would possess authority to execute the agreement if it is incident to an arrest being made by them. In any case, where an officer of this State requests you to deliver to him a member of the armed forces under your command for the violation of the laws of the Commonwealth, you would be justified in requiring such officer to furnish satisfactory proof of his authority to arrest such person. If you are satisfied that the officer has authority to make the arrest, such authority being incidental to the officer's duty of arrest, would imply authority on his behalf to execute the required agreement.

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**ARREST—Right of private citizen to arrest for misdemeanor. (F 129) 112**

**HONORABLE FRED L. RUSH,**

Commonwealth's Attorney for Buchanan County.

January 21, 1952.

I am in receipt of your letter of January 15, from which I quote as follows:

"A question has arisen in the Trial Justice Court of Buchanan County
and the Mayor's Court of Grundy, Virginia, as to the authority of a private citizen to making an arrest.

"Would you please be so kind as to let me have your opinion on this question, particularly the authority of a private citizen to arrest in misdemeanor cases."

Except in those instances authorized by statute relating to particular situations, I am aware of no statute conferring authority upon a private citizen to arrest in misdemeanor cases. Section 18-100 of the Code, and relative sections, applies to officers and agents of societies for prevention of cruelty to animals. These officers or agents, however, are required to qualify for purpose of effecting arrests. Section 24-189 relates to order at elections, and Section 56-354 relates to certain employees of railroads.

I call your attention, however, to the case of Lima v. Lawler, 63 F. Supp. 446. This is an opinion by Judge Sterling Hutcheson, Judge of the District Court for the Eastern District of Virginia. It related to the detention by a private citizen, who was attempting to hold and detain a member of the naval forces for arrest by local authorities for an alleged misdemeanor. Judge Hutcheson took occasion to say that "Although a private citizen, except where the rule is changed by statute, has the right to arrest without a warrant one who commits a breach of the peace in his presence, 6 C. J. S., Arrest, p. 607, section 8, such detention is only until a proper officer of the law is available. * * *"

I further cite 4 Am. Jur., Arrest, section 38. The rule is there laid down that, in the absence of special statutory regulation, a private citizen may arrest for an affray or breach of the peace committed in his presence, and while it is continuing, but not for a misdemeanor on suspicion, regardless of how well it is grounded.

It is my opinion, therefore, that, in the absence of statutory inhibition, a private citizen may arrest for a misdemeanor for an affray or breach of the peace committed in his presence, and during its continuance, but he can only detain the person of the individual so arrested just so long as he can with expedition deliver him to a duly authorized officer of the law.

ATTORNEYS—Member of General Assembly may be appointed by Court to defend criminal. (F 82) 184

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

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

"Will you kindly answer the following questions?

"Is the Court within its rights to appoint a member of the House of Delegates to defend a criminal on charges where capital punishment may be invoked?

"Is a member of the House of Delegates disqualified from appointment by the Court to defend a person charged with an offense where capital punishment may be invoked?

"Is it legal for the Court to appoint a member of the bar, who draws compensation from the State of Virginia for serving in any official capacity, to defend an indigent accused of a capital offense?

"Is a member of the General Assembly justified in declining appointment by the Court to represent and defend an indigent on a charge where capital punishment may be invoked?"
The sections of the Code dealing with the appointment by a court of counsel for certain indigent persons charged with crimes are 14-180, 14-181, 19-167 and 19-214.1. I can find no statute which prohibits a court from designating as such counsel a practicing attorney who also happens to be a member of the General Assembly.

It is my opinion, therefore, that in the application of these sections a member of the General Assembly who is a practicing attorney occupies the same status as any other lawyer.

ATTORNEYS — Practice of law — Appearing before Industrial Commission.
(F 190) 179
April 23, 1952.

HONORABLE FRED L. RUSH,
Commonwealth's Attorney for Buchanan County,

This is in reply to your letter of April 8 requesting my opinion as to whether or not the representation of a defendant in proceedings before the Industrial Commission of the Commonwealth of Virginia constitutes the practice of law in this State.

The practice of law in Virginia has been defined. See 171 Va. xvii. That part of the definition pertinent to the question under consideration reads:

"Generally, the relation of attorney and client exists, and one is deemed to be practicing law, whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill.

"Specifically, the relation of attorney and client exists, and one is deemed to be practicing law, whenever—

"(1) One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.

"(2) One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.

"(3) One undertakes, with or without compensation, to represent the interest of another before any tribunal,—judicial, administrative, or executive,—otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and bona fide employed on a salary basis, or by one specifically employed as an expert in respect to such facts and figures when such presentation by such employee or expert does not involve the examination of witnesses or preparation of pleadings."

In accordance with the provisions contained in the foregoing definition, it is my opinion that such representation before the Commission constitutes the practice of law in this State.

ATTORNEYS—Virginia State Bar—May publish newsletter. (F 190) 126

February 6, 1952.

MR. STUART T. SAUNDERS,
President, Virginia State Bar.

This will acknowledge receipt of your letter of January 19, requesting my
opinion as to the authority of the Virginia State Bar to prepare and distribute to its members periodically a newsletter or bulletin: I quote from your letter as follows:

"It would carry news of interest to the Bar—for example, reference would be made to activities of the State Bar through its Council and committees, plans for annual meetings, the activities of the Local Bar Associations, their officers, accounts of any unusual meetings; announcements would be made of judicial appointments, of changes in the Attorney General's office; deaths of members might be noted; reference might be made to certain opinions (but no publication would be made thereof) of the State and Federal courts, of the Attorney General's office and of the various administrative agencies which pertain to unauthorized practice and legal ethics and other subjects of special interest to the Bar.

"The newsletter, of course, would vary in length, depending upon the amount of news available. We would hope that it would be around four pages. Under no circumstances, however, could it be considered as a law magazine."

Section 54-52 relating to receipts and disbursements of the State Bar fund provides, among other things, that none of such funds shall be "devoted to publishing decisions of the Supreme Court of Appeals or to law magazines or to buying any such publications."

The facts submitted by you as to the scope of the publication or bulletin do not, in my opinion, come in conflict with this section. You state that reference might be made to certain opinions, merely to call them to the attention of the Bar, but no publication would be made thereof. Such a reference is not prohibited by the statute as long as the decisions of the Supreme Court of Appeals are not published.

Under the Rules for the Integration of the Virginia State Bar, the Council is vested with general charge of the administration of its affairs. Certain specific powers are given under Section IV, Rule 9. Subsection (k) of this Rule provides that the Council may exercise necessary powers:

"To cultivate an advance the science of jurisprudence;
"To promote reform in the law and in judicial procedure;
"To facilitate the administration of justice;
"To uphold and elevate the standards of honor, of integrity and of courtesy in the legal profession;
"To encourage higher and better education for membership in the profession;
"To promote a spirit of cordiality and brotherhood among the members of the Virginia State Bar; * * *.*"

It is my opinion that the funds of the Virginia State Bar may be properly used for the exercise of these powers in discharging the responsibilities and promoting the functions of the Bar. These powers are sufficiently broad, in my opinion, to authorize the preparation and distribution to the members of the Bar the newsletter or bulletin which you describe.

The conclusion here expressed is in harmony with the opinion of this office under date of July 8, 1948, to the Honorable R. E. Booker, Secretary-Treasurer, Virginia State Bar, relative to the use of funds to secure mats and cuts for certain advertising in conjunction with Local Bar Associations throughout the State.
BLUE LAWS—Used car dealer operating on Sunday. (F 194) 218

June 12, 1952.

HONORABLE HAROLD M. RATCLIFFE,
Commonwealth's Attorney for Henrico County.

This is in reply to your letter of June 10 in which you requested my opinion as to whether or not used-car dealers who operate on Sunday violate section 18-329 of the Code, the pertinent part of which reads as follows:

"If a person on a Sunday be found laboring at any trade or calling, or employ his apprentices or servants in labor or other business, except in household or other work of necessity or charity, he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than five dollars for each offense."

You state that it is very apparent to you that used-car dealers operating on Sunday are in violation of the above quoted section. I am inclined to agree. However, since I am not familiar with the circumstances surrounding the particular cases to which you refer I should only point out that in cases of this kind what is or is not "work of necessity" is an issue to be determined by a jury unless "the labor is so clearly a work of necessity that no two reasonable minds would differ thereabouts". Pirkey Brothers v. Commonwealth, 134 Va. 713, 727.

I call your attention to the fact that the Supreme Court of Appeals, in the case of Francisco v. Commonwealth, 180 Va. 371, adhered to its previous decisions to the effect that "necessity" did not mean a physical and absolute necessity. However, it overruled such cases as Lakeside Inn Corporation v. Commonwealth, 134 Va. 696, and Pirkey Brothers v. Commonwealth, supra, in so far as those opinions held that "necessity" is to be determined by whether a jury thinks that the work in question "is morally fit and proper to be done on Sunday". The test of a "work of necessity", as laid down in the Francisco case, supra, at page 383, is whether or not it is reasonably essential to the economical, social or moral welfare of the community.

BOARD OF SUPERVISORS—Authority to authorize killing of foxes to prevent spread of rabies. (F 224) 107

January 8, 1952.

HONORABLE EDWARD McC. WILLIAMS,
Commonwealth's Attorney for Clarke County.

This is in reply to your letter of January 2 requesting my opinion as to whether or not § 29-196, Code of Virginia, would permit the Board of Supervisors of Clarke County to pass a regulation authorizing the killing of foxes throughout the county in order to combat the spread of rabies which has infected foxes in the adjoining counties. You also state that there is a game commission regulation prohibiting the killing of foxes in Clarke County, except by land owners.

Section 29-196 provides as follows:

"The governing body of any county, city or town may adopt such ordinances, regulations or other measures as may reasonably be deemed necessary to prevent the spread within its boundaries of the disease of rabies, and to regulate and control the running at large within its boundaries of vicious or destructive dogs, and may provide penalties for the violation of any such ordinances."
The language of the foregoing statute is rather broad in scope for the purpose of preventing the spread of rabies. Moreover, measures which are in the protection of the general health and welfare of the public are favored where conflicts arise.

Accordingly, it is my opinion that if the attendant facts plainly evidence (as distinguished from a basis predicated upon suspicion or conjecture) the need for such protective measures, then, in accordance with § 29-196, such protective regulations may be adopted as required by the situation and as may reasonably be deemed necessary to prevent the spread of rabies.

As such a matter is necessarily not completely free from doubt, it might be that your county would desire to introduce specific legislation regarding the subject and, if enacted, the legislation would, of course, resolve the question.

BOARD OF SUPERVISORS—Authority to authorize special warrant for paying salary of Commonwealth Attorney. (F 219) 203

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

This will acknowledge receipt of your letter dated May 12, 1952, which I quote as follows:

"Beginning on the first of April, the Compensation Board ruled that salary checks could not be delivered, either by the State or County, until approved by resolution of the Board of Supervisors each month. Prior to that time, in the case of the Commonwealth's Attorney and other officers whose salaries were fixed and did not vary from month to month, the county paid their proportionate part of the salary on the first of the month and the Compensation Board the other portion of the salary anywhere from the 2nd to the 5th of the month. However, beginning April 1st, no checks were issued until after the middle of the month, for the preceding month, because in this county we had to wait until after the Board of Supervisors met and approved them by resolution and the regular meeting date is the second Tuesday in each month.

"I would like to have your construction and interpretation of Chapter 304 of the 1952 Acts of the General Assembly. Next to the last paragraph of this act, printed in italics, reads in part as follows: 'Notwithstanding the preceding requirement the governing body of the county may provide, by resolution, for the drawing of special warrants on the county treasurer, payable out of county funds, in payment of compensation, when such compensation has been earned or is due, for (1) all employees and officers under written contract, and (2) upon receipt of certified time sheets or other evidences of service performed, the payment of all other employees whose rates of pay have been established by such governing body or its properly designated agent.' Etc., etc., etc.

"It would seem to me that one resolution by the governing body would be all that would be necessary to authorize the payment of these fixed salaries for a period of one year or until the salary was changed.

"I would appreciate your construction of this act."

You desire an interpretation of the new language enacted into Section 15-253 by the 1952 General Assembly, which is as follows:

"Notwithstanding the preceding requirement the governing body of the county may provide, by resolution, for the drawing of special warrants
on the county treasurer, payable out of county funds, in payment of compensation, when such compensation has been earned or is due, for (1) all employees and officers under written contract, and (2) upon receipt of certified time sheets or other evidence of service performed, the payment of all other employees whose rates of pay have been established by such governing body or its properly designated agent, and (3) for payment on contracts for construction projects according to the terms of such contracts. All such special warrants so authorized shall be signed by the clerk of such governing body and countersigned by the chairman of such governing body. Any special warrant may be converted into a negotiable check in the manner herein provided. All such payrolls and contracts so paid shall be reviewed and approved by the governing body at its next regular meeting."

I feel that this language should be construed to mean that the board of supervisors could, by a general resolution, authorize its clerk and chairman to draw a special warrant on the county treasurer for payment of, when due, (1) wages and salaries of employees and officers employed by virtue of a written contract, or (2) employees whose rate of pay has been fixed by the board or its properly designated agent if evidence of services performed is submitted to the clerk and chairman of the board, or (3) payment on construction contracts according to the terms of the contract. The intention of this portion of the statute is to enable the board of supervisors to pay its regular employees or a contractor without the necessity of auditing the claim each month.

It will be observed that the new language of this section has reference only to special warrants drawn on the county treasurer and does not refer to regular warrants drawn for the payment of salaries fixed by the Compensation Board. It may be further noted that this section, not having an emergency clause, will not become effective until 90 days after the adjournment of the General Assembly.

I am of the opinion that the 1952 amendment to this section is not applicable to payment of your salary as Attorney for the Commonwealth.

BOARD OF SUPERVISORS—Authority to contract debt to be payable over a two year period without vote of people. (F 33) 84

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

This is in reply to your letter of November 3 from which I quote, in part, as follows:

"There was a bond issue election in this County for the purpose of bonding the County in the sum of $980,000.00 to build an addition to the present court house building, the new addition to include two circuit court rooms, one trial justice courtroom, clerk's office, commonwealth's attorney's office, jail, detention quarters, etc., which election was held on May 31, 1950, and which referendum was voted in favor of the issuance of said bonds. Shortly after the election there was litigation filed in the Circuit Court here contesting the validity of said election and the issuance and sale of said bonds. In fact, there were three separate and distinct suits filed in connection with this bond issue, all of which litigation was finally determined in favor of the County. The bonds were finally sold in the latter part of June, 1951. Plans and specifications for the building were prepared and the Board advertised for bids on October 24, 1951. There
were a number of bids made, however, the amount of the bid of the lowest bidder amounts to $153,000.00 more than the amount of the money on hand and derived from the bond issue. The lowest bidder in his proposal contracts to complete the building within 344 working days, not including Saturdays, Sundays and holidays. The contract to provide for payments to be made at the various stages of construction, and that 10% of the contract price to be withheld and not paid until after completion. The payments, therefore, would be spread over the 444 day period and not due and payable in one fiscal or tax year.

"This County will begin to operate under the Executive Secretary form of government on January 1, 1952, as provided by the statutes of Virginia.

"Under the terms of the advertisement for the bids on the addition to the court house building, the Board of Supervisors has a period of thirty days within which to accept or reject the bids that were received.

"The legal questions that have been propounded to me by the Board of Supervisors are as follows:

"1. Does a board of supervisors have the authority to sign a contract for the construction of a building, the contract price of which will be more than the amount of bond issue money on hand, the difference between the bond issue money and the actual cost of construction under the contract to be raised by levies to be made in the following fiscal year, the amount so raised by levy to be due and payable in the year the levy is made and the contract to provide that the money so raised by levy is to be paid during the fiscal or tax year the levy is made? * * * ."

The answer to your inquiry is controlled on principle by an opinion of this office dated March 18, 1948, given to the Commonwealth's Attorney for Orange County (opinions of the Attorney General, 1947-48, page 11), a copy of which I enclose. Viewing the matter realistically, the proposed contract creates a debt, payable over a period of approximately two years, not to meet a casual deficit in the revenue of the county, nor in anticipation of revenues for the current year, nor to redeem a previous liability. The contracting of such a debt, in my opinion, without the approval of a vote of the people is forbidden by § 115a of the Constitution. The fact that such a debt is created by contract rather than by the execution of notes or bonds does not alter the situation.

My answer to your first question makes it unnecessary to reply to your second question.

BOARD OF SUPERVISORS—Authority to contribute to construction of town fire-house; Authority to contribute to salary of game warden. (F 33) 125

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

February 21, 1952.

I am in receipt of your letter of February 20, in which you ask the following question:

"Do the Board of Supervisors of our County have the authority to pay part of the costs of erecting a building on a lot owned by the Town of Grundy in said County for the purpose of housing a fire fighting equipment owned by the said Town of Grundy and which was purchased by the County and Town and used for the benefit of both County and Town? The title of the lot and the fire equipment is in the Town of Grundy and the fire equipment is operated by the Town of Grundy."
Section 27-2 of the Code authorizes any city or town to "enter into a contract or contracts with adjacent or adjoining counties for rendering aid in fire protection in such counties, or any district or sanitary district thereof, on such terms as may be agreed upon by such governing body and the governing body of such counties." Upon this authority I should think that the Board of Supervisors of your County could contract with the Town of Grundy for fire protection in the County and by one of the terms of the contract agree to pay a part of the cost of erecting the building you mention. I must say that I do not think the question is free from doubt, but, in view of the statutory authority to which I have referred and the general authority conferred upon counties to provide fire protection, I believe that the better view is that Buchanan County may enter into such a contract with the Town of Grundy as I have indicated.

As to the authority of the Board of Supervisors to supplement the salary of the County Game Warden, I find that under date of September 13, 1949, in an opinion of the Commonwealth's Attorney of Giles County, I advise that pursuant to Section 29-209 of the Code the Board of Supervisors could supplement the salary of a Game Warden out of the dog fund, but could not use the general fund of the County for this purpose.

BOARD OF SUPERVISORS—Authority to let contract to repair Court House without public bids. (F 33) 195

May 6, 1952.

HONORABLE HORACE T. MORRISON, Commonwealth's Attorney for King George County.

I have your letter of May 2, in which you state that the Board of Supervisors of your County desires to make certain alterations and repairs to the Court House Annex. These repairs are described by you as follows:

"(1) Full size screens for six windows;
"(2) An adequate screen door for the entrance;
"(3) Addition of gutters to the roof to eliminate damage to law books from wall dampness;
"(4) Treatment of damaged walls and paint therefor;
"(5) Venetian blinds in keeping with the Court House;
"(6) Floor covering to eliminate dampness and dirt;
"(7) Oil stoves (two) to eliminate smoke and soot making present occupancy hazardous."

You desire my opinion on the question of whether or not the Board of Supervisors is required to seek competitive bids for the performance of this work.

From my examination of the statutes I can find no such requirement and, in its absence, I do not think it is necessary for the Board to call for competitive bids.

I am familiar with Section 15-539 et seq. of the Code, relative to the employment of a County Purchasing Agent, but, since you do not mention that King George has employed a Purchasing Agent, I assume that it has not done so and, therefore, the provisions of these sections are not applicable.

I observe that the advice you have given the Board of Supervisors is contrary to the view I am expressing herein and so, if you care to inform me as to the authority of your opinion, I shall be glad to consider the matter further.
BOARD OF SUPERVISORS—Authority to levy license tax on motor vehicles, business and professions. (F 149) 92

November 21, 1951.

HONORABLE H. M. RATCLIFFE,
Commonwealth’s Attorney for Henrico County.

This is to acknowledge receipt of your letter of November 1, in which you inquire "as to whether or not the Board of County Supervisors of Henrico County has the authority to levy a license tax on motor vehicles in the County, Henrico County having adopted the County Manager Form of Government. You further inquire whether this County has the authority to levy license taxes on businesses and professions in the County.

If Henrico County has the authority to impose a license tax upon the operation of motor vehicles within the County, it must be granted by Section 58-266.3 of the Code, which reads as follows:

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

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

The above section is substantially similar to Section 58-266.1 of the Code, authorizing cities and towns to impose a license tax "when anything for which a license is so required (by the State) is to be done within the city or town." This latter section has been on the statute books for many years, being contained in the Code of 1919 and incorporated in the Tax Code as Section 296. The section has generally been considered to confer authority upon the localities to impose a license tax upon such businesses, occupations and professions carried on within the locality for which State licenses are required under the general provisions of the old Tax Code. So far as I know, Section 58-266.1 and its predecessor statutes have never been construed to authorize the imposition of a license tax on motor vehicles. This is evidenced by the fact that in 1936 (Acts 1936, page 572) the General Assembly authorized cities and towns to impose license taxes on motor vehicles. This Act, together with certain amendatory Acts, is now carried in the Code as Sections 46-64 and 46-65. If Section 58-266.1 had been considered by the General Assembly as authorizing the imposition by cities and towns of license taxes upon motor vehicles, it certainly would not have considered it necessary to specifically grant this authority by the Act of 1936, to which I have referred.

Consideration should also be given to Section 58-266.2 of the Code, authorizing the governing body of any county in the State having a population of more than 2,000 per square mile to impose county license taxes on businesses, trades, professions, occupations and callings carried on within the county. Notwithstanding the broad provisions of this section, the General Assembly in 1948 amended the Act of 1936 conferring the authority upon cities and towns to impose license taxes on motor vehicles so as to confer this authority also upon counties having a population in excess of 2,000 inhabitants per square mile. See Acts of 1948, page 816. Again, I would not think that the General Assembly
REPORT OF THE ATTORNEY GENERAL

would have considered this specific authority necessary if the broad language of Section 58-266.2 had been sufficient.

I have referred to the above statutes as indicating that the General Assembly considered it necessary to specifically authorize localities to impose license taxes upon motor vehicles, and that the general authority given localities to impose general revenue licenses was not sufficient to authorize the imposition of license taxes upon motor vehicles, even though the language of the statutes authorizing the imposition of license taxes generally by the localities was quite broad, equally broad indeed as the language of Section 58-266.3 of the Code. Furthermore, where the General Assembly has specifically authorized localities to impose license taxes upon motor vehicles it has surrounded this authority with a number of restrictions and limitations. See again Sections 46-64 and 46-65 of the Code.

My conclusion is that the better view is that Section 58-266.3 of the Code does not authorize the counties included therein to impose license taxes upon motor vehicles. If Henrico County desires this authority, I suggest that the General Assembly at its next session be requested to grant it.

BOARD OF SUPERVISORS—Authority to levy tax in sanitary district to pay engineer to draw plans for sewage system. (F 213 a) 209

HONORABLE FOREST T. TAYLOR,
Commonwealth's Attorney for Augusta County.

This has reference to your letter of May 16 and our subsequent conference relative to the following resolution of the Board of Supervisors of Augusta County:

"On motion of E. S. Long, seconded by John Earhart, and unanimously adopted, the Board decided to advance from the General Funds of the County an amount sufficient to employ an engineer to draw up detailed plans and specifications for sewage and water supply systems for Verona Sanitary District, on the condition that it received an opinion from the office of the Attorney General of Virginia that in the event it was found to be impossible to construct these facilities for $300,000.00 that the Board of Supervisors had the power to tax the real and personalty property of the Sanitary District for an amount sufficient to reimburse the General Fund of the County."

It appears that Verona Sanitary District has been duly created pursuant to the provisions of Section 21-113 et seq. of the Code of 1950. Section 21-118 of the Code deals with the powers and duties of the governing body of a county after the creation of a sanitary district. This section as amended by Chapter 113 of the Acts of 1952, among other things, authorizes the levy of a tax upon the property in such district to pay the "expenses and charges incident to constructing, maintaining and operating water supply, sewerage *** systems *** for the use and benefit of the public in such sanitary district." The section also authorizes the employment of technical and other assistance for the construction, operation and maintenance of such systems. Certainly the employment of an engineer to draw up detailed plans and specifications for a sewage and water supply system is a necessary incident in connection with the construction of the system. It is, therefore, my opinion that the compensation of an engineer for this purpose would be a part of the cost of constructing the system and that under the authority of the section under discussion the tax may be levied for this part of the cost.

If it should develop that for some good reason the County cannot go ahead with the project after the engineer has drawn up the plans and specifications, it
is my view that a tax could still be levied for the purpose of raising money to pay the engineer for the work that he has performed. The plans and specifications would still be available and could be used at such time when the project could be completed.

BOARD OF SUPERVISORS — Authority to regulate outdoor movie screens, traffic or nuisance. (F 205) 219

HONORABLE GEORGE F. ABBITT, JR., Commonwealth's Attorney for Appomattox County.

June 16, 1952.

This will acknowledge receipt of your letter of June 11, 1952, the pertinent part of which I quote:

"I am enclosing a copy of a resolution and ordinance regarding outdoor theater that the Board of Supervisors of Appomattox County is considering adopting.

"I will very much appreciate it if you will let me know the opinion of your office: (1) Whether the Board of Supervisors has authority to regulate outdoor theaters; (2) to what extent the County Board of Supervisors may lawfully regulate the operation of outdoor theaters? (3) is the enclosed resolution and ordinance a valid exercise for the control of the operation of outdoor theaters?"

Section 15-8 of the Code reads, in part, as follows:

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

* * * * * *

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

This provision confers upon the board of supervisors very broad authority to adopt an ordinance relating to the protection of the health, safety and general welfare of the inhabitants of the county.

If the screens of such theaters are erected in such a manner as to create a public hazard, I am of the opinion that the Board of Supervisors could adopt an ordinance prohibiting the construction of such theaters until a permit has been obtained, provided such ordinance contained proper standards for the issuance of a permit.

If you are satisfied that such theaters constitute a public nuisance, you may consider the proceedings provided for in Sections 48-1 through 48-6 of the Code.

Referring now to the proposed ordinance by the Appomattox County Board of Supervisors, with particular reference to the provision requiring a permit from the State Highway Department approving the location of screen and highway outlets as a condition precedent to the construction of an outdoor theater, I am of the opinion that such a provision does not come within the proper standards for the issuance of a permit. This is based on the premise that it would be improper for the governing body to require one to obtain a permit from an agency over which the governing body could exercise no control. The condition of acquiring a permit is not thought to be unreasonable per se, but the permit should be issued by someone whom the governing body could force to act in the event that the person refused to so do.
BOARD OF SUPERVISORS—Authority to regulate outdoor movie screens which are traffic hazard. (F 205) 215

June 10, 1952.

HONORABLE MARTIN F. CLARK,
Commonwealth’s Attorney for Patrick County.

This is to acknowledge receipt of your letter dated June 9, 1952, which I quote as follows:

“The Board of Supervisors of this County have become concerned about the problem of open-air or drive-in theatres being erected in this County in such a manner that the screens are visible from the public highway. It is their further belief that they probably create a traffic hazard.

“With this in view they have inquired of me whether or not they have the power to prohibit the erection of such theatres in the manner aforesaid.

“From my own investigation I do not feel that Section 15-8 of the Code of Virginia would apply and I know of no other power that they have to regulate this problem without enabling legislation being passed by the General Assembly.

“Your advice or any assistance that you may be able to give me in connection with this matter will be appreciated.”

Section 15-8 of the Code reads, in part, as follows:

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

This provision confers upon the board of supervisors very broad authority to adopt an ordinance relating to the protection of the health, safety and general welfare of the inhabitants of the county.

If the screens of such theatres are erected in such a manner as to create a public hazard, I am of the opinion that the Board of Supervisors could adopt an ordinance prohibiting the construction of such theatres until a permit has been obtained, provided such ordinance contained proper standards for the issuance of a permit.

If you are satisfied that such theatres constitute a public nuisance, you may consider the proceedings provided for in Sections 48-1 through 48-6 of the Code.

BOARD OF SUPERVISORS—Authority to regulate reckless driving and speed limits. (F 60 a) 166

April 8, 1952.

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

I have your letter of April 2 in which you state:

“Please advise whether or not the Board of Supervisors of Amherst County, Virginia, has the power to adopt an ordinance prohibiting reck-
less driving or exceeding the speed limit by automobiles on the State Highway in Amherst County."

Your attention is invited to Section 46-204 of the Code of 1950 which reads as follows:

"The authorities of counties, except as herein otherwise provided, shall have no authority to adopt any ordinances, rules and regulations concerning matters covered by this chapter. All ordinances, rules and regulations, except as herein otherwise provided, adopted by the authorities of any county in conflict with the provisions of this section are hereby repealed.

"But nothing in this section shall apply to the authorities or the ordinances, rules and regulations adopted by the authorities of any county which adjoins a city within or without this State having a population of one hundred and twenty-five thousand or more, provided such county has a trial justice and provided, further, that the fines collected for the violation of such ordinances shall be paid to the State when the arrest is made by an officer of any division of the State government."

Your further attention is invited to Section 46-205. This section empowers the Board of Supervisors of counties having a population of more than five hundred inhabitants per square mile to enact ordinances prescribing speed limits for motor vehicles. As the County of Amherst does not come within the exception of the prohibition contained in Section 46-204, I am of the opinion that the Board of Supervisors of that county does not have the power to adopt traffic ordinances defining reckless driving, or prescribing speed limits of motor vehicles driven on the roads thereof.

BOARD OF SUPERVISORS—No authority to control methods used to collect delinquent taxes. (F 262) 171

HONORABLE C. H. MORRISSETT,
State Tax Commissioner.

I am in receipt of your letter of April 8, from which I quote as follows:

"The Board of County Supervisors of Albemarle, at a regular meeting on February 20, 1952, adopted the following resolution:

"'WHEREAS, it is the opinion of this Board that all other means for the collection of delinquent State and local taxes should be used prior to the use of processes of garnishment of salaries and levy on bank accounts;

"'NOW, THEREFORE BE IT RESOLVED that the Director of Finance be and he is hereby directed to furnish to this Board, or a Committee thereof appointed by the Chairman, a list of delinquent taxpayers against whom such processes are proposed to be used.

"'BE IT FURTHER RESOLVED that a copy of this resolution be forwarded to Mr. C. H. Morrissett, State Tax Commissioner.'

"A certified copy of this resolution is attached.

"The County of Albemarle is operating under the County Executive form of government. Chapter 11 of Title 15 of the Code of Virginia is
entitled 'County Executive and County Manager Forms of Government.' Section 15-288 relates to the Department of Finance and sets out the duties of the Director of Finance. Paragraph (e) of Section 15-288 contains the following pertinent sentence:

"The director of finance shall also exercise all the powers conferred and perform all the duties imposed by general law upon county treasurers, and shall be subject to all obligations and penalties imposed by general law."

"County treasurers, as you know, are governed by the statutes of this State. They are heavily charged with specific duties; among them being the collection of certain State and local taxes. Below I quote Section 58-965 of the Code of Virginia:

"The treasurer, after the fifth day of December, shall call upon each person chargeable with taxes and levies who has not paid the same prior to that time, or upon the agent, if any, of such person resident within the county or corporation for payment thereof; and upon failure or refusal of such person or agent to pay the same he shall proceed to collect them by distress or otherwise. Should it come to the knowledge of the treasurer that any such person or persons owing such taxes or levies is moving or contemplates moving from the county or corporation prior to the fifth day of December, he shall have power to collect the same by distress or otherwise at any time after such bills shall have come into his hands."

"Apparently, the Board of County Supervisors of the County of Albemarle is attempting to require the Director of Finance of the county to furnish to the Board, or to a committee thereof appointed by the chairman, a list of delinquent taxpayers against whom legal processes are proposed to be used as a means of collecting delinquent State and local taxes. It appears that the Board of County Supervisors intends to say to the Director of Finance in the performance of his State duties just how the Director of Finance is to perform his State duties in the matter of collecting State taxes."

I further understand from your letter that you interpreted the resolution of the Board as indicating an intention on its part to instruct the Director of Finance as to against whom he is to proceed in discharging the mandatory duty imposed upon him by Section 58-965 of the Code.

You ask for my opinion "on the validity of the attached resolution, especially with respect to its reference to the collection of State taxes."

If your interpretation of the resolution is correct, I am of opinion that the Board of Supervisors would be exceeding its power by attempting to control the Director of Finance as to what taxpayers he shall and what taxpayers he shall not proceed against in the collection of State taxes. The duties of the Director of Finance are prescribed by the quoted section and upon the failure or refusal of the taxpayer to pay his State taxes the Director is required to proceed to collect them by distress or otherwise, independent of directions from the Board of Supervisors.

BOARD OF SUPERVISORS—No authority to rescind approval of Literary Fund load already approved. (F 199) 158

April 2, 1952.

Dr. Dowell J. Howard,
Superintendent of Public Instruction.

I have your letter of March 14, from which I quote as follows:

"Under the provisions of the Constitution of Virginia and Chapter 7 of the Code of Virginia (1950), the State Board of Education is charged
with the responsibility of managing the Literary Fund of Virginia. Section 22-107 of the Code authorizes the school boards of the several counties, cities and towns operating as separate school districts to borrow money belonging to the Literary Fund and it further provides that such local school boards may make written application to the State Board for such loans on a form to be prescribed by the State Board. Section 22-113 of the Code (1950) makes provision for the repayment of such loans.

"You will note from the attached application form that the State Board of Education provides for a resolution to be executed by the Boards of Supervisors for the counties and the Councils for the cities. These certificates must be executed along with others shown on the form before the State Board of Education considers the application for approval or disapproval.

"A question has been raised by one of the county school boards as to the right of the Board of Supervisors to withdraw its approval of the application for a loan from the Literary Fund if it has been approved by that particular governing body and by the State Board of Education. * * *"

It further appears from your letter that a School Board of one of the counties duly applied for a loan from the Literary Fund on the form prescribed for the purpose, which application was approved by an appropriate resolution of the Board of Supervisors. The application, complying with the requirements in all respects, was approved by the State Board of Education and is now included in the list of authorized loans. Routine procedure would be for the funds to be paid over when they are available. However, the Board of Supervisors, after the approval of the loan by the State Board of Education, adopted a resolution rescinding its original resolution approving the application.

It does not appear to me, in view of the facts and the statutes involved, that the question of the general power of the Board of Supervisors to rescind a resolution is here presented. The real question is the legal effect, if any, of the resolution of the Board of Supervisors rescinding its original resolution of approval.

Sections 22-101 to 22-115 of the Code deal with the management and investment of the Literary Fund by the State Board of Education. Provision is made for loans to local School Boards upon application therefor by such Boards under prescribed conditions. It is made the mandatory duty of the local governing body (the Board of Supervisors in this case) to provide funds by tax levy or by appropriation for the payment of the loans to the School Board. There is no requirement that the Board of Supervisors approve the application for the loan. Apparently, as a matter of policy, the State Board of Education on the form used for the application requires the Board of Supervisors to approve the same, but the State Board does not have to do this and may make a loan to a School Board without the approval of the Board of Supervisors. The approval or disapproval of the Board of Supervisors is without legal effect.

In the case you present the approval and authorization of the loan by the State Board upon an application conforming with the requirements in all respects and approved by the Board of Supervisors is an accomplished fact. For the reasons stated it is my opinion that the second resolution of the Board of Supervisors is without legal effect and that the State Board may advance the funds in accordance with the application when they are available.

BOARD OF SUPERVISORS—Redistricting of county; affect on terms of board members. (F 33) 110

HONORABLE EDWIN LYNCH,
Member of House of Delegates.

I am in receipt of your letter of January 14, in which you raise the following question:
"At the last meeting of the Democratic Executive Committee of Fairfax County, a resolution was passed requesting the Legislature to pass a law which would require a new election of the Board of Supervisors when a proposed redistricting into new magisterial districts of the county has been approved. Would you tell me whether, in your opinion, such a proposal would be constitutional?

"The Constitution now provides that when a member of the Board is elected, he shall serve for four years."

A member of the Board of Supervisors of a County is a constitutional officer elected by the people for a term fixed by the Constitution. See Sections 111 and 112 of the Constitution. It is well settled that it is beyond the power of the General Assembly to deprive such an officer of his office, either directly or indirectly. See Pendleton v. Miller, 82 Va. 390. This principle has been recognized in other cases, among them Lipscomb v. Nuckols, 161 Va. 936. It is my opinion, therefore, that to comply with the request of the Democratic Executive Committee of Fairfax County would have the effect of shortening the tenure of office of the members of the Board of Supervisors of that County as fixed by the Constitution, and that such compliance would be invalid.

There is an exception to the above rule, but this exception is expressly incorporated in Section 110 of the Constitution in the last paragraph thereof. This paragraph 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."

Lipscomb v. Nuckols, Supra, discusses this exception. However, I do not think that this exception is applicable here, as I do not understand that there is a complete form of county organization and government involved in your question, but simply a proposed redistricting of the County into magisterial districts.

BONDS—Highway Toll Revenue Bonds as legal securities. (F 107) 170

HONORABLE JESSE W. DILLON,
Treasurer of Virginia.

This is to acknowledge receipt of your letter dated April 9, 1952, which I quote as follows:

"Under Chapter 485 of the Acts of Assembly of 1952, Section 33-240 of the Code of Virginia of 1950 was amended to provide 'All bonds heretofore or hereafter issued pursuant to the authority of this Article are hereby made securities in which all public officers and bodies of this State and all political subdivisions thereof, all insurance companies and associations, all national banks and trust companies, and savings institutions, including savings and loan associations, in the State, and all executors, administrators, trustees, and other fiduciaries, both individual and corporate, may properly and legally invest funds within their control.'"

"We have been requested by several of the banks in Virginia to accept the highway toll revenue bonds to secure State money deposited in banks. Section 2-181 of the Code of Virginia of 1950 provides 'Any such bank,
however, may deposit with 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 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 Owner’s Loan Corporation, and of any other corporation or agency created pursuant to an act or acts of 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 bond.

“In my opinion, Chapter 485 of the Acts of 1952 simply makes certain securities eligible for investments by fiduciaries, etc., and in no wise changes the type of security which a State Depository may deposit with the State Treasurer for the protection of State deposits. I have refused to accept these bonds referred to in Chapter 485 of the Acts of 1952 to secure the deposit of State funds. However, some of the banks and some of the bond dealers have insisted that they are eligible to secure State deposits. Won’t you kindly give me the benefit of your opinion in the matter.”

I concur in your interpretation of Section 33-240 of the Acts of the Assembly of 1952 and Section 2-181 of the 1950 Code of Virginia. I feel, however, that your attention should be called to Section 33-255.13 of Senate Bill No. 229 [H. B. 400] enacted at the 1952 session of the General Assembly. You will observe from reference to this section that the last sentence thereof provides as follows:

“* * * Such bonds are hereby made securities which may properly and legally be deposited with and received by any state or municipal officer or any agency or political subdivision of the Commonwealth for any purpose for which the deposit of bonds or other obligations of the Commonwealth is now or may hereafter be authorized by law.”

This Bill, not having the emergency clause attached, is not yet in effect, but when the same becomes effective and bonds are issued by the Commonwealth for toll road projects, I am of the opinion that such bonds will be eligible for deposit with you as securities. This is called to your attention to obviate any confusion that may arise in this connection between revenue bonds issued by the Highway Commission for toll road projects and other revenue bonds issued by the Commonwealth.

BONDS—School Bonds, Issuance and sale under various statutory methods.
(F 1003) 79

October 18, 1951.

Mr. J. Gordon Bennett,
Secretary State Commission on Local Debt.

This is in reply to your request for my opinion concerning the issuance of county wide and district school bonds. More specifically, you ask whether or not all school improvement bonds must be sold at public sale.

You will recall my letter of February 14, 1951, addressed to the Honorable C. H. Morrissett, Vice-Chairman of the State Commission on Local Debt, wherein I stated, in effect, that if the bonds in question are to be payable from taxes to be levied only in the districts in which the election is held, the provisions of Section 22-167 and Sections 15-601 to 15-604 of the Code must be followed, but
on the other hand, if there is to be assessed, levied and collected a tax upon all taxable property in the county for the purpose of providing for the payment of the principal and interest of county school bonds at maturity, an alternate method could be used, namely, the machinery set up by the provisions of Section 22-168 to 22-178 of the Code.

Section 22-167 authorizes a school board, with the approval, by appropriate resolution of the governing body of the county, to contract loans and issue county wide school bonds or district school bonds in the manner authorized by Sections 15-601 to 15-604. Since these last mentioned sections are found as part of Article 3, Chapter 19 of Title 15 and deal with bond issues by counties, it is clear that the words, “county school board” must, by necessity, be substituted for the words, “board of supervisors” whenever they appear. See, County School Board v. Miller, 164 Va. 334. Section 15-603 provides the specific method for the issuance of bonds and reads as follows:

"Upon the proceedings under the two preceding sections being had, and not otherwise, the board of supervisors is authorized and empowered to issue the bonds of the county for such loans, either registered or with coupons, in denominations of one hundred dollars, or multiples thereof. The bonds shall be in such form as the board may prescribe, shall be signed by the chairman of the board, countersigned by the clerk of the board, and sealed with its seal. They shall bear such rate of interest not exceeding six per centum, payable semi-annually; to be payable at such time not exceeding thirty years after date, and be redeemable after such time as the board may prescribe. If coupon bonds are issued, they shall be payable to bearer and shall have coupons attached for the semi-annual installments of interest. No bonds issued under this section shall be sold at less than par."

I find no section in Article 3, Chapter 19 of Title 15 that requires the sale of bonds at public sale and it is my opinion that a school board is required only to follow the provisions of Section 15-603, quoted above, and to sell the bonds at not less than par.

As I have already pointed out, Sections 22-168 to 22-178 provide an additional method for the issuance and sale of county wide school bonds. Section 22-175, as amended, reads as follows:

"The bonds shall be sold at public sale upon sealed proposals, to the highest bidder at not less than par and accrued interest to date of delivery. Notice of such sale shall be given by publication, in such papers as the county school board shall direct, not less than ten days prior to the date fixed for such sale. The notice of sale may specify the rate of interest the bonds shall bear, not exceeding six per centum per annum, or may require bidders to specify the rate of interest such bonds shall bear, not exceeding six per centum per annum, expressed in multiples or fractions or percentages of one per centum per annum, such interest to be payable semi-annually." (Italics supplied).

Thus, it is clear that when the machinery set up by Sections 22-168 to 22-178 has been followed for the issuance and sale of county wide bonds, such bonds must be sold at public sale. This requirement is mandatory and, in my opinion, absolutely prohibits a negotiated sale regardless of the facts and circumstances surrounding it.
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CENSUS—1950—Effect on Clerk’s Fees in certain cities. (F 116) 122

HONORABLE J. GORDON BENNETT,
State Auditor of Public Accounts.

February 4, 1952.

I am in receipt of your letter of January 30, from which I quote as follows:

"We are now in the process of auditing the accounts and records of the clerks of courts of both cities and counties for the calendar year 1951. Part of the responsibility of the Auditor in connection with these examinations is to verify the excess fees, if any, which should be paid into the treasury of the State for apportionment between the Commonwealth and the localities, as provided by law.

"As you undoubtedly are aware, at December 31st of each calendar year the several clerks of courts are required to file a fee report with the Compensation Board showing the receipts and expenses of their offices and the excess fees, if any, payable to the Commonwealth. These reports also reflect the salary which each clerk may retain as personal compensation in accordance with the amounts fixed by statute.

"The General Assembly of 1950 enacted Chapter 285, which provided that the census of 1950 should not apply to the Acts of Assembly or to the Code of Virginia * * * until June thirty, nineteen hundred and 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 * * *.

The Clerk of the House of Delegates, the Keeper of the Rolls, in May, 1951, in conformity with Chapter 285 of the Acts of Assembly of 1950, officially certified the 1950 census population figures to the political subdivisions of the State. The effective date of his certification was June 30, 1951.

"The official census of 1950 showed that the City of Portsmouth had 80,039 inhabitants. This population figure appears to bring Portsmouth within the provisions of Section 14-155.1 of the Code of Virginia. The official census of 1950 shows that Danville and Petersburg had populations of 35,066 and 35,054, respectively. These population figures seem to bring these two cities within the provisions of Section 14-155.4.

"Both sections referred to above provide a salary at the rate of $8,000.00 per annum for the clerks of courts in the cities covered by the two sections.

"You will notice that in both sections provision is made for all fees collected by the clerks of courts to be paid into the respective city treasuries and that all their expenses, including their own salaries, are to be paid out of the city treasuries. Further provision is made for the respective city councils to provide for the payment of such salaries in equal monthly installments.

"During the calendar year 1951 the two clerks of courts of the City of Portsmouth and the respective clerk of court of the City of Danville and the City of Petersburg continued to operate their offices without regard to the two aforementioned sections. In completing our audits for the calendar year 1951, we need your opinion with respect to the following questions:

"1. Where the financial operations of the clerks of courts of the City of Portsmouth and respective clerk of court of the cities of Danville and Petersburg subject to the provisions of Section 14-155.1 and Section 14-155.4, respectively, for the entirety of the calendar year 1951, inasmuch as the Keeper of the Rolls officially certified the 1950 United States census to the localities effective as of June 30, 1951, as required by Chapter 285 of the Acts of Assembly of 1950?"
"2. Would the salary of $8,000.00, which is the amount provided by both the aforementioned sections, be the salary which each of these clerks should receive for their services for the calendar year 1951?

"3. Should the amount of all official fees and commissions of whatever kind or character and from whatever source derived in excess of the salary of $8,000.00 for each clerk, plus the expenses incurred within the limitations and amounts fixed by the Compensation Board, be paid into the city treasury of each clerk's respective city; or

"4. Would the State be entitled to any excess fees for the period January 1, 1951, to June 30, 1951, inclusive, if the operations of the clerks of these courts did not come within the provisions of the aforementioned sections until June 30, 1951?"

The substance of your communication is to inquire when Sections 14-155.1 and 14-155.4 of the Code are effective as to court clerks in the cities of Portsmouth, Danville and Petersburg, respectively, the city of Portsmouth having a population according to the 1950 census such as to bring it within the classification prescribed in Section 14-155.1, and the cities of Danville and Petersburg having populations according to the 1950 census so as to bring them within the classification prescribed in Section 14-155.4. It seems to me that Chapter 285 of the Acts of 1950 makes the answer to this inquiry reasonably plain. By that Act the General Assembly took cognizance of the United States census of 1950 and made provision for just such situations as you now have before you. The second paragraph of the Act reads as follows:

"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."

Pursuant to the above quoted provision of the Act, the Keeper of the Rolls has certified the 1950 census population figures to the political subdivisions of the State, including the cities you mention, the effective date of the certification being June 30, 1951. It is my opinion, therefore, in view of the provisions of Chapter 285 of the Acts of 1950 and the action that has been taken thereunder, that Sections 14-155.1 and 14-155.4 of the Code became effective in the cities mentioned as of June 30, 1951. Having reached this conclusion, the answers to your specific inquiries do not present a difficult problem. I shall take up these inquiries in order.

1. Your first question must be answered in the negative. The sections becoming effective as of June 30, 1951, it follows that up to that date the former statutes relating to the compensation of court clerks in these cities and the disposition of the fees collected by them are applicable, and that subsequent to that date Sections 14-155.1 and 14-155.4 are applicable.

2. The salaries of $8,000 provided for these court clerks by the sections referred to are applicable for the last six months of the calendar year 1951.

3. The official fees and commissions collected by the clerks after June 30, 1951, should be paid into the treasuries of their cities and the salaries of such clerks should be paid from such treasuries.

4. Yes, in accordance with the statute applicable to the compensation and fees of these court clerks before the effective date of the sections applicable after June 30, 1951.
HONORABLE E. BLACKBURN MOORE,  
Speaker, House of Delegates.

This will acknowledge receipt of your letter of February 14, 1952, from which I quote as follows:

"If the General Assembly enacts a charter, or amendment thereto, for a city or town which has a provision therein which would render inoperative, as to such city or town, the application of the State Water Control Law, does the State Water Control law or the charter change prevail?"

The great preponderance of authority is to the effect that, when there is a conflict in the provisions of a special or local act and the general law on the subject, the special act is controlling. The doctrine that a special act should be construed as an exception to the general law is not to be invoked unless the two acts cannot be harmonized or reconciled in any other way.

Analyzing your question, if the General Assembly enacts legislation granting a charter, or an amendment thereto, to a city or town containing provisions in irreconcilable conflict with the State Water Control law, it is my opinion that such charter provisions would prevail as an exception to the general law on the subject.

CHIROPODISTS—Use of narcotics.  (F 80) 16

DR. ALBERT PINCUS,  
State Board of Medical Examiners.

This is in reply to your recent inquiry as to what limitations, if any, are placed upon the use of narcotics by chiropodists under the laws of Virginia.

Section 54-273(8) of the Code of Virginia makes it clear that, in the classification of drugs known as anesthetics, a chiropodist may use only such as are local anesthetics.

On October 18, 1950, I advised that a chiropodist may legally, within the limits of professional practice, administer such narcotics as are included in the classification "local anesthetics."

We come now to whether a chiropodist may, within the limits of sound professional practice, use narcotics generally, or whether he is limited to such narcotics as are local anesthetics.

Section 54-497 of the Code of Virginia, which is a part of the Uniform Narcotic Drug Act, reads as follows:

"A physician or a dentist, in good faith and in the course of his professional practice only, may prescribe on a written prescription, administer, and dispense narcotic drugs, or he may cause the same to be administered by a nurse or interne under his direction and supervision. Such a prescription shall be dated and signed by the person prescribing on the day when issued, and shall bear the full name and address of the patient for whom the narcotic drug is prescribed, and the full name, address, and registry number under the federal narcotic laws of the person prescribing, provided he is required by those laws to be so registered."

Section 54-487 of the Code, which is also a part of the Uniform Narcotic Drug Act, defines the term physician for purposes of the Act, and is, in part, as follows:
"(2) 'Physician' means a person authorized by law to practice medicine in this State and any other person authorized by law to treat sick and injured human beings in this State and to use narcotic drugs in connection with such treatment."

It would appear that the answer to your question depends upon whether a chiropodist is a physician within the definition contained in the Uniform Narcotic Drug Act. Reference to § 54-273(8) reveals that chiropody includes:

"(8) 'Practice of chiropody (podiatry)' means the medical, mechanical and surgical treatment of ailments of the human foot, but does not include amputation of the foot or toe, nor the use of other than local anesthetics."

Clearly, a chiropodist is a physician under the definition contained in the Uniform Narcotic Drug Act and, hence, may legally prescribe, administer and dispense narcotic drugs. In 1944 the Attorney General of Florida, Honorable J. Tom Watson, made the following statement which I regard as an excellent guide for chiropodists in this matter:

"So long as a chiropodist honestly and legitimately prescribes narcotic drugs within the limits of the special branch of the medical profession in which he is licensed to practice, he is acting within the authority granted by law."

CITIES, TOWNS AND COUNTIES — Ordinances, Territorial limitations on effect. (F 60 a) 3

HONORABLE JOHN H. BOOTON,
Trial Justice of Page County.

July 6, 1951.

I am in receipt of your letter of June 22, from which I quote as follows:

"Please advise me as to the proper construction of two State statutes: relative to the territorial application and method of enforcement of traffic ordinances enacted by town councils.

"First, do ordinances adopted under authority of Code Section 46-198: 'to regulate the operation of vehicles on the highways in such cities and towns', apply also to the highways outside, but within one mile of such city or town?

"Second, do such ordinances apply to areas outside the signs erected to mark the corporate limits, but within areas recently annexed but not so designated?

"Third, may municipal police officers habitually wearing full uniforms, remove these uniforms and don civilian clothes, provided with an inconspicuous badge, patrol the highways for the purpose of detecting unsuspecting motorists? Code Sections 46-14, 46-15 and 46-16.'"

Section 15-560 of the Code, providing that "the jurisdiction of the corporate authorities of each town or city, in criminal matters, shall extend one mile beyond the corporate limits of such town or city, * * *" was very recently before our Supreme Court of Appeals in Murray v. Roanoke (Advanced Sheets), 192 Va. 321. This case holds that the section of the Code to which I have referred does not purport to extend the effect of municipal ordinances beyond the corporate limits, but rather that it is a statute of enforcement of the effective law within the area specified and that its purpose is to prevent the territory contiguous to a,
city or town from becoming a refuge for criminals and to confer on the courts power to enforce the police regulations of the area involved. I think, if you will read the opinion in this case, you will agree with me that your first question must be answered in the negative. In answering your question I am, of course, not attempting to pass on any provision of the charter of any city or town.

Replying to your second question, I am of opinion that ordinances duly adopted by the city authorities apply to all areas within the corporate limits, whether these areas are marked or not, unless there is something in the ordinance itself that requires the marking of sections of a highway within that area. Although it is customary that the corporate limits of a municipality be marked for the convenience of the public and for the further protection of the people within its limits, I do not know of anything in the general law which would require the marking of the corporate limits before jurisdiction would apply to the areas duly annexed. I think it would be unfortunate for anyone to be misled by the markers designating the corporate limits of a town, but I cannot say that the improper marking of such corporate limits would render ineffective the ordinance of the town adopted under the authority of Section 46-198 of the Code. Certainly the local authorities will not allow this erroneous marking to continue.

In connection with your third question, Sections 46-14, 46-15 and 46-16 provide that officers exercising the authority contained in the sections "shall be in uniform or shall exhibit his badge or other sign of authority." I am not entirely clear as to what you mean when you refer to "an inconspicuous badge", but, if the officer complies with the statutory requirement by exhibiting his badge or other sign of authority, I am of opinion that this is sufficient.

CLERKS—Amount of compensation in certain cases. (F 116) 216

HONORABLE CHARLES R. PURDY,
Clerk, Hustings Court of City of Richmond, Part II.

June 11, 1952.

I am in receipt of your letter of May 26, from which I quote as follows:

"Section 14-155 of the Code of 1950 as amended by Acts of 1952, pages 816-17, provides that in cities or counties having a population of 100,000 or more the compensation of clerks shall not exceed seventy-five hundred dollars per annum, provided that the sum of twenty-five hundred dollars paid by cities or counties having a population of fifty thousand or more shall be disregarded. Section 14-155.2 Acts of 1948 increased the seventy-five hundred item by five hundred dollars, but provided that "no clerk shall receive a total net compensation exceeding ten thousand dollars, excepting such clerk who is the clerk of two or more courts."

"The General Assembly of 1952, page 603, Acts of 1952, adopted "An Act to raise the maximum compensation of clerks of courts of record" which reads as follows: § 1. Notwithstanding any provision contained in Article 3 of Chapter 2 of Title 14 of the Code of Virginia, the maximum compensation authorized for the clerks of courts of record is increased by ten per centum."

"Please advise me the maximum compensation of my office as Clerk of the Hustings Court, Part II, of the City of Richmond."

You have further advised me that the City of Richmond pays you a salary of $2500 per year.

As you state, the statutes primarily involved are Sections 14-155 of the Code as amended by Chapter 518 of the Acts of 1952, Section 14-155.2 of the Code, and Chapter 322 of the Acts of 1952.
Section 14-155 provides that the total annual compensation authorized by the State Compensation Board to a court clerk in cities having a population of 100,000 or more shall not exceed the sum of $7500 per annum. This sum, of course, refers to fees which the Compensation Board may allow the court clerk to retain as compensation. The section further provides that in determining the compensation allowed to any such clerk by the Compensation Board it shall disregard the compensation paid to him by his city to the extent of $2500 "for the discharge of any duties imposed upon such officer by the council." Under Section 14-155, therefore, you would be entitled to retain $7500 in fees plus the $2500 paid you by your City, or a total of $10,000.

Section 14-155.2 reads as follows:

"Notwithstanding the provisions of §§ 14-145 to 14-153, 14-155, 14-155.1, and 14-156 to 14-161, the maximum compensation thereby authorized for the clerks of courts of record is increased by twenty per centum for those clerks authorized by law to retain, from fees and commissions, a maximum of fifty-five hundred dollars or less; and by ten per centum and not exceeding five hundred dollars for those clerks authorized by law to retain, from fees and commissions, a maximum in excess of fifty-five hundred dollars, provided, however, that no increase authorized hereunder shall exceed the sum of one thousand dollars, and provided further that no clerk shall receive a total net compensation exceeding ten thousand dollars, excepting such clerk who is the clerk of two or more courts."

This section as applied to you authorizes you to retain from fees an additional amount not exceeding $500. I have previously expressed the opinion (Opinions of the Attorney General 1948-49, page 34) that the $10,000 limitation fixed by this section included the salary paid you by the City, although but for this limitation your total net compensation would have been $10,500, represented by $8,000 in fees plus your salary of $2,500.

Coming now to Chapter 322 of the Acts of 1952, the title of the Act is:

"An Act to raise the maximum compensation of clerks of courts of record."

And the body of the Act provides that:

"Notwithstanding any provision contained in Article 3 of Chapter 2 of Title 14 of the Code of Virginia, the maximum compensation authorized for the clerks of courts of record is increased by ten per centum."

Sections 14-155 and 14-155.2 are contained in the same Article 3 of Chapter 2 of Title 14. I think it reasonably plain that this Chapter 322 of the Acts of 1952 refers to the compensation authorized for the clerk of a court from the fees of his office and has no relation to the additional compensation which may be paid the clerk by his county or city. It would represent a strained construction of the Act to hold that a clerk may retain from fees of his office a percentage of the salary paid to him by his county or city for services rendered to such county or city. The language of Chapter 322, however, is quite broad and it is my view that where it provides that "Notwithstanding any provision contained in Article 3 of Chapter 2 of Title 14 * * *

"the limitation of $10,000 contained in Section 14-155.2 is no longer applicable.

Applying this construction to your case, it means that you are authorized to retain from the fees of your office $8,800 and that you may also receive the salary paid you by your city.

What I have written applies in principle to all clerks of courts of record unless there is a special statutory provision covering any particular clerk.
CLERK—Deputy may not act as agent for bonding company writing bonds for county officials. (F 181) 116

Honorable R. Page Morton,
Commonwealth's Attorney for Charlotte County.

I am in receipt of your letter of January 21, from which I quote as follows:

"The question was raised at the meeting of the Board of Supervisors this morning whether the Deputy Clerk of the Circuit Court of Charlotte County, Virginia, could act as agent for a bonding company in connection with the writing of the bond for the public officials of Charlotte County, including the Treasurer, the Commissioner of Revenue and the Sheriff. The Deputy Clerk is supplemented in his salary by the Board of Supervisors to the extent of $50.00 per month.

"Section Title 15-504 of the Code of Virginia of 1950 appears to expressly forbid this. The question was raised before the Board of Supervisors as to whether they should pay the share of Charlotte County on the premium on the bond. It was my opinion that the Board of Supervisors were not permitted to pay the County's share of the premium to the Deputy Clerk.

"The Board of Supervisors requested that I write to you for an opinion on this question. I would like to present your letter to the Board of Supervisors, and the matter will be held in abeyance until we receive your reply. I presume that the same principle would apply to the bonds of the deputies of the aforementioned officers."

I assume that the County is paying in whole or in part the premium on the bonds of the officers you mention, and that the Deputy Clerk, in acting as agent for the bonding company, would receive a part of the premium as his commission. It is my opinion that Section 15-504 of the Code clearly prohibits the Deputy Clerk from acting in the capacity you describe.

CLERKS—Office open during "convenient hours". (F 116) 225

Honorable O. B. Chilton,
Clerk, Circuit Court of Lancaster County.

This is in reply to your letter of June 16 in which you requested my opinion as to the proper interpretation of the words "during convenient hours" as they are found in section 17-41 of the Code.

Section 17-41 provided, among other things, that "the clerk's office of every court shall be kept open * * * during convenient hours, for the transaction of business". You point out that your office is now open from 9:00 A.M. to 5:00 P.M. and that you desire to close at 4:30 P.M. in view of the fact that all county offices in Lancaster County close at that hour. My attention is also called to the fact that the clerks' offices in a nearby judicial circuit open at 9:00 A.M. and close at 4:00 P.M.

It is not plausible to attempt to set forth an exact legal definition of the words "convenient hours" as those words are used in section 17-41, for what may be "convenient hours" in one section of the State may not be "convenient hours" in another part of the State. In my opinion a definition of "convenient hours" must necessarily be determined after a consideration of such facts as the custom and practice of other governmental agencies in the area as to office hours, the business hours of merchants and other businessmen and the extent of agricultural, industrial and other activities, which, of course, may vary with the location of every clerk's office.
From the facts recited in your letter it appears to me that you would be justified in keeping your office open from 9:00 A. M. to 4:30 P. M. However, I suggest that it would be proper to seek the advice of the governing body of your county and the judge of your judicial circuit before making the change.

COMPATIBILITY OF OFFICE—Clerk in A. B. C. store as member of Board of Supervisors. (F 249) 20

August 1, 1951.

HONORABLE T. MOORE BUTLER,
Commonwealth's Attorney for Alleghany County.

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

"Section 15-486 of the 1950 Code of Virginia prohibits any person holding the office of supervisor from holding any other office, elective or appointive.

"May I have your opinion as to whether or not a member of the Board of Supervisors of a County may also serve as a sales clerk in an Alcoholic Beverage Control Store, located in the same County?"

The section to which you refer prohibits, among other things, a member of a Board of Supervisors from holding any other office, elective or appointive. In my opinion, a clerk in an Alcoholic Beverage Control Store is merely an employee and not an officer and I, therefore, conclude that your question must be answered in the affirmative.

COMPATIBILITY OF OFFICE—Commonwealth Attorney as Town Recorder. (F 249) 138

March 10, 1952.

HONORABLE FRED L. RUSH,
Commonwealth's Attorney for Buchanan County.

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

"I am writing to you for an opinion on the following questions:

"'Can the Commonwealth's Attorney of Buchanan hold this office and at the same time accept the position of Town Recorder for the Town of Grundy?'

"Section 15-486 of the 1950 Code of Virginia takes up the subject of certain officers not holding more than one office. But this section is not clear, so I am writing you for the above opinion."

Section 15-486 of the Code provides in part 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:

"* * * *"

The section contains a number of exceptions, but the office of Town Recorder is not included among them. While I do not have the charter of the Town of Grundy before me, I assume that the Town Recorder is an officer of the Town. It is, therefore, my opinion that the section prohibits the Commonwealth's Attorney of Buchanan County from at the same time holding the office of Town Recorder of the Town of Grundy."
COMPATIBILITY OF OFFICE—Employee of State Highway Commission as member of board of supervisors. (F 249) 21
August 1, 1951.

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

I am in receipt of your letter of July 31, in which you ask "as to whether employment of one by the State Highway Commission under the State Revenue Bond Act precludes his serving as a member of the County Board of Supervisors."

Section 15-486 of the Code prohibits, among other things, a member of a Board of Supervisors from holding any other office, elective or appointive. I take it from your letter that the person about whom you write is simply an employee of the State Highway Commission. If my assumption is correct, I am of opinion that he may also serve as a member of the Board of Supervisors. If there is any doubt in your mind as to whether this person is an officer as distinguished from an employee, I will be glad if you will write me again.

COMPATIBILITY OF OFFICE—Officer serving as Social Security Administrator. (F 243 a) 153
March 31, 1952.

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.

This is in reply to your letter of March 28, 1952, which reads, in part, as follows:

"Will you review Section 15-504 and advise me whether in your opinion the Board of Supervisors of Brunswick may pay the treasurer for the extra duties which will be imposed upon him by the responsibilities connected with the position of local F. I. C. A. administrator of Brunswick County.

"I have had several telephone inquiries from clerks of circuit courts who serve also as clerks of boards of supervisors and who have been appointed local F. I. C. A. administrators as to whether their boards of supervisors may pay them for services performed as such administrators. I shall, therefore, appreciate it if you will advise me whether Section 15-504 would prohibit any of the officers mentioned in the Section from receiving compensation as local F. I. C. A. administrators."

Section 15-504 of the Code reads, in part, 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 boards, 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."
REPORT OF THE ATTORNEY GENERAL

In my opinion an arrangement whereby the board of supervisors would pay a person for his services as F. I. C. A. administrator would necessarily be a contract and, therefore, those persons prohibited from being interested in such contracts by § 15-504 may not receive compensation from the board for services as F. I. C. A. administrator.

This section of the Code is quite broad and inclusive. You may recall that, in 1950, § 15-504.1 was enacted to enable treasurers and clerks to be compensated for services performed in connection with the preparation of the budget. The fact that § 15-504.1 was needed to permit that practice clearly indicates that the suggested practice is barred by the statute. This opinion should not be construed to mean that such persons may not serve as F. I. C. A. administrator on a gratuitous basis, as service without compensation would not violate § 15-504.

COMPATABILITY OF OFFICE—Town manager as member of county board.

(F 249) 199

HONORABLE B. W. HAMILTON,
Commonwealth's Attorney for Wise County.

May 8, 1952.

I am in receipt of your letter of May 7, in which you ask the following question:

"Is the office of Town Manager of the Town of Appalachia, which is operating under the Town Manager form of government under the charter of the Town as provided by the Acts of the General Assembly of 1938, incompatible with the elective office for the Board of Supervisors of Wise County, Virginia? Can the Town Manager hold both offices under the law?"

In my opinion, the answer to your question is to be found in Section 15-486 of the Code, which provides among other things that no supervisor "* * * shall hold any other office elective or appointive at the same time, * * *" with certain exceptions none of which is applicable to the case you put.

In view of this statute it is my opinion that a member of the Board of Supervisors of Wise County may not at the same time hold the office of Town Manager of the Town of Appalachia.

COMPENSATION BOARD—Right to require officers to file forms.

(F 57) 201

HONORABLE L. Mccarthy Downs,
Chairman, Compensation Board.

May 9, 1952.

This will acknowledge receipt of your letter dated May 5, 1952, enclosing your file relative to the question raised by Honorable Walter Johnson, Attorney for the Commonwealth of Northumberland County, regarding forms required by the Compensation Board for salary and expenses of the office of the local official.

The file, together with the forms, has been examined. The position of Mr. Johnson, as I interpret it, presents two questions, namely, does the Board have authority to require these forms, and, if so, are such forms reasonable.

I am advised that these forms were prepared by the Auditor of Public Accounts pursuant to the provisions of section 2-128 of the 1950 Code of Virginia, for the purpose of enabling the Compensation Board to properly maintain its records, and particularly to carry out the provisions of Chapter 2 of the 1952 Code.
Acts of the General Assembly, known as the "Social Security Act." The forms were promulgated for general use and apply uniformly to all officers whose compensation and/or expenses of office are fixed by the Board. The forms are necessary for the purposes stated, independently of whether or not the particular subdivision has elected to come under the "Social Security Act."

In view of the broad authority conferred by statute upon the Auditor of Public Accounts with reference to matters of this nature, I am of the opinion that the Board is vested with ample authority to require the execution and submission of these forms, and, upon examination of them, I find them to be reasonable. Accordingly, you are advised that, in my opinion, the position taken by the Board is predicated upon ample authority.

It is noted from Mr. Johnson's letter dated April 30, 1952, that he advises if his contentions are not sustained he may proceed by mandamus. Upon receipt of notice of any legal proceedings in this instance, will you kindly communicate with this office promptly.

COMPENSATION BOARD—Tie vote; appeal from decision; duty of Commonwealth Attorney. (F 57) 121

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

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

"The Compensation Board has fixed the salary of the Commissioner of Revenue for Rappahannock County for 1952 and the Board of Supervisors has objected to this action pursuant to Section 14-63 of the Virginia Code of 1950. At a joint meeting held in accordance with this law by the Compensation Board and the Board of Supervisors in Richmond on January 23, '1952, for the purpose of determining the merits of the protest of the Board of Supervisors, there was a tie vote on the issue to be determined, one of the members of the Compensation Board being absent from the meeting.

"The following questions have now arisen as a result of this controversy which we would like to submit to you for consideration:

1. (a) Does the salary of the Commissioner of Revenue stand as previously fixed by the Compensation Board in view of the tie vote? (b) Shouldn't this tie be broken in some manner?
2. (a) Under Section 14-65 of the Virginia Code of 1950 what would be the proper method for a county to appeal from the decision of the Compensation Board? (b) Should this be done, if at all, by a resolution of the Board of Supervisors or by some other method?
3. Is it the duty of the Commonwealth's Attorney to represent the Board of Supervisors in such an appeal from the decision of the Compensation Board?
4. May the Board of Supervisors employ counsel, other than the Commonwealth's Attorney, to represent it on such an appeal and pay such counsel out of county funds?
5. On what basis should the Commissioner of Revenue be paid pending the final outcome of the controversy?"

In answer to your first question, it is my opinion that the salary of the Commissioner of the Revenue stands as certified by the Compensation Board. If an appeal is taken and the court should decide to fix some other compensation for
this officer, I presume that the order will designate the time as of which the new compensation will begin.

I do not think that I should attempt to go into the question of how the vote of the Compensation Board was taken pursuant to the objection filed by the Board of Supervisors. Presumably the Compensation Board adhered to the salary it originally fixed for the Commissioner of the Revenue, and stated in its minutes that this was the salary finally determined. This is the action from which the appeal, if any, will be taken.

Replying to your second question, I should think that, if the Board of Supervisors desires to appeal from the action of the Compensation Board, as it has a right to do under Section 14-65 of the Code, it will pass a resolution to that effect and then have its petition for appeal filed with the Circuit Court of Rappahannock County, giving notice of such appeal as provided by the section.

I can find nothing in the statute which imposes upon the Commonwealth's Attorney the mandatory duty of representing the Board of Supervisors in the Circuit Court in an appeal from the decision of the Compensation Board. As you know, the Commonwealth's Attorney is the legal advisor of the Board of Supervisors and it would certainly be entirely proper for him to represent the Board in the appeal, but I cannot say that he is required by law to do this. It not being the mandatory duty of the Commonwealth's Attorney to represent the Board, I am of opinion that the Board would have authority to employ and compensate other counsel if it so desired.

Your last question is covered by my answer to your first.

CONSTITUTIONAL LAW — Right of State to prohibit trawling in coastal waters. (F 233) 91

November 16, 1951.

HONORABLE JOHN B. BOATWRIGHT, JR.,
Director, Division of Statutory Research and Drafting.

This is in reply to your recent request for my opinion as to whether or not the Commonwealth of Virginia can constitutionally prohibit by statute the taking of fish by trawlers in those waters of the ocean which are within three miles of the shoreline.

The question presented has necessitated the extensive examination of United States Supreme Court decisions bearing upon this and related situation. I hereinafter set forth excerpts and comments upon several of the more pertinent decisions in order that the principles enounced may serve as a guide for the proposed legislation.

In Manchester v. Massachusetts, (1891) 139 U. S. 240, 11 S. Ct. 559, 35 L. ed. 159, the Court upheld a conviction (of a citizen of Rhode Island) of violating a Massachusetts statute prohibiting seining of fish in Buzzards Bay, a bay [similar to Chesapeake] wholly within the State, and whose mouth is less than two marine leagues in width; and, therefore, within the boundaries and jurisdiction of Massachusetts, as defined by Pub. St. Mass. c. 1, §§ 1-2, and held the statute not to be in violation of the U. S. Constitution, Article 3, § 2, Chapter 1, declaring that the judicial power of the United States extends "to all cases of admiralty and maritime jurisdiction."

By way of dicta the Court added:

"* * * if Massachusetts had continued to be an independent nation, her boundaries on the sea, as defined by her statutes, would unquestionably be acknowledged by all foreign nations, and her rights to control the fisheries within those boundaries would be conceded. The limits of the right of a nation to control the fisheries on its seacoasts, and in the bays and arms of the sea within its territory, have never been placed at less
than a marine league from the coast on the open sea; * * * We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tidewaters is a marine league from its coast; that bays wholly within its territory, not exceeding two marine leagues in width at the mouth, are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish, or fish attached to or imbedded in the soil. The open sea within this limit is, of course, subject to the common right of navigation; * * *.

"The statute of Massachusetts which the defendant is charged with violating, is, in terms, confined to waters 'within the jurisdiction of this Commonwealth,' and it was evidently passed for the preservation of the fish, and makes no discrimination in favor of citizens of Massachusetts and against citizens of other states. * * *"

In 

"In Skiriotes v. Florida, (1941) 313 U. S. 69, 85 L. ed. 1193, the court upheld the conviction of a citizen of Florida for violating a Florida statute prohibiting the use of diving apparatus in taking commercial sponges from the ocean floor off the coast of Florida. The opinion stated that, (1) Florida has a "legitimate interest" in the coastal sponge beds, (2) Florida had a jurisdictional interest over waters outside its territorial limits, and (3) Florida had certain authority over its own citizens. However, the court pointed out that, "no right of a citizen of any other state is here asserted."

And in Toomer v. Witsell, (1948) 334 U. S. 385, 68 S. Ct. 1156, a divided court held that, "* * * South Carolina has power to regulate fishing in the three-mile belt, at least where the federal government has made no conflicting assertion of power * * *" and that in § 3374 of the South Carolina Code, the state has exercised that power consistent with the Constitution (U.S.). A South Carolina tax on green shrimp taken in the maritime belt was held valid in the above case; but the court disallowed, under the equal privileges and immunity clause, a shrimping license fee one hundred times greater for nonresidents than for residents.

The court also stated that:

"* * * the District Court properly concluded that the State (S.C.) has sufficient interest in the shrimp fishery within three miles of its coast so that it may exercise its police power to protect and regulate that fishery."

In elaborating upon the first "Tidelands Oil Case," an earlier decision, the court further stated:

"* * * While U. S. v. California, 1947, 332 U. S. 19, 67 S. Ct. 1658, 91 L. ed. 1889, as indicated above, does not preclude all state regulation of activity in the marginal sea, the case does hold that neither the thirteen original colonies nor their successor States separately acquired 'ownership' of the three-mile belt."

It is to be noted that U. S. v. California, supra, which unmistakably diminishes state powers from the marginal sea belt, cites and distinguishes the Manchester case, thereby appearing to reaffirm that early decision. Moreover, in U. S. v. Louisiana, 339 U. S. 599, 70 S. Ct. 914, 94 L. ed. 1216, the second "Tidelands Case," the court distinguishes Toomer v. Witsell, supra, and, accordingly, indicates its continuing support of the Witsell case.

While it can by no means be stated as a legal certainty, it is my opinion, based upon the foregoing decisions, that the Commonwealth of Virginia can constitutionally, by statutes which do not discriminate against citizens of other states, prohibit the trawling for fish within the marginal sea belt of one marine
league (three marine miles) in width, provided there is no conflicting assertion of power by the federal government.

CONTRACTORS—State Board, Chairman must personally sign certificates.

Mr. Charles P. Bigger,
Secretary, State Registration Board for Contractors.

This will acknowledge receipt of your letter of August 28 inquiring whether or not the Chairman of the State Registration Board for Contractors must affix his personal signature to the certificates issued by that Board. You state that the Board's regulation provides that the certificates of registration issued by it shall bear the signatures of the Chairman and the Secretary. While I do not have a copy of that regulation, I shall rely upon your statement thereof.

The only construction that can logically be given this regulation is the plain meaning that the certificates shall bear the signatures. From the wording, it must be concluded that this meant the personal signatures. Had the Board intended rubber stamp of facsimile signatures it could have so provided.

Accordingly, it is my opinion that the signatures required by the regulation set forth in your letter refers to the personal signatures of the Chairman and the Secretary.

CORONER—When report required. (F 78) 221

Honorable Fred L. Rush,
Commonwealth's Attorney for Buchanan County.

This is in reply to your letter of June 11, 1952, from which I quote in part:

"The question in mind is as follows:

"'When a person dies at his home because of a Heart Attack, Cerebral Hemorrhage, or other cause such as these is the Coroner of the County required to make a report?"

"Code Section 19-22 sets out that a Coroner shall be notified of the death of a person, 'or when unattended by a physician.' Does this mean that all unattended deaths have to be reported to the Coroner and in turn does the Coroner have to make the report entitling him to the $10.00 fee?"

On March 8, 1949, in reply to a similar question submitted by the Honorable James P. Reardon, City Solicitor of Winchester, Virginia, I responded as follows:

"While the law concerning coroners provides that one instance in which a coroner should be called is when a person dies 'unattended by a physician', I do not consider that this is the only instance. Nor do I believe that this means that a coroner should necessarily be called when a person who has a physician dies when the physician is not present.

"A person may be under the care of a physician for some malady and death result naturally therefrom at a time when his physician is not present. In such case the statute does not require that a coroner be called. On the other hand, a person may be violently and critically injured and be under constant care of a physician until his death, in which case a coroner
should be called. That this latter is the case is illustrated by the fact that one person who is to notify the coroner is the 'attending physician.'"

From the above quotation you will see that, in my opinion, a coroner need not be called when a person who is under the care of a physician for some malady dies as a result of that malady even though the physician is not actually present at the time of death.

COUNTIES—Carrying workmen's compensation and liability insurance. (F 83) 127

Honorable William J. Hassan,
Commonwealth's Attorney for Arlington County.

February 7, 1952.

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

"I have been called upon by the officials of Arlington County to obtain the opinion of the Attorney General on the following matters:

"Workmen's Compensation

"1. Should the County insure the Treasurer, Commissioner of Revenue, Commonwealth's Attorney, Sheriff, Clerk of Court, Judges of Circuit Court, Judge of County Court, and their employees, under Workmen's Compensation?

"2. If answer to one is yes, should the County bear the entire cost of this insurance or should it be proportioned on the basis of the ratios used in paying salaries of these officials and their employees?

"3. Does the State provide any type of coverage under Workmen's Compensation for these officials and their employees?

"General or Public Liability

"The County carries a general liability policy to protect itself against acts of negligence on the part of its employees.

"4. Should the insurance extend to the acts of the officials and their employees as listed in one above?

"5. If the answer to four is yes, should the County bear the entire cost of this insurance or should it be proportioned among the several offices?

"Fire Insurance

"The County carries a blanket fire insurance policy on all of its properties.

"6. What is the responsibility of the County in the replacement of equipment, furniture, files, and records of the offices of the officials noted in one above?

"7. Should the cost of such protection be proportioned among the several offices?

"8. Does the State now have any provision for such protection in these offices?"

Taking up your questions in the order in which they are asked I will advise as follows:

1. The State Industrial Commission, which body administers the Workmen's Compensation Act, has uniformly held, I am advised, that the definition
of "employee" contained in Section 65-4 of the Code does not include the officers you mention nor their employees. It is my view that the language of the definition supports this construction. Therefore, it follows that it is not necessary that the County carry Workmen's Compensation insurance on the officers mentioned or their employees.

2. The answer to your first inquiry makes it unnecessary to reply to your second.

3. No.

4. As you know, a county is immune from suit on account of acts of negligence of its employees. Therefore, the question of whether or not a county should carry liability insurance against acts of negligence on the part of its employees is a matter of policy. So far as I know, there is no mandatory requirements that such insurance be carried. Where such insurance is carried it is more for the protection of the individual employees and the public generally than it is for the protection of the county.

5. If the governing body elects to carry such insurance, I should think that the cost would be borne by the County.

6. I am not sure that I exactly understand the purport of this inquiry. Obviously an officer cannot discharge his duties without the necessary equipment, furniture, etc. In case such equipment should be destroyed by fire, I should think that the County would have the same responsibility to replace it as it had to supply it in the first instance.

7. The articles mentioned in your sixth question belong to the County and I should, therefore, think that the cost of insurance protection would be borne by the County.

8. No.

COUNTIES—Classification for special legislation, population. (F 242) 119

Honorable Marcus A. Cogbill,
Commonwealth's Attorney for Chesterfield County.

This is in reply to your letter of January 25, 1952, in which you request my opinion as to whether the decision by the Supreme Court of Appeals of Virginia in the case of John Locke Green v. County Board of Arlington County, which was rendered on January 21, 1952, has the effect of nullifying that portion of Chapter 345, Acts of Assembly, 1942, which refers to counties adjoining any city within this State having a population of more than 190,000 according to the latest preceding United States census.

Section 1 of the Act in question reads as follows:

"Section 1. The board of supervisors or other governing body of any county adjoining any city within this State having a population of more than one hundred and ninety thousand, according to the latest preceding United States census, or any county which has an area of less than seventy square miles of highland, may, in lieu of the method now prescribed by law, provide for the annual assessment and equalization of assessments of real estate in such county, for local taxation, and to that end may establish a real estate assessment office and elect one or more persons to assess such real estate for taxation and to equalize such assessments. The term or terms of such assessor or assessors shall be as prescribed by such board of supervisors, or other governing body. The assessor or assessors shall be removable by such board or governing body for malfeasance, misfeasance or non-feasance in office. All vacancies shall be filled by such board of supervisors or governing body for the unexpired term."
In my opinion the Court, in its decision, did not purport or intend to declare unconstitutional that portion of the Act about which you inquire. In the opinion, which was rendered by Justice Spratley, the following statements, all of which indicate that no such result was intended, appear:

"* * * It is not claimed that the entire statute is unconstitutional
* * *"

"* * * That population may be a proper basis of classification is not questioned by the appellant. We will, therefore, disregard the population classification. * * *"

"* * * The statute thus provides two separate and distinct classifications, stated in the disjunctive, one based on population and the other on land area."

"* * * It is, therefore, a special or local law forbidden by § 63(5) of the Constitution, in so far as it undertakes to make the classification based on territorial area." (Emphasis supplied)

From the above statements in the opinion, it would appear that the Court has determined the objectionable classification to be distinct and separable. Apparently that portion, and only that portion, of the Act is presently declared invalid.

Section 24-4 of Sutherland on Statutory Construction reads, in part, as follows:

"In determining separability, legislative intent governs, but intent that the act be enforced in so far as valid is not the sole consideration. If the legislature so intended, the valid parts of an act will be upheld 'unless all the provisions are connected in subject matter, dependent on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other.' To be capable of separate enforcement, the valid portion of an enactment must be independent of the invalid portion and must form a complete act within itself. The law enforced after separation must be reasonable in light of the act as originally drafted. The test is whether or not the legislature would have passed the statute had it been presented with the invalid features removed."

Under the tests prescribed by this authority, it would seem apparent that the land area classification can be removed from the 1942 Act leaving a complete act to cover those counties falling within the population classification. I am, therefore, of the opinion that the Act is still effective in "any county adjoining any city within the State having a population of more than 190,000 according to the latest preceding United States census."

COUNTIES—Executive Form—Finance Board not required. (F 107) 106

HONORABLE D. A. ROBINSON,
Director of Finance, County of Albemarle.

January 3, 1952.

I am in receipt of your letter of December 26, in which you ask the following question:

"As you may know the County of Albemarle operates under the county executive form of county organization and government as provided for in Sections 15-272 to 15-304. I shall appreciate your opinion as to
whether or not a county finance board is required in a county operating under the above county form of government or whether the Board of County Supervisors under Section 15-288(e) acts in its stead."

In my opinion, the effect of Section 15-288(e) is to confer upon the Board of County Supervisors of a county operating under the county executive form of government the authority to designate what banks or trust companies shall be depositories for county funds. Indeed, it seems to me that the section confers upon the Board of County Supervisors substantially all of the powers and duties of the County Finance Board in counties generally. While I can find nothing that abolishes the County Finance Board in these counties, it would appear that, if such a Board were in existence, it would have no duties to perform. Therefore, it would appear that nothing would be accomplished by setting up such a Board.

COUNTIES—Payment of court cost in suits to collect taxes. (F 262) 211

June 5, 1952.

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.

This is in reply to your letter of May 29, from which I quote as follows:

"Under date of May 21st I received a letter from Honorable J. S. Andrews, Trial Justice of Giles County, which reads as follows:

"Mr. C. M. Hale, Treasurer of Giles County, asked me today if the county would have to pay costs for institution of civil suits to collect taxes.

"I do not recall any instances of such suits being instituted in our county except one, and the county did pay the costs.

"Will you please advise me if suits are instituted in the Trial Justice Court to collect taxes due Giles County, should we collect the usual civil costs?"

"Will you please give me your opinion as to whether trial justice court costs involved in suits instituted by a county for the collecting of taxes are required to be collected by a trial justice."

I can find no statute which exempts a county from the payment of costs in a trial justice court where suits are instituted for the collection of county taxes and in the absence of such a statute it is my opinion that the county should pay the costs collectible by the trial justice. Of course, where the judgment goes against the taxpayer, the costs will ultimately be paid by him.

CRIMES—Sex Offenders, Constitutionality of proposed legislation. (F 85 c) 78

October 24, 1951.

HONORABLE JOHN B. BOATWRIGHT, JR.,
Director, Division of Statutory Research and Drafting.

I have your recent letter in which you enclosed a draft of a Bill which the Commission to Study Sex Offenses created by the last General Assembly is considering. The title of the Bill is as follows:

"To protect the public from certain dangerous criminals; and to this end to define the dangerous sex offense and the dangerous sex offender;
to provide for the detection, detention, care and treatment of such persons; to provide for the hearing and committal of such persons to certain institutions, the conditions under which they shall be held; to provide for the return of such offenders to the committing court and the disposition thereof; to require the furnishing of counsel to such offenders and the provision of certain other assistance; and to repeal certain acts.”

Briefly summarized the proposed measure defines a dangerous sex offender as a person convicted of a felony punishable by death or life imprisonment and sexual in nature. After conviction, but before sentence, if the court has reason to believe, from certain examinations and reports provided for in the Bill, that the convicted person is a dangerous sex offender, it shall at the time and place set for sentencing hear evidence on that question. If the court finds that the accused is not a dangerous sex offender, sentence is imposed in accordance with the verdict of the jury, but, if it is found that the accused is a dangerous sex offender, he shall be committed to the Commissioner of Mental Hygiene and Hospitals for confinement in a mental hospital for a period not to exceed the period of the sentence. During such detention the accused shall be treated in an effort to improve his condition and, if the Commissioner finds that during detention the accused has improved to such extent as not to constitute a danger to society, he shall return him to the committing court for commitment to a penal institution for the remainder of his term unless released by pardon, parole or otherwise. From the judgment of the court that the accused is a dangerous sex offender and so committing him an appeal to the Supreme Court of Appeals may be had as provided by law.

If the Commissioner finds no improvement in the condition of the accused during the term fixed by the judge or jury, he shall, shortly before the expiration of such term, have him examined by a psychiatrist and return him to the court and file with the court the report of the psychiatrist. The court then sets a time for another hearing, at which time it considers the record of the trial, the history of the accused while in the care of the Commissioner and such other evidence as may be relevant. On the basis of the evidence if the court finds that the accused will not be a danger to society if released, it shall order his release. If the finding is that the accused will be a danger to society if released, the court is to return him to the mental institution to be further detained until such time as he shall be sufficiently improved as not to constitute such a danger, the declaration of improvement to be made to the court by the Commissioner, whereupon the court shall enter an order releasing him. From the judgment of the court recommitting the accused to the mental institution an appeal may be had to the Supreme Court of Appeals as provided by law.

I might add that the Bill preserves the right of the accused to counsel, to examination by psychiatrists of his own choice and to the introduction of other evidence in his behalf. Likewise the accused and his counsel have access to the reports of the Commissioner and those of the psychiatrists appointed by him or the court.

You state that the Commission has directed you to seek my opinion “as to whether or not the Bill is constitutional” and you call my “particular attention * * * to the provision for indeterminate commitments to mental institutions in certain cases.” I shall confine myself principally to the specific question raised.

A number of states have attempted to deal with the problem of sex offenders, variously described as criminal sexual psychopathic persons, sexual psychopaths, psychopath offenders, psychopathic personalities, or, as in the proposed Bill, dangerous sex offenders. The bases of jurisdiction rest in some cases upon a charge of a criminal offense, in others upon conviction of such offense, and in still others no crime or charge thereof is necessary. The purpose of this class of legislation is to segregate and commit these sex deviates to appropriate institutions for detention and treatment until such time as they will no longer be a menace to society. There have been several cases decided by State courts of
last resort involving State statutes substantially similar to the proposed Bill, and these cases hold that these sex deviates, while dangerous to society, may be committed to and confined in mental institutions, although they cannot be said to be insane. In other words, they are placed in a special class and treated in many respects as if they were insane. And this is true whether or not there is a charge or conviction of a crime. I must conclude, therefore, that there is no constitutional defect in what you term "indeterminate commitments to mental institutions" of these sex deviates.

I feel, however, that I should call your attention to the case of People v. Frontzak, 286 Mich. 51, 281 N. W. 534. There was involved a statute providing for the commitment to a State hospital after conviction of a sex offender. While the Michigan statute differs in several respects from the proposed Bill, it does provide that the court, without a jury as in the case in the Bill you submit, should determine whether cause for commitment existed. In a five to three decision the court held the statute unconstitutional apparently for the reasons, that the statute was contained in the criminal procedure code and because the indefinite confinement was regarded as an added penalty for crime, and so the accused was entitled to a jury trial on the question of whether or not he should be committed. The dissent was a strong one holding that the segregation of this class of persons was not a punishment for crime and that the determination of the question of whether the offender should be committed was not a criminal trial, but was a civil inquest in the nature of proceedings to determine insanity, and so constitutional limitations applicable solely to trials for crimes were not violated. The minority opinion appears to me to be better reasoned. Certainly upon the authority of this single case, decided by a divided court, I do not feel that I should advise that the proposed Bill is unconstitutional.

CRIMINAL LAW—Punishment for "drunk in public". (F 148) 38

September 10, 1951.

HONORABLE L. BROOKS SMITH,
Trial Justice of Accomack County.

This is in reply to your letter of August 28, 1951 in which you inquire whether instead of charging a person with being drunk in public and using abusive language, neither of which is punishable by confinement in jail, it would be possible to charge him with "breach of the peace" and thereby enable the court to impose the general misdemeanor punishment.

I can fully appreciate your motive in cases involving persons who repeatedly come before you for being drunk in public but, inasmuch as our Legislature has made specific provision for the punishment of these two offenses, I do not believe it would be proper to follow the procedure suggested.

CRIMINAL LAW—Recognizances always run to Commonwealth. (F 27) 146

March 25, 1952.

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

I am in receipt of your letter of March 22, from which I quote as follows:

"Please advise me as to whether or not there is any provision in the law whereby cities can pass an ordinance making bonds in criminal cases
payable to the city. It is my impression, and has always been, that a person going on another's bond recognizes himself indebted to the Commonwealth of Virginia and I know of no provision whereby he can recognize himself indebted in any other manner other than to the Commonwealth. Of course, we have a number of prosecutions under city warrants; however, in all these warrants the bond is the same as if it were a Commonwealth case rather than a city case and the one giving the bond and the surety on the bond both recognize themselves indebted to the Commonwealth in the amount of the bond."

My impression is the same as yours, namely, that recognizances in criminal cases are always made payable to the Commonwealth. I have never heard of any other practice. Furthermore, this practice seems to be incorporated in the law by Section 19-103 of the Code, the first sentence of which is "Recognizances in criminal cases shall be payable to the Commonwealth of Virginia."

CRIMINAL LAW—Reports of Medical Examiner and coroner as evidence.
(F 96) 210

June 5, 1952.

HONORABLE MARK D. WOODWARD, Attorney for the Commonwealth, Page County.

This is in reply to your letter of May 27 in which you requested my opinion as to whether section 19-26 of the Code applies only to reports of the Chief Medical Examiner in connection with post-mortem examinations or would it be applicable to reports of the chemical analysis of the content of blood to be used in connection with a driving under the influence case or to a report concerning the presence of spermatozoa in smears to be used in connection with an alleged rape case.

Section 19-26 of the Code reads as follows:

"Reports of investigations made by the Chief Medical Examiner or his assistants or by coroners, and records and reports of autopsies made under the authority of this chapter, shall be received as evidence in any court or other proceeding, and copies of Medical Examiner or any coroner, when duly attested by the Examiner or coroner in whose office the same are, shall be received as evidence in any court or other proceeding for any purpose for which the original could be received without any proof of the official character of the person whose name is signed thereto." (Italics added.)

It is my opinion that the italicized language quoted above modifies only the "records and reports of autopsies" and that reports made by the Chief Medical Examiner, his assistants or by coroners are required to be received as evidence in accordance with section 19-26 when such reports are made by such officers in their official capacity.

I call your attention to section 19-17 of the Code which not only provides for post-mortem examinations to be made under the supervision of the Chief Medical Examiner but also provides for the conduct of pathological, bacteriological and toxicological investigations. In my opinion the admission into evidence of such reports would be governed by section 19-26.

Section 52-11.1 of the Code requires that the laboratory and technical staff of the Department of Health and the Chief Medical Examiner shall be afforded the Department of State Police and that such assistance, cooperation and facilities as is requested by the Superintendent of State Police must be furnished.
Accordingly I am also of the opinion that reports of investigations made by the Chief Medical Examiner pursuant to this section would also be governed by the provisions of section 19-26.

Chapter 493 of the Acts of Assembly of 1952, which becomes effective June 28, amended section 52-11.1 by adding a new paragraph which reads as follows:

"The State Health Commissioner may, in his discretion, furnish to any other law enforcement officer or agency, such assistance, cooperation and facilities as are afforded by the laboratory and technical staff of the Department of Health and the Chief Medical Examiner."

In conclusion it is my opinion that if the reports to which you refer have been made under authority of any of the statutes cited above they should be received as evidence in any court or other proceeding in accordance with section 19-26.

CRIMINAL LAW—Sex Crimes—Duty of Court to commit defendant. (F 85) 51

September 13, 1951.

MR. JOHN B. BOATWRIGHT, JR.,
Secretary, Virginia Advisory Legislative Council.

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

"The General Assembly of 1950 created a Commission to devise proper ways and means of reducing crimes in which sex is an element. It is understood that you are a member of this Commission.

"At a previous meeting of the Commission, attention was directed to the provisions of Chapter 463 of the Acts of Assembly of 1950, which added certain sections to the Code. I have been requested by the Commission to obtain your opinion as to the effect of the three Code sections added by the Chapter referred to on the disposition of prisoners convicted in cases in which the judge of the court has had a mental examination made of the defendant. It is particularly desired to know whether the judge, after such an examination, must commit the defendant to a penal or a mental institution."

The material portions of the Act to which you refer are quoted below for clarity:

"§ 53-278.2. In the case of the conviction in any court of record or any person for any criminal offense which indicates sexual abnormality, the trial judge may on his own initiative, or on application of the Commonwealth's Attorney, the defendant, or counsel for defendant or other person acting for the defendant, defer sentence until the report of a mental examination of the defendant can be secured to guide the judge in determining what disposition shall be made of the defendant."

"§ 53-278.3. The trial judge shall have power to require the Department of Mental Hygiene and Hospitals to have a mental examination made of such person, and report thereon, to be made by a psychiatrist employed in any State hospital or in any mental hospital maintained by the State. Such report, when furnished to a judge, shall be available to the counsel for defendant and to the Commonwealth's Attorney. The psychiatrist making the examination shall not be entitled to any compensation for making the examination and the report but shall be paid his actual ex-
penses on vouchers approved by the trial judge, out of funds appropriated for criminal expenses."

"§ 53-278.4. Nothing contained in this law shall be construed to conflict with or repeal any statute in regard to the Department of Mental Hygiene and Hospitals, and this law shall be administered with due regard to the authority of, and in cooperation with, the Commissioner of Mental Hygiene and Hospitals."

In my opinion the Act is merely one to provide machinery whereby the trial judge may seek or be given information which will be helpful to him in disposing of such cases in a proper manner. Indeed, the Act states that the report of the mental examination can be secured to "guide the judge in determining what disposition shall be made." I do not feel that this Act in any way compels the judge to commit the defendant to either a penal or a mental institution after such examination.

CRIMINAL LAW—Standing in highway with loaded gun. (F 233) 96

December 6, 1951.

Honorable A. Laurie Pitts, Jr.,
Commonwealth's Attorney, Buckingham County.

This is in reply to your letter of November 20 requesting my opinion as to whether hunters have a legal right to stand with guns in public roads and roads adjacent to the posted property for the purpose of shooting game.

The statute which appears to apply is § 33-287 of the Code of Virginia, which provides:

"If any person shoot in or along any road, or within one hundred yards thereof, or in a street of any city or town, whether the town be incorporated or not, he shall, for each offense, be fined not less than five dollars."

The gravamen of the offense under the foregoing statute is the shooting in or along any road or within a hundred yards thereof. Accordingly, it is my view that sufficient evidence of the actual shooting of a gun would be required to establish a conviction under the foregoing penal statute. Moreover, an examination of the Code of Virginia does not reveal the existence of any statute under which hunters could be convicted for standing on a road with a gun.

CRIMINAL LAW—Taxing cost of prosecuting attorney in appeal from conviction for violating town ordinance. (F 60) 98

December 6, 1951.

Honorable C. N. Booth,
Clerk, Circuit Court of Washington County.

I am in receipt of your letter of November 3, from which I quote as follows:

"Whenever a case is appealed from the trial court of a town, the town pays an attorney to prosecute the case in the Circuit Court. The attorney's fee is much greater than the $5.00 which the Commonwealth
assesses as costs for the Commonwealth's Attorney for a misdemeanor which he prosecutes for the Commonwealth.

"In the event of a conviction in the Circuit Court of an appeal from a town trial court can the entire prosecuting attorney's fee be taxed as costs to the defendant?"

I know of no statutory authority for the taxing of a prosecuting attorney's fee against a defendant in the situation you describe. If the authorities of the town disagree and can refer me to a statute which provides for the taxing of such a fee, I shall be glad to give the matter further consideration.

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DEATH BY WRONGFUL ACT—Statutory limitation on recovery. (F 142) 187

HONORABLE R. WINSTON BAIN,
Member of the House of Delegates.

May 19, 1952.

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

"I am writing concerning Title 8, Section 636, of the Code of Virginia, relating to amount and distribution of damages in actions for death by wrongful act. As you know, this act was amended by the recent General Assembly increasing the maximum damages to $25,000.00. The new act may be found under Chapter 60, on page 83, of the Advance Sheets of the Acts of the General Assembly.

"The question which concerns me is whether or not a suit brought now for death by wrongful act for $15,000.00 could be amended after June 28th, asking damages for $25,000.00. In other words, would the personal representative bringing a suit at any time within the statutory period of one year from the date of death, where the death occurred prior to June 28, 1952, be bound by the present limitation of $15,000.00, or would it be proper to bring a suit for $25,000.00?

"Appreciating your advising whether or not you consider this act to be retroactive, at your convenience, I remain, with kindest personal regards."

The object of the Virginia death by wrongful act statutes (§§ 8-633 through 8-640 of the Code) was to give the right of action where none existed at common law. In other words, the statute confers the right itself. Brammer v. Norfolk, etc. R. Co., 107 Va. 206. Such statutes form no exception to the well established rule that a statute will not be given a retrospective effect by construction unless the intent that it shall operate retrospectively plainly appears upon its face. 16 American Jurisprudence, § 58. In 16 American Jurisprudence, Death, § 189, it is further stated that:

"The rule that a statute will not be given a retrospective effect by construction unless the Legislature has so explicitly expressed its intention to make it retrospective as to leave no reasonable doubt thereof is rigidly enforced in regard to statutes enlarging the amount recoverable in actions for wrongful death."

See also 25 Corpus Juris Secundum, Death, § 20. I can find nothing in the 1952 amendment to § 8-636 of the Code increasing the amount of recoverable damages from $15,000 to $25,000 to indicate that the General Assembly intended the increased limit to have a retrospective effect.
Applying the principles to which I have referred, it is my opinion that, where a right of action accrues under the death by wrongful act statutes prior to the effective date of the 1952 amendment (June 28, 1952), the amount of the recovery is limited to $15,000.

Of course, you will understand that in expressing this opinion I am not attempting to pass upon any question now pending before a court, as it is my invariable rule not to express an opinion in such a case.

EDUCATIONAL INSTITUTIONS—Segregation, equal facilities in another state school. (F 354) 212

MR. ALVIN D. CHANDLER,
President, College of William and Mary.

June 6, 1952.

This will acknowledge receipt of your letter of June 4, from which I quote in part as follows:

"Clyde Harper Jones, a Negro, a graduate of Virginia State College in 1941, has applied for admission to a program of graduate study in Education in Elementary and Secondary School Administration. This graduate program is offered at Virginia State College in Petersburg. Mr. Jones has been advised that since the program is available to him at Virginia State College we are unable to accept his application for admittance to the College of William and Mary Summer Session."

Assuming as you do that the applicant is academically qualified to pursue the course of graduate study which he desires, and that facilities for such course are provided at the Virginia State College in Petersburg, and also that the facilities at the two institutions are substantially equal, your advice to the applicant as set forth above is in keeping with the law and the policy of this Commonwealth. Under these circumstances, the College of William and Mary would have no right to accept the applicant for admittance to that College.

EDUCATIONAL INSTITUTIONS — Student Loan Fund — Virginia State College. (F 264) 196

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

May 6, 1952.

This is in reply to your letter of May 2, from which I quote as follows:

"Dr. R. P. Daniel, President of Virginia State College, has asked me whether the student loan fund of Virginia State College, at Petersburg, can be used for the establishment of scholarships at the Norfolk Branch of this institution. No appropriation for student loan fund has been made to the Norfolk Branch.

"I quote the following paragraphs from Dr. Daniel's letter of April 30th:

"In view of the enactment of the recent General Assembly by which unobligated loan funds under certain conditions are made available for scholarships, we have naturally received several inquiries about scholarship aid. However, the demands for loans are so great on the
part of the students both at Petersburg and at the Norfolk Division that we are writing to clarify the status of our authority with reference to making available the loan funds to the Norfolk Division.

"At the present time the appropriations to the loan fund are made as a part of the Virginia State College at Petersburg—212. Since no appropriation is made for loan funds at the Norfolk Division, we are of the opinion that since this is a special fund it may well be drawn on by students of the College whether at Petersburg or Norfolk so long as there is a central administration of the fund. We would certainly prefer to extend loans to Norfolk students in priority to scholarship grants.

"I am writing, therefore, to ascertain if there is any barrier to our extending loans from this fund to the students at the Norfolk Division as well as to those at Petersburg."

"Will you please write me whether in your opinion the unobligated balance in the student loan fund of the Virginia State College, at Petersburg, can be used, under Section 13-a of the general Appropriation Act for the 1952-54 biennium, to establish scholarships at the Norfolk Branch of this institution."

Section 13-a of the Appropriation Act of 1952 provides that "Each institution to which appropriations for student loans are made under this Act is authorized to employ not exceeding twenty-five per centum of the unobligated balances in such fund available to the institution * * * to establish a system of scholarships for graduates of Virginia high schools in accordance with the terms hereof."

The Virginia State College, at Petersburg, is an "institution" to which appropriations for student loans are made under the Act. The Norfolk Division is simply a branch of the institution. Students both at Norfolk and Petersburg are students of the institution. I can, therefore, see no reason why the unobligated balances in the student loan fund of the Virginia State College may not be used to establish a system of scholarships at the Norfolk Division as well as at Petersburg.

ELECTIONS—Absent Voting—By members of armed forces. (F 100 h) 217

Honorable Levin Nock Davis,
Secretary, State Board of Elections.

This is in reply to your letter of May 29, 1952, in which you request my opinion on several questions which have arisen in connection with the new "War Voters Law", as contained in Chapter 509, Acts of Assembly of 1952.

Your first question relates to the authority of local electoral boards to issue absentee ballots to members of the armed forces. On September 21, 1948, in an opinion to Mr. C. W. Newton, Registrar, Bluefield, Virginia, which was later explained and fully discussed in an opinion to His Excellency Governor Battle under date of February 12, 1951, this office held that, by adopting the War Voters Act of 1945, the Legislature had provided special machinery whereby members of the armed forces could secure absentee ballots and that, therefore, the laws dealing generally with applications for absentee ballots were not applicable to members of the armed forces. It follows that by adopting a new war voters Act in 1952 the Legislature has again provided special machinery and the general absent voter's provisions do not apply to members of the armed forces while this Act remains in force.

It is clear from a reading of the Act that this is the result intended by the Legislature. The machinery, safeguards and procedure established indicate a desire on the part of the Legislature to provide a central office for such ballots in
order to eliminate duplication of effort and confusion and to provide a readily understandable and convenient procedure for service personnel.

In view of the fact that the effect of this ruling may be to deny to some such persons the privilege of voting should they erroneously make application to a local board rather than to the State Board of Elections, I would suggest that you request all local boards to forward any such applications to your office for appropriate action. In view of the public policy as expressed in the 1952 Act, I believe such action on your part would be entirely proper.

You next inquire whether you should accept an application made within the five-day period prior to the election. My answer is in the affirmative. As I stated in response to your first inquiry, the general statutes regarding absent voters are not applicable to members of the armed forces, and I can find no time limitation on applications under the 1952 Act.

In answer to your third question, I am convinced that the language of the Act under consideration clearly indicates that a separate application must be made for each election. The only exception to this rule is contained in § 6 of the Act which provides for the automatic furnishing of ballots for a run-off primary to members of the armed forces who voted in such manner in the first primary. The existence of this feature of the law indicates that in all other cases separate applications must be made for each election. Incidentally, this feature regarding second primaries was probably one of the reasons for providing a central office for such ballots. The period of time between the first and second primaries is so brief that any other procedure would almost certainly have made it impossible for ballots to reach members of the armed forces in time to vote in a second primary.

Your final question is whether or not a member of the armed forces may make application to the State Board of Elections in person and be given a ballot to vote in person. Clearly, such person may make application in person but, in my opinion, the ballot must be mailed to such person and voted and returned by him in the manner expressly provided in the law. Departure from the procedure outlined by the Legislature by allowing the person to vote in person would by-pass certain of the safeguards provided in the Act, and I conclude, therefore, that the ballot must be delivered and returned by mail.

ELECTIONS—Absent Voting—Delivering ballot in person to electoral board.

(F 100 a) 59

HONORABLE CLIFTON C. SIMMS,
Treasurer, Grayson County.

September 24, 1951.

I am in receipt of your letter of September 21, from which I quote as follows:

"Is it legal for an applicant for a mail ballot to have the application signed by the registrar and deliver it in person to the Electoral Board or does the Registrar have to mail it to the Electoral Board?"

Under section 24-322 of the Virginia Code, the application may be handed by the applicant himself to the registrar in person.

Upon receipt of the application from the applicant in person, the registrar shall ascertain whether the applicant is duly registered in his precinct and enroll his name and address on the list kept by the registrar for that purpose. He shall then make the proper notation, as required by section 24-327, signifying his approval of same and return it to the applicant for delivery to the secretary of the electoral board.

Your question, therefore, is answered in the affirmative.
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ELECTIONS—Absent Voting—Return of ballot by voter.

ELECTIONS—Members of armed forces—Absent voting, capitation tax, registration. (F 100 a) 23

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

August 10, 1951.

I have your letter of August 7, in which you ask my opinion on the following question:

"With regard to voting by absentee ballot, Section 24-334 of the Virginia Code provides that the ballot shall be returned to the Electoral Board, either by registered mail or by delivery in person. I would like to have this section construed as to whether or not a ballot can be registered and mailed to a particular member of the Electoral Board, or delivered to a particular member of the Electoral Board in person."

Section 24-327 of the Code provides, among other things, that when the Electoral Board sends a ballot to an absent voter it shall enclose "a properly addressed envelope for the return of the ballot to the Electoral Board by registered mail or by the applicant in person." Section 24-334 provides that when the absent voter has marked his ballot and placed it in the envelope provided for the purpose he shall in turn place this envelope "within the envelope directed to the Electoral Board, which shall then and there be sealed, and shall be registered and mailed to the Electoral Board, or delivered personally by the voter to the Electoral Board." My information is that these envelopes for use in returning the ballot to the Electoral Board are addressed to the Board or its Secretary at the office of the Board in the county or city in which the voter resides.

In view of the above statutory provisions it is my opinion that, if the voter mails his ballot, he should use the envelope provided for this purpose, which, as I have above stated, is addressed to the Board or its Secretary at the office of the Board. I do not think that the statute contemplates that the voter should alter the address shown on the return envelope by directing the envelope to an individual member of the Board at the residence or place of business of such member. Likewise, I think that, if the voter chooses to deliver in person the envelope containing his ballot, he should deliver it at the office of the Board as shown on the envelope.

You also ask the following questions:

"** In this regard, I am particularly interested in whether or not a soldier would have to forward his application to the Registrar, or whether he could send it direct to the Electoral Board. Also, in view of your ruling that it is not necessary for a soldier to register or pay poll tax, I would like to know if this applies where the soldier has been discharged, and if so, what date of discharge would determine whether or not he is entitled to vote without registering or paying poll tax."

Section 24-327 of the Code provides that the application for an absent voter's ballot shall be made to the Registrar. I think that this plain statutory requirement should be followed.

Section 2, Article 17, of the Constitution provides that a member of the armed forces while in active service in time of war is relieved from the payment of poll taxes for every year during any part of which such person is a member of said armed forces and for the three years next preceding such person's discharge from said active service. Thus, you will see that a member of the armed forces discharged from active service during any year is relieved from the payment of the poll tax for that year.

As to registering, Section 1, Article 17, of the Constitution provides that no member of the armed forces while in active service in time of war shall be re-
required to pay a poll tax or to register as a prerequisite to the right to vote. The Constitution does not provide that a member of the armed forces discharged during a year shall not be required to register after his discharge. I am, therefore, of opinion that a member of the armed forces discharged during any year should register after his discharge if he desires to vote.

For your information, I am enclosing copy of an opinion rendered under date of February 12, 1951, to the Governor with reference to members of the armed forces being allowed to vote without payment of the poll tax or registering.

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**ELECTIONS—Campaign Literature—Single letter to editor. (F 2) 131**

February 15, 1952.

**HONORABLE HARRY F. BYRD, JR.,**
Senate Chamber.

This will acknowledge receipt of your letter of February 14. You desire to know "whether a single letter to the editor of a newspaper could be construed as campaign literature."

I have carefully examined the bill in its state when it was referred to the Committee on Privileges and Elections. I am assuming that it has not been since amended.

The bill does not define "campaign literature." It does define "writing." The broad catchall is embraced by the language found in lines 13 and 14, namely, "or any other written, printed or otherwise reproduced statement."

A single letter to the editor of a newspaper concerning a "candidate" as defined, which letter is published, would have to bear the name and address, "or otherwise plainly identify the person responsible" for its preparation and distribution.

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**ELECTIONS—Candidates—Clerk has duty to certify names of candidates properly filing without passing on their eligibility. (F 100 b) 39**

September 10, 1951.

**HONORABLE EMBRY E. FRIEND,**
Clerk, Pittsylvania Circuit Court.

I am in receipt of your letter of September 8, from which I quote as follows:

"Mr. Preston Moses who was a candidate for Clerk of Pittsylvania County in the Primary of August 7, 1951, and who filed the form of declaration prescribed by Sections 24-371 and 24-372 of the Virginia Election Laws, and who was defeated in the Primary, has now filed a declaration and petition requesting that his name be placed on the ballots in the coming general election to be held November 6, 1951.

"Please advise me if I am required as Clerk of Pittsylvania County to certify the name of Mr. Preston Moses as a candidate for Clerk to the Pittsylvania County Electoral Board."

As you are aware, Section 24-131 requires that the person embraced thereby who intends to be a candidate for any office shall give the notice, which notice shall in all respects be in the same form as that which candidates embraced by Section 24-130 are required to give to the State Board of Elections. Since the person named by you is not a party nominee, he is also required to file along with his notice of candidacy a petition therefor signed by fifty qualified voters of his city or county.
The requirement of Section 24-135 that the clerks shall notify the electoral boards of their respective counties and cities that the preceding sections herein referred to have been complied with is mandatory. The performance by the clerk of his duties therein prescribed is a ministerial action on his part not involving the exercise of discretion, assuming, of course, that the notice of candidacy and the petition meet the requirements of law.

The clerk is not an election official who is charged with the duty of preparing the ballots to be used in the general election; therefore the invoking of Sections 24-371 and 24-372 is the sole function of the election officials who are charged with the duty of preparing the ballots to be used in the general election.

The conclusions herein stated are fortified by the opinions of former Attorney General Abram P. Staples addressed to the Honorable Walter L. Hopkins under date of August 21, 1943, and to the Honorable A. H. Goff under date of August 26, 1943, and to be found in the report of the Attorney General 1943-1944, pages 59 and 60.

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**ELECTIONS—Candidate—Candidate defeated in primary cannot run in general election for same office.** (F 100 b) 52

Mr. C. D. Harvey,  
Member of Pittsylvania County Electoral Board.

Mr. Joe Francis,  
Member of Pittsylvania County Electoral Board.

This is in reply to letters from each of you in which you seek my opinion on the following questions:

It seems that a defeated candidate in the Democratic Primary of August 7 last has filed with the County Clerk his notice of candidacy and petition, pursuant to Sections 24-130 to 24-133 inclusive, indicating that he is a candidate for the same office in the general election to be held on Tuesday, November 6, 1951. I am informed that the candidate's declaration of candidacy in the August Primary followed the form prescribed by Section 24-371 of the Code. The Clerk of the Court has certified to the Electoral Board the name of this candidate who has filed his notice of candidacy in the general election. It being the duty of the Electoral Board to prepare the ballots to be used in the general election, you desire to know whether the name of this candidate should be placed on the official ballot.

Section 24-370 of the Code, dealing with primary elections, requires a candidate for nomination for an office in a primary to file a written declaration of candidacy, and Section 24-371 provides that this declaration "shall be in substantially the following form: 'I, .................................., of the county (or town or city of) ........................................, a member of the .................... party, declare myself to be a candidate for nomination to the office of .................................. to be made at the primary to be held on the ................ day of ................ If I am defeated in the primary I hereby direct and irrevocably authorize the election officials charged with the duty of preparing the ballots to be used in the succeeding general election not to print my name on said ballot.'" Section 24-372 requires the above declaration to be acknowledged before some officer authorized to take acknowledgments to deeds or to be attested by two persons who can write signing as witnesses.

I do not think that I should waste many words in advising you that, in my opinion, you should not print the name of this defeated candidate in the primary election on the ballots to be used in the general election. The only way by which I could rule otherwise would be to say that neither the candidate nor the statute (Section 24-371) meant what the language used plainly says. The defeated...
candidate, pursuant to law, has directly and irrevocably authorized the Electoral Board not to print his name on the ballots. For me by quasi judicial fiat to cancel or overrule this direction and authorization would be making a mockery of the primary system. This I will not do.

ELECTIONS—Candidates—Filing as candidate when nominated by convention. (F 100 B) 22
August 7, 1951.

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

I am in receipt of your letter of August 4, from which I quote as follows:

"Referring to Sections 24-131, 24-133 and 24-134 of the Code, I understand that where candidates for county and magisterial district offices have been nominated by convention said candidates do not have to file with the clerk for said offices, but that if candidates' names are filed by the chairman of the party that is all that is necessary.

"In cases where a candidate is running as an independent I understand that he must file with the clerk, together with a petition signed by fifty qualified voters.

"Sections 24-131 and 24-134 seem to be contradictory, as in Section 24-131 it apparently says that the candidate shall give the notice, while in 24-134 it says the chairman of the party may do so.

"Several candidates have already appeared in my office who were nominated by convention and desire to file their names as candidates with me and I have advised them that the chairman of the party should file the same, but your opinion in writing would be very helpful."

I agree with the conclusions reached by you. Sections 24-131 and 24-134 of the Code are not contradictory when you consider that Section 24-134 constitutes an exception to Section 24-131 in so far as candidates nominated by a party are concerned.

ELECTIONS—Candidates—Filing fee when salary of office is rising. (F 100 b) 160
April 2, 1952.

HONORABLE JESSE W. DILLON,
State Treasurer.

This will acknowledge receipt of your letter of April 1, 1952, relative to the fee to be paid by candidates who file a declaration of candidacy for the office of Representative in the Congress of the United States, subject to the Primary Election to be held on July 15, 1952.

Section 24-398 of the Code provides that such candidate, prior to the filing of his declaration of candidacy, shall pay a fee "equal to two per centum of one year's salary attached to the office for which he is a candidate."

Title 2, Chapter 3, Section 31, United States Code Annotated, provides that the compensation of Senators and Representatives in the Congress shall be at the rate of $12,500 per annum. This amount is the only salary or compensation attached to such office.

Section 31-a relates to expense allowances for Senators and Representatives. This section provides an expense allowance of $2,500 per annum "to assist in defraying expenses relating to, or resulting from, the discharge of his official duties,
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for which no accounting, other than for income tax purposes, shall be made." It is further provided that this sum be paid in equal monthly installments. This expense allowance was made subject to income tax purposes by Act of Congress of October 20, 1951. The effective date of this amendment is Noon, January 3, 1953.

It will be seen that compensation of members of Congress and the expense allowance are dealt with in two separate and distinct sections of the Federal Code. The only compensation or salary of a member of Congress is that specified in Section 31, namely, $12,500. The expense allowance provided for in Section 31-a, though made subject to income tax purposes, is not salary or compensation “attached to the office” for which the person filing declaration is a candidate. While the amendment to Section 31-a will not become effective until January 3, 1953, that fact does not appear material in answering your inquiry. If it were now in effect, the same answer would be forthcoming.

It is my opinion that the fee required by Section 24-398 of the Code of 1950 must be equal to two per centum of $12,500.

ELECTIONS—Candidates, Filing time in Town Election. (F 100 b) 206

HONORABLE JOHN A. K. DONOVAN,
State Senator.

This is in reply to your letter of May 22, 1952, in which you request my opinion on the following question which I quote from your letter:

"Section 4(b). Any person who intends to be a candidate for any town office shall at least ten days prior to such election, notify the mayor or town clerk in writing, attested by two witnesses, of such intention, designating the office for which he is a candidate. No person not announcing his candidacy as above provided shall have his name printed on the ballots for such election."

"This Charter of the Town of Vienna was approved by the General Assembly of Virginia April 1, 1940.

"Section 24-131 of the Code of Virginia, 1950, provides:

"'Any person who intends to be a candidate for any office not embraced in the foregoing (24-130) section at any election, shall give notice at least sixty days before the election if it is to be a general election .......... to the county clerk or clerks of the county or counties, and to the clerk or clerks of the corporation courts of the city or cities whose electors vote for such office, which notice shall be in the same form as that described by the preceding section and required to be given to the State Board of Elections."

"It is my opinion and also that of the officials of the Town of Vienna that this Section 24-131, as well as the foregoing Section 24-130, do not apply to incorporated towns."

I have examined the provisions and legislative history of § 24-131 of the Code of Virginia. Since the approval of the Charter of the Town of Vienna in April, 1940, § 24-131 has been twice amended and re-enacted. On neither occasion did the Legislature expressly repeal conflicting provisions of law. One cardinal provision of statutory construction is that repeal by implication is not favored. Especially is this true when it is sought to repeal special legislation by general legislation, the theory being that the Legislature having acted in a given way on a particular subject and having made conflicting provision in a more general subject, which also embraces the particular subject, it is more reasonable to assume
that the Legislature intended the special provision concerning the particular subject to stand along side of the general legislation on the broader field. It should be observed that the sixty-day provision for filing in State, county and city elections was already a part of the general law at the time the Charter of the Town of Vienna was approved. This fact adds strength to the conclusion that the Legislature intended a different filing time to apply in the town, and I have been unable to find any other provision of law which would require a different result. It is, therefore, my conclusion that any person intending to be a candidate for any town office in Vienna should announce his candidacy as provided in § 4-b of the Charter.

ELECTIONS—Candidates—Time for filing.  (F 100 b) 181

HONORABLE E. T. WHITE,
Clerk of the Circuit Court of Norfolk County.

This is in reply to your letter of April 17, 1952, in which you state that during the last Legislature a local bill was passed for Norfolk County requiring the Tie-breaker of the Board of Supervisors to be elected in the November general election, and you inquire whether a candidate for this office should file with the chairman of the Committee ninety days before the primary election.

Section 3 of House Bill 247 reads, in part, as follows:

"* * * During the effective period of this act in order that ballots may be printed in primary elections in ample time for the transmission of same to absent members of the armed forces, and their return, all declarations of candidacy required by Chapter 14 of Title 24 of the Code of Virginia to be filed by candidates in primary elections shall be filed at least ninety days before the primary, regardless of whether the candidacy is for an office filled by election by the voters of the State at large or of a district, county, or city. * * *"

Under the provisions of this section of the 1952 Act, it is my opinion that in order for a candidate for this office to qualify to have his name printed on the primary ballot he should file with the chairman of the County Committee ninety days prior to the primary election.

ELECTIONS — Capitation Tax — Effect of repeal of tax on new residents.  (F 100 c) 159

HONORABLE CHARLES R. FENWICK,
Member of State Senate.

I am in receipt of your letter of March 26, from which I quote as follows:

"Senate Bill No. 228 repealing Section 58-51 of the Code of Virginia was passed by the General Assembly without an emergency clause. The provision which was repealed relates to the requirements that the capitation tax of $1.50 be levied upon every person not less than 21 years of age who moves into Virginia and becomes a resident regardless of whether he was a resident on the 1st day of January of such year or becomes a resident thereafter during such year.

"The question has arisen as to whether a person who moved into Virginia during 1951 and will have been in the State a year by November
4, 1952, will be eligible to vote in said election if they fail to pay their poll tax for the year 1951 but would be otherwise qualified to vote in the November election.

"In other words, will persons moving into the State in 1951, in view of the repeal of Section 58-51 be required to pay the capitation tax for that year on or before May 4 in order to participate in the general election."

The Bill to which you refer is Chapter 144 of the Acts of 1952 and was approved by the Governor on February 29, 1952. It does not contain an emergency clause and so does not become effective until June 28. Section 58-51 of the Code, which is repealed, reads as follows:

"Notwithstanding any of the provisions of §§ 58-4 to 58-7 or any other provisions of law, the State capitation tax of one dollar and fifty cents per annum is hereby levied upon every person not less than twenty-one years of age who moves into Virginia and becomes a resident for the year in which he first becomes a resident, regardless of whether he was a resident on the first day of January of such year or became a resident thereafter during such year."

I assume that you refer to a capitation tax for the year 1951 actually assessed against a person moving into the State during that year. It seems to me plain that this is a capitation tax assessed against such a person for one of "the three years next preceding", which he is required to pay by Section 21 of the Constitution in order to be eligible to vote in the election to be held in November, 1952. I can see no escape from this conclusion.

ELECTIONS—Capitation Taxes—New Residents—Eligibility to vote. (F 100 c) 165

HONORABLE R. L. DAVIDSON,
City Treasurer, Buena Vista.

April 8, 1952.

I have your letter of April 3, in which you ask what poll taxes a person is required to pay who became a resident of the State on the first day of March, 1949, in order to be eligible to vote in a municipal election to be held in June of this year.

Pursuant to Section 58-49 of the Code, such a person is subject to the poll tax for the year in which he becomes a resident of Virginia, namely, 1949. He is, of course, also subject to poll taxes for the years 1950 and 1951. The three years next preceding the municipal elections to be held in June are 1949, 1950 and 1951. I am of opinion, therefore, that the person you describe, in order to be eligible to vote in the June election, must have paid his poll taxes for the three years I have mentioned.

It is true that Section 58-49 of the Code was repealed at the last session of the General Assembly, but the repeal is not effective until after the June election of this year.

ELECTIONS—Capitation Tax—New residents—Repeal of tax. (F 100 c) 228

HONORABLE A. S. HARRISON, JR.,
Lawrenceville.

June 30, 1952.

This is in response to your inquiry of recent date based upon the following state of facts:
"A person moved to and took up residence in Virginia during the year 1951 but subsequent to January 1 of that year. As a prerequisite to the right of this person to vote in the July 15 primary of this year, must he have paid the State capitation tax for the year 1951 six months prior to the November, 1952, general election? This person has paid his 1952 capitation tax and has duly registered."

Section 21 of the Constitution provides, in material substance, that as a prerequisite to the right to vote a person shall have paid all State poll taxes assessed or assessable against him during "the three years next preceding" that in which he offers to vote.

Section 58-51 of the Code of 1950 is as follows:

"Notwithstanding any of the provisions of Sections 58-4 to 58-7 or any other provisions of law, the State capitation tax of one dollar and fifty cents per annum is hereby levied upon every person not less than twenty-one years of age who moves into Virginia and becomes a resident for the year in which he first becomes a resident, regardless of whether he was a resident on the first day of January of such year or became a resident thereafter during such year."


It is assumed that the 1951 State capitation tax, while assessable against the prospective voter prior to the effective date of the repeal of section 58-51, has never been assessed. While the General Assembly might have done so, it is noted that Chapter 144 of the Acts of 1952 contains no savings clause as to the tax assessable thereunder after its expiration by repeal.

I can see no escape from the conclusion that a capitation tax actually assessed against a person moving into the State during the year 1951 is a tax assessed against such a person for one of "the three years next preceding" which he is required to pay by section 21 of the Constitution in order to be eligible to vote in the November, 1952, election, and consequently the July 15 primary of that year.

Upon the expiration of section 58-51 on June 28, 1952, a tax theretofore assessable thereunder which has not been actually assessed would, in my opinion, be no longer assessable for the reason that the statute conferring express authority for the assessment no longer exists.

Upon the assumption, therefore, that the prospective voter has paid his capitation tax for the year 1952, has duly registered, is otherwise qualified and has not been actually assessed for the year 1951 prior to the expiration of section 58-51, it is my opinion that he is entitled to vote in the primary election to be held on July 15, 1952.

ELECTIONS—Dates for various elections. (F 100) 108

Mr. C. L. Booth,  
General Registrar, Danville.

This will acknowledge receipt of your letter of January 10, making inquiry relative to elections and officers to be elected during the year 1952.

The first Tuesday in August, which falls on the 5th, is the date established by law for the August primary (section 24-349).
City officers such as sergeant, attorney for the Commonwealth, treasurer, commissioner of revenue, and clerk of court, do not come up for election until 1953. (Sections 24-161—24-162). Therefore, in the August primary there will be up for nomination one member of the United States Senate and Congressman for the 4th Congressional District. Electors for President, unless there be a change in the law, are selected by convention and, of course, will not appear on a primary ballot. In the event the Senator or Congressman do not have opposition, they may be declared nominees, and, if so, will not appear on the primary ballot.

The general election is fixed by statute on Tuesday after the first Monday in November, which is November 4. On the general election ballot there will be the candidates for President of the United States, one United States Senator, and a Congressman for the 4th District. I am not advised that there are any other officers to be voted on in these elections.

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ELECTIONS—Death or withdrawal of candidate and qualification of new candidate twenty days prior to election. Absent ballots in such cases. (F 100 a) 76

Mr. W. H. Curtis,
Chairman, Electoral Board for Warwick County.

I have your letter of October 24 relating to the printing of ballots for the General Election where the candidate nominated in the Primary has withdrawn and a new candidate has qualified under the provisions of Section 24-234 of the Code. Such new candidate may file his notice of candidacy as late as twenty days before the election, and you have before you a case where a new candidate has filed his notice of candidacy exactly twenty days before the election. You further state that the ballots to be used in the General Election have already been printed pursuant to Section 24-213 of the Code. You desire to know what should be done about now printing ballots so as to include the name of the new candidate.

I think your inquiry is answered by Section 24-234 of the Code and especially that portion of it reading as follows:

"* * * If the same is filed with the proper official at least twenty days before the day on which the election is to be held, the electoral board or boards having charge of the printing of the ballots for such election shall either:

(1) Cause to be printed thereon the name of every person so qualifying as provided in this section, or

(2) If ballots for the election have already been printed and contain the names of candidates for other offices to be voted on at such election, any such electoral board may in its discretion cause to be stricken therefrom the title of the office involved, and the names of all candidates for such office appearing thereon, and cause separate ballots to be printed for such office on which shall be printed the names of all candidates qualifying under the provisions of this section."

In my opinion, paragraph (2) controls since you state that the ballots have already been printed. The paragraph in question contemplates that the Electoral Board shall cause to be stricken from the original ballots the title of office for which the new candidate has qualified and cause to be printed separate ballots for such office, on which shall be printed the names of all candidates qualifying under the provisions of Section 24-234.

You further state that some absent voters' ballots (that is, the original ballots first printed) have already been mailed, and you desire to know what should be done about these ballots.
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This question is covered by Section 24-235 of the Code, reading as follows:

"Whenever any additional candidate shall qualify pursuant to this section, no ballots theretofore cast by mail vote for a candidate for such office shall be counted, but any person who has so voted shall be entitled to receive a new ballot and to vote for his choice among all such candidates for such office."

In view of the provisions of the above section, as to the ballots that have already been mailed I would notify the voters receiving such ballots not to vote them and at the same time supply these voters with new ballots. If any of the voters have already voted the ballots sent them I would notify them that these ballots will not be counted and send them new ballots for their use in voting. At the same time I think it would be advisable to notify the appropriate election officials what has been done in connection with the ballots that have already been mailed. I also suggest that no further absent voters' ballots be mailed until the new ballots have been printed.

ELECTIONS—Judges—Electoral board may not alter number. (F 100 g) 73

October 16, 1951.

MR. JOHN D. CROWLE, JR.,
Chairman, Electoral Board, Staunton.

You desire my opinion as to whether or not it would be proper for the electoral board to reduce the number of judges of election at a given precinct from the number provided by statute. You stated that for the general election in November the nominees of the August primary were on the ballot without opposition. I can readily see that the exercise of such discretion on the part of the electoral board would serve to materially reduce the cost of conducting an election. However, Section 24-193 of the Code of 1950 seems to be couched in mandatory terms making it the duty of the electoral board to appoint three competent citizens who shall constitute the judges of election in a precinct or election district for a term of one year, such appointment to be made at the regular meeting of the electoral board in the month of May of each year.

It is my opinion that the electoral board has no authority to change the number of judges, either by increase or decrease, from that number specified by statute. While in many instances it would no doubt not cause the taking of exception and would work out without prejudice to interested persons, nevertheless, the law as laid down by the legislature should be complied with in all material respects.

ELECTIONS—Legality of Primaries in 1952 in view of Congressional Redistricting. (F 100) 144

March 20, 1952.

HONORABLE ERNEST ROBERTSON,
Member, House of Delegates.

This is in reply to your telegram of March 19, 1952, in which you ask my opinion as to whether the Democratic Party may legally hold a primary election in July of this year in the Sixth Congressional District for the purpose of nominating a candidate for the office of Representative in the Congress of the United
States. Your question regarding the possibility of such a primary is inspired by the Congressional Reapportionment Act of 1952, which will not become effective as law until June 28, 1952, since no emergency clause was contained in the enactment. In answering your inquiry, it would appear appropriate to discuss generally the effect of the aforesaid Act upon the permissibility of holding primaries for the nomination of candidates for Congress in July of this year, since many of the questions of law involved are applicable in each district.

The effect of this enactment is to divide the State into ten Congressional Districts instead of nine as now provided. In accomplishing this redistricting all of the present districts were changed except three, viz., the Fifth, Sixth and Ninth. To some of the districts no new territorial units were added but territorial units were taken away. I mention this latter fact to illustrate that there are three distinct situations:

1. Unchanged districts;
2. Districts changed by addition of territory; and
3. Districts changed by reduction of territory only.

Some have advanced the view that a different result might be reached by virtue of differences in the nature of the changes to be made in the districts. The honest differences of opinion currently prevailing have to some extent arisen by the requirements that candidates for the office in question file with the proper Congressional District committee ninety days prior to the primary; that the district committee notify the State Board of Elections thirty days prior to the date set by law for the primary of their intention to hold a primary; and that the chairman furnish the electoral boards and the State Board of Elections the names of the candidates for such primary, all of which actions would have to be taken prior to the effective date of the "redistricting bill".

In brief it has been contended that, since the new districts are not yet legally in existence and will not be in existence until after the date for compliance with the legal requirements listed above, adherence to those requirements is impossible, thus precluding the holding of primaries. That argument is founded on a well-known and oft-repeated rule of statutory construction to the effect that any act done or purporting to have been done under a law prior to its effective date is void.

I have given careful thought to the question, and I have made what I believe to be a thorough study of the election laws of Virginia, the Democratic Party Plan and an exhaustive search for cases bearing on the question. I am of the opinion that it is legally permissible to hold primaries in all of the districts.

A review of the Democratic Party Plan (the only plan with which I am familiar) reveals that the Party has extremely broad powers in the selection of candidates, and the State Central Committee, which may meet on call of the Chairman, has all of the powers of the Party or the State Convention at such times as the Convention is not in session. The full power to organize district committees lies in the Party and the "redistricting bill" in no way affects that power. It is true the "redistricting bill" would be looked at to determine the territory of each district, but the power to form the committees flows from the Party with sanction of State law not related to the redistricting Act.

Looking first at the unchanged districts, I can see absolutely no bar to primaries being held therein. Such district committees could, in my opinion, be recognized to represent the "new" district, and with that done I can think of no objection that could be raised to their requesting a primary and receiving the notices of candidacy. This same reasoning would hold true for districts changed only by a reduction in territory. A new committee, consisting of members from the remaining territory only, would be a proper committee.

The question as it relates to the districts to which territory was added, and, of course, the Tenth District, have produced a wider divergence of opinion. It seems clear under the Party Plan that committees can be created for party purposes, but, when the committee does or attempts to do acts made necessary
by State law, will those acts be void because the committee represents a district not yet legally in existence? As I have indicated, I believe such committees have authority to act.

The rule of statutory construction previously referred to, namely, that any act done under a law prior to its effective date is void, is not universally true. As stated in Crawford on Statutory Construction, at page 169, "** there is an obvious difference between the time a law becomes effective and the scope of its operation**".

The Supreme Court of Appeals of Virginia has recognized the validity of this statement from Crawford's work. In Burks v. Commonwealth, 126 Va. 763, the General Assembly had passed a law relating to the taking of fish from rivers and streams in Rockbridge County. The act was not to become effective until adopted and ratified by the board of supervisors of Rockbridge County. The act contained no emergency clause and did not become law until June 18, 1914. On June 1, 1914, the board of supervisors by formal action adopted and ratified the act. Burks violated the law and upon conviction appealed on the ground that the purported ratification and adoption was ineffective because the act was not law on the day of such ratification and adoption. Our Court said:

"The question upon which the whole case depends is whether the board of supervisors could validly adopt and ratify the act of 1914 before the same actually took effect as a law. It is argued on behalf of the defendant that the action of the board on June 1, 1914, was null and void, and that their subsequent action in 1916, being merely an amendment to a void proceeding, could not have the effect of validating the original adoption and ratification.

"It is undoubtedly true as a general proposition of law that until the time arrives for a statute to take effect, all acts purporting to have been done under it are null and void. 36 Cyc. 1192, and cases cited. It is also true that a void act cannot be made the subject of a mere amendment. Lambkin v. Pike, 115 Ga. 827, 42 S. E. 213, 90 Am. St. Rep. 153; Copeland v. Sheridan, 152 Ind. 107, 51 N. E. 474; Louisville Ky. v. St. Louis, 134 Ill. 656, 25 N. E. 962. We do not think, however, that these propositions apply to the question under consideration, and while we have not found and have not been referred to any decision or other authority directly in point, we are unable to give our assent to the contention that the first action of the board of supervisors was void. There is nothing in the act to indicate any intention on the part of the legislature to require the board to wait until the law would inevitably become effective before signifying approval of its terms, and we perceive no reason or principle which would require such a course. The evident purpose of the legislature was to make the action of the board a condition precedent to the effectiveness of the act; and it was left optional with the board whether the law should come into force at the end of ninety days from its passage, or at a later period, or should remain entirely dormant. If it was to become effective at the end of ninety days from its passage, the more promptly the board acted the better opportunity the public would have to respect its terms. This view seems reasonable and just, and is in accord with the modern trend of legislation regarding the time when laws, other than emergency laws, shall take effect." (Italics added).

The Court, in the Burks case, has, in effect, said that the new law may be looked to for the purpose of taking such actions as are necessary to make it fully effective on the day it becomes law. That is exactly what must be done to hold primaries this year. Certain acts necessary to give the electors of this State the opportunity to nominate by primaries must be done in advance of the effective date of the new redistricting law, but these acts constitute more preparation for nomination by primaries which will be held after the new law goes into effect.
It may be well to note that the *Burks* case was a criminal case and the allegedly void action took away rights of the defendant. The actions required in the instant case are procedural only and designed to preserve the rights of the people.

It should also be observed that the primary law places a positive duty on the district committees to notify the State Board of Elections thirty days prior to the primary date whether a primary will or will not be held. To obey this mandate the committee must exist prior to the effective date of the law. If such a committee can be formed for the purpose of notifying that a primary will not be held, it seems obvious that it can be created to notify that a primary will be held.

In section 24-346(e) the rule to be followed in construing our primary laws is laid down in the following words:

"The provisions of this chapter shall be liberally construed so that the will of the electors may not be defeated by any informality."

In my opinion, our courts would not construe the statutes dealing with filing of declarations of candidacy or notification of intent to hold a primary with such strictness as to make void the filing of a declaration with a "new" district committee or a request for a primary filed by such committee. It would appear reasonable, just, and in the interest of public policy, to hold that the legislature having made available the machinery for a primary election in July, the political parties can do all things required of them to effectuate the use of that machinery to the end that the citizens of the State may express their will at the polls.

My conclusion, therefore, is that the appropriate party authorities may provide for the nomination of candidates for Congress in the several districts by means of primaries to be held on July 15 of this year.

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**ELECTIONS—Primary Election—Candidates—Defeated candidates for one office may run in General Election for different office when his party has no nominee for that office. (F 100 b) 30**

*HONORABLE ROBERT W. ARNOLD, JR.*, Commonwealth’s Attorney for Sussex County.

I have your letter of August 20, in which you ask the following question:

"I will thank you to advise me as to whether or not a person who runs in the Primary for an office and is defeated for nomination for that office can seek election to another county office in the general election, for which office there is no nominee of his party."

I know of nothing which would prohibit a person from becoming a candidate under the circumstances stated by you, provided, of course, such person complies with the statutes relating to candidates for office in general elections.

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**ELECTIONS—PRIMARY ELECTIONS—When no more persons qualify than there are vacancies such persons are party nominees. (F 100 b) 34**

*MR. FISHER W. BRUCE*,
Chairman, Democratic Party Committee, Chesterfield County.

This is in reply to your letter of September 6, 1951. In answering your inquiry I shall make reference to certain of the information which you made available in discussing the question presented with a member of my staff yesterday.
You have requested my opinion as to which persons shall be certified to the Electoral Board to be printed on the ballot for the General Election as party candidates for Justice of the Peace. The factual situation presented by the various magisterial districts is somewhat different; however, they can be treated as falling into three classes as follows:

1. Four nominations for justice of the peace were to be made and four persons qualified and each received more votes than any other person.
2. Three nominations for justice of the peace were to be made but no person duly qualified as a candidate.
3. Three nominations for justice of the peace were to be made and at least one person but less than three persons qualified and in some instances persons who had duly qualified were not among the three receiving the highest number of votes cast.

In the Democratic Party Plans at page 16 it is provided that whenever there shall be no more candidates who have qualified than there are nominations to be made for the particular office in question, then such candidates who have duly qualified shall become the nominee or nominees of the Democratic party.

Applying this rule to the various factual situations existing, we find that in no case were there more qualified candidates than there were nominations to be made. Therefore, under the Party Plan each person who duly qualified was entitled to be and was, as your letter indicates, declared a party nominee. Therefore, it is immaterial that in some cases persons who had qualified received less votes than persons who had not qualified. All persons who duly qualified were already nominees of the party. In the cases where there were fewer persons qualified than there were nominees to be chosen the remaining party nominees are to be determined from the number of votes received, and, of course, the persons receiving the greatest number of votes (disregarding the persons who qualified who are automatically nominees) should be certified as having won those nominations not already filled by persons who had duly qualified.

ELECTIONS — Primary — Obligation of voter to support nominees in general election. (F 100) 71

HONORABLE E. L. JOHNSON,
Mayor, Bedford, Virginia.

I am in receipt of your letter of October 2, from which I quote as follows:

"Kindly advise if there is any legal obligation which requires a person who voted in a Primary to vote for the nominee of that Party in the General Election."

The word "Party" as used in the Primary Election Laws of Virginia denotes a political party or organization, which, at the presidential election next preceding the Primary, polled at least one-fourth of the votes cast at such election. The Democratic Party of Virginia is such a "party".

By virtue of Section 24-363 Virginia Code 1950, each party shall have power to make its own rules and regulations and to perform all functions inherent in such organization.

Pursuant to such authority the Democratic Party has adopted rules and regulations for its governance and prescribed the qualifications of its members. When a person offers to vote in a Democratic Primary he represents himself to be a member of the Democratic Party. By this act of participation as a voter he represents to the judges of his election precinct and to all who participate with him in that Primary, voters and candidates alike, that he will support all of the nominees of that party at the next ensuing general election.
The relevant statutory law on the subject, as well as the Party Plan, provides that any person offering to vote at a Primary may be challenged and upon challenge shall be sworn by one of the Primary judges. If he does not make oath that he is eligible to vote under State law and the law of his Party, he shall not be permitted to vote in such Primary. It is further provided by statute that, if such person so challenged knowingly makes any false statement as to any matter material to his right to vote, he shall be deemed guilty of perjury.

The fact that the voter is not challenged does not alter the fact that through his participation he has represented himself to be qualified to vote in the Primary and that he will support all of the nominees. While the obligation thus assumed is not one which can be legally enforced, yet in ethics, good conscience and honor it far transcends legal considerations. The obligation is one of honor and morality which cannot be discharged by resort to narrow legalistic concepts.

ELECTIONS—Primary and Special—Closing of registration books. (F 100 d) 192

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

I am in receipt of your letter of May 16, from which I quote as follows:

"The County of Elizabeth City is holding a special election June 17, 1952, and the primary-election is to be held July 15, 1952. Section 24-83.1 states that the books of the registrar shall be closed six (6) days next preceding the day of a special election, which in this case should be June 10, 1952, and Section 24-74 requires the registrar to close the books 30 days prior to the primary election. Section 24-83.1 further states, and I quote, 'This section shall not be construed to shorten the period during which under any provision of law such books are required to be closed * * *.'

"Inasmuch as the two elections are of such vital importance, I would appreciate your opinion immediately in regard to the date for the registrar to close her books for these elections."

In my opinion the registration books should be closed on June 10 and remain closed until after the primary on July 15. Construing Sections 24-74 and 24-83.1 of the Code together, I can see no escape from this conclusion. By closing the books on June 10, the period during which the books are required to be closed under Section 24-74 would not be shortened and in view of this fact it is my opinion that Section 24-83.1 must be given effect.

ELECTIONS—Registrars—Ineligibility for election to other office. (F 100 d) 37

HONORABLE R. TURNER JONES,
Commonwealth's Attorney for Highland County.

This is in reply to your letter of August 30, 1951, and will confirm the telephone conversation between you and Mr. Gray of this office on September 5, 1951.
You have requested my opinion as to whether a registrar who resigns verbally in January, 1951, and whose successor was not appointed until May, 1951, is eligible to be elected to a county office in the November general election.

As you have indicated, your question is governed by § 24-66 of the Code of 1950 (formerly § 97 of the Election Laws) which reads, in part, 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; * * *.""}

It is my opinion that the language of this section clearly indicates that the election referred to is a general election and not a primary for offices are not filled by primary elections. Therefore, since the November general election is the next election after the person in question has acted as registrar, he is ineligible for election at that time.

ELECTIONS—Registrar—Ineligibility to election office. (F 100 d) 69

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

This is in reply to your letter of October 1, 1951, and will confirm the telephone conversation between you and Mr. Gray of this office on October 4, 1951.

You have requested my opinion as to whether a registrar who resigned his office on April 30, 1951, and whose successor was appointed on July 1, 1951, is eligible to be elected Sheriff of the County in the coming November general election.

Your question is, as you have indicated, governed by § 24-66 of the Code of 1950, which reads, in part, 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 only interpretation of this statute which would make it possible for the person inquired of to be elected sheriff in November would be one in which the word "election" is construed to mean primary election. However, this office has previously construed this statute to mean general election and not primary election. The section refers to offices to be filled at the election, and since offices are not filled at primary elections, our conclusion has been that the election referred to is the general election. Therefore, since the November general election is the next election after the person in question has acted as registrar, he is ineligible for election at that time.

ELECTIONS—Registrar—may not serve as postmaster. (F 100 d) 26

HONORABLE LLOYD M. ROBINETTE,
State Senator.

This is in reply to your letter of August 10, in which you ask for my opinion on the following questions:
"X, who holds the office of registrar of Bales Mill precinct, Lee county, Virginia, was appointed temporary postmaster at Ewing, Virginia, and took over the office there on August 1, 1951. Please advise me if Mr. X is still eligible to serve as registrar of that precinct in view of the fact that he is now serving as postmaster at Ewing, and also advise me whether or not any voters who have registered since he took over the office of postmaster will be eligible to vote at the November, 1951, election, without further registration."

Section 24-53 of the Code provides that the acceptance of any other office, either elective or appointive, by a registrar during his term of office, except that of precinct judge of election, "shall ipso facto vacate the office of registrar." I am, therefore, of opinion that the registrar you mention may not hold his office as registrar and at the same time hold the office of postmaster at Ewing.

As to the validity of registrations before this registrar since he began serving as postmaster, I am of opinion that this registrar while acting as such during the period indicated is a de facto officer. See Owen v. Reynolds, 172 Va. 304; 43 Am. Jur., Public Officers, Sec. 471. The general rule is that the acts of a de facto officer are valid as to third persons and the public, the rule being based on the ground of public policy and for the protection of those having official business to transact and to prevent a failure of public justice. Third persons, in the nature of things, cannot be expected to investigate the right of one assuming to hold a public office, and they have a right to consider that officials apparently qualified and in office legally hold such office. In view, therefore, of the well established principles relating to de facto officers, I am of opinion that the registrations mentioned are valid.

I also direct your attention to Section 2-33 of the Code and the annotations thereunder.

ELECTIONS — Registration — Appointment of General Registrar for county. (F 100 d) 198

HONORABLE WILLIAM J. PHILLIPS,
Commonwealth's Attorney for Warren County.

May 7, 1952.

This will reply to your letter of May 1, from which I quote as follows:

"I would appreciate very much your giving me your opinion on the question of whether or not a general registrar can, at this time, be appointed for Warren County.

I am enclosing a copy of House Bill No. 33 which provides that the governing body of any county may in the month of March of any year create by resolution the office of general registrar. I will call your attention at this point to the fact that this bill was an emergency bill. Due to the fact that we did not learn of this bill's passage until recently, the Board of Supervisors of Warren County did not adopt a resolution as provided for in the bill during the month of March.

"On December 31, 1951, the Board of Supervisors of Warren County adopted a resolution concerning the anticipated bill pertaining to the general registrar in the following language:

"'Whereas it is the sense of the Board of Supervisors of Warren County in order to promote the better welfare of said county and to carry out more efficiently the election laws of the State of Virginia, it is deemed wise to have the Legislature of the State of Virginia to enact a law providing for the creating of the office to be known as the general registrar of Warren County."
"Be it therefore resolved that the Board of Supervisors of Warren County does hereby request and authorize the Electoral Board of Warren County, Virginia, within thirty days from the date of the passage of the act of the Legislature of Virginia creating the office of general registrar to appoint said general registrar, who shall be a resident of the county for which they are appointed and shall possess the qualifications prescribed by law for general registrars.

"Under these circumstances, I am wondering if in your opinion it can be construed that the action of the Board of Supervisors by adopting the resolution in December sufficiently meets the requirements of the law. You can readily understand that if this interpretation is not put upon the act it will mean that we will have to wait until March, 1953, before a general registrar for Warren County can be appointed."

The Act to which you refer is an enabling Act "authorizing the Board of Supervisors in the month of March of any year" to create the office of general registrar of the County. While it is difficult for me to understand just why the General Assembly limited the Board of Supervisors to create this office in the month of March, I must assume that it had some good reason therefor. Without the Act, the Board has no authority to create the office and the General Assembly has limited the Board to taking this action in the month of March. I do not feel that by any rule of statutory construction with which I am familiar I can hold that the General Assembly did not mean what it said. It is, therefore, my opinion that your Board of Supervisors is limited to action taken in the month of March. In view of what I have said, it does not appear to me that the action of the Board of Supervisors of last December complies with the Act to which you refer.

I regret to have to be compelled to reach the above conclusion, but I can see no escape from it. The situation is certainly a unique one.

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ELECTIONS — Registration books — right of public to examine and copy.

(F 100 d) 15

Mr. James N. Colasanto,
Secretary, Electoral Board of Alexandria.

This is in reply to your letter of July 18, 1951, from which I quote as follows:

"According to 24-84 of the 1950 Code of Virginia, it provides as follows:

"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."

"The City of Alexandria now has over fifty thousand residents and is subject to this provision. Will you kindly advise me as soon as possible when we may legally permit the copying of our books? Our Board met today and we feel, in accordance with your opinion to the Fairfax County Electoral Board, that we cannot legally permit copying of these books until after the 23rd of July, the date of closing of the said registration books.

"Up until the present time, our Board has refused the copying of these books and has based its authority on the case of Keller v. Stone in 96 Va. 667. However, if it is your opinion that the books should be open
As you know, § 24-113 provides that the registration books shall at all times be open to public inspection.

In the recent opinions to which you make reference I stated that, in my opinion, the right to inspect these books carried with it the right to make notes or memoranda therefrom and that the words "at all times" in § 24-113 mean all reasonable times. The registrar is required by law to prepare lists of the persons registered and the public right to inspect the books cannot be allowed to interfere with his duties. With this exception, however, the public should have easy access to such books. I do not think the closing of the registration books has any bearing on the situation except that immediately after such closing the registrar would normally be engaged in preparing the list of persons registered and could prevent interference with that duty.

I do not believe the case of Keller v. Stone, 96 Va. 667, is authority for a registrar to prevent copying from the registration books. It is authority for the proposition that he cannot be required to furnish copies or supervise the preparation of copies, but the Court in that case said:

"What was said by this court in Gleaves v. Terry, 93 Va. 491, with reference to the record of the proceedings of the electoral board of Wythe County, as to which secrecy was not enjoined by law, applies as well to the registration books in the custody of the respondent in these cases."

Reference to Gleaves v. Terry, 93 Va. 491, reveals the pertinent language:

"That so much of the record of the proceedings of the Electoral Board of Wythe county, contained in the book provided by law and committed to the custody of the respondent as secretary of the Board, as relates to the appointment and removable of judges and commissioners of election and registrars, or the ordering of a new registration, is a public record, open to inspection by any citizen and voter of Wythe county, and that he may take therefrom memoranda or notes of the proceedings of the Electoral Board as to which secrecy is not enjoined by law, which memoranda or notes may be made at and within a reasonable time in the presence of the secretary, but until it is shown that the right to inspect these records, or to make memoranda or notes proper to be made as aforesaid has been denied a mandamus should not issue requiring respondent to allow such memoranda or notes to be made."

It would appear, therefore, that the Court has expressly recognized the right to make notes or memoranda as an incident of the right to inspect.

ELECTIONS—Registration—Books open to public inspection. (F 100 d) 7

HONORABLE EDWIN LYNCH,
Member of the House of Delegates.

July 10, 1951.

This is in reply to your inquiry regarding the rights of the public to inspect the registration books during the thirty-day period prior to elections when the registrar is required by law to close such books.

The requirement that registration books be closed for the purpose of registering new voters is contained in § 24-82 of the Code of 1950 as follows:
"After the completion of 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."

This section does not preclude inspection of the registration books by the public but rather prohibits new registrations between the regular registration day and the day of the election following. However, the question which you raise is completely answered by § 24-113 of the Code of 1950, which reads as follows:

"Registration books shall be kept and preserved by the registrar and shall at all times be open to public inspection." (Italics added.)

ELECTIONS—Registration books open to public inspection and notes may be made therefrom. (F 100 d) 15

HONORABLE EDWIN LYNCH,
Member of the House of Delegates.

This is in further reply to your letter of July 10, 1951, in which you state that the Electoral Board of Fairfax County has ruled that no one can copy names from the registration books after the closing date for registration.

As I stated in my letter of yesterday, § 24-113 provides that such books shall at all times be open to public inspection. I am aware of no provision of law which would prohibit a person from making notes while inspecting the registration books and, in my opinion, the right of inspection carries with it the right to make such notes.

ELECTIONS—Registration—Books, when open to public. (F 100 d) 43

HONORABLE LEVIN NOCK DAVIS,
Secretary, State Board of Elections.

This is in reply to your letter of July 11, 1951, in which you request my opinion on the apparently conflicting interest of registrars and candidates for office. This conflict of interest arises by virtue of the fact that, after the registrar's books are closed thirty days prior to any primary or general election, many of the candidates wish to examine the registrar's books and make lists of the qualified voters therefrom for their individual purposes. On the other hand, the registrar is required by law to prepare within five days after such closing lists of all persons so admitted to registration. You also point out in your letter that § 24-113 of the Code of 1950 provides that the registrar's books shall be at all times open to public inspection, and you state that many registrars complain that it is impossible to permit inspection of the books while the registrar's list is being prepared.

I am enclosing copies of two opinions which I have recently rendered to the Honorable Edwin Lynch on this subject. In these letters I expressed the opinion that the statutory right to examine the registration books carried with it the right to copy therefrom. It is my considered opinion that, so long as the registrar has need of the registration books in the preparation of the lists which he is required by law to make within five days after the closing of the books, he would be within his legal rights to refuse to surrender the books for inspection by other persons. However, the registrar should be acting in good faith and should not use this statutory duty as a method of preventing the public from examining the registration books during the five-day period at such time as would not interfere
with his duties as registrar. After the five-day period, which the law allows the registrar to complete his list, it would appear that the candidates or other members of the public should have easy access to them.

ELECTIONS—Registration of new residents. (F 100 d) 10

Mr. E. S. Bishop,
Secretary, Montgomery County Electoral Board.

I am in receipt of your letter of July 7, from which I quote as follows:

"We should like your opinion on the following matter:
"Two people have moved into the Blacksburg District from West Virginia and will have lived here one year on November 1, 1951. They wish to register and vote in the primary election in August and the general election in November. When may they register and when may they vote?
"We are unable to find this point covered in our copy of the election laws."

This office has previously expressed the opinion that pursuant to Section 24-76 of the Code a registrar shall at any time previous to the regular days of registration register any voter entitled to vote at the next succeeding election who may apply to him to be registered. The two persons you describe will have been residents of Virginia for one year at the next November election and they may, therefore, register at any time before the November election when the registration books are open for registration. However, since pursuant to Sections 24-74 and 24-82 of the Code the registration books are now closed for new registrations and will be closed up until the August primary, these new residents cannot register so as to be able to vote in the August primary.

ELECTIONS—Registration, Residence and Poll Tax of members of armed forces. (F 100 h) 61

Mr. Wailes Hank,
Secretary, Electoral Board, Norfolk.

I am in receipt of your letter of September 24, requesting an opinion as to whether or not section 3 of Article XVII of the Virginia Constitution nullifies or abrogates the provisions of Section 24 of the Constitution. This latter section of the Constitution relates to the gaining of legal residence by members of the armed services of the United States by reason, on account of such services, of being stationed in the State, or in any county, city or town thereof.

These two sections of our Constitution are not in anywise in conflict. Section 3 of Article VII of the Constitution relieves members of the armed forces in active service in time of war of the requirement to pay a poll tax or to register as a prerequisite to the right to vote. It manifestly relates only to those members of the armed services who are citizens of Virginia, and who are otherwise qualified to vote in this State.

Under Section 24, members of the armed services referred to therein do not gain residence as to the right of suffrage by reason of being stationed in Virginia. Section 24 remains unimpaired through the adoption of Article XVII of the Constitution.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—Registration of voters—Does not depend on eligibility to vote at next election. (F 100 d) 145

March 21, 1952.

HONORABLE LIGON L. JONES,
Commonwealth's Attorney for Hopewell.

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

"The City of Hopewell has a general election on June 10, as well as on November 11. Several residents of the City of Hopewell who have paid their poll tax in time to qualify for the November election, but not in time to qualify for the June election, have offered to register for the November election. Will you please advise me whether the registrar shall register these persons for the November election notwithstanding they are ineligible to register for the June election which intervenes?"

In so far as the payment of poll taxes is concerned, a person who has paid all poll taxes assessed or assessable against him for the three years next preceding that in which he offers to register is eligible to register at any time that the registration books are open. Section 20 of the Constitution. A person eligible to register does not register for a particular election. If he is eligible to register, he may do so at any time the registration books are open, irrespective of when the next election is to be held. The fact that a person is registered, however, does not necessarily mean that he is eligible to vote at any particular election. The conditions for voting are prescribed by Section 21 of the Constitution, and in so far as the payment of poll taxes is concerned, to be eligible to vote a registered person must have paid, at least six months prior to the election in which he offers to vote, the State poll taxes assessed or assessable against him for the three years next preceding. Specifically answering your inquiry, in the light of what I have written the registrar should allow the persons you describe to register.

ELECTIONS—Towns—First election in newly created town. (F 100) 97

December 6, 1951.

HONORABLE LEVIN NOCK DAVIS,
Secretary, State Board of Elections.

This is in reply to your recent request concerning the next election to be held for the Town of Melfa in Accomack County.

You point out that the town was incorporated in April, 1951, and that the first election of officers was held on June 12th of this year, and you desire my opinion as to whether the next regular election should be held in June, 1952, or June, 1953.

Chapter 5 of Title 15 describes how the first election in a newly incorporated town shall be held, and Section 15-69 thereof provides, in part, as follows:

"* * * The election shall be held and the vote counted, returned, canvassed and certified as regular elections are held, returned, canvassed and certified, but officers elected at the election shall only hold office until the next regular election of town officers to be held as provided for by general law. * * *" (Italics supplied.)

Section 24-136 of the Code provides, among other things, that general elections for town officers shall be held on the second Tuesday in June. Therefore, it is my opinion that the election of the town officers to which you refer should be held on June 10, 1952, which is the next regular election referred to in that part of Section 15-69 quoted above.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—Transfer of voter. (F 100 d) 55

September 18, 1951.

Mr. R. D. Trice,
Chairman, Goochland County Electoral Board.

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

"Several years ago a voter of Hadensville Precinct, Byrd Magisterial District, Goochland County, Virginia, sold his home and moved from the County and has not returned to take up his residence in the County, but has continued to vote at the Hadensville Precinct. Recently this voter requested and received from the Registrar of Hadensville Precinct a transfer to Rockets Precinct, in Lickinghole Magisterial District, Goochland County. The Registrar at the former precinct has erased his name from the registration books. The Registrar at the Rockets Precinct, Lickinghole Magisterial District, has refused to accept the transfer because the voter does not reside in that District."

You desire my opinion as to the right of this citizen to be registered by transfer from the Hadensville Precinct to Rockets Precinct.

Under the provisions of section 24-85 of the Code of Virginia, upon the application of a citizen for a transfer from his former election district, it was the duty of the registrar to issue same and to erase from the registration books of that district the name of the citizen to whom the transfer was issued. He had no right, however, to secure registration by transfer to the Rockets Precinct unless he had removed thereto and resided therein at least thirty days prior to the next election.

It is my opinion that the registrar at the Rockets Precinct was correct in refusing to accept the transfer under the facts stated in your letter.

ELECTIONS—Voter's eligibility of woman married to Canadian. (100 d) 17

July 25, 1951.

Honorable Lewis Crawley,
Clerk, Circuit Court of Cumberland County.

I have your letter of July 20, from which I quote as follows:

"A lady born and reared in the County of Cumberland, Va., and in the year 1919 married a Canadian and lived for about two or three years in Canada, and returned to this county and in the year 1925 registered as a VOTER in this county. However, it has become a question in her mind if she should vote (or was she not a national citizen, having married a Canadian). Will you give your opinion as if she has the privilege of voting in this State as of this date? It appears that she wishes to vote in the coming Primary."

The question presented is not a simple one and involves the construction of several federal statutes dealing with citizenship. As you know, to be eligible to vote in Virginia a person must be a citizen of the United States. Under existing law, a woman citizen of the United States does not cease to be a citizen of this country by reason of her marriage to an alien unless she makes a formal renunciation of her citizenship. See 2 American Jurisprudence, Aliens, § 185. I observe from your letter, however, that the lady to whom you refer married a Canadian
in the year 1919. As I understand the law as of that time, a woman marrying an alien lost her citizenship in the United States. The statutes changing this rule have not been construed to be retroactive. 14 Corpus Juris Secundum, Citizens, § 16. Therefore, a lady about whom you write, unless she has taken the steps prescribed by 8 U. S. Code Annotated, § 717, to re-establish her citizenship in this country, I fear from the facts which you present that she is not eligible to vote. If she has re-established her citizenship here, of course, she is eligible to vote, provided she has complied with the other requirements of the election laws.

There may be other facts in this case which are not stated in your letter that might affect the status of this lady. It might be well, therefore, for her to confer with her attorney.

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ELECTIONS—Voter—Residence of inmate of Elks Home. (F 100 e) 205

May 23, 1952.

HONORABLE LEVIN NOCK DAVIS,
Secretary, State Board of Elections.

This is in reply to your letter of May 22 in which you enclose a letter from the Honorable DuVal Radford, from which latter letter I quote as follows:

"A question has arisen here as to whether or not a resident of the Elks Home which is situated in Bedford, and maintained as an indigent person in the Home here by his local lodge, is qualified to register and vote in Virginia provided he meets the other requirements. The main question that has arisen is under Section 24-18 of the Code and a similar provision of the Constitution set forth as Section 23 and also an interpretation of Section 24 of the Constitution. In this latter connection, it seems somewhat to me the question of intention as to a permanent resident even though he is a member of a charitable institution."

Section 23 of the Constitution of Virginia provides that paupers shall be excluded from registering and voting. The question of whether a person is a pauper is one to be determined from all the facts in any particular case and, since I am in possession of only one fact regarding the particular individual inquired of, I do not believe it would be proper for me to attempt to pass on his status on that basis. Section 24 of the Constitution and § 24-20 of the Code both provide that no inmate of any charitable institution shall be regarded as having either gained or lost residence, as to the right of suffrage, by reason of his location or sojourn in such institution.

It is my opinion, therefore, that, in so far as voting is concerned, the residence of an inmate of a charitable institution of this State remains the same as it was prior to his admission to such institution. To construe this provision of our Constitution and the similar provision of our Code in such a manner as to permit the inmate of a charitable institution to establish domicile for voting purposes merely by a change of intention on his part would be to circumvent the obvious meaning and intent of the law. I am returning Mr. Radford's letter as requested.
REPORT OF THE ATTORNEY GENERAL

EMBALMERS AND FUNERAL DIRECTORS — Issuing certificate redeemable with purchase. (F 91) 182

Mr. F. C. Stover,
Secretary, State Board of Embalmers and Funeral Directors.

This is in reply to your letter of April 21, in which you request the opinion of this office as to whether or not a certificate issued by a funeral director purporting to be usable at all times in its full value of $25.00 toward payment of any funeral service for any adult person is in violation of Section 54-259 of the Code of Virginia.

Section 54-259 of the Code provides:

“No funeral director or any member of his firm or employee or agent thereof, or embalmer, shall directly or indirectly offer or give any money or other valuable consideration to any burial association, whether incorporated or not, or to any other person for soliciting, suggesting, advising, requesting or inducing any person to employ him as a funeral director or embalmer. No burial association, whether incorporated or not, and no other person corporate or natural shall receive, directly or indirectly, any money or other valuable consideration for soliciting, suggesting, advising, requesting or inducing any person to engage, employ or arrange with any funeral director or embalmer for the funeral of any person or burial or cremation of any deceased body.”

Inasmuch as the above section appears to apply only to the giving of valuable consideration to intermediaries, it is my opinion that the above-mentioned certificate is not within the purview of the aforesaid section. It is also pointed out that the aforesaid section carries a criminal penalty and, therefore, any interpretation as to its applicability would be against the Commonwealth.

FEES—Justice of Peace or Bail Commissioner for bailing. (F 136 b) 227

Honorable E. R. Hubbard,
Justice of the Peace.

This will acknowledge receipt of your letter of June 19. You request my advice relative to certain fees which may properly be charged by a justice of the peace, as well as the fee of a bail commissioner for admitting an accused person to bail.

If you will refer to the 1952 amendment to section 14-135 of the Code of Virginia, which emanated from House Bill No. 61, you will note that this amendment does not affect a justice of the peace for a county. For the issuance of any warrant in which the Commonwealth is not plaintiff, you are authorized to charge fifty cents. This would include a warrant in debt. For the issuance of a subpoena separate from the warrant, you are authorized to charge fifty cents. The law provides that for other services a justice of the peace shall have the same fee as the clerk of a circuit or city court for like services.

Section 14-123(23) provides that a clerk, for issuing an attachment, with a copy of the rule or order for the same, if sent out therewith, and recording the returns thereof when proper to do so, shall receive a fee of fifty cents. It seems, therefore, that you would be entitled to fifty cents for issuing an attachment in those cases where it is proper for a justice of the peace to so act.

You desire to know whether or not you could charge more than two dollars in your capacity as bail commissioner for admitting a person to bail. I am
assuming that you have been appointed bail commissioner pursuant to the provisions of section 19-92. In such capacity, you are authorized to charge two dollars. There is no provision authorizing you to charge more than two dollars because of the circumstances pointed out in your letter.

The 1952 amendment to section 14-135, which increases the allowance for the issuing of any warrant in which the Commonwealth is not the plaintiff, applies only to a justice of the peace in cities within the population brackets enumerated in this section.

FINES AND PUNISHMENT—Defendant entitled to refund of surplus of bond over fine. (F 27) 134

HONORABLE WILLIAM D. PRINCE,
Trial Justice for Sussex County.

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

"I would thank you to give me your opinion of Section 19-108 of the Code of Virginia—1950.

"I wish you would clarify for me the following example of a traffic violation: A. Suppose John Doe was arrested for a traffic violation and brought before a Justice of the Peace, who bonds him for $100 for his appearance in my court on a certain future date. On this certain date, as specified, John Doe is called and I find that he does not respond to the call. I, therefore, consider that he is not present and forfeit his bond to the Commonwealth of Virginia for his non-appearance. Then, I read the warrant and adjudge him guilty and fix his punishment at $50 and cost. Then I proceed to take the fine and cost, say $54.25 out of his bond. Has this man any legal right to demand the difference between $54.25 and $100?

"B. Suppose Richard Roe has violated the traffic laws of Virginia and has been apprehended and brought before a Justice of the Peace for the purpose of being bonded for his appearance in my court at some certain future date. For instance, say the J. P. bonds him for $150 for his appearance on the specified date and the law in this case specifies that $100 and cost is the maximum punishment. On this certain specified date his case is called and bond forfeited to the Commonwealth of Virginia, when he does not answer and I am satisfied that he is not present. After reading the warrant, I proceed to try the case and find him guilty as charged in the warrant and fix his punishment at the maximum fine and cost which is $104.25. Has this man any legal right to demand of me that I refund the difference between $104.25 fine and cost and the amount of the bond taken by the J. P.?"

I presume that your inquiry relates to the cash deposit made in lieu of a recognizance with surety.

Section 19-108 of the Code insofar as is here pertinent reads as follows:

"If there be no default in the observance of the conditions of the recognizance, or if there be default and it be a case which may be tried in the absence of the defendant and he is so tried, and if, upon the trial of the case, the defendant be found not guilty, the money so deposited shall be refunded to him, or upon his order, but if he be found guilty, the court or trial justice trying the case shall apply the money, or so much thereof as may be necessary, to the payment of such fines and costs, or costs, as may be adjudged against the defendant, and the residue thereof, if any, shall be paid over to the defendant, or upon his order; * * *"
Applying the above section to the cases you present, I am of opinion that it is clear that the defendant is entitled to the difference between the cash deposit he has made and the fine and costs imposed by you.

FIREWORKS—Disposition of illegal kinds. (F 66) 114

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

January 22, 1952.

This is in reply to your letter of January 17, in which you ask for an opinion on the following question:

"A is convicted of illegal storage of fireworks pursuant to § 59-214 of the Code of 1950 as amended. The fireworks, none of which came within the stated exceptions to the statute, were seized by the arresting officers and held for evidence. After the conviction of A what disposition should be made of the illegal fireworks?"

"I find no statute declaring them to be contraband and subject to forfeiture, such as is the case with reference to illegal alcoholic beverages. On the other hand, I do not see how the Court could legally return the fireworks to the owner since he has no right to have the same without again violating the law."

"It might appear that § 29-229 of the Code governs, but that provides for a sale of the illegal article, which could not be done in this case. The only practical disposition that I see is for the Court to order the fireworks destroyed. Your official opinion in this matter will be greatly appreciated."

This office has previously expressed the opinion that, where property held by a court as evidence in a criminal matter is retained or destroyed, the court for all intents and purposes has imposed a forfeiture on the defendant just as effectively as though the property had been destroyed under some forfeiture statute. The office has also ruled on several occasions that, since the Legislature has seen fit to provide specifically for forfeitures in some cases, it would seem that where no forfeiture is so provided there is no authority therefor. The sections of the Code dealing with fireworks (Chapter 15 of Title 59) contain no forfeiture provisions.

While I am inclined to agree with you that the practical disposition of the fireworks you mention would be for them to be destroyed, I know of no authority therefor in view of the statutes involved and of the previous opinions of this office. I also call your attention to the fact that Section 59-215 of the Code permits the display and sale of fireworks under certain circumstances, and so conceivably the fireworks which have been seized may still be lawfully used and sold.

GAME, INLAND FISH AND DOG LAWS—"Bob-cat" is wild animal. (F 233) 86

HONORABLE HAROLD G. POTTS,
Trial Justice for Clarke County.

November 13, 1951.

This is in reply to your letter of October 29 requesting whether or not the possession of a bobcat raised from infancy as a pet is a violation of the laws of the State of Virginia where the possessor has no permit for holding such animal.
Section 29-143 of the Code of Virginia provides, in part, as follows:

"Unless and until otherwise provided by a regulation of the Commission, in accordance with the provisions of the law, the following shall be unlawful:

*(k)* To hunt, trap, take, capture, kill, attempt to take, capture or kill, possess, offer for sale, sell, offer to purchase, purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation, transport, cause to be transported, carry or cause to be carried, by any means whatever, receive for shipment, transportation or carriage, or export, or import, at any time or in any manner any wild bird or wild animal or the carcass or any part thereof, except as specifically permitted by law and only by the manner or means and within the numbers stated.” (Emphasis added)

Accordingly, under the above Code section, the question appears to resolve itself into an interpretation of what is meant by the word “wild animal.”

Words and Phrases, Vol. 45, page 158, gives as a definition that a wild animal is an animal which is not by custom devoted to the service of mankind at the time and in the place in which it is kept. Restatement, Torts, § 506. The office of the Commission of Game and Inland Fisheries advises me that the same definition is applied in their administrative practice.

It, therefore, appears, under the above definition, that a bobcat would fall within the classification of “wild animal” and its possession would be contrary to § 29-143.

However, I will add that the matter is not free from doubt as § 29-133 permits open season on predatory species of wild animals, and it would appear that a bobcat comes within that classification also.

GAME, INLAND FISH AND DOG LAWS—Dogs—Livestock killed by dogs are liability on county where killed. (F 95) 41

September 11, 1951.

HONORABLE HUGH R. ROSS,
Commonwealth’s Attorney for Madison County.

I am in receipt of your letter of September 8, from which I quote as follows:

"Recently the Board of Supervisors of Madison County has had a claim properly certified to it requesting payment for sheep killed by dogs. The Board is uncertain whether or not payment should properly be made by this County in view of the facts which are as follows:

The owner of the sheep which were killed is a resident of Madison County and owns a farm in this County and declares his personal property for taxation in this County, however, his farm is located adjacent to the Orange County line and in the operation of his farm this owner has rented lands adjacent to him, in Orange County, on which the sheep in question were grazing when killed by dogs. It is firmly believed these dogs belonged to residents of Orange County.”

The question is which county is liable for compensation for the sheep killed under § 29-202 of the Code.

I must assume from your letter that the sheep were killed while grazing on land rented by their owner in Orange County and that the dogs belonged to a resident of that county. Under these circumstances, I must conclude that the county in which the sheep were killed is liable for the compensation. If, say
sheep belonging to a resident of Madison County were killed by a dog on land in Henrico County, I do not think there could be any real doubt but that the liability was on Henrico County. The fact that the sheep were killed in a county adjoining, the county in which the owner of the sheep resides would not change the principle involved.

GAME, INLAND FISH AND DOG LAWS—Dogs not "domestic animals" within laws giving certain powers to State Veterinarian. (F 95) 149

March 25, 1952.

DR. W. L. BENDIX,
State Veterinarian.

This is in reply to your recent letter in which you inquire whether the use of the term "domestic animals" in Chapter 22 of Title 3 of the Code includes dogs. I quote your letter as follows:

"My reasons for asking are these. Rabies in dogs is on the increase in the United States and we in Virginia have had our share of the increased incidence of this disease. It has been generally conceded that a dog, while being a domestic animal is not considered livestock. There is considerable feeling throughout the state that this Rabies problem should be handled on a state basis, rather than through specific acts of County Boards of Supervisors as is now being done. Because of the language used in the law regarding animal diseases, there is considerable doubt in my mind that the authority of this office extends to dogs."

In my opinion the term "domestic animals" as used in Chapter 22 of Title 3 was not intended to apply to dogs. As you have pointed out, there is specific legislation concerning dogs and their quarantine elsewhere in the Code. I believe that specific legislation covers the field and that a construction of the words "domestic animals" to include dogs would inevitably lead to conflicts between the State Veterinarian and the local boards.

There have been numerous court decisions in other states as to whether the term includes dogs. In some instances it has been held that dogs are included, in others that they are not included. It becomes a question of determining the legislative intent which, in this case, I believe, excludes dogs from the term.

GAME, INLAND FISH AND DOG LAWS—Law applicable to pond formed by flood on private property. (F 233) 222

June 18, 1952.

HONORABLE MARK D. WOODWARD,
Commonwealth's Attorney for Page County.

This is in reply to your letter of May 27 requesting my opinion as to the status, and certain questions ensuing therefrom, of a pond formed on private property by the flooding of the Shenandoah River.

The controlling question involved is whether or not the pond would be classified as private, the determination of which appears to depend upon certain undisclosed factors, such as the movement, if any, of the fish to and from the pond and river; the permanency of the pond; the nature of the connecting waters, if any, between the pond and the river and the frequency and duration of the river's flooding into the pond area.
In accordance with the apparent preponderance of authorities as cited in the annotations contained in 15 A. L. R. (2d) 754, it would be my view that the pond would be classified as private if the facts disclose that it is permanent and unconnected with the river, except by infrequent floodings of short duration. It would be my further view that if the pond is determined to have a private status, then the land owner could seine for fish therein in the same manner as could be done in other private inland ponds. On the other hand, if the facts are such that would deprive the pond of a private exemption status, then the converse would necessarily be true.

**GAME, INLAND FISH AND DOG LAWS—Poultry and livestock killed by dog, owner need not prove knowledge of viciousness. (F 95) 224**

**HONORABLE HANSEL FLEMING,**
Commonwealth's Attorney for Dickenson County.

This is in reply to your letter of June 17, 1952, in which you inquire whether, under the provisions of § 29-202 of the Code of Virginia, as amended, it is incumbent upon the owner of livestock or poultry which has been killed or injured by a dog not his own to prove that the owner of the dog had knowledge of its viciousness before the owner of the livestock would be entitled to recover from the owner of the dog.

Section 29-202, as amended in 1950, in so far as material to your inquiry, 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 construed 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."

There appears to be no requirements that the owner of the livestock or poultry prove knowledge of viciousness on the part of the owner of the dog prior to recovery.

**GAME, INLAND FISH AND DOG LAWS—Sale of hunting license and stamps. (F 233) 85**

**MRS. VIRGINIA D. CLEEK,**
Clerk, Bath County Circuit Court.

This is in reply to your letter of November 5 asking my opinion as to whether or not it is legal for a person to purchase and resell to others for a profit the various stamps which are attached to hunting licenses.
The applicable sections of the Code of Virginia are as follows:

"§ 29-122.—Stamp to hunt bear and deer.—There shall be a special stamp for hunting bear and deer in this State, which shall be in addition to regular season license required to hunt other game. The fee for such special stamp shall be one dollar for a resident and two dollars and fifty cents for a non-resident. * * *.

The special stamp to hunt bear and deer may be obtained from the clerk or agent of any county or city whose duty it is to sell hunting licenses." (Emphasis added)

"§ 29-123. Date on stamps; affixing to hunting licenses; cancellation by licensees.—The clerk or agent shall write or stamp the date of issue on the face of all special stamps issued pursuant to the provisions of this chapter, and each stamp shall be adhesively affixed to the back of the regular season hunting licenses of the person to whom the stamp is issued, and such person shall cancel the same with his initials in ink. Failure to affix the special stamp to the license and to initial it before hunting, as herein above provided, shall be a misdemeanor." (Emphasis added)

As noted from the underlined portions, the statutes provide for issuance by "clerks and agents" and that each stamp shall be affixed to the "hunting licenses of the persons to whom the stamp is issued." Accordingly, it is my opinion that it is unlawful for persons to handle the stamps in any manner other than as set forth by the applicable statutes.

GENERAL ASSEMBLY—Failure to reapportion State representation. (F 29) 168

April 8, 1952.

HONORABLE ARMISTEAD L. BOOTHE,
Member General Assembly.

This is in reply to your letter of April 2nd in which you requested my official opinion on the following questions:

"1. Does Section 43 of the Virginia Constitution contain a mandate to reapportion the State for the Senate and House of Delegates in the year 1952?

2. Is the General Assembly's failure to reapportion in 1952 a violation of the constitutional mandate contained in Section 43?"

In answer to your first question, I need only quote section 43 of the Constitution of Virginia, which imposes upon the General Assembly the duty of apportionment of the Commonwealth into Senatorial and House Districts, with the observation that section 198 thereof, dealing with rules of construction, provides, among other things, that in imposing a duty "shall" is mandatory:

"The present apportionment of the Commonwealth into senatorial and house districts shall continue; but a reapportionment shall be made in the year nineteen hundred and thirty-two and every ten years thereafter." (Italics supplied).

It follows, of course, that your second question must also be answered in the affirmative.
HIGHWAYS—Length and Width limits—Not applicable to temporary movement of farm machinery. (F 353) 66

October 4, 1951.

HONORABLE GEORGE F. ABBITT, JR.,
Attorney for the Commonwealth.

This is to acknowledge receipt of your letter dated September 28, 1951, requesting my interpretation of the provisions of Section 46-326 of the 1950 Cumulative Supplement in reference to exemption granted to implements temporarily propelled or moved upon the highways. You inquire, first, if the exemption would apply to a piece of farm machinery being moved on the highway on a truck which extends beyond the truck body and exceeds the total outside width of ninety-six inches, and, second, if the exemption would be applicable to a similar piece of farm machinery being towed or pulled on the highway.

Section 46-326 reads as follows:

"No vehicle shall exceed a total outside width, including any load thereon, in excess of ninety-six inches, excepting that a farm tractor shall not exceed one hundred and eight inches and excepting, further, that the limitations as to size of vehicles stated in this section and sections 46-327 to 46-330 shall not apply to implements of husbandry temporarily propelled or moved upon the highway nor to fire fighting equipment of any county, city town or fire fighting company or association."

The phrase "implements of husbandry", as used in the statute, clearly has reference to all farm machinery except tractors which are specifically classified and allowed a total outside width, including any load thereon, of one hundred and eight inches. The exemption given by the quoted section to implements of husbandry temporarily propelled or moved upon the highway is also made applicable to Sections 46-327 to 46-330. The exemption as contained in the statute is clear and unambiguous, and is intended to apply to farm machinery when it becomes necessary for the same to be temporarily upon the highways.

I am, therefore, of the opinion that the exemption permitted by the statute would apply to the temporary moving on the highway of the farm machinery in the manner mentioned in both of your inquiries.

HIGHWAYS—Proper speed limit signs. (F 192) 157

April 1, 1952.

GENERAL J. A. ANDERSON,
State Highway Commissioner.

This is to acknowledge receipt of your letter dated March 28, 1952, enclosing photograph of sign designated as "R-3C". You wish to be advised if this sign is adequate for proper law enforcement.

Your attention is called to engrossed House Bill No. 588, Section 46-212(3), which provides as follows:

"Drive anywhere else upon a highway in this State any school bus carrying school children to or from school at a speed in excess of thirty-five miles per hour, or any other passenger carrying bus at a speed in excess of fifty-five miles per hour, or any passenger motor vehicle or motorcycle at a speed in excess of fifty-five miles per hour, or any * truck at a speed in excess of forty-five miles per hour, * or any other motor vehicle at a speed in excess of fifty-five miles per hour, unless the State Highway Commission prescribed a lower rate of speed * *"
The sign you propose seems to be in compliance with this provision with the exception of the speed limit provided for school buses, which remains at thirty-five miles per hour. This provision, in reference to speed of school buses, was not changed by the 1952 amendment, and I assume that the school authorities will, therefore, not be misled by the sign and will properly instruct their school bus drivers. If this is the case, I am of the opinion that the sign you propose will furnish proper notice to the motorists traveling the highways of Virginia of the speed limits of this State.

HIGHWAYS—Secondary—Jurisdiction of Board of Supervisors over. (F 33) 82

November 7, 1951.

HONORABLE M. A. COGBILL,
Attorney for the Commonwealth, Chesterfield County.

I quote below your letter dated October 29, 1951, requesting an opinion from this office:

"The Board of Supervisors of Chesterfield County has directed me to get your opinion on the following matter: What control, supervision and authority does the said Board have over the Secondary System of Highways?

"This query was raised because of another political subdivision exercising some jurisdiction over said roads without the authority of the Board of Supervisors.

"On April 13, 1948 the Chesterfield County Board of Supervisors, acting under authority of Chapter 369 of the Acts of 1946, adopted the Virginia Subdivision Law. This is given for your information.

"I am sorry to have to bother you about this, but the Board has asked that I get your opinion."

It will be found upon reference to Section 33-141 of the 1950 Code, as amended by the Acts of 1950, page 721, that the local road authorities continue to have the power vested in them on June 20, 1932, for the establishment of new roads and the power to alter or change the location of any road now in the secondary system of State highways within the county, provided the State Highway Commissioner is made a party to the proceedings for the establishment or for the alteration or change of the location of such road. This section provides further that the local authorities may pay the right of way cost for a newly established road or where the location of an existing road is altered or changed. Such right of way cost may be paid out of the general county levy funds. Since the County of Chesterfield adjoins a city of the first class, the following provision of Section 33-138 of the Code would apply:

"* * * and provided, further, that the boards of supervisors or other governing bodies of counties adjacent to cities of the first class may, for the purpose of supplementing funds available for expenditure by the State for the maintenance and improvement of roads in such counties when such supplementary funds are necessary on account of the existence of suburban conditions adjacent to cities, levy county or district road taxes, as the case may be, the proceeds thereof to be expended at the option of the board of supervisors or other governing body either by or under the supervision of the State Highway Commissioner in the maintenance and improvement, including construction and reconstruction, of roads in such suburban district. * * *"
It would seem to follow from the foregoing that the Board of Supervisors of Chesterfield County, insofar as the secondary system of State highways is concerned, continues to have control over such roads for the establishment and alteration provided, of course, the provisions of the statute are complied with and, further, that said Board would have authority to levy a tax for the purpose of supplementing funds available for maintenance and improvement of roads in the County.

The foregoing may be subject, however, to the "Virginia Land Subdivision Act" carried in the 1950 Code as Title 15 Article 2. With reference to this Article, it may be seen from Section 15-786 that the governing body of any city or incorporated town may adopt subdivision regulations, which shall be effective both within its corporate limits and beyond within the distances therein set out. Section 15-787 authorizes the governing body of any county to adopt regulations for subdivisions in unincorporated areas of the county.

The administration and enforcement of such regulations, after they are validly adopted, is provided for by Section 15-788.1, which I quote:

"The administration and enforcement of subdivision regulations in so far as they pertain to public improvements as authorized in Section 15-781 shall be vested in the governing body of the political subdivision in which the improvements are or are to be located.

"Except as provided in Sections 15-786 to 15-788, the governing body which adopts subdivision regulations as authorized in this article shall be responsible for administering and enforcing the provisions of those subdivision regulations."

The first paragraph of the foregoing quoted section seems to be plain. The second paragraph, however, is not so plain because such regulations may be adopted by either or both the county and the adjoining city or town. In such event, the proper construction of this portion of the section is not free from doubt. The rule of construction in such cases is if possible to construe the statute in order that it may be given a reasonable meaning. It would, therefore, seem to follow that the governing body which first adopts subdivision regulations as authorized in this Article, insofar as administration and enforcement of the same is concerned, has preempted the field in the territory where joint jurisdiction extends.

I am, therefore, of the opinion that where two or more political subdivisions have jurisdiction to adopt subdivision regulations as authorized in Title 15 Article 2 of the Code, the first political subdivision properly adopting such regulations has the responsibility for administering and enforcing the provisions of the same. If the regulations are adopted pursuant to the provisions of Section 15-788, I am of the opinion that the administration and enforcement should be determined by an appropriate order of the court entered in such case.

HIGHWAYS—Weight Laws—No appeal by Commonwealth. (F 192) 129

February 11, 1952.

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

I am in receipt of your letter of February 6, from which I quote as follows:

"Your file will reveal that on May 24, 1951, you replied to a letter written by me, dated May 23, 1951, pertaining to overloading of trucks on highways, and gave your opinion therein, referring me to Section 46-334, under which prosecution would be had and punishment as provided by Section 46-338.1."
"The defendant was tried in the Circuit Court of Montgomery County, on February 4th, for overloading on a secondary road which had signs posted for eight ton limit, being a total of 16,000 pounds permitted on that road. This happened in January, 1951, but the trial in the Circuit Court was not actually had until the 4th of this month due to continuance of the case from the Trial Justice Court. In the Trial Justice Court the overweight was 39,600 pounds, which under Section 46-338.1, penalty would be five cents per hundred, or $1980.00. On appeal by the defendant and tried before a jury as stated above, instruction was given by the court covering the proper penalty. No evidence was introduced by the defense, nor did the defendant appear. The Commonwealth proved its case and the jury went into their room to bring in a verdict. The jury returned with a verdict of not guilty.

"This being such an obvious flagrant error as to the verdict, I am asking assistance from your office as to whether or not this could not be classed as a revenue measure whereby the Commonwealth would have the right to appeal. I made a motion before the court to set aside the verdict as contrary to the law and the evidence, due to the same being a revenue measure and asked for time to present some law upholding my contention."

Section 88 of the Constitution provides in part that no appeal shall be allowed to the Commonwealth in a case involving the life or liberty of a person except that such an appeal may be allowed in any case involving a violation of a law relating to the State revenue. This provision of the organic law is implemented by Section 19-255 of the Code. It is my opinion that the phrase "a law relating to the State revenue" refers to a law enacted under the taxing power of the General Assembly. And so our Supreme Court of Appeals in Commonwealth v. Perrow, 124 Va. 805, says that "the purpose of the constitutional provision was to protect the State government in the tremendously important matter of enforcing the laws enacted to secure an income for its support and maintenance."

In the case to which you refer the defendant has been charged with a violation of a statute prohibiting the operation on the highways of a vehicle exceeding the maximum gross weight prescribed by Section 46-334 of the Code. A violation of the statute, by Section 46-335.1 of the Code, is made a misdemeanor. It is plain, I think, that these statutes relating to the maximum size and weight of vehicles which may be operated on the highways are criminal statutes and are enacted under the police power. It is true that Section 46-338.1 of the Code provides an additional penalty for exceeding the maximum load limits, but I do not think it can be soundly contended on this account that these statutes are not criminal laws as distinguished from revenue laws. All criminal statutes which provide for fines and monetary penalties in a sense produce revenue, but I do not think that this fact makes them revenue laws as that term is generally understood.

In view of what I have written, my conclusion is that no appeal lies to the Commonwealth in the case you have under consideration.
"I have before me a case of a truck driver operating with a gross weight of 66,900 pounds on a permit for 53,500 pounds, issued pursuant to Section 46-339. Does this constitute a violation of the terms and conditions of such permit, punishable as a simple misdemeanor as set forth in said Section 46-339, or does it constitute an over-weight of 13,400 (the difference between 53,500 authorized by the permit and 66,900 actual weight) punishable under the provisions of Section 46-338.1?"

I am advised by the Department of Highways that they, in the exercise of the discretion vested in them by Section 46-339 of the Code, have established a policy of granting permits depending upon the length and width of the vehicle to be used and the route to be traveled. The permit issued by the Department sets forth the item, or items, to be transported and sometimes the exact weight of such item, or items, is not known.

If the item, or items, set forth in the permit which you mentioned in your letter were being transported on the route designated although they exceeded the weight authorized by the permit, I am of the opinion that the offense should be punishable under the provisions of Section 46-339 as a misdemeanor because this being a penal statute the same should be strictly construed in favor of the offender.

If, however, the item, or items, mentioned in the permit were not being transported, or if they were being transported but not on the route designated, then the restrictions or conditions of the permit would not be involved, and I am of the opinion that the offense should be punishable as other overweight offenses pursuant to the provisions of Section 46-338.1 of the Code.

HONORABLE FOREST T. TAYLOR,
Commonwealth's Attorney for Augusta County.

This is to acknowledge receipt of your letter dated May 14, 1952, requesting my opinion as to whether or not the C. & O. Railway Company can be legally called upon to bear a part, if not all, of the expense in connection with widening or constructing a new underpass at the intersection of U. S. Route 11 and U. S. Route 250 in the City of Staunton. You advise that this underpass was built probably 50 to 70 years ago, and that it has become inadequate to serve the vehicular traffic now required to pass through the structure.

The only statute of which I am advised that may pertain to your inquiry is Section 56-365 of the Code. However, this does not seem to be comprehensive enough to include proceedings against the company to compel them to widen an existing structure or to construct a new underpass in lieu of an existing structure.

I shall not undertake to express an opinion on the broad police powers of the Commonwealth and its political subdivisions when the welfare and safety of the public are involved, because there are many important factors which must be considered in each case, among which is the procedure necessary to comply with the due process clause of the Constitution. So. R. R. Company v. Commonwealth, 159 Va. 779, 167 S. E. 578, overruled 290 U. S. 190, 54 S. Ct. 148, 78 L. Ed. 260. Also, the benefits, if any accruing to the affected railway company in relation to the evils to be eradicated must be shown before exaction can be made from them of a contribution for building a structure. N. C. and St. Louis R. R. Co. v. Waters, 294 U. S. 405, 55 S. Ct. 486.

You next inquire if the City of Staunton is called upon to contribute, what portion the City and Highway Department should bear respectively. In this con-
nection, your attention is called to Section 33-114, which provides insofar as material as follows:

"In any case in which an act of Congress requires that federal aid highway funds made available for the construction or improvement of federal or State highways within an urban place be matched by local funds, the State Highway Commission may contribute one-half of such local funds, provided the urban place contributes the other one-half."

Pursuant to the provisions of this section, I am advised that it is customary where federal funds are available to the State for an urban project to allocate fifty per centum federal funds and the remaining one-half to be paid by the municipality and the State Highway Commission.

INSANE, EPILEPTIC, FEEBLEMINDED—Duty of officer to convey patients to hospital. (F 136) 67

HONORABLE P. HOLT LYON,
City Sergeant, Danville.

I am in receipt of your letter of October 2, from which I quote below:

"In accordance with a recent amendment to the Code of Virginia all persons on whom a commission is held, whether they are mentally ill, an inebriate or otherwise and are committed to an institution they are committed to the City Sergeant or Sheriff as the case may be awaiting delivery to the institution designated.

"I have been requested a number of times by friends and relatives of persons just committed to let them have custody of the person committed and allow them to convey the patient to the hospital or institution. I shall appreciate an expression of your opinion as to the risk I would be taking if I allow the above procedure.

"The thought in my mind is whether or not I should send a guard with all patients who have been committed to me to be delivered to various institutions. Of course, I do not mean the patients that the different institutions send for."

Section 37-72 of the Code provides that the sheriff (or sergeant) shall be responsible for the safe keeping and proper care of any person committed to a State hospital or colony until such person is delivered to the proper institution or its authorized agent.

Section 37-87 states the cases in which the mentally ill patient shall be transported to a hospital or colony by the sheriff (or sergeant).

In view of the responsibility placed upon the sheriff or sergeant, it would be difficult for me to attempt to set out the cases in which the officer would be justified in turning over the patient to friends and relatives for conveyance to the hospital or institution. Doubtless there are many cases in which it would be entirely safe for the officer to allow a friend or relative to take the patient to the hospital, but I do not think the officer can escape the responsibility placed upon him by Section 37-72. In short, considering the statutes involved and specifically answering your question, if an officer should follow the procedure outlined by you, I am of opinion that the risk would be his. As a practical matter, however, I can conceive of many cases in which it would be reasonably safe for the officer to allow a friend or relative to deliver the patient to the institution.
INSANE, EPILEPTIC, FEEBLEMINDED—Fee of Justice of Peace for commitment. No fee for trial justice. (F 148) 27

HONORABLE JOHN W. B. DEEDS,
Trial Justice, Pulaski.

August 15, 1951.

I am in receipt of your letter of August 14, in which you call my attention to two Acts of 1950 amending Section 37-75 of the Code dealing with fees and expenses of commitments in cases of insane, epileptic, feebleminded, etc. The section was first amended by Chapter 465 of the Acts of 1950, approved April 7, 1950, and was again amended by Chapter 585 of the Acts of 1950, approved April 11, 1950. Neither Act contained an emergency clause. It is my opinion that the amendment of the section made by Chapter 585 prevails and that, therefore, the fee of the Justice of the Peace is $5.00. I have heretofore expressed the opinion that the amended section does not provide for a fee to a Trial Justice for sitting in commitment cases.

INSANE, EPILEPTIC AND FEEBLEMINDED—Requirements for sterilization.

DR. C. G. HOLLAND,
Acting Superintendent, Western State Hospital, Staunton.

May 20, 1952.

I am in receipt of your letter of May 15, written at the request of Major General E. Walton Opie, Chairman of the State Hospital Board. You enclose with your letter a report from Mrs. Mozelle C. Brown, Superintendent, Department of Welfare of Greene County, which gives a very thorough case history of Susie Anne Breeden.

You state that Miss Breeden is a twenty-four year old white unmarried female, who was admitted to the Institution on January 4, 1952, following legal commitment as a mentally ill person. It is further stated that "After observing and studying her for a period of time, our Staff made a diagnosis of Without Psychosis, Psychopathic Personality, Pathological Sexuality, Nymphomania. At that time, our Staff was of the opinion that Miss Breeden should be sterilized. In addition, she has asked that it be done."

Miss Breeden's case has been presented to the Sterilization Board. The Board has come to no decision because "the medical testimony was such that the patient did not fit any of the classifications given in the statutes governing the sterilization of patients committed to the state hospitals; i.e., Miss Breeden is neither epileptic, feebleminded, nor insane (mentally ill)."

You desire my opinion as to whether or not this patient could be sterilized since she has voluntarily made a request for sterilization, and since diagnosis of her mental status discloses that she is competent to make such a request.

Authority for sterilizations and the procedures laid down by statute must be strictly complied with. This authority can only be exercised after it has been determined that the patient is "afflicted with hereditary forms of insanity that are recurrent, idiocy, imbecility, feeble-mindedness or epilepsy," and that "it is for the best interest of the patient and of society." The Board must find that these conditions exist before it may order the superintendent to perform, or to have performed by some competent physician to be named in the order, the sterilization operation.

It is clearly apparent that the best interest of society would support sterilization in this case. However, it is equally apparent that the conditions precedent to the exercise of the authority do not exist. It is my opinion, therefore, that there is no warrant or authority in law under the circumstances of this case for
the Board to order that this patient be sterilized. The fact that she is competent to consent to the operation, and has consented, would not confer authority upon the Board to officially order her sterilization. If performed under order of the Board under these circumstances, the act of performance would not be under authority conferred by law, and would not be in discharge of the official duties of the person performing the operation.

JAILS—Authority of State Board of Welfare and Institutions. (F 231) 13

Honorable R. M. Youell,
Director, Divisions of Corrections, Department of Welfare and Institutions.

July 18, 1951.

I have your letter of July 16, with enclosures, from which it appears that pursuant to the authority contained in Section 53-134 of the Code the State Board of Welfare and Institutions has prohibited the confinement of prisoners in the Bland County jail because this jail does not meet the minimum standards for construction prescribed by the Board. I presume that the procedure set out in Section 53-134 has been followed. It is now suggested that the Board "is powerless to close the Bland County jail so long as Bland County does not accept or request reimbursement for jail expenses," and you desire my opinion on the question as to whether the Board is deprived of the authority conferred upon it by the statute by virtue of this fact.

The purpose of Section 53-133 of the Code, authorizing the Board to prescribe minimum standards for the construction, equipment, maintenance and operation of jails, and of Section 53-134, authorizing the Board to prohibit the confinement of prisoners in jails which do not comply with these standards, is to make sure that the jails are so constructed, operated and equipped as to make them safe and decent places for the confinement of prisoners, not only in the interest of the prisoners, but also in the interest of the public generally. The sections have a humane object as well as that of the public safety. In my opinion, the suggestion advanced completely ignores the purpose of the sections and is entirely without merit. The fact that a county does not request or accept the reimbursement for jail expenses to which it is entitled by statute has no effect, in my opinion, upon the authority of the Board under the sections to which I have referred.

JUSTICE OF PEACE—Authority to issue warrants or admit to bail. (F 82) 81

Honorable John B. Boatwright, Jr.,
Secretary, Virginia Advisory Legislative Council.

November 7, 1951.

This will acknowledge receipt of your letter dated November 2, 1951, in connection with the study of traffic accidents being considered by the Virginia Advisory Legislative Council. You advise that in order to facilitate the handling of the traffic cases, to avoid unnecessary hardship for the person arrested and to save the time of the arresting officer, two suggestions have been made to the Council.

"** The first is that justices of the peace be appointed with power to issue warrants returnable in any appropriate jurisdiction, and to release on bail or on recognizance or accept cash in lieu thereof in such cases;
the second is that all justices of the peace be given power to issue warrants returnable to trial courts in counties adjoining counties of the justices' residence, and to grant bail, release on recognizance or accept cash deposits in lieu thereof in such cases. In this connection, the Council is not certain of the effect of Sections 19-77 and 19-78 of the Code in such cases."

You request my opinion as to any adverse results which might come about were either of the above suggestions adopted into law; or whether justices of the peace have the suggested powers under existing law.

The sections you refer to are here quoted:

"Section 19-77. Duty of arresting officer; bail.—An officer arresting a person under a warrant for an offense shall bring such person before and return such warrant to a trial justice or justice of the peace of the county or corporation in which the warrant is issued, unless such person be let to bail as hereinafter mentioned, or it be otherwise provided."

"Section 19-78. When warrant issued in another county, etc., what to be done with accused.—When a warrant is issued in a county or corporation, other than that in which the charge ought to be tried, the trial justice or justice of the peace before whom the accused is brought, shall, by warrant, commit him to an officer, and such officer shall carry him to the county or corporation in which the trial should be, and there shall take him before, and return such warrant to, a trial justice or justice of the peace thereof, unless otherwise provided."

It is provided in Section 108 of the Constitution of Virginia as follows:

"The General Assembly may provide for the appointment or election of justices of the peace and prescribe their jurisdiction." *(Italics supplied)*

In my opinion, the provisions of Section 19-78 are sufficiently broad to permit a justice of the peace to issue a warrant for any accused brought before him notwithstanding the offense was not committed in his jurisdiction. The justice of the peace, in such case, is required to commit the accused to an officer, and such officer is required to carry the accused to the jurisdiction in which the trial should be had. The justice of the peace is authorized by the provisions of Section 19-88 to admit certain persons brought before him to bail.

Since the Constitution confers on the General Assembly authority to prescribe the jurisdiction of justices of the peace, I am of the opinion that the legislation being considered by the Virginia Advisory Legislative Council could be validly adopted by the General Assembly. The proposed legislation would seem to confer upon the justices of the peace some additional powers, however, I should not like to express an opinion on any adverse results which may come about by the adoption of either of your suggestions into law without first having an opportunity to carefully study the context of the proposed legislation.

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**JUSTICE OF PEACE—Writing civil warrants for employer, carrying concealed weapon. (F 136 b) 204**

May 14, 1952.

HONORABLE E. N. PRITCHETT,
Justice of the Peace, Petersburg.

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

"I would appreciate very much your opinion on two matters directly concerning my position of Justice of the Peace."
"In January, 1950, I, being a duly qualified voter of the City of Petersburg, was appointed to the office of Justice of the Peace by the late Honorable R. T. Wilson. I am also Credit Manager of Baxter Optical and Jewelry Co., Inc.

First, I would like to know if, in the capacity of Justice, I am permitted to write civil warrants for the Company by whom I am employed? "Second, presuming that a Justice of the Peace is considered as a conservator of the peace, is he permitted to have on his person a concealed weapon?

"I do not wish to carry a gun except in an emergency, but due to the fact that the City of Petersburg has a newly appointed Police Justice, replacing the late Honorable E. F. Clements, Judge, there seems to be some doubt in his mind concerning this matter."

Answering your first question, I can envisage a situation in which it might be of doubtful propriety for you to write civil warrants under the circumstances you describe, but I know of no statute which prohibits you from so doing.

In connection with your second question, I enclose a copy of an opinion given under date of November 2, 1949, to Mrs. Thelma Y. Gordon, Secretary of the Commonwealth, dealing with the authority of a Notary Public who is a conservator of the peace to carry concealed weapons. In view of the tenor of this opinion, I believe that, if you feel it is necessary for you to carry a concealed weapon, it would be advisable for you to apply to the proper court for a permit to do so.

JUVENILE AND DOMESTIC RELATIONS—No right to jury trial in juvenile proceedings. Report of investigation is part of record. (F 239) 80

HONORABLE WILLIAM W. JONES,
Judge, Juvenile and Domestic Relations Court of Nansemond County.

This is in reply to your letter of October 26, 1951, in which you request my opinion on two questions involving procedure in juvenile and domestic relations cases.

Your first question involves an interpretation of that portion of § 16-172.8t of the Code which reads as follows:

"* * * Proceedings in juvenile cases in such courts shall conform to the equity practice where evidence is taken ore tenus; provided, however, that an issue out of chancery may be had as a matter of right upon the request of either party. * * *.

(Underscoring added.)

This entire section deals with procedure on appeal from a judgment of a juvenile court and, in my opinion, the words "such courts," in the language quoted, refers only to the courts of record and not the juvenile court. The problem presented would, therefore, not arise in your Court.

I quote your second question as follows:

"Does the investigation referred to in Section 16-172.30 become a part of the record and does it become a part of the evidence in the Juvenile and Domestic Relations Court or in the Circuit Court upon appeal?"
In my opinion the report of the investigation becomes a part of the record in the case and subject to the privacy provisions of § 16-172.28. The function of the report, however, is to guide the judges in making such disposition of the case as the welfare of the particular child may demand. I do not think it can properly be considered as "evidence" in the case.

JUVENILE AND DOMESTIC RELATIONS—Publication of names of juvenile traffic violators. (F 239) 64

Honorable O. Raymond Cundiff,
Judge, Juvenile and Domestic Relations Court of Lynchburg.

October 2, 1951.

This is in reply to your letter of September 27 from which I quote below:

"The newspapers of this city have recently adopted a policy of publishing all names of adult traffic violators that are convicted in the Police Court, and have requested that I likewise give them permission to publish the names of juvenile traffic offenders who are adjudicated in the Juvenile and Domestic Relations Court. They feel that the publication will be a deterrent; and that is the reason for desiring to publish the names.

"I have read your opinions dated March 6, 1951 and June 15, 1951, concerning newspaper publication of proceedings before the Juvenile and Domestic Relations Courts. I have also read Section 16-172.28 and 29. It appears to me that in said sections the records shall be withheld from public inspection and only exhibited to those persons having a legal interest therein; with the approval of the judge.

"I am not clear as to whether or not I have the legal authority to give this information to the newspapers, if I should desire to do so, and will appreciate your advising me whether or not, in your opinion, that I do have the authority to release the names of traffic violators to the newspapers for publication in the event that I feel that it would be helpful to do so."

The pertinent statutes are §§ 16-172.28 and 16-172.29 of the Code which read respectively 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."
In one of the opinions to which you refer—that to Honorable Ligon L. Jones, Commonwealth's Attorney for the City of Hopewell—I concluded that:

"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."

In my opinion this conclusion is equally applicable to the situation before you. Giving to the newspapers for publication the names of juvenile traffic offenders would constitute, certainly in part, disclosing the records in such cases. Contrary to the above quoted statutes, the second of which expressly mentions violations of the motor vehicle law. It may well be that the newspapers are right in feeling that such publication would be a deterrent but, in view of the law as it is now written, this is a matter for consideration by the General Assembly.

JUVENILE AND DOMESTIC RELATIONS—Time limits for reopening cases.
(F 239) 5

HONORABLE ANDREW W. CLARKE, State Senator.

This is in reply to your letter of July 3, 1951, in which you inquire whether § 16-27 of the Code of Virginia prevents the Judge of the Juvenile and Domestic Court from reopening criminal and domestic cases where a motion for a new trial is made on newly discovered evidence six months from the date of his findings.

Section 16-172.81 of the Code of Virginia of 1950 provides, among other things, that such judge may in any case grant a rehearing within thirty days upon good cause shown after due notice to the interested parties. In my opinion, the judge would, in ordinary cases, be bound by this thirty-day limitation. I have used the term "ordinary cases" advisedly, for there are certain types of cases which a juvenile and domestic relations court may reopen at any time. For example, §16-172.49, which deals with the commitment or placement of juveniles, provides that the court may, of its own motion, reopen any case and modify or revoke its order, and § 16-172.53 provides that, in the trial of other than juvenile cases, the court may even after sentencing the defendant and before sentence has been fully served, suspend the unserved portion of such sentence, increase or decrease the probation period and revoke or modify any conditions of probation. However, except for those cases over which the court has continuing jurisdiction by specific legislation, it is my opinion that the court cannot grant a new trial after the thirty-day period provided in § 16-172.81.

LABOR—Certificate to minor employed as picket. (F 56) 89

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

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

"Can an employment certificate be refused to a minor who participates as a picket in a picket line who is employed, permitted or suffered to work for a union in this capacity in a street or public place?
"This Department does not feel that it can conscientiously approve certificates for this particular type of employment for boys and girls under 18 years of age; however, Title 40, Section 99 of the 1950 Code of Virginia, page 433, Volume 6, seems to indicate that it would be necessary for us to honor the application for a certificate."

Section 40-99 of the Code provides that no boy under fourteen and no girl under eighteen years of age shall be employed, permitted or suffered to work in a street or public place in connection with any gainful occupation except as provided in Sections 40-114 to 40-118 of the Code. Section 40-114 reads as follows:

"Any boy between twelve and sixteen years of age may engage in the occupation of (1) bootblacking, (2) selling newspapers, magazines, periodicals or circulars which are by law permitted to be distributed and sold, (3) running errands or delivering parcels, or (4) caddying or other outdoor employment, at such hours between six o'clock ante meridian and seven o'clock post meridian as the public schools are not in session, provided such boy procures and carries on his person a badge as hereinafter provided."

You will observe that the quoted section permits a boy between the specified ages to engage in the occupation of "caddying or other outdoor employment" during the specified hours. Picketing, assuming that it is lawful, peaceful picketing, is outdoor employment and I must, therefore, reluctantly advise you that in my opinion such employment is permitted by the broad language of the statute. If the General Assembly feels that boys should be prohibited from engaging in this class of work, it will be necessary for it to take the necessary action.

LABOR—Women in certain hospital positions limited as to hours. (F 120) 54

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

September 18, 1951.

I am in receipt of your letter of September 12, from which I quote as follows:

"The regulation of hours of work of women, Title 40, Section 34, page 415, Volume 6 of the 1950 Code of Virginia, provides in part 'no female shall be employed, suffered or permitted to work in any factory, workshop, laundry, restaurant, mercantile or manufacturing establishment in this State more than forty-eight hours in any one week, nor more than nine hours in any one day of twenty-four hours.'

"Occupations engaged in by females over 18 years of age, such as PBX operators, elevator operators, cooks, waitresses and kitchen helpers and laundry workers have heretofore been classified by this Department as workshop jobs. Recently we have received a number of complaints from women who are working excessive hours in hospitals in the above capacities.

"Your opinion would be appreciated as to whether or not the 'regulation of hours of work of women' applies to female employees in hospitals in the above stated occupations."

This office has recently expressed the opinion that Section 40-34 of the Code regulating the hours of work for women, as quoted in part by you, applies to PBX operators in hospitals. It is my view that the reasoning of this opinion
LAND GRANTS—On island formed from dredging. (F 177) 88

HONORABLE W. E. HOCO,
Trial Justice for York and Warwick Counties.

November 14, 1951.

This is in reply to your letter of November 1, requesting my opinion as to whether or not a valid land grant could be secured to that portion of an island lying more than fifteen hundred feet from and parallel with the axis of the channel of a navigable river. The island lies partly within and partly without the fifteen hundred foot line and was created through the instrumentality of dredging operations conducted by the United States.

Section 41-8, Code of Virginia, being the applicable statute, provides, in part, as follows:

"The State Librarian shall not issue any grant for land upon any survey heretofore made and not yet carried into grant * * * or to pass any estate or interest in lands which are a common under § 62-1, or to pass any estate, or interest in any natural oyster bed, rock, or shoal, whether such bed, rock, or shoal shall ebb bare or not, or interest in any islands created in the navigable waters of the State through the instrumentality of dredging operations conducted by the United States between parallel or concentric lines fifteen hundred feet on either side of the channel axis, but every such grant for any such lands, island, bed, rock, or shoal shall be absolutely void; * * *.

It is to be noted that the foregoing section renders "absolutely void" any grant to an "interest in any island" so created lying within the designated area.

It is an unsettled question as to whether or not valid title can be passed to the portion lying outside of the fifteen hundred foot line, and the answer does not lend itself to an unequivocal determination. However, in view of the aforementioned language used in the statute and, in view of the apparent legislative intent to leave the area entirely unhindered for purposes of navigation, it is my opinion that it is highly doubtful that a valid title could be secured by grant.
REPORT OF THE ATTORNEY GENERAL

LOTTERY—What constitutes. (F 123) 18

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

This is in reply to your letter of July 23rd from which I quote below:

"For the past several years, during the tenure of office of the late W. T. Spencer, Jr., a rather strict interpretation has been placed upon the lottery statutes by my predecessor in office.

"In particular we know of certain types of promotional schemes which have taken place in other cities in Virginia, but which we have taken the position here in Lynchburg are violations of the lottery laws.

"It will be appreciated very much, if you can give us an opinion in connection with the following types of promotional schemes:—

"(1) A merchant displays in his establishment a jar of beans; with no obligation upon the public, anyone may fill out a card guessing the number of beans in the jar. The person guessing the closest number of beans, receives a prize. It is not necessary to make a purchase to be eligible to win the prize.

"(2) A merchant displays in his establishment a large block of ice, in the center of which a blanket may be seen. The person guessing the approximate time that it will take the ice to melt so that the blanket may be removed therefrom is awarded the blanket. There is no obligation to purchase anything from the establishment, but, of course, the person must go to the establishment to sign the necessary entry blank.

"(3) A large candle is placed in a mercantile establishment. All persons who go to this establishment, even though they make no purchases, may fill out a card and guess the time it will require the candle to melt. The person guessing closest to the time receives a prize.

"(4) Any container is filled with a substance and the person guessing the weight is awarded a prize. There is no obligation on the person making the entry to make a purchase but he must visit the establishment."

Your inquiry involves the construction of section 18-301 of the Code prohibiting lotteries. This section has been considered by this office many times in its application to varying factual situations. The three essentials of a lottery have been clearly stated by our Supreme Court of Appeals notably in Maugh v. Porter, 157 Virginia, 415. There it is said that these essentials are consideration, prize and chance. There can be little doubt but that the latter two essentials are present in the cases you put. And in view of Maugh v. Porter, supra, I think it is clear that the first essential is present also, the consideration being the presence of the persons participating in the contest in the merchant's place of business. It is reasonable to suppose that the object of the merchant is to attract persons to his store with the hope of making sales of merchandise to them even though they do not obligate themselves to buy by entering the contest.

It has been suggested that the element of chance is eliminated upon the theory that the schemes outlined are games of skill. I think that this theory presses the definition of the word "skill" too far. Skill implies the ability to use one's knowledge effectively in execution or performance, that is, knowledge gained from study, experience or training. Surely the average person does not have or use much knowledge in making these guesses.

Finally it should be remembered that the statute involved is remedial and is to be liberally construed. Abdella v. Com., 174 Va. 450.

In my opinion, from the facts presented, these schemes fall within the prohibition of the statute.
REPORT OF THE ATTORNEY GENERAL

MARRIAGE—Performed in West Virginia by Virginia minister. (F 223) 117

January 24, 1952.

Senator Curry Carter,
Senate Chamber.

I have given some thought to the matter which you discussed with me yesterday relative to Senate Bill No. 59, introduced by you on January 16, 1952. The facts submitted by you are substantially as follows:

A marriage license was duly issued by the clerk of the Circuit Court of Augusta County authorizing the marriage of H and W, both residents of said county. The marriage ceremony was performed by a minister resident and qualified to perform rites of marriage in Virginia. The marriage, however, was performed by said minister in the State of West Virginia. You desire my opinion as to the validity of this marriage.

The statutes of both Virginia and West Virginia prescribe certain indispensable requirements for a celebration of a valid marriage within the State. The States require that the marriage license be procured, that certain serological tests be made, and that the marriage be solemnized in the manner required by the statutes. In Virginia it may be solemnized by either a minister who has qualified to perform such rites before the proper court, or some other person may be authorized by law. In West Virginia the marriage must be solemnized by a minister authorized by the circuit or county court to perform marriages. The marriage in question was solemnized in West Virginia under a Virginia license. Virginia cannot authorize the entering into a marital state beyond the confines of the State.

You are familiar with the general rule that a marriage valid where performed is valid everywhere, with certain exceptions not here material. The marriage performed in this instance was not valid where celebrated; therefore, no legal vitality can be imputed to it.

Section 20-23 of the Code relating to the authorizing of ministers to perform the marriage ceremony restricts the authority of the minister to celebrate the rites of matrimony in this State. If the statute did not contain such language, Virginia could not authorize a minister to perform the rites of marriage in any other State without reciprocal legislation between the two States.

My conclusion is, therefore, that these people are not married. The simple way out would be for them to secure a license and have the ceremony performed as directed by law. Our Supreme Court has held that the Virginia statutes requiring the issuance of a license and the solemnization of marriages is mandatory. I believe this is in reply to the question which you submitted.

MEDICINE AND MEDICAL PROFESSION—Sale of drugs at medicine show. (F 134) 19

Honorable Royston Jester, III,
Commonwealth’s Attorney, City of Lynchburg.

This will acknowledge receipt of your letter of July 23 in which you inquire whether or not a proposed Hadacol show, which in no way sells or disposes of the product during the show, but which requires a Hadacol box top for admission, would be in violation of § 54-520, Code of Virginia.

Section 54-520 provides:

"It shall be unlawful for any person to sell, distribute, vend or otherwise dispose of any drug, medicine, or pharmaceutical or medicinal preparation by means of any public exhibition, entertainment, performance,
or carnival, commonly known as 'medicine shows' and 'patent medicine shows'.

"Any person violating any provision of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not exceeding one hundred dollars for each offense, or confined in jail not exceeding one year, or both."

It is to be noted that the statute refers to shows commonly known as "medicine shows" and "patent medicine shows", which were of a particular type and famous in prior years. However, the proposed Hadacol show appears to materially differ from that type of show classed as the "medicine show." Accordingly, it is my view that it is highly doubtful that the proposed show is embraced within the prohibition as set forth in the above-quoted statute.

In addition, the statute is penal in nature and must be strictly construed against the Commonwealth.

While the problem presented is not entirely free from doubt, it appears that it would be practically impossible to sustain any conviction under § 54-520 upon the facts as set forth in your letter.

MOTOR VEHICLES—Hauling through Virginia must be registered. (F 353) 162

Honorable Stanley Owens,
Commonwealth's Attorney for Prince William County.

April 3, 1952.

This is to acknowledge receipt of your letter of March 31 in which you state:

"Section 46-152 of the 1950 Code provides in part as follows:

* * * The presence on a motor-vehicle, trailer or semi-trailer of property as to which the owner or operator of such motor vehicle, trailer or semi-trailer is unable to show evidence of ownership or of having produced the same, or that he has sold the same in the regular course of his usual business, shall be prima facie evidence that he is transporting such property for compensation. * * *

"We have a criminal case under this section pending in our Trial Justice Court which involves an out-of-state truck, loaded before entering the State and destined beyond Virginia but passes through the State of Virginia. The driver did not have any evidence of ownership or of having produced the merchandise and we are wondering whether being an out-of-state vehicle, loaded out-of-state and destined beyond Virginia, makes any difference under the section referred to above."

Your attention is invited to Section 46-142 of the Code of 1950, which you will note requires any person who operates a vehicle which is licensed in another State (not required to be registered in Virginia) and transports persons or property for compensation, must register the same with the State Corporation Commission and obtain therefrom a registration card or identification marker. This section certainly applies to interstate movements. Both Section 46-142 and 46-152 were parts of Chapter 377, Acts of 1942. In order to determine whether the vehicle is operated for the transportation of property for compensation, the provisions of 46-152 are invoked. I understand from the State Corporation Commission that Section 46-152 has been applied in similar cases for many years.

I am, therefore, of the opinion that Section 46-152 would be applicable to the operation of a motor vehicle, such as a truck, which is loaded with cargo.
in a foreign state and is destined to another state, and passes through Virginia enroute.

MOTOR VEHICLES—License—Required for logging trucks. (F 149) 173

April 14, 1952.

HONORABLE CHARLES S. SMITH, JR.,
Commonwealth’s Attorney for Middlesex County.

This is to acknowledge receipt of your letter of April 8 in which you state in part:

"There are several parties in this section who have flat body trucks with derricks or booms on them and these are used to go into the woods where logs are lifted with the booms on to the flat body of the truck and hauled over the State Roads to saw mills. Some of the owners of these trucks have not gotten licenses for them and they claim they do not have to have a license."

Your attention is invited to Section 46.1, paragraph 13 of the Code of 1950 which reads as follows:

"Motor vehicles"—"Every vehicle as herein defined which is self-propelled or designed for self-propulsion."

Section 46-42 requires the owner of every motor vehicle to apply to the Division of Motor Vehicles to obtain registration therefor. There is nothing in Sections 46-45 and 46-46 which exempts this type of equipment from being licensed.

I am, therefore, of the opinion that these trucks must be licensed if they are to be driven upon the highways of Virginia.

MOTOR VEHICLES—Operating car emitting flaming gas, felony. (F 353) 156

April 1, 1952.

HONORABLE ALFRED L. MARCHANT,
Commonwealth’s Attorney for Mathews County.

This is in reply to your letter of March 31, 1952, which reads as follows:

"Will you kindly refer to Section 46-309 of the Motor Vehicle Code and advise me whether or not in your opinion it would be proper to issue a warrant under that section charging the operator of a motor vehicle with a felony for operating an automobile on the highway with a device attached to the exhaust which when operated ejects a flame from the exhaust.

"The particular case that I have in mind threw a flame about eighteen inches long, but it is possible that under certain conditions that the vehicle might have been operated the flame would have been much larger. This device consisted of a coil and a spark plug attached to the exhaust which, when operated by the driver, caused the flame to shoot out of the exhaust.

"In my judgment it is possible that such a device when operated could be a hindrance or obstruction to traffic and it seems to me that
would be the only question to be decided to determine whether or not the possession or operation of such equipment was a felony under this section."

Section 46-309 to which you make reference provides that it shall be a felony to install upon any motor vehicle any device for "emitting any gas which may be a hindrance or obstruction of traffic" or to knowingly own or operate a vehicle so equipped. I concur in your judgment that a flaming gas could constitute a hindrance or obstruction to traffic and that, therefore, the operation of a vehicle with knowledge that it is equipped to emit a flaming gas is in violation of this section.

MOTOR VEHICLES — Operating of motor vehicle by one whose permit was revoked and has not been restored. (F 149) 105

December 27, 1951.

MR. BERNARD MAHON,
Commonwealth's Attorney for Caroline County.

I have your letter of December 12, 1951, in which you state the following:

"When a person is convicted for drunken driving and his operator's permit is revoked for a period of twelve months, and at the end of the twelve months period of revocation, he operates an automobile without first having obtained an operator's permit as provided by law, is he guilty of operating while his permit is revoked or of only operating his automobile without an operator's permit."

When a person's operator's license is revoked under the provision of Section 46-416 of the Code for a period of one year, a new license is not re-issued to him until he furnishes proof of financial responsibility, which is required under provisions of Section 46-426 of the Code. That section reads as follows:

"Every such suspension or revocation shall remain in effect and the Commissioner shall not issue to such person any new or renewal license or register in his name any motor vehicle, until permitted under the provisions of this chapter and only then if he gives proof of his financial responsibility in the future as provided in this chapter, except that when five years shall have elapsed from the date of the termination of the revocation provided by Section 46-416 or Section 46-417, such person is not required to furnish or maintain proof of financial responsibility under any other provision of this chapter."

Your attention is invited to Section 46-484 of the Code which reads as follows:

"Any person whose operator's or chauffeur's license or registration certificate or other privilege to operate a motor vehicle has been suspended or revoked, restoration thereof or the issuance of a new license or registration being contingent upon the furnishing of proof of financial responsibility, and who, during the period of suspension or while the revocation is in effect, or in the absence of full authorization from the Commissioner, drives any motor vehicle upon any highway or knowingly permits any motor vehicle owned by him to be operated by another upon any highway except as permitted under this chapter and any nonresident from whom the privilege of operating any motor vehicle on the highways
of this State has been withdrawn as provided in this chapter who operated a motor vehicle in this State shall be guilty of a misdemeanor and upon conviction be punished by imprisonment for not less than two days nor more than six months and be fined not less than twenty-five dollars nor more than five hundred dollars, either or both." (Italics supplied.)

The revocation called for under provisions of Section 46-416 remains in effect until the person concerned has met the requirements giving proof of financial responsibility in the future. The 1948 amendment to Section 46-426 which added: "* * * except when five years shall have elapsed from the date of the termination of the revocation provided by Section 46-416 or Section 46-417, such person may be relieved of giving proof of his financial responsibility in the future, provided such person is not required to furnish or maintain proof of financial responsibility under any other provision of this chapter". You will note that the Legislature has used the word "may" and not "shall" although the word "shall" was used twice in the preceding part of the section. I take it that had the Legislature intended that the revocation should cease to exist after the five years, it would have used the term "shall" or other appropriate language. This it did not do, so it is obvious that the Legislature intended that a person in this category could, if the Commissioner deemed necessary, be required to furnish proof of financial responsibility. In other words, it seems to me that under the provisions of this section, the Commissioner of the Division of Motor Vehicles continued a certain control over the issuance of the driver's license; hence, it would follow that the revocation has not been extinguished but continued until such time as the person has been permitted by the Commissioner to secure the license without giving evidence of financial responsibility. In administering the act, I understand the Division of Motor Vehicles follows a policy to issue the license after expiration of five years as a matter of course, provided the records of the Department do not indicate that the person concerned has been convicted or involved in accidents or has become physically or mentally impaired in the meantime. However, if nothing is done and the person continued to drive, he is guilty of driving after his permit is revoked and not simply of driving without having a permit.

It would seem, therefore, that once a person's operator's license has been duly revoked, he must comply with the law in giving proof of financial responsibility for the future, and regardless of how long he waits to have his license renewed, the suspension continues until he secures authorization to drive from the Commissioner.

I am of the opinion that a person whose driving license has been revoked, and after the expiration of the revocation period he operates an automobile without having obtained an operator's license, is guilty of operating a motor vehicle while his license is revoked and is in violation of Section 46-484 of the Code and, therefore, the charge against him should be made under the provisions of that statute.

MOTOR VEHICLES—Reckless Driving—Entering highway from "side" road. (F 353) 63

September 28, 1951.

HONORABLE A. LAURIE PITTS, JR.,
Attorney for the Commonwealth, Buckingham County.

This is to acknowledge receipt of your letter dated September 25, 1951, requesting my opinion on the following:

"Is a person who comes up to a main arterial highway, from a dirt road, stops before entering the highway, but then drives into the high-
way, when a car is approaching the intersection at 45 to 50 miles per hour and is in about 100 feet of the intersection, when the driver from the secondary road enters the main hard surfaced highway, guilty of reckless driving in the ensuing collision?

"Especially what is a 'side road' under Sec. (8) above.

"There is another section which says that when two people are about to enter an intersection, the one on the right has the right of way and this causes the confusion as to which of the drivers is in fault, the man on the main arterial highway, or the man driving on such highway from a dirt road with a 'STOP' sign against him, but who did stop and then drove on the main road with another car approaching in about 100 feet, but which he did not see until it struck him."

Section 46-209(8) provides as follows:

"Any person shall be guilty of reckless driving who shall:

* * * * *

"(8) Fail to bring his vehicle to a stop immediately before entering a highway from a side road when there is traffic approaching upon such highway within five hundred feet of such point of entrance."

Manifestly, the requirement of this statute that a driver of a vehicle stop before entering a highway when traffic is approaching upon such highway within five hundred feet of the point of entrance is intended to prevent the driver of such vehicle from entering into the highway in front of such approaching traffic. Simply to stop and then proceed immediately to drive the vehicle into the highway in front of approaching traffic would defeat the intention of the statute.

Section 46-240 provides that a driver of a vehicle entering a public highway from a private road shall immediately, before entering such highway, stop and yield the right of way to all vehicles approaching on such highway.

In the case of Temple v. Ellington, 177 Va. 134, 12 S. E. (2d) 826, the court said:

"The presumption, in the absence of evidence to the contrary, is that the driver on the private road did stop and that he looked for oncoming traffic."

"Whether the driver on the private road is justified in going into the highway under the circumstances is for the jury."

In view of the holding in the foregoing case, it would seem upon analogy that your first inquiry presents a jury question to be determined by them in the light of all of the circumstances.

Insofar as I am advised, there has been no judicial determination or definition of "side road" as used in paragraph 8 of Section 46-209. Since, however, there is a special statute, as before referred to regarding entrance into highways from private roads, the term "side road" as used in this section would refer to a public road.

I am advised that the Department of Highways erects stop signs at all public roads entering arterial highways. Such signs when erected should be sufficient notice to the operator of a motor vehicle that such road is a side road as referred to in the statute.

The other section of the Code to which you refer is Section 46-238, and reads as follows:

"When two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the
right of way to the vehicle on the right, except as otherwise provided in Section 46-240. The driver of any vehicle traveling at an unlawful speed shall forfeit any right of way which he might otherwise have hereunder."

I am of the opinion that this section is not applicable when one road of the intersection has a stop sign properly posted.

MOTOR VEHICLES — Reckless driving unlike drunken driving must be on highway. (F 353) 186

May 16, 1952.

MR. R. PAGE MORTON,
Commonwealth’s Attorney for Charlotte County.

This will acknowledge receipt of yours of May 13, 1952 in which you ask if I concur in your opinion that a person must drive a vehicle upon a highway in order to be guilty of reckless driving under §46-208 of the Code of Virginia of 1950, and that it is not necessary for a person to drive on a highway in order to be guilty of driving while under the influence of intoxicants under § 18-75. You also set forth two locations which you ask if, in my opinion, could be considered as highways within the contemplation of § 46-208.

Title 46, § 46-208 of the Code of Virginia of 1950 reads as follows:

"Irrespective of the maximum speeds herein provided, any person who drives a vehicle upon a highway recklessly or at a speed or in a manner so as to endanger life, limb or property of any person shall be guilty of reckless driving; provided that the driving of a motor vehicle in violation of any speed limit provision of § 46-212 shall not of itself constitute ground for prosecution for reckless driving under this section."

I believe this statute to be clear in the requirement that a vehicle must be driven on a highway in order to have a violation of this section. On the other hand § 18-75 reads 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."

It is noted that no limitation is set forth in this statute as to where the motor vehicle shall be driven in order to violate this section. The Code of Virginia of 1950 reads as follows:

"The following words and phrases when used in this title shall, for the purpose of this title have the meanings respectively ascribed to them in this section except in those instances where the context clearly indicates a different meaning:

(8) ‘Highway’.—Every way or place of whatever nature open to the use of the public for purposes of vehicular travel in this State, including the streets and alleys in towns and cities.

In view of this definition, I believe that both the driveway in front of the business establishment and the drive around the public school described in your letter would be construed as highways within the meaning of the Motor Vehicle Code.
MR. A. D. JOHNSON,
Commonwealth's Attorney for Isle of Wight County.

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

"Granary is a concern engaged in the business of buying, selling and shelling corn and mixing food. The only real estate owned by this concern is located in the Town of Windsor, Virginia, upon which is located its plant and principal office, no real estate being owned or rented by it for farm or agricultural purposes. In addition to its stationary shellers at its plant, this concern owns a Ford truck upon which is securely and permanently attached and mounted a corn sheller. This truck, with the attached corn sheller, is operated over and along the highways in this area from the Windsor plant to the farms of those farmers who want their corn shelled on their farms rather than at the plant of Windsor Granary and is used exclusively for this purpose.

"I will appreciate your opinion as to whether or not the above mentioned truck should be annually registered and provided with license plates, or whether or not it is exempt therefrom as farm machinery under Section 46-45, or any other section of the Code."

Your attention is invited to Section 46-45 of the Code of Virginia, which reads as follows:

"No person shall be required to obtain the annual registration certificate and license plates or to pay the fee prescribed therefor, pursuant to the provisions of this title, for any truck upon which is securely attached a machine for spraying fruit trees and plants of the owner or lessee of the truck or for any motor vehicle, trailer or semi-trailer, which is used exclusively for agricultural or horticultural purposes on lands owned or leased by the owner thereof and which is not operated on or over any public highway of this State for any purpose other than for the purpose of operating it across a highway or along a highway from one point of the said owner's land to another part thereof, or for the purpose of taking it or other fixtures thereto attached, to and from a repair shop for repairs. The foregoing exemption from registration and license requirements shall also apply to any farm trailer owned by the owner or lessee of the farm on which such trailer is used, when such trailer is used by the owner thereof for the purpose of moving farm produce and livestock from such farm along a public highway for a distance not to exceed ten miles to a storage house or packing plant, when such use is a seasonal operation.

"The exemptions contained in this section shall also apply to farm machinery and tractors; provided further that such machinery and tractors may use the highways in going from one tract of land to another tract of land regardless of whether such land be owned by the same or different persons.

"Any vehicle exempted hereunder from the requirements of annual registration certificate and license plates and fees therefor shall not be permitted to use the highways as above provided between sunset and sunrise unless said vehicle is equipped with headlights, taillights and other lights required by law."

This section includes certain exemptions from the requirement to pay license fees for motor vehicles used in farming operations. As you know, statutes setting forth exemptions from taxes are construed strictly against the person seeking the exemption. In other words, before a person can take advantage of an exemption,
he must show that he comes within the four corners of the statute allowing the exemption, and not necessarily within the spirit of the exemption.

An examination of the statute indicates that the truck used by this concern in the manner you described, does not come within the exception set forth in the statute.

I am, therefore, of the opinion that this truck should be properly licensed before it can be lawfully driven upon the highways of Virginia.

MOTOR VEHICLES—Registration—Required for fuel truck on highway contract. (F 149) 190

May 20, 1952.

HONORABLE BURLEIGH W. HAMILTON,
Commonwealth's Attorney for Wise County.

This is to acknowledge receipt of your letter dated May 17, 1952, which I quote as follows:

"Is a road contractor in the State of Virginia required to register a fuel truck which is used exclusively on the contract job, and is such equipment subject to inspection by State authorities?

"I will thank you for your opinion on this matter at your earliest convenience."

In reference to registration and certificate of owner of a motor vehicle, I call your attention to Section 46-42 of the 1950 Code, which provides:

"Except as otherwise provided in §§ 46-43 to 46-48, 46-108 and 46-109, every person, including every railway, express and public service company, owning a motor vehicle, trailer or semi-trailer intended to be operated upon any highway in this State shall, before the same is so operated, apply to the Division for and obtain the registration thereof and a certificate of title therefor."

It is clear that the motor vehicle described in your letter would not be exempt from registration pursuant to the provisions of any of the sections referred to in the above quoted section with the possible exception of Section 46-46, which section provides as follows:

"Farm tractors, road rollers and road machinery used for highway purposes need not be registered under this title."

I do not feel that the term "road machinery", as used in this section, should be given such a broad meaning as to include a fuel truck even though the same is used exclusively on the contract job. A motor vehicle of this type would be no different from any other motor vehicle which may be used on the job in connection with a construction project.

Your attention is called to Section 46-317 of the 1950 Supplement to the Code, which authorizes the Superintendent of State Police by proclamation of the Governor or otherwise to require the owner or operator of any motor vehicle operated upon a highway within the Commonwealth to submit such vehicle to an inspection of its mechanism and equipment by an official inspection station. The only vehicle excepted under this section is one transporting well-drilling machinery licensed under Section 46-164 of the Code.

From an examination of the pertinent statutes, I am of the opinion that a road contractor in the State of Virginia is required to register a fuel truck which is used exclusively on the contract job, and that such equipment is subject to inspection by State authorities.
HONORABLE R. H. MARRIOTT,
Trial Justice of Fauquier County.

This is to acknowledge receipt of your letter of September 12 in which you state in part:

"A nonresident driver, say of the District of Columbia, is arrested, tried, and found guilty of drunken driving. At the time of trial he pays his fine. Having only the District of Columbia permit does the Trial Justice Court have the right to take up that permit?"

Pursuant to Section 46-414 of the Code of Virginia, the clerk of the court, or the court if there be no clerk, is required to transmit a report of conviction to the Commissioner of the Division of Motor Vehicles. Upon receipt of the report of conviction indicating the person was driving while drunk, or of other offenses enumerated therein, the Commissioner is required to revoke the driving license of such person. In the case of a nonresident, the Commissioner may suspend or revoke the driving license of a nonresident, or forbid such nonresident to operate motor vehicles on the highways of this State. This is in accordance with Section 46-450 of the Code.

The term "license" in Sections 46-416 and 46-450, apparently refers to the license issued by the Motor Vehicle Commissioner of Virginia. Upon receipt of the report of conviction of a nonresident of an offense which justifies revocation, the Commissioner proceeds to issue an order forbidding the nonresident to operate motor vehicles in this State. Thereupon, the Commissioner proceeds to transmit a certified copy of the record of conviction of the nonresident to the Motor Vehicle Commissioner, or the officer performing the functions of such Commissioner, in the State, District of Columbia, or Province in which the nonresident resides.

Although the non-resident, upon his conviction of drunk driving, automatically loses his right to operate motor vehicles on the highways of Virginia, his permit issued by the State of his domicile may be still honored as valid by or in a foreign jurisdiction. That is to say, although he cannot lawfully operate a motor vehicle in Virginia, he may lawfully drive elsewhere and his operator's permit honored in a foreign jurisdiction. Hence, I do not believe that the Virginia authorities, including the courts, would have the authority to compel such a nonresident to surrender his driving permit issued by a foreign jurisdiction.

There is no statutory duty imposed by law on the courts to compel such surrender. However, the Judge of a court in which a nonresident is convicted should enjoin the nonresident not to drive upon the highways of Virginia, and if he does so he would be criminally liable.

In the case of the conviction of drunk driving of a resident of Virginia who holds a driver's permit issued by the Commissioner of the Division of Motor Vehicles, the case is different. Upon the conviction of such a person, the court in which the person is convicted should require him to surrender his driving permit forthwith. Of course, where the accused notes an appeal and gives bond, he should be permitted to retain his permit. The driving permit is mere evidence of the existence of the right to operate a motor vehicle; hence, it would be strange, indeed, if after the abolition of that right that the person be permitted to hold in his possession the evidence to exercise the forfeited right. Upon the conviction of a person, the Court has the custody of that person and can require him to surrender the permit. Such an order of a court could be enforced through contempt proceedings.

I am, therefore, of the opinion that a court has no authority to compel the surrender of a driving permit issued by a foreign jurisdiction, upon the conviction of a licensee of drunk driving.
MOTOR VEHICLES—Revocation of registration and license when vehicle forfeited for criminal operation. (F 149) 176

April 18, 1952.

MR. B. W. HAMILTON,
Commonwealth's Attorney of Wise County.

This is to acknowledge receipt of your letter of April 15 in which you state:

"Information for forfeiture of one Dodge automobile used in the taxi business has been filed against J. C. Johnson, Norton, Virginia, for the unlawful sale of whiskey from said automobile.

"I would appreciate it very much if you would give me your opinion as to whether or not the registration and license plates should be revoked under these circumstances."

Your attention is invited to the following sections of the Code of 1950:

"§ 46-98. License plates remain property of Division—Every license plate so issued by the Division shall remain the property of the Division and shall be subject to be revoked, cancelled and repossessed by the Division at any time as in this title provided."

"§ 46-57. Same; improper use, etc.—The Division shall revoke, rescind and cancel the registration of a motor vehicle, trailer or semi-trailer and shall revoke, rescind, cancel or repossess the registration card, registration or license number plate or plates, whenever the person to whom the registration card or registration or license number plate or plates has been issued shall make or permit to be made an unlawful use of the same or permit the use thereof by a person not entitled thereto, or fail or refuse to pay, within the time prescribed by law, any lawful road taxes due the State."

I understand from the Division of Motor Vehicles that it has been the practice of that Division, upon receipt of information for forfeiture duly filed against a vehicle, to revoke the registration and license plates. Should the original owner acquire ownership of the vehicle, through the sale resulting from the information filed, then the Division requires the owner, as purchaser, to secure a new title and new registration plates.

I am of the opinion that, under the provisions of the sections quoted above, where a vehicle has been used in such a manner, that it can be forfeited under the provisions of the Alcoholic Beverage Control Act, and that the registration and registration plates pertaining to and on the said vehicle can be lawfully revoked. I am further of the opinion that where a motor vehicle is used for any unlawful enterprise as a means of perpetrating a crime, the registration and license plates thereon can and should be forfeited under the provisions of the aforesaid statutes.

MOTOR VEHICLES—When Chauffeur's license necessary. (F 149) 163

April 3, 1952.

HONORABLE GEORGE S. ALDHIZER, II,
Broadway, Virginia.

This is to acknowledge receipt of your letter of March 29 in which you say:

"We have in Harrisonburg several automobile owners who operate their privately owned automobiles on "H" tags, and who have been
operating for years without chauffeurs' licenses. They have recently been told by some of the City authorities that they are required to have chauffeurs' licenses.

"May I trouble you to advise me whether this is correct?"

Your attention is invited to Section 46-160 of the Code of 1950 which states that the Commissioner of the Division of Motor Vehicles may issue appropriately designated tags for taxicabs. It has been the consistent policy of the Commissioner for many years to issue tags with the numbers thereon prefaced with the letter "H"—commonly known as the "H" tag. If the vehicles bearing these "H" tags are not used as taxicabs, then the tags are unlawfully used and should be forthwith returned to the Division. In your letter you do not state that the owners actually operate their vehicles as taxicabs.

Section 46-343 of the Code of 1950, subsection 1, defines chauffeur as follows:

"'Chauffeur'—Every person employed for the principal purpose of operating a motor vehicle and every person who drives a motor vehicle while in use as a public or common carrier of persons or property."

Section 46-347 of the Code of 1950 prohibits a person from driving a vehicle unless they possess an operator's or chauffeur's license. From the definition of the term "chauffeur" as above, it includes any person who drives a vehicle as a public or common carrier of persons. This would certainly include a driver of a taxicab. Furthermore, if any person is employed for the principal purpose of operating a motor vehicle as a chauffeur within the meaning of the act. It is, therefore, my opinion that is the owners of these vehicles bearing "H" tags actually operate (drive) the same as taxicabs, then the said owners must secure chauffeurs' licenses from the Division of Motor Vehicles. If the vehicles bearing the "H" tags are not used as taxicabs, the tags are not lawfully used and should be surrendered.

NARCOTICS—Sales by persons other than pharmacists. (F 134) 50

Mr. Linwood S. Leavitt,
Secretary, State Board of Pharmacy.

This is in reply to your letter of August 22, 1951, which reads as follows:

"It is respectfully requested that the above reference chapter (§ 54-499 Code of 1950) be reviewed and your opinion rendered as to the validity of sales of exempt narcotic preparations by rural merchants and retail dealers.

"The drug market in retail pharmacy contains many trade preparations which are packed in quantities so as to place them within the lawful limit as noted in paragraph one (1) of Title 54-499.

"Under paragraph 54-499 (b), it is specifically stated 'No person other than a licensed pharmacist regularly employed in a registered pharmacy shall sell or offer for sale to consumers any exempted narcotic drug; provided, however, Paregoric in original packages and such other medicines as the Board of Pharmacy may designate may be sold by merchants and retail dealers at their place of business in rural communities and towns.'

"It would appear the Board of Pharmacy may protect the common interest of the general public by confining the sale of any exempt narcotic drug, except Paregoric, to licensed pharmacists."
In my opinion the section referred to clearly prohibits the sale to consumers of even exempted narcotic drugs (See § 54-499 (1), (2) and (3)), with the exception of paregoric in original packages, by anyone other than a licensed pharmacist regularly employed in a registered pharmacy. The section provides that the Board of Pharmacy may designate other medicines which may be sold by merchants and retail dealers in rural communities and towns, but in the absence of such designation by the Board, such sales are forbidden.

NURSING—Nurse giving medication directly into blood stream. (F 294) 99

December 10, 1951.

Mr. C. P. Cardwell, Jr.,
Director, Medical College of Virginia, Hospital Division

This is in reply to your letter of December 3, 1951 in which you request my opinion as to whether § 54-275 of the Code of Virginia prohibits a registered nurse in attendance on a patient from giving medications directly into the blood stream by means of a hypodermic syringe under directions from a physician.

Section 54-275 of the Code of Virginia reads, in part, as follows:

"Any person shall be regarded as practicing the healing arts and some school or branch thereof within the meaning of this chapter who opens an office for such purpose, or advertises or announces to the public in any way a readiness to practice in any county or city of the State, or diagnoses the condition of, prescribes for, gives surgical assistance to, treats, heals, cures or relieves persons suffering from injury or deformity or disease of mind or body, or advertises or announces to the public in any manner a readiness or ability to heal, cure or relieve those who may be suffering from any human ailment or infirmity, * * * ."

The scope of this section is, however, qualified by § 54-276.4, which reads as follows:

"Nothing in this chapter shall be construed to apply to or interfere with nurses, registered midwives, or masseurs who publicly represent themselves as such, within the scope of their usual professional activities, nor to any other persons in the lawful conduct of their particular professions or businesses under State law, while actually engaged in such profession or business."

The question to be determined is whether the giving of such medications ordered by physicians is within the scope of the usual professional activities of a nurse. Section 54-236 of the Code defines the term "practice of professional nursing" as follows:

"The term ‘practice of professional nursing’ means the performance of any professional service requiring the application of the principles of nursing based on biological, physical and social sciences, such as responsible supervision of a patient requiring skill in observation of symptoms and reactions and the accurate recording of the facts and carrying out of treatment and medications as prescribed by a licensed physician, and the application of such nursing procedures as involved understanding of cause and effect in order to safeguard the life and health of a patient and others." (Italics added)

In my opinion the clause "and carrying out of treatment and medications as prescribed by a licensed physician" is broad enough to permit this type of treatment by a registered nurse.
PAINT LAWS—Water-proofing compound defined. (F 5) 70

October 5, 1951.

Mr. Robert C. Berry,
Director, Division of Chemistry, Department of Agriculture and Immigration.

This is in reply to your letter of September 7, 1951, in which you request an interpretation and clarification of the term "water-proofing compound" as used in § 59-61.2(1) of the Code of Virginia, 1950, as amended.

Chapter 5.1 of Title 59 of the Code of Virginia contains the Virginia paint law and the term "paint" is defined as being any substance or mixture or substances, liquid powder or paste intended for use as a protective or decorative coating on buildings, fences or structures. This is a broad and apparently all-inclusive definition, but certain specific exemptions are made, one of which is "water-proofing." The Code does not contain any definition of the term "water-proofing compound" and the Department has adopted the definition used by the Federal Trade Commission as found in the pamphlet "Trade Practice Rules for the Masonry Waterproofing Industry." That definition is such as to include only such products as when properly integrated with or applied to masonry units or masonry structures will render such units and structures impermeable to, or proof against the passage of water and moisture throughout the life of such units or structures and under all conditions of water or moisture contact or exposure.

We all know, practically all types of paint have certain water repellant or water-proofing qualities and, obviously, it was not the intention of the Legislature that every substance which is capable of rendering protection from moisture should be excluded from the definition of paint. It is my understanding that the Department, in adopting the definition of waterproofing set forth above, has attempted to conform to the intention of the Legislature as understood by them at the time the paint law was adopted. The Department has been given authority to prescribe rules and regulations in order that the paint law may be effectively administered. Having been left an undefined term to work with, I am of the opinion that the Department is authorized to adopt a reasonable definition of that term. While I can understand the inclination of some manufacturers to object to their products being classified as paint when they are not such products as are normally considered as paint, I believe that the Department has not exceeded its authority in the adoption of the definition of water-proofing compound as discussed above.

PENITENTIARY — Effect of court order denying "good conduct time".

(F 75 b) 193

May 21, 1952.

Honorable W. Frank Smyth, Jr.,
Superintendent, Virginia State Penitentiary.

This is in reply to your letter of May 15, 1952, in which you inquire whether the amendments to §§ 53-211 and 53-213 of the Code of Virginia, adopted at the 1952 session of the General Assembly, will have a retroactive effect on the "several people now confined in the penitentiary whose orders specify that their time is to be served flat."

The sections referred to are the sections providing good conduct credit for prisoners and which sections were amended by the addition of the following words:

"and so much of an order of any court contrary to the provisions of this section shall be deemed null and void."
It is obvious that after the effective date of this Act (June 28, 1952) any order sentencing a person to confinement and providing that his time shall be served flat will be subject to the provisions of this amendment, and that portion of the order which purports to deny to prisoners good conduct time will be null and void. However, your problem, as stated in your letter, is whether such orders which have already been entered prior to the effective date of the Act are affected thereby. This amendment is remedial in purpose and should be given a liberal construction and if it were necessary to do so I would be inclined to the view that it should be given the broadest possible interpretation in order that the full purpose of the law might be effectuated. However, in a recent habeas corpus case, James N. Joyner v. W. Frank Smyth, Jr., heard before the Circuit Court of the City of Richmond, it was determined by that court that an order requiring the prisoner to serve four years flat could not have the effect of denying him good time credit. This decision was reached under the law as it stands today and not as it will be under the amendment. The effect of the judgment of the court is, therefore, to render null and void that portion of any order which would deny to the prisoner good conduct credit which results, of course, in the language of the 1952 amendment becoming merely clarifying language, since the same effect is reached under the law prior to the amendment.

It is my opinion, therefore, that, under the decision of the Court in Joyner v. Smyth, persons now serving sentences under court orders requiring that they serve flat time should be given proper good conduct credit.

PENITENTIARY—Good conduct time of jail prisoners. (F 75) 178

April 18, 1952.

HONORABLE W. FRANK SMYTH, JR.,
Superintendent, Virginia State Penitentiary.

This is in reply to your recent letter regarding good conduct time for jail prisoners. I quote your letter as follows:

"With further reference to our telephone conversation, I am enclosing a copy of the Act amending and reenacting Section 53-151 of the Code regarding good conduct credit of prisoners confined in jail.

"As you know the good conduct time applicable to the Penitentiary are Sections 53-211 and 53-213, and provides for good conduct time after sentence has been pronounced. Previously the time spent in jail awaiting trial has been credited to the inmate day for day.

"It appears to me that Section 53-151 will in effect allow prisoners sentenced to the Penitentiary time off for good behavior for the total time that they are in jail awaiting trial as well as the time spent in jail after sentence has been pronounced awaiting transfer to the penitentiary."

Chapter 217 of the Acts of Assembly of 1952 reads as follows:

"What records jailers shall keep; how time deducted or added. 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 twenty days 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 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."

In my opinion, the portion of the Act which I have underscored reveals that you are correct in concluding that, after this Act becomes effective, prisoners should receive good conduct time for the total time spent in jail, instead of only for that portion of the time spent in jail after sentence, as was previously true.

PENITENTIARY—Person sentenced to penitentiary and released by Court to another state should be returned by such state to committing court for transfer to penitentiary. (F 75) 31

August 23, 1951.

MR. W. FRANK SMYTH, JR.,
Superintendent, Virginia State Penitentiary.

This is in reply to your recent inquiry regarding the transfer to prison of persons sentenced to confinement in the penitentiary but not available for immediate transfer. Your letter reads, in part, as follows:

"Quite frequently this office receives orders sentencing prisoners to the Penitentiary from the various courts where the man is not available for immediate transfer to the prison, but was borrowed from some other state for trial and after being sentenced in Virginia was either returned to the state from which he was borrowed, or some Federal prison, to either serve a sentence or be tried there.

"The question arises in this office whether it is the duty of the Superintendent of the Penitentiary to return these people from out of State, or whether it is the responsibility of the sentencing court to have the inmate returned to their jurisdiction when released upon completion of a sentence in some other state or Federal jurisdiction.

"This office has no knowledge or information to identify the man and in a large majority of cases we do not know whether it is a white or colored man. Quite frequently the information is not sufficient to know exactly what authority the man was released to."

I have examined the statutes regarding transfer of prisoners to the penitentiary but find no provision which covers such situations as you describe.

In my opinion the correct procedure in such cases would be for the court imposing the sentence to take the necessary steps to regain custody of the individual when he has completed service of his sentence in the foreign jurisdiction. When custody is regained the individual would then be transferred to the penitentiary just as in the normal case.

It would seem strange to expect your institution to arrange for receiving such person directly from the foreign jurisdiction as you would have no means of identifying the person, since he has never been in your custody.

PENITENTIARY—Transfer of insane convicts. (F 75) 155

April 1, 1952.

MR. W. FRANK SMYTH, JR.,
Superintendent, Virginia State Penitentiary.

This is in reply to your recent letter regarding the transfer to the mental hospitals of convicts found to be insane.
Your letter sets forth two specific questions:
1. Is it necessary that the prisoners be taken in court in order that commitment to a mental hospital be ordered?
2. Would the mental hospital have to return the prisoner to the court that sent him to the hospital in order to return him to the Penitentiary?
I believe both of these questions may be answered in the negative.

Section 19-209 reads as follows:

“If any person, after conviction of any crime, or while serving sentence in the State penitentiary, or any other penal institution, or in any reformatory or elsewhere, is declared by a jury or commission of insanity to be insane or feeble-minded, he shall be committed by the court to the department for the criminal insane at the proper hospital, and there kept until he is restored to sanity; and the time such person is confined in the department for the criminal insane at the proper hospital shall be deducted from the term for which he was sentenced to such penal institution, reformatory or elsewhere.”

In my opinion the court could order a commission to inquire into the sanity of the prisoner. The commission could perform its duty at the penitentiary and make its report to the court which could then make proper disposition of the case. However, I believe this is a matter for the court's determination and could be required to be done in court if the court so desired.

Section 53-46 provides that when such person is restored to sanity, he shall be returned to the penitentiary in the manner provided in § 19-211.

Section 19-211 makes reference to § 37-93. Reading the two sections together it would appear that when such person is restored to sanity the superintendent of the hospital should so notify the clerk of the court having ordered confinement, and that the clerk would then issue an order to an officer of the court requiring him to take the prisoner from the hospital and return him to the penitentiary. The presence of the prisoner in court would not be required.

PENITENTIARY AND PRISON FARMS—Prison goods may not be disposed of to private sources. (F 227) 2

HONORABLE A. B. GATHRIGHT,
Director, Division of Purchase and Printing.

This is in reply to your letter of June 14, 1951, in which you request my opinion as to whether the Division of Purchase and Printing may issue invitations to bid for certain commercial feeds and concentrates which it is desired to use at the State Farm, and include as a condition of the purchase that the successful bidder shall agree to accept in full settlement shelled corn to be delivered to him by the State Farm in quantities sufficient to equal the amount due for the feed delivered under the bid.

Article 3 of Chapter 2, Title 53, Code of Virginia of 1950, deals with prison goods and provides for the disposal of goods manufactured or produced within the penitentiary or at the State Farms. This Article does not contemplate the disposal of such property to private sources and, in my opinion, such disposal would be improper.
REPORT OF THE ATTORNEY GENERAL

PERSONNEL DIVISION — Rules not subject to Administrative Agencies Act.  
(F 243) 185

DR. HARRIS HART, 
Director of Personnel.

May 16, 1952.

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

"Please advise if an act passed by the General Assembly, 1952, to regulate administrative agencies in their functions of rule making and adjudication, being Chapter 703, has application to the rules of the Governor for the administration of the Personnel Act.

"The Personnel Act of 1942, Section 4 (b), provides as follows:

"The Governor shall promulgate such rules, not in conflict with this act, as he may consider necessary to provide for the administration of the classification plan, the compensation plan and the system of service ratings, and to govern minimum hours of work, attendance regulations, leaves of absence for employees, and the order and manner in which layoffs shall be made.

"Since no rule or regulation of the Personnel Division is issued except upon the authority of the Governor, it appears to me that the act in question would not apply to this Division.

"Please advise if I be correct in this interpretation."

Chapter 703 of the Acts of 1952, to which you refer, defines in part a "rule" to which the Chapter is applicable as "* * * any regulation (including amendments and repeals) of general application and future effect affecting private rights, privileges or interests, promulgated by an agency to implement, extend, apply, interpret or make specific the legislation enforced or administered by it, but does not include regulations solely concerning internal management of the agency or of the State government, nor regulations of which notice is customarily given to the public only by markers or signs, nor mere instructions." The rules promulgated by the Governor under the Personnel Act, in my opinion, come within the exception described as "regulations solely concerning internal management of the agency or of the State government." It is, therefore my further opinion that the rules to which you refer are not subject to the provisions of Chapter 703 of the Acts of 1952.

PUBLIC FUNDS—Deposit of securities to protect.  (F 130) 103

December 14, 1951.

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

This is in reply to your letter of December 13, from which I quote below:

"I am writing this letter at the request of Mr. D. A. Robinson, County Executive of Albemarle County. The inquiries contained herein have to do with the escrow arrangement in the case of depositories of county funds as provided by Section 58-943 to 58-945 of the Code of Virginia (1950).

"Specifically, the inquiries are as follows: If a depository deposits with the escrow agent safe-keeping receipts for security which are actually held by another banking institution, does that satisfy the requirements of Section 58-945? Further, would the above arrangement of substituting safe-keeping receipts for the actual securities be satisfactory if the securities themselves are held subject to said safe-keeping receipts, by a bank in another state?"
Section 58-945 of the Code reads as follows:

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

It does not appear to me that the deposit of the “safe-keeping receipts” meets the requirements of the quoted section, since I think that the law contemplates that the securities themselves shall be deposited with the escrow agent. I can envisage a number of complications that could arise as a result of the suggested procedure, and it is my view that there should be literal compliance with the statute.

PUBLIC OFFICERS—Compatibility—Retired teacher as member of school board.

(F 203) 57

September 20, 1951.

HONORABLE E. HAGAN RICHMOND,
Commonwealth’s Attorney for Scott County.

This is in reply to your recent letter requesting an opinion as to whether or not a retired school teacher, drawing a pension as such, is eligible to be a member of the County School Board.

Section 22-69, Code of Virginia, disqualifies certain persons from membership on the County School Board, but contains no prohibition with respect to retired teachers. Moreover, the fact that the retired teacher is currently drawing a pension does not appear to render such person ineligible. Inquiry has been made with the office of the Director of the Retirement System and that office concurs in the foregoing view.

Accordingly, it is my opinion that a retired school teacher currently drawing a pension as such is eligible for membership on the County School Board.

PUBLIC OFFICERS—Deputy of officer serving as social security administrator; employee of officer so serving. (F 161 a) 174

April 17, 1952.

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

This is in reply to your letter of April 8, 1952, which reads as follows:


“We would like to have your opinion as to whether or not this section would preclude payment to a deputy-treasurer or clerk employed in the Treasurer’s office for services rendered in the administration of the F. I. C. A. Act.”
This office has had occasion in the past to pass upon whether deputy treasurers come within the provisions of § 15-504 and it has been our conclusion that the term "any paid officer" includes such deputies. However, it is my opinion that persons employed in the treasurer's office merely as clerks and not having the status of deputy do not come within the provisions of § 15-504, and that, therefore, such persons could be compensated for services rendered as F. I. C. A. administrator.

PUBLIC OFFICERS—High Constable of Richmond—City Officer. (F 136 d) 120

HONORABLE FRANK S. RICHESON,
State Chamber.

This will acknowledge receipt of your letter of January 29. You pose the question as to whether or not the High Constable of the city of Richmond is a State Officer or a city official.

You are, of course, familiar with section 19-19 of the charter of the city of Richmond (Acts of Assembly, 1948, page 270). The appointment of the High Constable is vested in a majority of city courts whose courts are provided for in the charter. The appointment, therefore, is a city matter. The constable holds office at the pleasure of the appointing power. His salary is fixed by the council of the city, to be paid by the city. It follows, therefore, in my opinion, that his status is that of a city officer, even though he serves process and performs other functions on behalf of the Commonwealth. By enactment of a charter, the General Assembly has so designated the office of High Constable of the city of Richmond. To change the matter of his appointment, the fixing of his salary, and the source from which the salary shall come would involve an amendment to the charter either expressly or by implication.

You are familiar with Chapter 299, Acts of Assembly 1948, page 544, which was designed to be applicable to the High Constable of the city of Richmond, and fixes the salary of that officer between the brackets of $7,500 and $8,500 per annum.

This matter has been considered by this office on a former occasion and, while I do not recall that any formal opinion was written, the view was expressed, which I now reaffirm, that the provisions of the charter had precedence over this Act as reflected in Chapter 299, on the theory that the Act is general and that the Legislature at the same term dealt specifically with the subject in the enactment of the charter.

PUBLIC OFFICERS — Incompatibility of office — Sheriff may not be town sergeant. (F 249) 36

HONORABLE GEORGE F. ABBITT, JR.,
Commonwealth's Attorney for Appomattox County.

This is in reply to your letter of September 5, 1951, which reads as follows:

"I will appreciate it if you will give me an opinion as to whether or not a person who is a full time Sheriff and Jailer, can also serve as Town Sergeant or policeman, for the Town of Appomattox."
Section 15-486 of the Code of Virginia, 1950, reads, in part, 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:

* * * * *

“(5) That any deputy sheriff of a county may hold the office of town sergeant of any town within such county.”

You will observe that a specific exception has been enacted whereby a deputy sheriff may hold the office of town sergeant. This exception does not apply to sheriffs and since it was necessary to enact a specific exception to enable a deputy sheriff to hold the office of town sergeant, it seems clear that a sheriff may not hold such office.

PUBLIC OFFICERS—Member of Armed Forces Reserve called to duty is eligible as member of School Trustee Electoral Board. (F 249) 102

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

This is in reply to your letter of December 4, inquiring if a member of the United States Army Reserve who was involuntarily called to active duty, assigned to duty in Richmond and retained his former legal residence and abode, is qualified to hold position as a school board trustee in his county.

Section 2-27.1 of the Code of Virginia provides 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.”

The pertinent exception is contained in § 2-29, and provides as follows:

“§ 2-29. Further exceptions.—Section 2-27 shall not be construed:

“(3) To exclude from such office or post officers or soldiers on account of the recompense they may receive from the United States when called out in actual duty.”

In construing the pertinent parts of the foregoing statutes as they formerly appeared, and which pertinent parts are substantially the same, the case of Lynchburg v. Suttenfield, 177 Va. 217, stated:
"* * * the manifest purpose of the General Assembly is to disqualify as office holders members of the regular Army of the United States who are permanently in the service without being ‘called,’ and to except from such disqualification ‘officers and soldiers’ of the State Militia or National Guard who may be called into the service of the United States for a temporary period, even though it may be for as long as ‘twelve consecutive months,’ as is the case here.”

Accordingly, it is my opinion that the reserve officer who was involuntarily called to active duty and who continues to reside in the county wherein he has a legal residence, is qualified to hold office as a school board trustee.

REAL ESTATE—Brokers license to employee of real estate firm. (F 273) 60

September 24, 1951.

HONORABLE E. H. WILLIAMS, JR.,
Director, Department of Professional and Occupational Registration.

I am in receipt of your letter of September 20, in which you ask for my opinion on the following question:

"Your opinion is requested on the following question which involves the interpretation of the second sentence of Section 54-749 of the Code of Virginia, 1950.

"Under the provisions of the aforementioned Code section: ‘Can a real estate broker’s license be issued by the Virginia Real Estate Commission to an employee who actively participates in the real estate business of a partnership, association, or corporation, when the individual is not a partner, or a participating member of the firm or association, or an officer of the corporation?’"

A real estate broker is defined by Section 54-730 of the Code as follows:

"A real estate broker within the meaning of this chapter is any person, partnership, association or corporation, who for a compensation or valuable consideration sells or offers for sale, buys or offers to buy, or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, or rents or offers for rent, any real estate or the improvements thereon for others, as a whole or partial vocation."

It does not seem to me that the person you describe is embraced within the definition of a real estate broker. On the contrary, he is an employee of a real estate broker and very probably comes within the definition of Section 54-731 of the Code defining a real estate salesman, but I do not have sufficient facts to enable me to pass on this question. From the facts stated by you I should not think that this person should be issued a license as real estate broker.

REFERENDUM—Advisory, not authorized. (60 a) 49

September 12, 1951.

HONORABLE T. STOKELEY COLEMAN,
Commonwealth's Attorney, Spotsylvania County.

I am in receipt of your letter of September 1, from which I quote below:
REPORT OF THE ATTORNEY GENERAL

"The following questions having been taken up before the Board of Supervisors I would appreciate your opinion as to same:

"Title 4, section 97 of the Code provides that the Board of Supervisors may enact ordinances regulating the time of sale of wine and beer on Sundays.

"Can repeal of the ordinance prohibiting the sale be submitted to the voters of the County under section 24-141 of the Code?

"If the repeal of the ordinance can be submitted to referendum, can the Board of Supervisors initiate the referendum?

"Can the Circuit Court upon the petition of interested persons initiate the referendum?"

Section 24-141 of the Code simply provides that special elections and referendums may be called and held. In other words, the section simply provides the machinery for such elections. It does not authorize an election or referendum in any particular case.

Section 4-97 of the Code, as you state, authorizes the boards of supervisors of counties to enact ordinances regulating the sale of wine and beer on Sundays. The section does not provide for submitting such an ordinance once adopted to the people on the question of whether or not the ordinance should be repealed, and I can find no general statute authorizing a referendum on the repeal of ordinances adopted by a board of supervisors. In the absence of such a statute authorizing a referendum, I am of opinion that no binding referendum may be held.

RETIREMENT SYSTEM—Right of State to repeal or amend. (F 243 a) 75

October 22, 1951.

MR. CHARLES H. SMITH,
Director, Virginia Retirement System.

This is in reply to your letter of October 1, 1951, from which I quote as follows:

"A plan is under consideration whereby the present Virginia Retirement System (Chapter 3, Title 51, Code of Virginia of 1950) would be repealed in order to enable present members to be covered by Social Security.

"We desire your opinion as to whether the Virginia Retirement System can be abolished by repeal legislation without effecting the vested rights of the members or those retired under the retirement provisions of the Act if the repealing Act includes the following provisions:

"1. Provide for establishment of a trust fund out of which subsequent retirement allowances will be paid to retired former members of the Virginia Retirement System or their beneficiaries. Such fund to be based on the actuarial requirements for continued payment of allowances during the life expectancy of each.

"2. Provide members of Virginia Retirement System the option of:

"(a) Withdrawing their accumulated contributions (including credited interest) in the Virginia Retirement System, such right to continue in effect until such time as the enactment containing the supplemental retirement system terminates that right, or

"(b) Leaving such accumulated contributions in a trust fund for the purpose of securing coverage under any supplemental retirement system which might in the future be adopted, or"
"(c) A retirement allowance if eligibility requirements for retirement have been fulfilled prior to effective date of repeal and the member is not in service on such date.

“(1) Advance publicity with regard to effective date of repeal would enable members in service otherwise eligible for a retirement allowance to retire from service prior to effective date and receive a retirement allowance under the provisions of the Virginia Retirement Act."

I should like to preface my remarks with a word of caution. The opinion which I will express on the question submitted must be somewhat a generalization. It is difficult, if not impossible, to determine the legality of legislation without having access to the exact words of the legislation. I am of the opinion, however, that our Legislature has the power to amend or repeal the Virginia Retirement System without violating constitutional principles.

The problem of repeal of such systems has been before the courts of this country many times and the decisions are widely varied. However, from such examination of the reported cases as I have been able to make, the weight of authority seems to favor the view that such systems can be terminated. The majority of the cases which I have seen take the view that only those persons who have met all conditions for retirement have vested rights and where repeal legislation adequately protects such persons, it is valid. I notice that the proposed bill would not only protect those in our system who have fully qualified but would, by advance publicity, protect those who are eligible to retire but have not yet taken the necessary steps to qualify for benefits.

In addition to the light thrown on this question by cases from other jurisdictions (See American Digest System, Constitutional Law, § 102(2) for a compilation of such cases), the words of the Virginia Act indicate that the Legislature intended to, and did, retain the right to amend or repeal the system.

Section 51-37 of the Code of 1950 reads as follows:

"No amendment or repeal of the provisions of this chapter shall diminish or annul in any respect any right acquired by a member or beneficiary under such provisions in or with respect to any fund derived from contributions made by members of the retirement system after its date of establishment."

In my opinion this section is, in effect, a reservation by the Legislature of power to repeal or amend the system so long as the members or beneficiaries are not deprived of their contributions to the system.

I am, therefore, of the opinion that legislation repealing the system which fully protects the members in their rights to their contributions and which protects those who have fulfilled the requirements for eligibility for retirement would not be invalid as an invasion of any vested rights.

RETIREMENT SYSTEM—V. P. I. repeal and reenactment. (F 268 g) 180

Mr. S. K. Cassell,
Business Manager, Virginia Polytechnic Institute.

April 24, 1952.

This is in reply to your letter of April 9, 1952, in which you refer to my letter of February 28, 1952, in which letter I advised Dr. Newman that the Board of Visitors of V. P. I. have the authority to terminate the then existing V. P. I. retirement plan and to re-enact at some future time a modified form of the V. P. I. retirement plan. The purpose of these steps was to enable the
employees at V. P. I. to secure the benefits of federal social security legislation. You now inquire whether in re-establishing a retirement plan the Board of Visitors of V. P. I. may undertake to provide a retirement plan for employees who are now covered by both federal social security and the Virginia Supplemental Retirement System.

You are quite correct in assuming that I did not understand that the employees to be covered by the V. P. I. retirement plan would also be covered by the Virginia Supplemental Retirement System, and I do not believe that such action is contemplated by the Legislature. While I do not have the legislation creating the Virginia Supplemental Retirement System in its final form, House Bill No. 3, which I understand was passed without change in so far as that portion material to this opinion is concerned, provides that an institution of higher learning may provide a retirement system for their employees or may participate in the Virginia Supplemental Retirement System. The enactment contains no authority for a combination of the two, and I do not believe that such would be proper.

In answer to your specific question, therefore, it is my opinion that a modified V. P. I. plan may be adopted, but that such plan should not cover employees covered by the Virginia Supplemental Retirement System unless membership in the latter named system is terminated.

RETIREMENT SYSTEM—Validity of proposed repeal legislation. (F 243 a) 94

MR. CHARLES H. SMITH,
Director, Virginia Retirement System.

This is in reply to your letter of November 20, 1951, in which you enclose a copy of a proposed bill the purpose of which is to repeal the Virginia Retirement Act in order that the State may enter into an agreement with the federal government for coverage under social security.

As I stated to you in a letter under date of October 22, 1951, it is possible, in my opinion, to repeal the Virginia Retirement System so long as steps are taken to protect those persons who have retired under the system or their beneficiaries and persons qualified to retire but who have not made application for retirement. In addition, our law specifically requires that no amendment or repeal may in any way affect the rights of the members to their accumulated contributions. I have very carefully studied the proposed bill and, while I speak from a rather limited knowledge of the actual mechanics of the retirement system, it would appear that the interests of retired members and their beneficiaries are protected and that the right of members to their accumulated contributions is absolutely protected. It also appears from the bill that those who are eligible to retire under the present Act but who have not made application for retirement are being given a reasonable opportunity to make such application. It follows, therefore, that the bill satisfies the requirements set forth in my letter of October 22, 1951.

You also inquire whether this bill “repeals Chapter 3 of Title 51 of the Code of Virginia and all amendments thereto.” I believe it is your purpose to determine whether this bill repeals our present retirement system to an extent sufficient to enable the State to enter into an agreement with the federal government under the existing requirements of federal law. Mr. Gray, of this office, who has been attending the various conferences in Washington with the members of the Federal Security Administration advises me that this repeal is sufficient, in his opinion, to enable the State to enter into such an agreement.
Mr. E. S. H. Greene,
Superintendent of Schools, Chesterfield County.

This is in reply to your letter of March 21, 1952, from which I quote as follows:

"I desire an opinion from you as to whether or not a child whose sixth birthday falls on October 1 can be legally admitted to school in that year in a school system that does not have mid-term promotions. It appears to me that the law as set forth in Section 22-218 of the Code of Virginia covers this."

Since you have indicated your familiarity with § 22-218 of the Code, I shall not set forth its provisions at this point other than to state that it provides that persons who have reached their sixth birthday on or before September thirtieth may be admitted to school in a system that does not have mid-term promotions.

The question presented by your letter is whether a child whose birthday falls on October 1st reaches his birthday on September 30th.

I have previously been called upon to study this problem in connection with the age requirements for voting. At that time I discovered that the rule at common law was that a person attains his next year of age on the day prior to his birthday. The reasoning of the courts is such that, in my opinion, a child whose birthday falls on October 1st reaches that birthday on September 30th and is, therefore, eligible to attend school if children of six years of age are being admitted.

This result is reached by courts because the law will not consider parts of days and it is reasoned that at midnight on September 30th the child has reached his birthday. He has not entered upon his birthday, but he has reached it. Since he reaches his birthday on the last stroke of September 30th and since the law will not consider parts of days, if follows that at any time on September 30th he has reached his birthday and it follows that children whose sixth birthday falls on October 1 meet the requirements of our law by reaching that birthday on September 30th.

It should be noted that this reasoning can only apply to October 1st for by no process of reasoning can it be said that a child whose birthday falls on October 2nd reaches his birthday on September 30. I do not think there is any doubt that a child born on October 1st reaches his birthday on September 30th, but if there was a doubt, since only children born on that day are affected, I would be inclined to resolve the doubt in their favor.

Honoroble Dowell J. Howard,
Superintendent of Public Instruction, State Board of Education.

This is in reply to your letter of September 5, from which I quote below:

"The Arlington County Board on April 30, 1951, established the total tax rate for the fiscal year 1951-52 as $2.75 per $100.00 of assessed valuation and established distribution of that tax as $1.47 per $100.00 for school purposes and $1.28 per $100.00 for other purposes."
REPORT OF THE ATTORNEY GENERAL

"However, when the tax bills were prepared by the County Treasurer, the distribution of the tax rate is recorded as $1.28 per $100.00 of assessed valuation for school purposes and $1.47 per $100.00 of assessed valuation for the county purposes, or the reverse of what the county board had authorized on April 30, 1951.

"The Arlington County School Board at its regular meeting on August 28, 1951, passed the enclosed resolution.

"I shall appreciate it very much if you will advise this office as to whether or not the error made on the tax bills will affect the ultimate distribution of the monies collected for school and county purposes."

The resolution which you enclosed simply asks for the opinion of the Attorney General on the question which you have stated in the last paragraph of your letter.

The authority to levy taxes and to allocate the purposes for which the taxes are to be used is vested in the board of supervisors of the county. The Board of Supervisors of Arlington County has ordained that taxes in Arlington County for the year 1951-52 shall be apportioned as stated in the first paragraph of your letter. I take it that the preparation of the tax bill by the Treasurer of the County in the manner indicated in the second paragraph of your letter is simply a clerical error. The treasurer has no authority to apportion the use for which the taxes collected are to be put, and I am, therefore, of the opinion that the action of the supervisors controls, notwithstanding the clerical error in the preparation in the tax bill.

SCHOOLS AND SCHOOL BOARDS—Authority of School Board over salaries; Budget transfer from one item to another. (F 203) 143

March 17, 1952.

DR. DOWELL J. HOWARD,
Superintendent of Public Instruction.

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

"Albemarle County operates under the County Executive Form of Government and the School Board is appointed by the Board of Supervisors. The County Executive, who is also appointed by the Board of Supervisors, serves as Director of Finance and Purchasing Agent.

"Recently several questions have arisen as to whether the School Board or Board of Supervisors should fix the salaries of the secretaries in the School Board offices, and of the mechanics and repairmen employed by the School Board. I shall appreciate it very much if you will give us an opinion on the following questions:

"1. Does the Albemarle County School Board have the sole authority to fix compensations of all of its employees so long as it remains within the bounds of its budget?

"2. Does the Albemarle County School Board have the authority to purchase the supplies and equipment it deems best so long as it remains within the bounds of its budget?

"3. Is it necessary to request the Board of Supervisors to make an additional appropriation for a separate item in the school budget whenever it becomes apparent that this item will be overspent before the end of the year, although other items in the budget carry surpluses sufficient to prevent the total budget from being overspent?"
As you further suggest in your communication, your questions have been discussed in prior opinions of this office and passed upon, but since further clarification is desired I shall consider your questions in the order in which they are presented.

1. Yes.
2. Yes. I refer you to an opinion of this office to be found in the Report of the Attorney General for 1936-37 at page 149, in which it was stated:

"So far as the purchasing of supplies is concerned, it seems to me that this is also the function of the school board, but, where the county has a purchasing agent, I should say that, as a matter of policy, it would be an economical thing for the school board to have the purchasing agent purchase its supplies upon requisition of the school board or by some other mutually satisfactory method."

This opinion, I may say, related to counties operating under the County Executive Form of Government.

3. In the situation you describe an additional appropriation for schools from the Board of Supervisors is not necessary. However, it is my opinion that the consent of the Board of Supervisors is necessary to transfer funds from one item in the budget to another.

The case of Board of Supervisors of Chesterfield County v. County School Board of Chesterfield County, 182 Va. 266, contains an excellent discussion of the respective powers of Boards of Supervisors and County School Boards in connection with the operation of schools. The last paragraph of the opinion, quoted below, is particularly illuminating:

"* * * After the board of supervisors have appropriated money for schools, the exclusive right to determine how this money shall be spent is in the discretion of the school board, so long as they stay within the limits set up in the budget."

SCHOOL AND SCHOOL BOARDS—Board has authority to pay "back-dating" of Social Security. (F 161 a) 124

This is in reply to your letter of February 13, 1952, which reads, in part, as follows:

"I understand that your office has made a ruling that a School Board could not spend any money for any purpose if this particular item had not been included in the original budget.

"The following question has been asked: Can a School Board pay the employer's portion for back-dating social security from January 1st, 1951 to March 1st, 1952 if no item was included in the School Board budget for paying social security for its employees?"

In my opinion the action taken by the Legislature which brings employees of school boards under social security in such a manner as to require the payment of the employer's portion of the social security tax retroactive to January 1, 1951, overrides the previous bar to expending money for any purpose not included in the original budget.
REPORT OF THE ATTORNEY GENERAL

We must assume that the Legislature was aware of that bar and aware that the school boards did not, and could not have been expected to, have an item in their budgets for that express expenditure. It must be concluded, therefore, that an expenditure for this purpose, though not included in the budget, would be proper.

SCHOOLS AND SCHOOL BOARDS—Borrowing money in anticipation of "Battle Fund". (F 203) 202

HONORABLE A. A. RUCKER,
Attorney for the Commonwealth, Bedford County.

May 13, 1952.

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

"I have been requested by the County School Board of Bedford County to request from you an opinion as to whether or not it will be legal for the County School Board of Bedford County, with the prior consent of the Board of Supervisors of Bedford County, to borrow from a bank or banks a sum of money not to exceed in amount the amount of money which is to become available to the County School Board of Bedford County from the "Battle Fund" in July of the year 1953. If it is legal for the School Board to borrow this money now, it is contemplated that it will be used immediately for certain badly needed additions to schools in Bedford County, and that it will be repaid out of the "Battle fund" money which will become available to the County School Board of Bedford County in July, 1953.

"The Battle fund" money which will become available to the School Board in July of 1952 will be used also for purposes of school building and expansion.

"The contemplated loan, the legality of which is the subject of this inquiry, will be for a period of approximately one year. It is desired to obtain this loan at this time in order that certain badly needed school expansion can be made at this time and without waiting until the 1953 'Battle fund' money becomes available in July of 1953."

The only authority of which I know for temporary loans to county school boards is to be found in section 22-120 of the Code. As you will observe from reading this section, the amount of the loan is limited to one-half of the amount produced by the county school levy or one-half of the cash appropriations made for schools in lieu of the levy. The loan has to be repaid within one year and may not be negotiated without the approval of the tax levying body. If your school board can meet the conditions laid down in this section then, of course, the loan may be negotiated. I do not think that the "Battle Fund" money to which the county will be entitled may be considered as a part of the county school levy or the cash appropriation made for schools for the purpose of determining the amount of the loan.

SCHOOLS AND SCHOOL BOARDS—Budgets, Authorization to use surplus, disposition of surplus. (F 197) 142

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

March 14, 1952.

I have your letter of March 11, in which you advise me that it is estimated that at the close of the current appropriation year there will be a surplus of ap-
proximately $950,000 in the school fund of your county over and above the school budget approved by the Board of Supervisors for the year 1951-52. You state that the reason for this surplus is that in fixing the school levy for the year 1951-52 the Board of Supervisors was furnished an erroneous estimate of the taxable values in the county. It appears that the School Board has now requested the Board of Supervisors to authorize the expenditure or commitment for expenditure of this surplus for capital outlay. Put in another way, the request of the School Board is that it be allowed to expend or contract to expend an amount in excess of its budget for the year 1951-52 equal to the surplus aforesaid. You state in your letter that it is not contemplated that any of this surplus is to be actually spent during the current budget year, but that it would be spent during the year 1952-53. The reason given by the School Board for immediate action by the Board of Supervisors is stated in your letter to be as follows:

"Two members of the School Board of this County appeared before the Board of County Supervisors on March 5, 1952, with a delegation of residents of the County, when the said resolution was presented to the Board, and the two members of the School Board insisted that the Board of County Supervisors act promptly one way or another on the matter of the authorization of the School Board to spend this surplus as indicated. The reason given for promptly acting on the matter was that in the event this surplus is not committed before the 1952-53 budget is adopted in that event this surplus would have to be reflected as a surplus in the advertised budget and considered as such at the public hearing, and considered as such by the Board of County Supervisors in determining the budget and the levies for the year 1952-53 (Section 15-576, Subsection 1)."

Section 22-72(9) of the Code, dealing with the powers and duties of the School Board, reads as follows:

"Costs and expenses.—In general, to incur costs and expenses, but only the costs and expenses of such items as are provided for in its budget without the consent of the tax levying body."

Clearly, I think the above language empowers the Board of Supervisors to authorize the School Board to exceed the amount of its budget where the funds are available, but this power given to the Board of Supervisors is applicable to the budget for the current appropriation year, in this case the year 1951-52. However, in the situation you describe, consideration must be given to Section 22-122 of the Code, providing for a school budget to be submitted on or before the first day of April of each year showing the amount of money which will be needed during the next scholastic year for the support of the public schools of the county including permanent capitalization, and also to Section 15-575 et seq. of the Code, requiring the Board of Supervisors of a county, at least thirty days prior to the time when the annual tax levy is made, to prepare a budget which includes, of course, the school budget. The sections go on to require a statement of the contemplated revenues, disbursements, reserves, surplus, etc. A synopsis of the budget must be published and a public hearing is provided for. In view of the budget statutes, it is my opinion that the normal and orderly procedure under the circumstances present, taking into consideration the fact that this surplus would actually be spent during the year 1952-53, would be for these proposed expenditures for capital outlay to be shown in the budget for the year 1952-53, and for the surplus also to be shown as a part of the contemplated available revenue. Thus the Board of Supervisors, as well as the taxpayers, will be informed as to the items of the proposed expenditures for schools.

However, in view of the authority contained in Section 22-72 of the Code, if the request of the School Board is to be allowed to expend this surplus during
the year 1951-52 or to actually contract during that year to expend this surplus, I am of opinion that the Board of Supervisors may grant such request, which would mean that the surplus would not have to be shown in the budget submitted for the year 1952-53, nor would the details of how it is to be spent have to be shown in that budget. If, on the other hand, the request of the School Board is to be allowed to expend or contract in the year 1952-53 to expend this surplus, then I am of opinion that the regular proceedings prescribed by statute relating to the preparation and submission of the budget should be followed.

TAXATION—Motor Vehicle belonging to serviceman. Soldiers and Sailors Relief Act. (F 273) 87

HONORABLE CECIL C. FROST,
Commissioner of Revenue, Elizabeth City County.

This is to acknowledge receipt of your letter of November 5, in which you state in part:

"As I understand, there is an amendment to the Soldiers and Sailors Civil Relief Act whereby if a person in the Armed Forces comes to one of the Government reservations in Virginia, under orders of the Government and resides off the reservation or in Elizabeth City County for instance, that so long as he maintains his out of state license on his automobile, the car is not subject to assessment as Tangible Personal Property, however, if he changes this license to a State of Virginia license and has a Virginia license on his car on January 1st of the year, the car then becomes a subject of Tangible Personal Property assessment. I have put this in effect in this County as of January 1, 1951, and am now experiencing considerable trouble with the service men over this assessment. The trouble seems to be that these service men have been told that after they have been in Virginia for a certain short period of time they are compelled to take out a Virginia license. I have contacted the Division of Motor Vehicles local office and they are apparently in doubt on the subject."

The following is quoted from the Soldiers and Sailors Relief Act (50 U. S.-C. A., App. 574):

"(1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed
to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district: Provided, That nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942.

"(2) When used in this section (a) the term 'personal property' shall include tangible and intangible property (including motor vehicles), and (b) the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: Provided, That the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid."

I think it is clear from the language of this Congressional Act that the State of Virginia is without authority to exact automobile license fees from the serviceman whose car is properly registered in his domiciliary state. If the serviceman is residing in Virginia by virtue of military orders, he does not require a domicile but remains a resident of his domiciliary state regardless of the length of time he resides in Virginia by virtue of such orders.

This office has heretofore expressed its opinion that a city cannot exact an automobile license fee from a person in the Armed Forces whose domicile is outside of the State of Virginia (opinions of the Attorney General, 1948-1949, page 166). The question of whether or not a serviceman domiciled in another state should purchase license tags for his automobile in Virginia is a question for the serviceman to decide, and not for the taxing authorities in Virginia to determine.

SCHOOLS AND SCHOOL BOARDS—Budget—Exceeding budgetary items. Expenditure for item not carried in budget. (F 203) 229

HONORABLE STIRLING M. HARRISON,
Commonwealth's Attorney for Loudoun County.

You have requested my opinion concerning a question raised by the Division Superintendent of Schools for Loudoun County in his letter to you of November 5th. I quote as follows from his letter:

"The question has arisen: Does the School Board of Loudoun County have the legal right to use surplus funds for the current fiscal year to pay an architect for preliminary work on plans for a new central high school?"

"The essential facts are:
1. On March 5, 1951 on request of the school board the county board of supervisors approved an application for a literary loan and an application for the use of State School Construction Funds for a new central high school. The literary loan application was approved by the State Board of Education on May 24, 1951.
2. On April 5, 1951 the school board adopted a resolution requesting the board of supervisors to appropriate $15,000 for purchase of a site for the new high school.
3. On April 10, 1951 the board of supervisors appropriated out of its surplus funds $15,000 for the purchase of the site."
4. On April 11, 1951 the school board accepted a proposal of the owner to sell approximately 30 acres of land for the high school site.

5. In the preparation of the school budgets for 1950-51 and 1951-52 the costs for architects fees were not in any case listed separately, but considered as part of the cost of new buildings, which item was included in each budget. In the supplementary explanations for the 1951-52 budget no mention was made of the new high school building.

"Particular reference is made to Sections 22-72 and 22-122 of the Code. The latter sections seem to us to define the meaning of 'items' to which reference is made in Section 22-72.

"Attention is also called to a Virginia Court decision—182 Va. 266, 28 S. E. (2nd) 698, which probably most nearly covers our question."

The fact that the Board of Supervisors has already approved a loan from the Literary Fund for the construction of the new central high school and has already appropriated $15,000 out of surplus county funds for the purchase of thirty acres of land for the new high school site cannot, in my opinion, be construed as approving the use of surplus school funds for the payment of an architect's fee for preliminary plans for the new central high school. Such action on the part of the Board of Supervisors must necessarily be considered as being made independently of approval of the school budget for the fiscal year beginning July 1, 1951.

I have before me the above mentioned budget, the pertinent part of which reads as follows:

**SUMMARY OF SCHOOL BUDGET**

1951-52
Capital Outlays—New Buildings ...........................................$67,000

**SYNOPSIS OF SCHOOL BUDGET**

1951-52
New Buildings ..........................................................$67,000

**DETAILS OF SCHOOL BUDGET**

1951-52
New Buildings ..........................................................$67,000

1951-52
Arcola Addition ..........................................................$67,000

The above information concerning expenditures for new buildings is quoted from pages 2, 5 and 18 of the document entitled "LOUDOUN COUNTY SCHOOL BUDGET—Fiscal Year Beginning July 1, 1951" and such document is so named by the Division Superintendent in his letter of transmittal to the Board of Supervisors. Under these circumstances it is my opinion that the "DETAILS OF SCHOOL BUDGET" is an integral part of the school budget for the fiscal year beginning July 1, 1951, and that it cannot now be treated simply as "supplementary explanations".

Therefore, since the school budget, as approved by the Board of Supervisors, did not include funds for a new central high school, I am of the opinion that the School Board has no legal right to use surplus school funds for the purposes set forth in the Division Superintendent's letter without first obtaining the approval of the Board of Supervisors.

The conclusion reached by me follows former opinions of this office which deal with the interpretation of sections 22-72 and 22-122 of the Code. For your information I quote as follows from my opinion addressed to the Honorable
Robert Bolling Lambeth, Commonwealth's Attorney for Bedford County, under date of June 12, 1950:

"Section 22-72 of the Code provides that county school boards may incur only such costs and expenses as are provided in its budget unless they first secure the consent of the tax levying body. **

"Of course, if the school budget did not include any item for capital expenditures, Section 22-72 referred to above would prohibit the expenditures of funds therefor until the approval of the tax levying body is first secured, at which time the Board of Supervisors can require that the specific school projects be itemized. Likewise, if the school budget named certain projects, the funds can be used only for the one specified unless the approval of the Board of Supervisors is first secured.

* * *

"Section 22-122, which deals with the preparation of school budgets, provides that the 'estimate so made shall clearly show all necessary details in order that the governing body and the taxpayers of the county or of the city may be well informed as to every item of the estimate'. Under the section, the Board of Supervisors could have required a more detailed account of the capital expenditures planned at the time the school budget was submitted for approval, but, if it did not and instead approved a sum for that general purpose, it is my opinion that the school board may expend the funds provided on such capital improvement projects as it deems most appropriate.”

The opinion quoted above follows the decisions of the Supreme Court of Appeals in the cases of Scott County School Board v. Board of Supervisors, 169 Va. 213, and Board of Supervisors v. County School Board, 182 Va. 266. In the first mentioned case the Court pointed out that what is now section 22-72 of the Code of 1950 means that "whatever costs or expenses are incurred must [either] be shown in a budget which has been approved by the board of supervisors or by its consent". (169 Va. at page 216).

The second case arose in Chesterfield County and presented the question of whether the Board of Supervisors could reduce an individual item in the estimates or budget submitted to it by the School Board so as to bind the School Board not to expend more than the amount approved by the Board of Supervisors for that particular item. The Court held that Boards of Supervisors are concerned only with the total amount of tax to be levied and cannot limit individual items of the school budget. In other words, the Board of Supervisors has the right to fix the amount of money to be raised by local taxation for school purposes but does not have the right to reduce or eliminate individual items of the budget submitted by the School Board.

My attention has been called to the following language of the Court in the Chesterfield County case which is suggested might be construed as authority for the School Board of Loudoun County to use the surplus school funds as proposed in the Division Superintendent's letter to you:

"* * * After the board of supervisors have appropriated money for schools, the exclusive right to determine how this money shall be spent is in the discretion of the school board, so long as they stay within the limits set up in the budget.” (Italics supplied.) (182 Va. at page 281.)

It is to be noted that the Court used the word, "limit", in the plural rather than in the singular. I am, therefore, of the opinion that the above quoted language does not mean that a school board may expend school funds for whatever purpose it wishes so long as the amount of the total budget is not exceeded. The word, "limits", must necessarily refer to the limits of the individual items
set up in the Budget. In any event, the Court, in the Chesterfield County case, made it clear that surplus school funds could not be expended for items not included in the school budget without consent of the Board of Supervisors, for upon consideration of what is now section 22-72 it said:

"'Under this last quoted section, I am of the opinion that 'its budget' refers to the estimate submitted by the school board to the board of supervisors. If the school board wanted to expend money for purposes not set up in its estimate, then it would be required to get the consent of the tax levying body. * * *' " (182 Va. at page 278).

To repeat, it is my opinion, based upon section 22-72 of the Code and upon the two Supreme Court cases discussed herein, that a school board in suspending funds provided for the operation of the county schools must spend money for the purposes and "within the limits set up in the budget."

SCHOOLS AND SCHOOL BOARDS—Budgets—Special Town District. (F 206)

HONORABLE PHILIP P. BURKS,
Treasurer of Bedford County.

April 8, 1952.

I am in receipt of your letter of April 4, in which you ask the following questions with reference to the school budget for the Town of Bedford:

"1. Is it the duty of the division superintendent and the Municipal School Board in the special school district in the Town of Bedford to prepare a budget for school purposes and have said budget approved by the Town Council of the Town of Bedford before the said budget is submitted to the Board of Supervisors of Bedford County for the purpose of tentatively fixing a levy for school purposes in the said Town of Bedford special school district?

"It is my understanding that the division superintendent and the Municipal School Board do prepare the school budget for the special school district in the Town of Bedford. The question has arisen as to whether or not there is any duty on the Municipal School Board to have the school budget approved by the Town Council before submitting same to the Board of Supervisors.

"2. When the Board of Supervisors publishes a synopsis of its annual budget for county general and school purposes, as contemplated by Section 22-121 Code of Virginia (1950), does the law require the Board of Supervisors of Bedford County to publish a synopsis of the budget for school purposes for the special school district in the Town of Bedford?

"3. If it is not the duty of the Board of Supervisors to publish a synopsis of the school budget for the special school district, then whose duty is it to publish the said budget before the levy is fixed by the Board of Supervisors?"

1. The Town of Bedford constitutes a special school district operated as such by its own School Board. The budget for school purposes of such a special school district is not a part of the county school budget and does not have to be submitted to the Board of Supervisors. While the County Treasurer is required to pay over to the Town of Bedford the town's share of the county levy or appropriation for schools in accordance with Section 22-141 of the Code, the Board of Supervisors does not have to have before it the town school budget in making the county school levy or appropriation.
In so far as the town school budget is concerned, this is prepared by the Superintendent of Schools with the Town School Board and submitted to the Council of the town. The Council will then levy such additional tax or make such additional appropriations as may be necessary for the town schools. See Sections 22-97 and 22-129 of the Code. Pursuant to Sections 15-575 et seq. of the Code, the Town Council prepares a town budget which will include the budget for school purposes of the town. As you will observe from reading the sections mentioned dealing with budgets, the same procedure as to hearings and publication of the town budget is followed in the case of county budgets.

The answers to your second and third questions are contained in the answer to your first question.

SCHOOLS AND SCHOOL BOARDS—Budget—Transfer of item—Additional appropriation. (F 203) 169

April 10, 1952.

DR. DOWELL J. HOWARD,
Superintendent of Public Instruction.

This has reference to my letter to you of March 17, 1952, in reply to yours of March 5, and particularly to your third question and my answer thereto. The question and answer follows:

Q. "3. Is it necessary to request the Board of Supervisors to make an additional appropriation for a separate item in the school budget whenever it becomes apparent that this item will be overspent before the end of the year, although other items in the budget carry surplus sufficient to prevent the total budget from being overspent?"

A. "3. In the situation you describe an additional appropriation for schools from the Board of Supervisors is not necessary. However, it is my opinion that the consent of the Board of Supervisors is necessary to transfer funds from one item in the budget to another."

In our conversation of a few days ago you requested an elaboration of my views on the question of what constitutes an item of the school budget.

My understanding is that the expenses as shown in the school budget are set out under such broad classifications as Administration, Instruction, Transportation, Housing, Fixed Charges, etc. It is my view that a practical construction is that these classifications constitute items and that the School Board has the power to make such expenditures properly embraced in each item as to it may appear necessary, but I do not think that the Board may transfer funds from one item to another item, for example, from Administration to Instruction, without the consent of the Board of Supervisors.

SCHOOLS AND SCHOOL BOARDS—Contract between Board and company controlled by member's father. (F 203) 68

October 4, 1951.

DON P. BAGWELL, Esq.,
Attorney at Law, Halifax, Virginia.

This is in reply to your letter of October 1, 1951, in which you inquire as to the legality of a contract for the purchase of gasoline by the Halifax County School Board from the United States Oil Company.
Your letter contains a detailed background of past events leading up to the present situation and, I must say, presents a strong equitable case in favor of the validity of this contract. The desire of the School Board to continue dealing with this corporation is entirely understandable from your letter.

However, from a legal standpoint, the pertinent facts are briefly as follows:

Mr. Watkins owns all, or practically all, of the stock in the United States Oil Company. His daughter, who has married and is an adult, is a member of the School Board. The daughter is also an employee of the United States Oil Company. She does office work but is not an official of, and owns no stock in, the Corporation. Her duties in no way involve the solicitation of this business and she receives no kind of fee or commission from this business.

The question to be determined is whether the provisions of § 22-213, which prohibit contracts between the school board and firms in which members of the school board are interested, or the provisions of § 15-504 which prohibit any paid officer of a county from being directly or indirectly interested in any contract with the school board, are being violated.

I have given considerable thought to this situation. The father-daughter relationship coupled with the employment of the daughter by both the corporation and the school board make this an exceedingly difficult question to resolve. The Supreme Court of Appeals of Virginia has said that § 22-213 is a highly penal statute and cannot be extended by doubtful implication. (Barrow v. Commonwealth, 118 Va. 257, 87 S. E. 576.) With that principle in mind, I cannot categorically state that this contract is in violation of the law. I might add that a final determination may well depend on the comparative importance of this contract to the corporation. Obviously, a small contract held by a huge concern would be less likely to affect the interests of an employee of the firm than a large contract held by a small concern. I can only state that, because the situation is doubtful, the rule of interpretation cited above makes it impossible for me to say definitely that the contract is in violation of the statutes.

You also inquire whether the contract is invalid because it is entered into periodically by the school board without first seeking bids. I can find no provision of law which would render the contract invalid on such grounds, though, of course, the practice of securing bids has long been a recommended procedure in ordinary cases.

As you stated in your letter, the penalties for violation of the statutes referred to are such that one cannot be too diligent in this regard. For that reason may I suggest that you consider the advisability of submitting this matter to the State Board of Education which, under the provisions of § 22-213, is empowered to authorize contracts which would otherwise be barred by that section?

SCHOOLS AND SCHOOL BOARDS—Contracts not subject to statute on advertising for bids. (F: 203) 14

Mr. H. Prince Burnett,
Attorney at Law, Galax.

July 18, 1951.

This is in reply to your letter in which you requested my opinion as to whether Section 11-17 applies to contracts let by local School Boards.

The pertinent part of Section 11-17 of the Code, as amended, reads as follows:

"Every contract in excess of twenty-five hundred dollars, except in a case of emergency and except also contracts for the purchase of stone, soil, lumber, borrow pits, gravel, sand, hay, grain, repairs and supplies for standard equipment, and other materials bought locally from farmers
and property holders, to which the State of Virginia, or any department, institution or agency thereof is a party, for the construction, improvement or repair of any building, highway, bridge, street, sidewalk, culvert, sewer, reservoir, dam, dock, wharf, draining, dredging, excavation, grading, or other such construction work, shall be left by the State, or such department, institution or agency thereof, only after advertising for bids for such work at least ten days prior to the letting of any such contract therefor. * *"

While local school boards are, of course, instrumentalities of the Commonwealth by virtue of the fact that they are created by the sovereign state, I am of the opinion that they are not departments, institutions or agencies of the Commonwealth within the meaning of section 11-17 of the Code.

The department and agencies referred to in section 11-17 are those, for example, that obtain their funds directly on warrants drawn upon the State treasury. Instrumentalities of the Commonwealth, such as city councils, boards of supervisors, sanitary district commissions and local school boards, do not use the State treasury as a depository for their operating funds.

My conclusion is borne out by an examination of section 11-18, which provides that every bidder on public contracts mentioned in section 11-17 must accompany his bid with a certified check payable to the State Treasurer.

SCHOOLS AND SCHOOL BOARDS—Contract with board member. (F 203) 6

HONORABLE DOWELL J. HOWARD,
Superintendent of Public Instruction.

July 10, 1951.

I am in receipt of your letter of July 6, from which I quote as follows:

"Mr. O. B. Darnell and Miss Mae Franklin are joint owners of the O. B. Darnell Bus Lines, a common carrier for Scott County and vicinity. Mr. Darnell is a member of the Board of Supervisors from DeKalb District and chairman of the Board.

"The O. B. Darnell Bus Lines are asking for a contract with the Scott County School Board to transport school children to and from the schools during the session 1951-52.

"Is the School Board of Scott County within its rights under provisions of Chapter 284-H206 of the 1950 Acts of the Assembly in contracting with the O. B. Darnell Bus Lines to transport pupils?

"If the answer is 'yes', would the buses used for transporting school children be required to conform to all of the Board Regulations covering buses used for transporting school pupils?"

The statute to which you refer, which is Section 15-504 of the Code, provides, so far as is pertinent here, that no member of a Board of Supervisors shall become interested, directly or indirectly, in any contract or in the profits of any contract made by or with any officer, agent or person acting on behalf of the County School Board.

In view of the facts stated in your letter and of the statute to which I am referred, I am of opinion that the proposed contract is contrary to law. Section 15-504 contains certain exceptions, none of which seems to be applicable here.

The answer to your first question makes it unnecessary for me to reply to your second question.
REPORT OF THE ATTORNEY GENERAL

SCHOOLS AND SCHOOL BOARDS—Division Superintendent may be Clerk of School Board. (F 249) 33

HONORABLE DOWELL J. HOWARD,
Superintendent of Public Instruction, State Board of Education.

September 5, 1951.

This is in reply to your letter of September 4, 1951, in which you request that I review a previous opinion in which I stated that in my opinion a division superintendent could not serve as clerk of the school board.

The opinion to which you refer was rendered on February 15, 1949, to the Honorable Robert Whitehead, Member of the House of Delegates, and was based upon an opinion written in 1934 by the late Honorable Abram P. Staples.

In your letter you call my attention to the provisions of § 22-78 of the Code of Virginia of 1950 which reads, in part, as follows:

"* * * All such special warrants so authorized shall be signed by the clerk or deputy clerk of the school board and countersigned by the division superintendent of schools or the chairman or vice chairman of the school board, provided, however, that when the division superintendent and clerk is one and the same person such special warrants shall be countersigned by such chairman or vice chairman. * * *." (Italics added.)

The italicized language in § 22-78 is a definite legislative recognition of the propriety of permitting a division superintendent to act as clerk of the school board, and, it would appear, clearly reveals that my previous opinion was erroneous.

My previous ruling was based on the general principles of law regarding incompatibility of offices as was Judge Staples'. In fairness to Judge Staples, I must point out that his opinion was undoubtedly correct for, at the time it was rendered, the provisions in § 22-78, to which you referred me, had not been adopted. This provision was first placed in our Code in 1945. At the time I rendered the opinion to Mr. Whitehead the provisions of § 22-78, which bear on this question, had not been brought to my attention. I, therefore, followed what I believe to be the correct rule where there is no express legislative pronouncement to the contrary. Having had this provision called to my attention, I believe the general rule must give way to the clear legislative sanction for such practice.

SCHOOLS AND SCHOOL BOARDS—Member School Trustee Electoral Board may not contract with School Board. (F 203) 29

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

August 21, 1951.

I am in receipt of your letter of August 17, in which you ask for my opinion on the following question:

"Section 22-60 of the Code provides for a School Trustee Electoral Board composed of three resident qualified voters whose duty is to appoint members to the County School Board.

"Section 22-213 of the Code provides that it shall be unlawful for any Division Superintendent of Schools, Member of the School Board or any other School Officer, Principal or Teacher in a public school to be interested in a pecuniary way with certain contracts more particularly set forth in the statute."
"I am requesting your official opinion as to whether the phrase 'any other School Officer' found in Section 22-213 includes a member of the School Trustee Electoral Board."

Although the only duty imposed upon the School Trustee Electoral Board is to appoint members of the School Board and to fill vacancies, it is entirely clear from the statutes that members of the Electoral Board are public officers. Although I cannot say that the question is entirely free from doubt, I am inclined to be of the opinion that members of this Board are school officers within the meaning of Section 22-213 of the Code. The purpose of the section is to prohibit certain named officers and employees of the school system of a county from being peculiarly interested in certain contracts relating to schools. While the reason for applying the prohibition contained in the statute to members of the Electoral Board may not be as strong as that for applying it to the other officers and employees of the school system, yet we must take cognizance of the fact that members of the Electoral Board occupy a position of considerable power in that they appoint members of the School Board itself and thus may, if they choose so to do, exercise much influence. The underlying purpose of the statute is to prevent those persons who may have influence by reason of their connection with the school system from profiting thereby. I think, therefore, that the language of the section is broad enough to include members of the School Trustee Electoral Board.

SCHOOLS AND SCHOOL BOARDS—Member school trustee electoral board may not write insurance on schools. (F 200) 74

October 18, 1951.

HONORABLE DUVAL RADFORD,
Member of House of Delegates.

I have your letter of October 16, in which you ask the following question:

"I have been requested by someone to obtain from you an opinion as to the propriety of members of the School Electoral Board writing fire insurance on the school buildings in the County in which they serve. In this connection, I understand that this information does not pertain to the County of Bedford."

The answer to your inquiry is contained in Section 22-213 of the Code, which provides among other things that no school officer shall sell or write or solicit insurance on any school building. This office has heretofore expressed an opinion that a member of the School Trustee Electoral Board is a school officer within the meaning of the prohibitions contained in Section 22-213. I am, therefore, of the opinion that it is unlawful for a member of such Board to sell or write or solicit insurance on any school building in his County.

SCHOOLS AND SCHOOL Boards—New London Academy, Cost of operation. (F 268 e) 118

January 28, 1952.

HONORABLE JOHN B. BOATWRIGHT, JR.,
Director, Division of Statutory Research and Drafting.

I am in receipt of your letter of January 25, in which you ask two questions relating to the New London Academy. You state that:
"Chapter 475 of the Acts of Assembly of 1926, relating to the New London Academy and its operation by the counties of Bedford and Campbell, provides for the payment of costs of instruction, operation and maintenance by the school boards of the counties in proportion to the number of pupils attending from each and authorizes the board of managers of the Academy to apportion between the county school boards the cost of 'permanent improvements, present loans, and insurance'. We have been asked by a member of the General Assembly to ascertain whether this apportionment of costs by the board of managers could be enforced against one of the school boards if such board or the board of supervisors of the county did not budget or appropriate funds for this purpose.

We would also like to know whether the board of managers of this institution can contract for any new capital outlay without the consent of all the participating boards."

This school occupies a unique status, as will be seen from a study of the entire Chapter 475 of the Acts of 1926. In most respects it is treated as a joint public school operation of the counties of Bedford and Campbell. The section of the Act pertaining to your inquiry is number 7, which reads as follows:

"The expenses of New London Academy shall be determined and paid according to the following plan, to-wit: The board of managers of New London Academy shall each school session apportion between the county school board of Bedford county and the county school board of Campbell county, the cost of instruction, operation and maintenance of New London Academy upon a per capita basis in proportion to the number of pupils attending New London Academy from each of said counties; and said board of managers shall also apportion the cost of permanent improvements, present loans, and insurance equally between said county school boards.

The aforesaid apportionments shall be reported to the county school boards of Bedford and Campbell counties; and each of said county school boards shall pay to the said board of managers its proportional part of the expenses of New London Academy, approximately one-half of same, not later than October first of each year, and the balance after February first of each year, on demand of said board of managers after thirty days notice, to be by them disbursed as herein provided for."

This section in so far as it deals with the expenses of the operation of the school by the counties is mandatory and requires that such expenses shall be borne proportionately by the two counties. It is, therefore, clear, I think, that the "cost of instruction, operation and maintenance" of the school, as apportioned in accordance with the section, constitutes an enforceable obligation of the respective counties.

In reply to your second question, I am not entirely sure as to just what you mean by "new capital outlay". I have no hesitation in saying that I find nothing in the Act which would authorize the board of managers of the school to obligate the two counties to pay for unlimited capital outlays. For example, I do not think the board of managers could by its sole action obligate the two counties to pay for an entirely new school. It is true that Section 7 of the Act provides that the board shall also apportion the cost of "permanent improvements, present loans, and insurance equally between said county school boards."

In view of the tenor of the whole chapter, however, I would not think that the use of the term "permanent improvements" means that the two counties will be required to pay for any and every new capital outlay that the board of managers may decide upon. Certainly the term should be limited to improvements to existing structures. Furthermore, you will observe that in the second paragraph of Section 7 each of the two counties is required to pay its proportional part of the "expenses" of the school.
REPORT OF THE ATTORNEY GENERAL

SCHOOLS AND SCHOOL BOARDS—No requirement for bids on contract to erect school. (F 203) 1

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

I have your letter of July 2, in which you ask if a County School Board may legally contract for the erection of a school building, out of funds available for the purpose, without first advertising for bids.

Section 22-72 of the Code, dealing with the powers and duties of a local School Board, gives the Board authority, among other things, to "provide for the erecting, furnishing and equipping of necessary school buildings and appurtenances and the maintenance thereof." From my examination of the statutes I have not found any provision which requires a School Board to advertise and ask for bids on contracts for the erection of school buildings and, in the absence of such a requirement, it is my opinion that a School Board may negotiate such a contract without asking for bids.

You ask for any comments that I may make on the question of public policy that may be involved. With the law as it is, I think it would be inappropriate for me to express any views on this subject, a matter which I am sure the School Board has carefully considered.

SCHOOLS AND SCHOOL BOARDS—Real Estate, title should be examined even though acquired by condemnation or gift. (F 203) 44

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

I am in receipt of your letter of August 29 in which you ask the following questions:

"Does Section 22-150 of the Code apply and should it be followed when the School Board acquires title to land for public uses by way of condemnation proceedings, or by a gift deed?

"Is the title to land purchased by the School Board defective if the provisions of this Section are not complied with?"

In my opinion the answer to your first question must be in the affirmative. Since § 22-150 of the Code provides that where a school board purchases real estate or acquires title thereto for public use, the title shall be examined and approved by an attorney, I can think of no reason why this requirement is not applicable to the acquisition of title by condemnation proceedings or by a deed of gift.

In answer to your second question, it is my opinion that if the title to the land purchased by the school board is otherwise good, such title would not be rendered defective by the failure to comply with the section as to the approval by an attorney. In such case, the requirement of the section may be said to be directory and would not render a title bad which is otherwise good.
SCHOOLS AND SCHOOL BOARDS—Segregation—Requiring students to leave county. (F 203) 220

June 17, 1952.

HONORABLE CURTIS A. SUMPTER,
Commonwealth's Attorney for Floyd County.

This is to acknowledge receipt of your letter of June 9 in which you requested my opinion as to whether the School Board of Floyd County may legally require certain Negro students of Floyd County to attend high school at the Christiansburg Industrial Institute which is located in Montgomery County.

I call your attention to the case of Corbin v. County School Board of Pulaski County, 177 Fed. (2d) 924, wherein the United States Court of Appeals (Fourth Circuit) held that the Negro high school students of Pulaski County, who were transported to the Christiansburg Industrial Institute in Montgomery County, where discriminated against, not by virtue of the fact that there were no Negro high schools in Pulaski County but because (1) more than ten courses open to the white high school students of Pulaski County were denied to the Negro high school students; (2) the physical facilities at the white high schools of Pulaski County were superior to the physical facilities at the Christiansburg Industrial Institute; (3) the extracurricular activities furnished the Negro students at the Christiansburg Industrial Institute were inferior to those furnished the white high school students of Pulaski County; and (4) the Negro high school children had to travel approximately sixty miles per day and thus had to leave home earlier, endure a longer ride and arrive home later than white high school students.

Therefore, I am of the opinion that the fact that the high school is located outside the county is not of itself controlling in determining whether or not the local school board may legally enforce attendance. The answer to your question must necessarily depend upon a comparison of all the facilities offered at the best white high school in Floyd County with the facilities offered at the Christiansburg Industrial Institute.

I have read with interest the correspondence between the State Superintendent of Public Instruction and the Division Superintendent of Schools of Floyd County, which you enclosed with your letter, and, under the circumstances of this case, I fully concur in the views expressed by the State Superintendent to the effect that compulsory attendance at the Christiansburg Industrial Institute should be required of the Negro high school students of Floyd County.

SCHOOLS AND SCHOOL BOARDS—Special school levies must be used for school purposes. (F 197) 133

February 28, 1952.

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

This is in reply to your letter of February 22, from which I quote as follows:

"First, the Nelson County School Board has accumulated a sum of about $90,000 to its credit by means of a District School Levy for the past several years. I assume that this levy could only be made under Section 22-128 of the Code authorizing a special district levy for payment of rent, capital expenses, or indebtedness. However, this levy has never been recorded as a special district levy, but only as a district school levy for district school purposes."
"The School Board now has in effect a four-year plan for building new schools in the County, which has been approved by the voters in an unofficial election, but it is doubtful when this fund will be entirely expended. Out of this fund has been paid only a comparatively small amount for interest on the two literary fund loans.

"The Board of Supervisors of Nelson County has found it necessary to propose a 50 cent increase in local levies this year. The opponents of this increase take the position that taxes should not be increased when we have on hand this fund of $90,000. However, the School Board takes the position that this fund cannot be spent for anything but capital expenses, indebtedness or rent under the above statute.

"Therefore, I will appreciate your opinion on the question of whether or not this fund can be used for general county purposes, or whether it can be used only for the purposes set forth in the statute."

You have further advised me that in two of the magisterial districts of your county there is an existing indebtedness, whereas in the other two districts there is no district indebtedness, and no such indebtedness has existed since 1946.

As to the two districts in which there is an outstanding indebtedness, there can be no question but that the special district levy should be used for the payment of the debt.

While I am not familiar with the situation by which the Board of Supervisors was confronted which that body deemed to justify the levying of a special district tax for school purposes in the districts having no outstanding district indebtedness, I must assume that such levy was made "for capital expenditures and for the payment of indebtedness or rent" as authorized by Section 22-128 of the Code, since that section is the only authority for levying a special district school tax. Therefore, the levies having been made under the authority of Section 22-128 for the purposes specified, I am of opinion that the proceeds of the levies may only be used for those purposes. This means, of course, that the proceeds of these levies cannot be used for general county purposes. In short, it seems to me that the School Board is correct in the position that it has taken.

SCHOOLS AND SCHOOL Boards—Special Town Districts—Constitutionality.

Honorable Rush P. Webb,
Commonwealth's Attorney for Carroll County.

I am in receipt of your letter of March 3, in which you refer to Section 58 of the charter of the Town of Galax (Acts of 1938, p. 411) reading as follows:

"Said school district as aforesaid shall be under the supervision of the Division Superintendent of Schools of Grayson County."

You then direct attention to that portion of Section 132 of the Constitution dealing with the powers and duties of the State Board of Education, which reads:

"The duties and powers of the State Board of Education shall be as follows:

"First. It shall divide the State into appropriate school divisions, comprising not less than one county or city each, but no county or city shall be divided in the formation of such divisions **."

Your inquiry is as to the constitutionality of the above quoted charter provision in view of Section 132 of the Constitution.
Galax is an incorporated town situated in part in Carroll County and in part in Grayson County. It constitutes a separate school district (not division) operated as such. My information is that Carroll is a school division and Grayson is another school division. Galax is not a school division. It is clear, therefore, that the State Board of Education in carrying out its duties has not violated the constitutional mandate. Nor has the General Assembly designated Galax as a school division. It seems to me that what the General Assembly has done is to recognize a rather unique factual situation (a town lying in two counties) and has in effect provided for the administration of the schools in this separate school district. I do not feel that I should say that this action offends Section 132 of the Constitution.

I might add that this office is exceedingly reluctant to declare an Act of the General Assembly to be unconstitutional, since such an opinion would not be binding. This practice is all the more applicable in a case where, as here, the Act has been in effect for a long period.

SCHOOLS AND SCHOOL BOARDS—Trustee electoral board, membership from town school districts and magisterial districts, filling vacancies and county surveyor serving as member of. (F 203) 4

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

This is in reply to your letter of June 26, from which I quote below:

"Your official opinion is respectfully required on a local matter dealing with the County School Board of Pittsylvania County. In order that you might have the full picture, I shall state the facts as detailed as possible.

"Pittsylvania County is composed of seven magisterial districts. Each magisterial district is the basis of representation of the County School Board which means that normally we would have a County School Board of seven members. The 1932 session of the Virginia General Assembly enacted a special act dealing with the public schools of Pittsylvania and two other counties, this being Chapter 416 of the Acts of 1932, Sec. 2 of which is as follows:

"'For the purpose of representation only, each magisterial district and each incorporated town having a population of one thousand or more, according to the latest United States census, in each of said counties shall constitute a school district, and the county school board shall be composed of one member from each such district in the county, to be appointed or elected as provided by law, provided that the member from a magisterial district shall not be a resident of any town which is, by this section, constituted a school district.'

"The act further provides that it shall not become operative locally until approved by recorded votes of two-thirds of the members of the County School Board and the Board of Supervisors. For the purposes of this opinion, that has been done.

"However, you can see from reading the special statute that the biggest change it wrought was to enlarge the membership of the County School Board of Pittsylvania County from seven to eight members, providing separate trustees for Chatham Magisterial District and the Town of Chatham, the Town of Chatham being the only municipality with a
population of 1,000 or more. This statute was ignored and the membership of the County School Board remained at seven until a meeting of the School Trustee Electoral Board on June 6, 1951.

"On June 6, 1951, the School Trustee Electoral Board held its annual meeting for the purpose of electing trustees from Callands and Tunstall Magisterial Districts and the meeting was advertised for that purpose only. However, at the meeting, the board took legal cognizance of the 1932 statute and proceeded to elect trustees for the Town of Chatham and Chatham Magisterial District, apparently taking the position that both officers were legally vacant since the trustee from the Chatham Magisterial District was a resident of the Town of Chatham and, therefore, according to the 1932 statute, ineligible to represent Chatham Magisterial District. The questions on which your official opinion is sought are:

"1. Is Chapter 416 of the Acts of Assembly of 1932 still effective or has it been repealed by Sections 22-42 and 43 of the Code of 1950?

"2. Could the members from the Town of Chatham and Chatham Magisterial District be elected by the School Trustee Electoral Board without advertisement of the meeting?

"3. Is the County Surveyor eligible to serve on the County School Board of Pittsylvania County?

"4. Whether the School Trustee Electoral Board had the right to transfer the school board representative from Chatham Magisterial District whose term does not expire until June 30, 1953, to the proposed school district of the Town of Chatham, and then to appoint a new member to the Chatham Magisterial District."

Chapter 416 of the Acts of 1932 is a special Act dealing, insofar as is pertinent here, with the composition of the local School Boards of Roanoke, Pittsylvania and Pulaski Counties. Section 22-42 of the Code is the general law dealing with the composition of local School Boards in counties. This section provides, "except where otherwise provided by law," that a local School Board shall consist of one member from each magisterial district of a county. So far as Pittsylvania County is concerned, Chapter 416 of the Acts of 1932 provides for an additional member of the County School Board from the Town of Chatham, since that Town has a population of more than 1,000. Section 22-43 of the Code is not of particular importance in answering your first question, since this section deals primarily with special school districts operated as such.

It is important to observe that Sections 22-42 and 22-43 of the Code of 1950 are not new with that Code, but have been in effect in substantially the same form for a number of years. Indeed, they were in effect when the special Act of 1932 was enacted. I do not believe it is necessary to trace the statutory history of these two sections more than to say that the Act from which they were codified was amended a number of times both before and after the special Act of 1932. So far as I have been able to find, Chapter 416 of the Acts of 1932 has never been in terms repealed.

It is well settled that, unless there is a plain indication of an intent to repeal it, a general Act will not be construed to repeal a special Act, and the words in a general Act which conflict with those in a special Act will be restrained and modified accordingly, so that the two Acts will be deemed to stand together, one as a general law and the other as the law of a particular case. See South Norfolk v. Dale, 187 Va. 495. Furthermore, I emphasize the provision in Section 22-42 of the Code to the effect that "except where otherwise provided by law" the County School Board shall consist of one member from each magisterial district.

In view of the fact that Chapter 416 of the Acts of 1932 has never been repealed in terms, and of the rule of statutory construction to which I have referred, and of the language I have emphasized from Section 22-42 of the Code,
it is my opinion that Chapter 416 of the Acts of 1932 is still effective in Pittsylvania County.

In answer to your second question, it is true that Section 22-62 of the Code provides that before appointments of School Board members are made the School Trustee Electoral Board shall give notice by advertising the meeting which is to be held for this purpose. However, it is my opinion that this requirement only applies when the School Trustee Electoral Board is naming the whole School Board. Section 22-65 of the Code provides that the School Trustee Electoral Board may fill vacancies in the County School Board, but there is no requirement of advertising the meeting to be held for the purpose of filling vacancies. This was plainly the view of our Supreme Court in the case of Owen v. Reynolds, 172 Va. 304, 310. It is my conclusion, therefore, that your second question must be answered in the affirmative.

Coming to your third question, Section 22-69 of the Code provides in effect that no State or County officer shall be a member of the County School Board, with certain exceptions not pertinent here. I am of opinion, therefore, that the same individual cannot be the County Surveyor of Pittsylvania County and at the same time serve on the County School Board. If, however, a County Surveyor should be appointed as a member of the County School Board, it would be a simple matter for such person either not to qualify as a member of the School Board or to resign as County Surveyor. In other words, the choice as to which office he shall hold seems to lie with the individual.

I am not sure that I entirely understand your fourth question. It is my understanding that there is no question involved of a "transfer" of a member of the School Board from one district to another district. There seem to be two vacancies on the Pittsylvania School Board, one vacancy by reason of the fact that there has been no appointment of a member of the School Board to represent the Town of Chatham thereon, and another vacancy by reason of the fact that the member of the School Board from Chatham Magisterial District has moved his residence to the Town of Chatham, thus vacating his office by reason of the fact that the member of the School Board from a magisterial district shall not be a resident of any town which constitutes a school district. These are the two vacancies which were filled by the School Trustee Electoral Board at its meeting held on June 6, 1951.

SHERIFFS AND SERGEANTS—Authority to serve capias from another jurisdiction. (F 136) 83

HONORABLE DAVID T. ROBERTSON, Sheriff of Appomattox County.

This is in reply to your letter of November 1, 1951 in which you inquire as to your authority to serve a capias pro fine upon a person in your county which capias issues from the town of Appomattox or other towns and cities within the State.

Section 19-320 of the Code of Virginia of 1950 provides that any court, in which a judgment for a fine going in whole or in part to any city or incorporated town is rendered, may issue a capias pro fine thereon, and § 19-322 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."
I am, therefore, of the opinion that you are authorized to serve such capias and to confine the person upon whom the capias is to be served until the fine and costs have been paid, subject to the limitations, as to the length of confinement, set forth in § 19-309 of the Code.

SHERIFFS AND SERGEANTS—Commission in case of multiple executions and single sale. (F 136) 45

HONORABLE G. G. BAKER,
Sergeant, City of Winchester.

September 11, 1951.

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

"I would appreciate your advice as to the proper commission to charge under Section 14-120 of the Code.

"If I should have five executions, that came into my hands consecutively, against the same judgment debtor and on a sale of the judgment debtor's property would I be entitled to the fees provided by Section 14-120 on the total amount paid and collected on each execution, or would my fee be limited to 10% on the first $100.00, 5% on the next $400.00 and 2% on the residue of the total sale price?"

Section 14-120 of the Code reads as follows:

"An officer receiving payment under an execution or other process in money, or selling goods, shall receive the like commission of ten per centum of the first one hundred dollars of the money paid of proceeds from sale, five per centum on the next four hundred dollars, and two per centum on the residue; except that when such payment or sale is on execution on a forthcoming bond, his commission shall only be half what it would be if the execution were not on such bond."

In an opinion given to the Auditor of Public Accounts under date of March 25, 1943, this office held that the word "of" which I have emphasized in the quoted section, was obviously intended to be "or", and so appears in the official Code of 1919. If the payments under the executions were made to you without the necessity for a sale, I am of opinion that you would be entitled to the commissions prescribed by the section on each payment. If, however, the judgment debtor's property is sold, it is my opinion that the total amount of your commissions under all the executions would be limited to 10% on the first $500.00 of the proceeds of sale; 5% on the next $400.00 and 2% on the residue. I do not think it would be reasonable to construe the statute as allowing you the full statutory commission on the entire proceeds of sale on account of each execution.

SOCIAL SECURITY—Civilian employees of National Guard not covered. (F 243 a) 152

MARCH 31, 1952.

GENERAL S. GARDNER WALLER,
Adjutant General.

This is in reply to your letter of March 17, 1952, in which you enclosed a letter from Col. P. M. Booth recommending that the civilian employees of the Virginia National Guard Units be brought under Social Security if possible.
You desire my opinion as to whether these civilian employees are "State employees" within the meaning of the legislation providing social security coverage for State employees.

Mr. Gray of this office discussed the status of these persons with you and Col. Booth on Friday. It is our understanding that they are paid with federal funds.

The term "State employee" is defined in the Act in question as follows:

"The term 'State employee' means any person who is employed in the service of, and whose compensation is payable, in whole or in part, by the Commonwealth * * * ."

In view of this express language regarding compensation, it is my opinion that these persons are not "State employees" within the meaning of this Act.

SOCIAL SECURITY—Employees of Norfolk County Ferries. (F 161 a) 147

March 25, 1952.

HONORABLE MAJOR M. HILLARD,
State Senator.

This is in reply to your letter of March 21, 1952 in which you inquire whether the employees of the Norfolk County Ferries, which are jointly owned and operated by the City of Portsmouth and the County of Norfolk as provided in §§ 33-194 and 33-195 of the Code, are employees of political subdivisions and eligible for social security coverage under the Act passed at the 1952 session of the General Assembly.

In my opinion there can be no doubt that they are employees of the City and County and within the scope of the Act so long as the City and County operate the ferry themselves. Should they lease the ferry, as they are authorized to do, a different result would obtain. The fact that these employees have in the past been barred from social security coverage because they were employees of political subdivisions of the State can only serve to strengthen my conviction to that effect.

SOCIAL SECURITY—Finance Director is "special employee". (F 161 a) 150

March 26, 1952.

MR. CHARLES H. SMITH,
Director, Virginia Retirement System.

This is in reply to your letter of March 19, 1952, in which you inquire whether a finance director in a county having the County Manager form of government qualifies as a special employee within the meaning of Chapter 2 of the Acts of Assembly of 1952, and whether the State may reimburse the employing political subdivisions in such cases for the cost of the employer contribution as provided in that chapter.

The term special employee is specified by the Act to mean, among other things, a city or county treasurer, or commissioner of revenue. Finance directors are not specifically included within the definition contained in the Act. Reference to Title 15 of the Code will reveal that the direction of finance has all of the
powers and is required to perform all of the duties imposed by general law upon commissioners of revenue and county treasurers. He is subject to all of the obligations and penalties imposed by general law on these two offices.

It is my considered opinion that we will do no violence to the spirit and intention of this enactment to hold that a director of finance is a special employee, and I base this conclusion upon the fact that he is in fact, though not in title, both the county treasurer and the commissioner of revenue, both of which offices are included in the term special employee.

SOCIAL SECURITY—Political subdivision may pay entire expense of back-dating. (F 161 a) 177

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.

This is in reply to your letter of April 3, 1952, which reads, in part, as follows:

"Legislation enacted by the recent session of the General Assembly in connection with the Social Security Program has been interpreted to provide that the counties of the State, upon appropriate resolution by their boards of supervisors, may pay the entire back-dating taxes for the employees of the counties without deducting such taxes from the salaries of the employees. Several counties have asked me to find out if they, under the law, may similarly pay the current employee F. I. C. A. taxes from local funds without deducting these taxes from the compensation of their several employees.

"Will you at your earliest convenience advise me whether it would be proper and legal for a board of supervisors to pay on behalf of its employees (and without making deduction from their salaries) the employee F. I. C. A. taxes."

Reference to Chapter Two of Acts of the 1952 session of the General Assembly reveals that you are correct in your statement that the counties may by appropriate resolution of their governing body pay the entire back-dating taxes for the employees without requiring reimbursement by the employees.

Section 5 (c) (2) of the Act reads as follows:

"Every political subdivision required to make payments under paragraph (1) of this subsection is authorized, in consideration of the employee’s retention in, or entry upon, employment after enactment of this act, to impose upon its employees, as to services which are covered by an approved plan, a contribution with respect to wages, as defined in § 2 of this act, not exceeding the amount of tax which would be imposed by the ‘Rate of Tax’ section of Part I of the Federal Insurance Contribution Act if such services constituted employment within the meaning of that act, and to deduct the amount of such contribution from the wages as and when paid. Contributions so collected shall be paid into the contribution fund in partial discharge of the liability of such political subdivision under paragraph (1) of this subsection. Failure to deduct such contribution shall not relieve the employee or employer of liability therefor."

It is my opinion that this provision effectively authorizes the political subdivision to pay the employee contribution without requiring reimbursement. It imposes an obligation on the political subdivision to pay the entire tax, both employee portion and employer portion. It authorizes the subdivision to impose a
contribution with respect to wages on its employees but it does not require it to do so. It authorizes the subdivisions to withhold such contribution from the employee's wages, but it does not require such action. The last sentence of the section provides that its failure to deduct the contribution does not relieve the employer from liability.

My conclusion is that the Legislature has left it optional with the political subdivisions (excepting school boards) whether they desire to come under social security. If they elect to come under they subject themselves to liability for both the employee and employer portions of the tax; whether they shall pass on to the employee the liability for the employee portion of the tax plainly appears to be optional with the political subdivision.

SOCIAL SECURITY—Regarding coverage of state employees, school boards, etc. (F 243 a) 109

HONORABLE JOHN B. BOATWRIGHT, JR., Director, Division of Statutory Research and Drafting.

January 14, 1952.

This is in reply to your letter of January 11th concerning social security coverage to be provided State and local employees.

Your first question is whether House Bill No. 1, offered January 9, 1952, completely repeals the Virginia Retirement System while at the same time preserving rights which may have vested by virtue of the Virginia Retirement Act. A careful study of this problem has been previously made by this office and it is my opinion that House Bill No. 1 completely repeals the Virginia Retirement Act while preserving any vested rights which may have accrued thereunder.

Questions 2 and 3 deal with House Bill No. 2, offered January 9, 1952, which provides for coverage of officers and employees of the State and local governments. Question 2 reads as follows:

"Are treasurers, sheriffs, sergeants, constables, Attorneys for the Commonwealth, clerks of courts, and commissioners of the revenue in the counties and cities, State or local Constitutional officers for the purposes of coverage under the Social Security System?"

The term "local employee" as defined in section 2 of House Bill No. 2 includes the above mentioned officers and Articles VII and VIII of the Constitution of Virginia, pertaining to the organization and government of counties and to the organization and government of cities and towns, respectively, specifically classify them as county and city officers. Therefore, in my opinion it is clear that Attorneys for the Commonwealth, treasurers, sheriffs and sergeants, commissioners of the revenue and clerks of court may be considered local officers for the purpose of coverage under the provisions of Title II of the Federal Social Security Act.

Your third question is:

"Are the school boards * * separate entities aside and apart from the governing body of the county to such extent as to permit coverage agreements applicable to employees of such school boards, leaving the governing body of the locality to take coverage in such manner as it may see fit?"

An examination of House Bill No. 2 indicates to me that it is contemplated that county and city school boards are political subdivisions of the State. Furthermore, as you have pointed out, section 133 of the Constitution of Virginia vests supervision of schools in local school boards and various statutory
provisions give such boards the power to enter into contracts, to sue and be sued and in general to incur costs and expenses provided for in their budgets without the consent of the tax levying body. (See sections 22-63 and 22-72 of the Code). Local school boards are juristic entities and local governing bodies exercise no direct authority or control over their employees. Accordingly, it is my opinion that a local school board is a "political subdivision" as that term is defined in section (i) of section 2 of House Bill No. 2 and may enter into a coverage agreement applicable to its employees, leaving the governing body of the locality to take coverage in such manner as it may see fit.

SOCIAL SECURITY—Reimbursement of State by localities for employer contribution on game wardens, home demonstration agents and county agent. (F 161 a) 151

Mr. Charles H. Smith, Director, Virginia Retirement System.

This is in reply to your letter of March 19, 1952, in which you inquire whether the various political subdivisions of the State may be required to reimburse the State for their proportionate share of the employer cost of social security coverage on game wardens, county agents and home demonstration agents. Persons in these three categories are being reported as State employees and it is my understanding that rulings of the Federal Security Agency are such that all of the salary that a person receives by virtue of the fact that he holds a position covered by social security is taxable under social security, regardless of the source of such compensation. In other words, where a game warden is being reported as a State employee, his full salary, including that portion paid by the local political subdivision, is reported and is taxable for social security purposes, irrespective of the fact that the local political subdivision has elected not to come under social security.

In my opinion the responsibility and liability of the locality to pay a portion of the salary of such persons necessarily includes the responsibility and liability for the employer contribution incident to such salary. Further, even though the State reports the full salary and is primarily responsible to the Federal Security Administration for the payment of the employer contribution, that portion of the employer contribution which arises out of the salary paid by the locality would, in my opinion, create an obligation upon the locality to reimburse the State. I do not believe that the fact that a particular subdivision has elected not to be included under social security would be at all material for the reasons already set forth.

STATE POLICE—Power to arrest when not in uniform. (F 353 b) 48

Honorable L. Brooks Smith, Trial Justice, Judge of the Juvenile & Domestic Relations Court of Accomac.

This will acknowledge receipt of your letter dated September 4, 1951 which I quote as follows:

"From time to time some of our local attorneys raise the question in my Court as to whether a State Trooper has the authority to make an arrest when not in 'uniform,' and in as much as the representatives of
that Department in this area do not seem to know the answer, I am wondering if you could give me an opinion on this subject, or cite me the pertinent section of the Code.

"It would seem that a State Trooper when not on actual patrol duty and not in uniform, while either in a 'State Car' or a personal car, and with proper badge to identify him as an Officer, comes upon a violation of the traffic laws, such as driving drunk, reckless driving, speeding, etc., should have the power of arrest, regardless of uniform and I have so held. However sections 19-78.1 and sections 19-74 and 19-75 seem to be somewhat confusing, though they do not cover the exact point in question, yet they are the only sections I can find on this subject. I will thank you for an opinion on this subject at your convenience."

I agree that the sections of the Code referred to by you do not cover your specific inquiry. Section 19-78.1, a reproduction in full of § 52-20 relating only to State Police, requires that an officer be in uniform or display his badge of office when making certain arrests without a warrant. Sections 19-74 and 19-75 establish the legislative mandate that before any officer, who shall make an arrest, search or seizure on any public road or highway in this state, shall become eligible to obtain any fee therefor, he must be dressed in a uniform clearly indicating the nature of his official capacity; exception being made in the case of an officer making an arrest, search or seizure in the presence of a uniformed officer. The last sentence of § 19-75 exempts the operativeness of §§ 19-74 and 19-75 upon the lawfulness of any such arrest, search or seizure and strongly suggests that an arrest may be made by an officer not in uniform. Still another section pertaining to uniforms, § 52-9.1, requires the Superintendent of State Police, with approval of the Governor, to adopt a distinctive uniform which "shall be worn by all officers and men of the department when on patrol duty." It does not appear that these or any other sections of the Code expressly prohibit or authorize arrest in general by State Troopers not clothed in a uniform.

Certainly a member of the State Police lawfully empowered to effect an arrest is, in the performance of his duties, a minister of justice. He is charged with the affirmative duty of preserving the peace and enforcing the law. It is his duty, of course, to inform the accused of his authority and he must, upon demand, be in position to satisfactorily identify himself. In the absence of statutory authority to the contrary, however, in my opinion a member of the State Police is not required to be in uniform in order to make a valid arrest.

TAXATION—Authority of Commissioner of Revenue to correct assessment.

(F 58) 175

HONORABLE E. GLENN JORDAN,
Commissioner of Revenue.

April 18, 1952.

I refer to your letter of recent date and to our conversation of yesterday relative to the authority of the Commissioner of Revenue to correct an assessment of State income tax made by him pursuant to Section 58-116 of the Code. This section reads as follows:

"The commissioner of the revenue shall secure a return from every delinquent taxpayer within his jurisdiction, or if any such taxpayer refuses to make a return or fails to make such return for fifteen days after the commissioner of the revenue calls upon him to do so, such commissioner shall, from the best information he can obtain, make an estimate
of the income of such taxpayer and report the same to the Department of Taxation.

"The commissioner of the revenue shall have authority to assess taxes, penalties and interest upon such estimate, and such taxes, penalties and interest shall be collected in like manner as is provided by law for the collection of State taxes."

Where the Commissioner of Revenue makes the assessment in accordance with the above quoted section, I am of opinion that he has no power to change or cancel the assessment. Chapter 22 of Title 58 of the Code deals with the correction of erroneous assessments of income and other taxes, and nowhere in this chapter is any authority given to the Commissioner of Revenue to correct such assessments. You will observe that jurisdiction in this matter is confined to the courts of record and in certain cases to the State Corporation Commission and the State Department of Taxation. I can find no statutory provision giving such jurisdiction to the Commissioner of Revenue except this officer does have authority to correct certain erroneous assessments of local levies and local and State capitation taxes. See Sections 58-1141 to 58-1143 of the Code.

TAXATION—Capitation Tax on new resident; constitutional. (F 100 c) 113

HONORABLE JAMES T. TODD,
Treasurer of Orange County.

I am in receipt of your letter of January 18, in which you raise the question of the constitutionality of Section 58-51 of the Code. This section imposes a State capitation tax "upon every person not less than twenty-one years of age who moves into Virginia and becomes a resident for the year in which he first became a resident, regardless of whether he was a resident on the first day of January of such year or became a resident thereafter during such year."

In my opinion, the imposition of this tax by the General Assembly offends no constitutional provision. While Section 173 of the Constitution requires the General Assembly to levy a State capitation tax on every resident of the State, the section does not fix the time as of which the resident shall be liable for the tax. This determination is left to the General Assembly. While it is true that liability for many State taxes is fixed by the status of the individual as of January 1 of any year, there is nothing so far as I know to prohibit the General Assembly from making tax liability fall as of some other time, as is the case with the statute that you mention.

You say that under Section 58-51 it would be possible for a person to become a resident of the State so late in the year that he would not be eligible to vote in the November election of the following year, although he had paid his capitation tax for the year in which he became a resident. I direct your attention to the fact, however, that, while the payment of the prescribed capitation taxes is made a prerequisite of the right to vote, the liability to the tax is dependent upon residence, and a person does not have to exercise the right of franchise in order to be subject to the tax.

My conclusion is that Section 58-51 of the Code represents a valid exercise of the legislative power.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Coin operated miniature pool tables, slot machines. (F 123) 139

March 10, 1952.

HONORABLE W. C. MUSE,
Commissioner of the Revenue, Salem.

I am in receipt of your letter of March 4, in which you ask the following questions:

"1. If a party who is a salesman for certain miniature pool tables seeks a ruling on the license necessary for him to place machines in local stores for display, the machines to be operated by the merchant for a period of 30 to 60 days and then to either buy machines or the salesman to remove same, is he subject to any other license than a miniature pool table license?

"2. Is a salesman of machines which he displays and which are classed as miniature pool tables, for which he obtains a miniature pool table license, upon presenting pictures of the machines, together with a description of the operation of said machines to the Commissioner, and which machines he places in certain stores for display and sale to merchants subject to an operator's license upon a later ruling by the state that machines are pin ball machines, if upon such ruling the salesman withdraws machines from market as quickly as possible.

"3. May a person who seeks advice from the Commissioner before going into business as to the license necessary withdraw from said business upon a ruling that a much greater license is necessary, without paying the higher license fee if he in the first instance made a full disclosure to the Commissioner upon application for the original license?"

Taking up your questions in the order in which they are asked, I beg to advise as follows:

1. Any person, firm or corporation having anywhere in this State a miniature pool table in the operation of which nickels or coins of larger denominations are used is required to pay a State license tax of $10 per year. (Code of Virginia, § 58-355, clause (7)). This annual State license tax is levied on each such machine.

Any person, firm or corporation selling, leasing, renting or otherwise furnishing a coin-operated miniature pool table or tables to others, or placing a coin-operated miniature pool table or pool tables with others, is a slot machine operator, and such person, firm or corporation is subject to an annual State license tax of $1,000. The slot machine operator's license tax is not in lieu of, but is in addition to, the tax of $10 per year on each individual coin-operated miniature pool table. (Code of Virginia, § 58-359).

Section 58-359 excepts from the slot machine operator's license tax several types of coin-operated or slot machines, but the miniature pool table is not found among the exceptions.

From the foregoing you will see that the salesman mentioned in your first question, or more particularly the employer of such salesman, if any, is liable to the slot machine operator's license tax of $1,000 per annum; also that each individual miniature pool table is subject to the annual State license tax of $10.

It would be impossible to hold, as I view it, that this salesman or his employer is exempt from the slot machine operator's license tax because the miniature pool tables are put out on trial.

2. If a person who is ignorant of the law becomes liable to the slot machine operator's license tax and upon being correctly informed of the law immediately gets out of the slot machine operator's business, he does not thereby relieve himself of legal liability to the slot machine operator's license tax for what he has done. This license, however, is issuable quarterly and, if such a slot machine
operator was in business for only one quarter or a part of a quarter, his tax will be only $250 at the most. I do not know of any opinion to the effect that a coin-operated miniature pool table is a pin ball machine. The term "pin ball machine" does not appear anywhere in our laws on the licensing of slot machines or slot machine operators so far as I know.

3. The legal answer to this question, as I view it, is in the negative; but, if any such case actually exists, the Commissioner of the Revenue may submit it in detail to the Department of Taxation for the purpose of ascertaining whether or not it is possible to do anything administratively.

TAXATION—Finance Director supplying Board of Supervisors with list of delinquent taxpayers against whom he will proceed. (F 262) 197

HONORABLE D. A. ROBINSON,
Director of Finance, County of Albemarle.

This is in reply to your letter of May 1, from which I quote as follows:

"Mr. C. H. Morrissett, State Tax Commissioner, has been kind enough to forward me a copy of your opinion dated April 8, 1952, regarding a resolution adopted by the Board of County Supervisors of Albemarle County at its regular meeting held on February 20, 1952, as follows:

"'WHEREAS, it is the opinion of this Board that all other means for the collection of delinquent State and local taxes should be used prior to the use of processes of garnishment of salaries and levy on bank accounts;

"'NOW, Therefore, Be It Resolved that the Director of Finance be and he is hereby directed to furnish to this Board, or a committee thereof appointed by the Chairman, a list of delinquent taxpayers against whom such processes are proposed to be used.

"'Be It Further Resolved that a copy of this resolution be forwarded to Mr. C. H. Morrissett, State Tax Commissioner.'

"I shall appreciate your opinion as to whether or not there would be any personal liability upon me as Director of Finance should I furnish the Board of County Supervisors of Albemarle County, or a committee appointed by the Chairman, any information, list or otherwise, of delinquent taxpayers against whom I propose to proceed by garnishment of salaries and levy on bank accounts for the collection of such unpaid taxes as I am directed to do under Section 58-965 of the Code of Virginia."

As I understand the resolution of the Board of Supervisors, it is only desired that you furnish the names of the taxpayers against whom you propose to proceed under Section 58-965 of the Code. The resolution does not call for any detail as to the transactions, property, income, or business of the persons involved. In this situation I know of no reason why there would be any personal liability on you should you furnish the Board the information it seeks.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Inheritance or gift tax—Class or individual. (F 157) 200

Honorable Carleton Penn,
Director, Division of Inheritance and Gift Taxes,
Department of Taxation.

May 9, 1952.

Pending litigation requiring immediate attention and other pressing matters in the office have prevented an earlier study necessary to properly construe the will of the late Ellen Pollard Vaden, which reads as follows:

"I, Ellen Pollard Vaden bequeath all my possessions both real and personal to my beloved husband Marshall Tate Vaden, should he survive me, if not then I give my property to the brothers and sisters of my husband, Marshall Tate Vaden."

Your specific question is whether the children of such brothers and sisters as had died prior to the death of the testator take their mother's or father's share of the estate by virtue of Section 64-64 of the Code. Section 64-64 provides:

"If a devisee or legatee die before the testator, leaving issue who survive the testator, such issue shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof be made or required by the will. This rule shall also apply to a devise or bequest to several jointly, one or more of whom die in the lifetime of the testator."

In my opinion, the answer to your question turns on whether or not the devise or bequest to the "brothers and sisters of my husband" is a class gift or a gift to individuals. If it is the former, there would be doubt in my mind as to whether the nieces and nephews concerned would participate in the distribution of the estate if their ancestors were deceased at the time of the execution of the will, since the Virginia decisions seem to indicate that Section 64-64 was intended to apply only when the deceased ancestor was specifically named in a will. On the other hand, if the devise or bequest is a gift to individuals rather than to a class, there can be no question of the fact that the nieces and nephews will share in the estate by virtue of Section 64-64, since the devisee or legatee named in the will does not have to be living at the death of the testator or even at the date of the will. Wildberger v. Cheek, 94 Va. 517.

The definition of a class gift which has been accepted by the Supreme Court of Appeals reads as follows:

"a gift of an aggregate sum to a body of persons, uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or some other definite proportions, the share of each being dependent for its amount upon the ultimate number." (Emphasis added) (Driskill v. Carwile, 145 Va. 116, 121)

It is to be noted that Marshall Tate Vaden, the husband of the testator, had passed the age of 60 at the time the will in question was executed. Therefore, for the purposes of this opinion I assume that the number of his brothers and sisters was certain at that time. This being true, the devise or bequest to "the brothers and sisters of my husband, Marshall Tate Vaden" is not a gift to a class, but a gift to individuals as certain as if they had been specifically named in the will. Under such circumstances it is my conclusion that Section 64-64 of the Code is applicable in this case and that the nephews and nieces of the surviving brothers and sisters of the testator's husband are entitled to share in the estate.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Inspection of personal property returns by public. (F 58) 100

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

December 10, 1951.

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

"Several taxpayers and members of the Board of Supervisors of this County have requested permission from the Commissioner of Revenue to examine the individual tangible personal property tax returns filed in her office.

"Upon advice from the State Department of Taxation, she has refused to allow inspection of these returns. Would you please advise me whether or not it is proper for the Commission of Revenue to permit citizens of this County or the public to inspect tangible personal property returns?"

The pertinent section of the Code dealing with your inquiry is Section 58-46, which I quote below:

"It shall be unlawful for any tax or revenue officer or employee to divulge any information acquired by him in respect to the transactions, property, income or business of any person, firm or corporation while in the performance of his public duties. Any violation of the provisions of this section shall be punished by a fine not exceeding five hundred dollars or by imprisonment not exceeding six months or by both; provided, however, that the Governor may at any time, by written order, direct that any information herein referred to shall be made public or be laid before any court; and, provided, further that this inhibition does not extend to any matters required by law to be entered on any public assessment roll or book, nor to any act performed or words spoken or published in the line of duty under the law."

The language of the section is quite broad and imposes a heavy fine upon the Commissioner of the Revenue if he divulges any information acquired by him in respect to the transactions, property, income or business of any person, firm or corporation while in the performance of his public duties.

By Section 57-876 of the Code the Commissioner of the Revenue is required to carefully preserve in a permanent file of his office all returns of tangible personal property. I fail to see how he could allow the public to inspect these returns of tangible personal property in his charge without disclosing information acquired by him with respect to the property of the taxpayers filing the returns. I am somewhat strengthened in my view by the proviso in the section that the inhibition contained therein does not extend to any matters required by law to be entered on any public assessment roll or book. Thus the assessment books are in effect made such public records as are open to inspection. But I do not think that the returns themselves may be made available for public inspection by the Commissioner of the Revenue.

My information is that the interpretation which I have placed upon Section 58-46 is in accordance with the uniform construction of the Department of Taxation over a period of years both as to returns of intangible property and tangible property. This administrative construction is entitled to great weight.
TAXATION—Motor Vehicles—Liability to tangible property tax depends on situs on January 1. (F 149) 95

December 3, 1951.

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

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

"An officer in the Air Force purchased an automobile and had same financed in the State of Virginia in May, 1950. Thereafter he was ordered to Korea and his family moved back to their home in Arkansas, taking the automobile with them, but still retaining the Virginia license. This officer was recently returned here under military orders and his wife returned from Arkansas with the automobile, which because it was financed in Virginia still bore Virginia license tags renewed for the current year, although it was after the first of the year before his family returned here to Virginia with the car. This officer states that it was coincidental that he was ordered back here to Langley Field in Virginia. The question which arises is, 'Is this car subject to a tangible personal property tax under Section 58-834 of the Code of Virginia and also under the Soldiers' and Sailors' Relief Act as cited in an opinion given by the Attorney General in "Opinions of 1948-49, page 240"?' I might also add that this, officer has not abandoned his residence in Arkansas."

In the case you present neither the automobile nor the officer nor his family was in Virginia on January 1, 1951, and the officer had not abandoned his residence in Arkansas. Under these circumstances, I am of opinion that the automobile was not subject to a local tax on tangible personal property for the year 1951. See Sections 58-834 and 58-835 of the Code.

TAXATION—Powers of Board of Equalization. (F 242) 154

April 1, 1952.

HONORABLE R. TURNER JONES,
Commonwealth’s Attorney for Highland County.

This is in reply to your letter of March 28, which I quote below:

"As concerns the local Board of Equalization, Section 58-906 of the Tax Code provided:

"'The board shall hear and determine any and all such petitions and, by order, may increase, decrease or affirm the assessment of which complaint is made; and, by order, it may increase or decrease any assessment, upon its own motion; provided, however, that no assessment shall be increased until after the owner of the property has been notified and given an opportunity to show cause against such increase, unless such owner has already been heard.'"

"This section defines the duties of such board and I am assuming that this is the only section dealing with their duties. It is my opinion that the board hears and decides only on the petitions or complaints filed with it and it has the further right on its own motion to increase or decrease the assessment in cases where the board of its own knowledge is aware of any inequality."

"My question is can it be read into the section quoted that the Equalization Board has the power to review all of the work done by the reassessment board and in effect report a new appraisal of real estate for"
the entire county. Your answer will outline all of the duties with which the Equalization Board is empowered and I hope will clarify the duties of such board which is now functioning in Highland County."

It is my opinion that the question asked in the last paragraph of your letter must be answered in the negative. The local Board of Equalization has the power only to make such changes in the several items of the general reassessment of real estate so as to equalize as among themselves such items. Suppose, for example, the Board of Assessors adopts a certain percentage of the true value of such real estate in the county as the basis for its assessment of such real estate. I do not think the local Board of Equalization has the power to change this basis.

The question you raise was before the Supreme Court of Appeals in Lynchburg v. Taylor, 156 Virginia 53, 61. There the Court said:

"The local board of equalization is a board of special and limited jurisdiction. It has the power to make such decreases and increases in the several items of the general reassessment of real estate as are necessary or proper to equalize as among themselves the several items of such assessment; and as incidental to this end is given the power to correct individual items of the assessment which are erroneous, including errors in the quantity of land assessed. It is also expressly given the further power to cancel duplicate assessments and to assess items of property incorrectly omitted by the land assessor. But its function is to equalize the general reassessment made by the land assessor, not to make a new general assessment.

"When a local board of equalization after having proceeded to equalize the several items of a general reassessment, then orders a general reduction of twenty per cent in all items of the assessment, including those which it has changed to effect an equalization of the assessment, such action can have no relation whatever to the equalization among themselves of the several assessments made by the land assessor. It is, in effect, the making of a new general assessment by the local board of equalization, which is beyond the scope of its jurisdiction."

TAXATION—Recordation—Deed by husband and wife to themselves, change in estate. (F 90 a) 213

Honorable Robert D. Huffman,
Clerk, Circuit Court of Page County.

I am in receipt of your letter of June 3 relative to the construction of Section 58-61 of the Code as amended by Chapter 461 of the Acts of 1952. This section follows the section of the Code imposing taxes upon the recordation of deeds, deeds of trust, contracts, etc. and specifies in part what deeds are not subject to the recordation tax. The section as amended reads as follows:

"No additional recordation tax shall be required for admitting to record any deed of confirmation or deed of correction or deed in which a husband and wife being joint tenants or tenants by the entireties whether or not with right of survivorship as at common law are both grantors and grantees from themselves to themselves, the only change being one of tenancy, when the tax has been paid at the time of the recordation of the original deed; provided, that, if the tax already paid is less than a proper tax based upon the full amount of the consideration or actual value of
the property involved in the transaction, an additional tax shall be paid based on the difference between the full amount of such consideration or actual value and the amount on which the tax has been paid.”

The language of the section which is italicized represents the 1952 amendment. The inquiries which you make are as follows:

“1. Is a deed on property owned by a husband and subsequently conveyed to himself and his wife jointly, with the right of survivorship, exempt wholly from the State recordation tax?

“2. Is a deed on property owned jointly by a husband and wife and subsequently conveyed to both jointly, with the right of survivorship, likewise wholly exempt?

“3. Is a deed on property owned by a husband and a one-half interest conveyed to his wife likewise exempt?”

It is plain that the answer to your first question must be in the negative since the deed which you describe does not fit the specifications prescribed for the exemption.

Your second question clearly comes within the amendment and such a deed, therefore, may be recorded without the payment of the tax.

The deed mentioned in your third inquiry does not come within the exemption since it is not one where the husband and wife are both grantors and grantees from themselves to themselves, the only change being one of tenancy.

TAXATION—Recordation—Exemption for school property applies only to site.

(F 90 a) 77

HONORABLE FELIX E. EDMUNDS,
Member of House of Delegates.

October 29, 1951.

This is in reply to your letter of October 22, from which I quote as follows:

“Please let me have your opinion as to the provisions of Chapter 3, Title 58, Section 58-54 of the 1950 Code of Virginia relative to the exemption from recordation taxes of deeds to schools, churches, etc. and deeds of trust of same. This section, as you know, provides that the taxes imposed by Sections 58-54 and 58-55 shall not apply to deeds conveying land as a site for a school house or church, nor to any deed of trust or mortgage given to secure debts, etc. The title to the section seems to apply and intends to exempt all deeds to schools and all deeds of trust of same from the taxes of Section 58-54 and Section 58-55.

“The Fishburne-Hudgins Educational Foundation, Incorporated, a non-profit corporation, organized and existing under the laws of the State of Virginia, is as of Monday, October 29th, purchasing the Fishburne School properties from the City of Waynesboro and specifically the question has arisen as to whether the deed of the City to the Foundation, and the mortgage of the Foundation conveying the property to secure debts shall be subject to the recordation taxes as provided for by Sections 58-54 and 58-55.”

Section 58-54 of the Code, exempting from the recordation tax “any deed conveying land as a site for a school house or church * * *,” is quite restricted. The word “site” as used in the section, in my opinion, means a place on which a school house or church is to be constructed.
In the case you present the deed, as I understand it, conveys a complete educational institution including the land and all the buildings thereon, which have already been constructed. When the rule that tax exemption statutes are to be strictly construed against the exemption is considered, I must advise that I can reach no other conclusion but that the deed you describe is subject to the recordation tax.

I am further of the opinion that what I have said also applies to the recordation tax upon the deed of trust or mortgage.

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TAXATION—Recordations—Options taxable as contract relating to real property. (F 90 a) 12

HONORABLE RUSSELL J. WATSON,
Clerk of Courts, Roanoke.

I am in receipt of your letter of July 16, in which you enclose a copy of what is described as a "Fixed Purchase Option" and ask for my opinion as to the recordation tax that should be imposed upon its recordation.

It appears from the instrument that the Atlantic Refining Company has leased from certain lessors in Roanoke a tract of land with the buildings and improvements thereon, the lease to run for a term of years. It is now proposed to record another instrument described as a "Fixed Purchase Option" between the same parties whereby the Atlantic Refining Company has the right and option to purchase the leased property for the sum of $28,000 at any time during the continuance of the lease. If the Company desires to exercise the option, written notice shall be given to the owner and within sixty days thereafter the Company shall tender to the owner the purchase money and the owner shall deliver to the Company a deed to the property involved.

The instrument is unquestionably a contract relating to real property, and the statute imposing the tax is Section 58-58 of the Code. It is provided that the amount of the tax shall be fifty cents on every hundred dollars or fraction thereof of the consideration or value contracted for. The question is what is "the consideration or value contracted for." The contract says that the consideration is one dollar and "other good and valuable consideration." If the instrument were a binding contract for the sale of the land, I would say that the tax should be based upon the value thereof, which seems to be $28,000. See Opinions of the Attorney General 1942-43 at page 280. But the instrument offered for recordation is not such a contract; it merely grants a right to purchase the land at a stated price. Certainly, a right to purchase property, which the grantee may never exercise, cannot be said to be as valuable as the property itself, and the value contracted for is not the value of the land itself because the land is not contracted for. The only thing contracted for is a right to purchase the land, which does not have to be exercised and may never be exercised.

Not knowing all the facts, I cannot advise you the amount of the consideration in view of the language in the instrument that the consideration is one dollar and other good and valuable consideration. This will have to be agreed upon between the parties. Normally, I would say that in cases of options to purchase real estate the consideration or value contracted for is nominal, and it follows that the recordation tax would be nominal.

I may say that I have consulted with Honorable C. H. Morrissett, State Tax Commissioner, and that he is in accord with the views expressed herein.
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TAXATION—Recordation Tax—Deed of Trust to Housing Authority. (F 90 a) 101

December 12, 1951.

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

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

"There is offered for recordation a deed of trust from the Norfolk Redevelopment and Housing Authority, a political subdivision, to John Alfriend, et al., trs., securing $1,200,000.00.

"Section 122 of the Tax Code exempts a deed conveying property to a political subdivision from the payment of the recordation tax. The same section specifically exempts churches from paying a recordation tax when it borrows money on a church site. However, I can find no exemption in statute law exempting the collection of a recordation tax in the above set case.

"Please advise me in your opinion if a tax should be collected in this matter."

I assume that the Norfolk Redevelopment and Housing Authority was created under the provisions of Sections 36-1 to 36-55 of the Code, known as the "Housing Authorities Law". By Sections 36-4 the Authority is a political subdivision of the State. Under Section 183(a) of the Constitution its property is exempt from taxation. See also Mumpower v. Housing Authority, 176 Va. 426.

I agree with you that Section 58-55 of the Code, imposing a tax upon the recordation of deeds of trust, contains no specific exemption for the deed of trust offered you for recordation. However, a general rule in construing a tax statute is that such a statute will not be construed to impose a tax upon a political subdivision of the State unless such an intention is clearly manifested by the statute. This exemption from taxation of political subdivisions rests upon implication and it is a reasonable conclusion that, however general may be the enumeration of property for taxation, property held by the State and its political subdivisions for governmental purposes was intended to be excluded, and the law will be administered as excluding it in fact. For an elaboration of this rule see Pelouze v. Richmond, 183 Va. 805, and Opinions of the Attorney General 1938-39, page 181. In the case cited the Court held that the city of Richmond was exempt from the writ tax imposed by Section 58-71 of the Code, although the language of the statute was broad enough to include the city of Richmond and did not contain any exemption therefor. The Court followed the rule I have mentioned above.

It is, therefore, my conclusion that Section 58-55 is not to be construed as imposing a tax upon the recordation of the deed of trust which has been presented to you.

TAXATION—Recordation Tax—Dissolution of Corporation, transfer of property. (F 90 a) 140

March 10, 1952.

HONORABLE H. BRUCE GREEN,
County Clerk, Court House, Arlington.

You have requested my written opinion as to the proper recordation tax for recording a deed of bargain and sale from Colonial Village, Inc., to Colonial Village Apartments, Inc.

The information before me indicates that Colonial Village, Inc. was recently dissolved under the laws of this State and incident to such dissolution conveyed its land and premises to a new corporation, namely, Colonial Village Apartments,
Inc. Your specific question is whether or not the third paragraph of section 58-54 of the Code is applicable to such a conveyance. It reads as follows:

“When the charter of a corporation is amended, and the only effect of such amendment is to change the corporate name of such corporation, the tax upon the recordation of a deed conveying to, or vesting in, such corporation under its changed name, the title to any or all of the real or personal property of such corporation held in its name as it existed immediately prior to such amendment, shall be fifty cents.” (Italics supplied).

Under the above mentioned circumstances it certainly cannot be said that the charter of Colonial Village, Inc., was amended. The corporation was dissolved. Therefore, in my opinion the third paragraph of section 58-54, quoted above, should not be considered in ascertaining the amount of tax due for the recordation of the deed of bargain and sale from Colonial Village, Inc., to Colonial Village Apartments, Inc.

I might add that I have just been informed that the records in the Clerk's Office of the State Corporation Commission do not show that Colonial Village, Inc., has been dissolved. However, they do show the transfer of the assets and liabilities of Colonial Village, Inc., to Colonial Village Apartments, Inc. This additional information does not alter my conclusion which, to repeat, is that the third paragraph of section 58-54 does not apply to the recordation of the deed of bargain and sale under consideration.

TAXATION—Newly created city may be authorized to levy tax for full year.
(F 273) 72
October 10, 1951.

Mr. John B. Boatwright, Jr.,
Director, Division of Statutory Research and Drafting.

I am in receipt of your letter of October 4th from which I quote as follows:

“I have been requested by a member of the General Assembly to obtain your opinion upon the following matter.

“There is a town in the State which desires to become a city. The town presently has a charter as a town and it is proposed to amend the charter at the 1952 session and transform the town into a city, the necessary population being present. The difficulty is this. The liability for taxes becomes due on January 1, such taxes being payable later in the year. The town is now levying only a nominal tax. Should it become a city it would be necessary to levy a materially higher tax. The question therefore is as follows:

“Can a town subsequent to January 1 become a city and impose a tax liability on residents for the entire year beginning January 1 and if not can it impose a tax liability upon its citizens for that portion of the year remaining after the date of incorporation as a city?”

I assume you are referring to taxes on real estate and tangible personal property and that the act creating the new city will carry an emergency clause. I know of no constitutional prohibition which would prevent the Legislature from authorizing the new city in its charter to impose property taxes on property in the city for the tax year 1952 even though the new city does not become such until after January first of that year. So far as I have been able to discover there is no requirement that a property owner shall own property in a city for
the entire year in order to make him liable for taxes on such property for that year. It is my opinion, therefore, that your first question must be answered in the affirmative which makes it unnecessary for me to reply to your alternative question.

TOLL BRIDGES AND FERRIES—Free use by police and civil defense personnel.

(F 243) 189

Honorable John S. Battle,
Governor of Virginia.

May 19, 1952.

This will acknowledge receipt of your letter dated May 13, 1952, which I quote as follows:

"We have a small group of people working in our civil defense setup who from time to time have to use the State-operated ferries in their official capacities. I understand that the Highway Department is agreeable to issuing passes to these people to be used when they are on official civil defense business but question their authority so to do.

"I believe the last session of the Assembly passed some act on the subject which may restrict the Highway Commission in the matter of passes, but it has been suggested that I may have authority under the Civil Defense Act to issue a directive which would cover the situation. I will be very much obliged to you if you will give me the benefit of your advice on this subject."

The Code sections pertaining to your inquiry are 33-173.1 of the 1950 Cumulative Supplement, 33-11.1, as amended by Chapter 572 of the Acts of the 1952 General Assembly, and Chapter 121 approved February 25, 1952, by the General Assembly, known as the "Civil Defense Act".

For the purpose of brevity, it is only necessary to state that the 1952 Amendment to Section 33-11 extended the privilege afforded by this section to include the Department of State Police, and provided that free use of toll bridges and ferries by the employees of the Department of Highways, the Division of Motor Vehicles and the Department of State Police is limited to such use as is necessary when actually engaged in the performance of their duties.

Section 33-173.1 of the Code provides as follows:

"It shall be unlawful for the State Highway Department or any other employee thereof to give or permit free passage over any bridge or ferry which has been secured through the issuance of revenue bonds and which bonds are payable from the revenues of such projects. Every vehicle shall pay the same toll as others similarly situated. The provisions hereof shall apply with full force and effect to vehicles and employees of the State government, governments of counties, cities and towns or other political subdivisions, and to vehicles and persons of all other categories and descriptions, public, private, eleemosynary, or otherwise. There shall be excepted from the provisions of this section vehicles and persons in the employ of the State Department of Highways when actually engaged in the performance of their duties as such, and personnel and vehicles of the Virginia State Police and employees and vehicles of the Division of Motor Vehicles when actually engaged in the performance of their duties as such."
I also quote from Page 54, Section 502, of the Trust Indenture, dated September 1, 1949, between the Virginia State Highway Commission and the National Bank of Commerce and Trust, as Trustee, as follows:

"The Commission covenants that tolls will be classified in a reasonable way to cover all traffic, so that the tolls may be uniform in application to all traffic falling within any reasonable class regardless of the status or character of any person, firm or corporation participating in the traffic, that no reduced rate of toll will be allowed within any such class except through the use of commutation or other tickets or privileges based upon frequency or volume, and that no free vehicular passage will be permitted over any of the Projects except to the Consulting Engineers, members, officers and employees of the Commission or to any fire department and to the police officers of the Federal Government or of any state, county or municipality while in the discharge of their official duties."

You wish to be advised if you have authority, under the Civil Defense Act, to issue a directive which would permit a small group of people working in a civil defense setup who from time to time have to use the State-operated ferries in their official capacity to use such facilities without payment of toll.

Your powers, under this Act relating to the defense of the State and Nation in time of war or when in your opinion a grave national peril or a serious national disaster exists, are broad. However, these powers could not be construed to impair the obligation of a contract. Article 1, Section 10, of the United States Constitution provides, in part, as follows:

"No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

Section 58 of the Constitution of Virginia is to the same purport and provides further

"* * * It shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation, * * *"

The statutory authority and inherent powers of the governor of a sovereign state, in time of grave national peril or serious national disaster in which the safety of the Commonwealth is involved, in my opinion, have few limitations. It may extend even to the taking of private property upon the payment of just compensation.

In view of the statutory provisions against granting free passage over toll facilities, the prohibition contained in the Trust Indenture and the constitutional prohibitions against impairment of a contract or taking private property. I am of the opinion that the Civil Defense Act does not confer upon the Governor authority to issue a directive for free passage over ferries and bridges to people working in civil defense.

It will be seen by reference to Section 33-173.1 of the 1950 Supplement and Section 502 of the Trust Indenture that State Police officers in the performance of their duties are excepted from the provisions of these sections. If, therefore, the civil defense workers have or are given police authority, I am of the opinion that they would be entitled to free passage over the ferries and bridges of the State independently of a directive from the Governor.
REPORT OF THE ATTORNEY GENERAL

TOWNS—Authority to install parking meters. (F 60 a) 226

Honorable Robert C. Vaden,
Gretna.

This is to acknowledge receipt of your letter dated June 20, 1952, inquiring if the Gretna Town Council has authority to install parking meters within the Town limits on U. S. Highway No. 29.

Your attention is called to Section 46-259 of the Code of Virginia which provides, insofar as material, 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," * * *.

In view of the plain language of the foregoing section, I am of the opinion that the Town Council of Gretna has authority to adopt a general ordinance providing for the installation of parking meters on all streets within the Town including U. S. Highway No. 29.

TREASURER—Deputy must be resident of county. (F 130) 42

Miss Edith Farrar,
Treasurer, Fluvanna County.

I am in receipt of your letter of September 4 in which you present the following question:

"Please advise if a deputy treasurer, who has recently moved to an adjoining county, can act as deputy treasurer in the county from which she has moved? If she is not eligible to be deputy treasurer, can she be clerk in the treasurer's office, receive money for taxes in absence of the treasurer and receipt tax tickets, if she is bonded to the treasurer? "If she is eligible to serve (sign) as clerk would she sign the treasurer's name with her name under it as clerk?"

This office has heretofore expressed the opinion that, pursuant to §§ 15-487 and 15-488 of the Code, a person who does not reside in a county may not hold the office of deputy treasurer of such county.

In connection with the other questions in your letter, § 15-485 of the Code provides that a deputy treasurer of a county may discharge any of the official duties of his principal except some duty the performance of which by a deputy is expressly forbidden by law. Receiving taxes and receipting therefor is a function of the treasurer, and while this duty may be performed by a deputy treasurer, I do not think it may be performed by a clerk in the office of the treasurer. Nor do I think that by the subterfuge of designating a person as a clerk in the office of the treasurer such person may do what a deputy treasurer is authorized to do.
I suppose it would not be improper for a treasurer to authorize a clerk in his office to issue a tax receipt in the treasurer's name by the clerk but, as I have indicated above, I do not think that a clerk in the office of the treasurer should be permitted to act as a deputy treasurer in fact when he is not permitted to hold the office by law.

TREASURER—Deputy must be resident of county.

TREASURER—Clerk may not sign warrants. (FO 130) 25

HONORABLE HUGH D. MCCORMICK,
Commonwealth's Attorney for Warren County.

I am in receipt of your letter of August 9, in which you ask for my opinion on the following questions:

"The Treasurer of Warren County has asked for an opinion whether or not his Clerk, who actually lives in an adjoining County, can fulfill the requirements of law for a Deputy Treasurer. It is my opinion that such person should not qualify in view of Section 15-487 of the 1950 Code of Virginia. If I am in error, I would appreciate your advising me to the contrary.

"The Clerk for the County Treasurer has been in the Treasurer's office for the past five years and is well qualified to perform the duties of the County Treasurer, but has moved to an adjoining County since the beginning of employment.

"I would appreciate your opinion as to whether or not the County Treasurer could legally permit his Clerk to sign checks during his absence by Power of Attorney."

A Deputy Treasurer is undoubtedly a county officer and, therefore, in view of Section 15-487 of the Code, I am of opinion that a person who resides in another county is not eligible to the office of Deputy Treasurer of Warren County. Indeed, this office has heretofore expressed an opinion to this effect.

As to your second question, I do not think that the County Treasurer has the authority to authorize a clerk in his office to sign warrants. This is a function of the Treasurer or one of his Deputies, provided the Treasurer has designated a Deputy to sign warrants, with the approval of the Board of Supervisors, pursuant to Section 58-951 of the Code. See also Section 58-485 of the Code as to the powers of deputies generally. The Legislature having expressly dealt with the question of signing warrants and stipulated who may do so, I am of opinion that the Treasurer may not authorize any person to sign such warrants other than one of his Deputies.

TREASURER—Poll tax list, separation of races, Indians. (F 100 c) 137

HONORABLE LYON G. TYLER,
Commonwealth's Attorney for Charles City County.

This will reply to your letter of March 3, from which I quote in part as follows:

"Section 38 of the Constitution and Section 24-120 of the Code of Virginia require the Treasurer of each County to list alphabetically by
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districts all persons who have paid their poll taxes and states that white and colored persons shall be listed separately.
"In Charles City County there are a considerable number of Indians who are members of the Chickahominy Tribe, but who do not live on a reservation. These Indians attend a separate Indian School, are sent to college in Oklahoma and are recognized as Indians for these purposes.
"First: Under the provisions listed above should persons having Indian blood but no Negro blood be listed as white or separately as Indians, or is either permissible?
"Second: Should persons having an ascertainable degree of Negro blood but having one-fourth or more of American Indian blood be listed as colored persons or may they be listed as Indians, or under some other appellation such as 'others' or 'mixed'?
"Third: Should persons having some but less than one-fourth Indian blood and more than one-sixteenth Negro blood be listed as colored persons or may they be listed separately as Indians or under some other category?
"Fourth: What is legally the best method for determining what the racial composition of a person is for the purpose of the Treasurer's list?"

Section 38 of the Constitution, dealing with the list of persons who have paid their poll taxes which County and City Treasurers are required to prepare, provides that such list " * * * shall state the white and colored persons separately * * *". Section 24-120 of the Code implements the constitutional mandate in the same language. Colored persons and Indians are defined by Section 1-14 of the Code as follows:

"Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one-fourth or more of American Indian blood shall be deemed an American Indian; * * * ."

Taking up your first question, I direct your attention to the fact that the above constitutional and statutory requirements as to the Treasurer’s list have been in effect for fifty years. While I do not feel that I can say that these requirements forbid the separate classification on the list of any other than white and colored persons, my information is that it has been the uniform practice during this long period for the list to be prepared with these two classifications only. This administrative construction is entitled to great weight, and so I suggest that it be followed. This means that those who have Indian blood, but no Negro blood, should, for the purpose of the Treasurer’s list, be classified as white.

As to your second and third questions, I must advise that the persons described therein are plainly colored persons according to the definition contained in Section 1-14 of the Code and should be so carried on the Treasurer’s list.

The question of "the racial composition of a person" within the definitions to which I have referred is one of fact which, of course, can best be determined by tracing the ancestry of each individual involved. As a practical solution in cases of doubt I suggest that the records of the Bureau of Vital Statistics be examined.

TRIAL JUSTICE—Appeal from conviction, refund of fine and costs. (F 173) 161
Honorable Thomas R. Miller,
Clerk, Hustings Court, City of Richmond.

April 3, 1952.

This will acknowledge receipt of your letter of March 31, from which I quote as follows:
“There seems to be some confusion in the minds of a number of Clerks of Court as to proper procedure in cases where a person has been convicted of a misdemeanor in a Trial Justice or Police Court, pays his fine and costs in said Court and then decides to appeal to the Circuit or Corporation Court. Although I believe that I am using the proper method, as there are some who differ with me, I thought it best to request a ruling on the matter.

“ It is my contention that, regardless of payment of fine or not, the noting of the appeal wipes out the conviction, the case coming to the higher Court de novo, and therefore there is no fine to be paid, and the defendant is properly due to be refunded whatever he has paid for fine and costs, and to be properly bonded for his appearance in the Circuit or Corporation Court. As evidence of this is the fact that where the conviction in the trial court is for drunken driving, the appealing defendant has the right to drive a car pending the disposition of his case in the higher court, plus the fact that in said higher court he is tried de novo. In case the trial court, as is often done, fixes the bond at the amount of the fine and costs already paid, then the clerk of that court will, of course, have to give a receipt for a cash bond, and transfer the money he has from his fine account to his bonding account. This seems to me to be the correct manner of handling these cases, but I would appreciate it if your office would give a ruling on this matter in order that all of us may be advised as to our responsibilities.”

The statutes relating to the disposition of fines and costs do not contemplate such a situation as you present, and I imagine that such cases rarely occur. As a general rule, fines and costs are not paid by defendants if they propose to appeal. In view of the small number of such cases that will arise and in the absence of a statute which specifically covers them, I think that the method you have suggested is a practical solution of the problem.

I have talked with the Auditor of Public Accounts and he concurs with the further suggestion that the record would be clarified if the Trial Justice or Police Justice drew a check payable to the defendant covering the fine and costs which he has paid and then have the defendant endorse the check, returning it to the Justice to be used as a cash bond.

TRIAL JUSTICE—No fee for committing person to mental institution. (F 148) 8

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.

July 11, 1951.

This will acknowledge receipt of your letter of July 3, in which you state that you have received a letter from the Trial Justice of Albemarle County reading as follows:

“Please advise me of the correct amount of costs and fees to be taxed in a commitment of a person to one of the State institutions.

“In light of the existing statute which does not specifically provide for a fee to the Trial Justice or costs to be taxed by the Trial Justice, it is understood that certain counties or municipalities have refused payment of such costs which were taxed as part of the commitment. This does not apply to the doctor’s fees or the Sheriff’s costs.

“This jurisdiction has numerous commitment hearings and it is of special importance that the correct fees and costs be charged to the proper county or city.”
You then ask what costs and fees should be taxed by a Trial Justice in the commitment of a person to one of the State mental institutions.

The fees and expenses of commitment of a person to one of the State mental institutions are in terms prescribed by Section 37-75 of the Code. I do not see how anything that I could say would add anything to the section itself. I take it that your correspondent is primarily interested in whether or not a fee is allowed to a Trial Justice who may be a member of the Commission. The section prescribes a fee for a Justice of the Peace, but I can find no provision for a fee to a Trial Justice.

If I can be of any further assistance to you, please advise me.

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WAR—Recordation of discharge of World War II Veteran. (F 356 a) 115

January 23, 1952.

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

I am in receipt of your letter of January 21, in which you ask for my opinion on the following question:

"Section 17-91 Code of Virginia provides for the recordation of the discharges of World War II veterans. "I have been presented with a discharge dated January 19, 1952, for recordation. "Please advise me in what book this discharge is to be recorded."

Section 17-91 of the Code provides for the recordation of the discharge "of any person who served in the armed forces of the United States * * * during World War II * * *." Technically, a state of war still exists and, therefore, I am of the opinion that the discharge you have before you should be recorded in the "Induction and Discharge Record World War II" book as provided in the section.

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WAR—World War II Memorial Commission, terms of members. (F 21 c) 123

February 5, 1952.

HONORABLE JOHN J. WICKER, JR.,
Chairman, Virginia World War II Memorial Commission.

This will acknowledge receipt of your letter of February 4 relative to Chapter 244 of the Acts of 1950, which authorized and created the Virginia World War II Memorial Commission.

As you point out, the Commission is to be composed of fourteen citizens of Virginia, with appointive powers divided between the Speaker of the House, the President of the Senate, and the Governor.

You desire my opinion as to whether or not legislative confirmation of these appointments is necessary, and whether the members of the Commission hold terms of a defined duration and therefore are subject to reappointments. You state that it was the apparent intention of the legislature that the membership of the Commission appointed as prescribed by the Act would continue in such membership indefinitely, subject, of course, to such changes in personnel as might become necessary due to vacancy created as a result of death or some other cause.

A careful examination of the Act brings me to the same conclusion expressed by you. The General Assembly might well have provided specified terms of office...
and for reappointment, as has been done relative to many of the boards, commissions and agencies of the State Government. No such limitations are to be found in the law.

It is my opinion, therefore, that this Commission is a continuing one, the appointment of which is prescribed by the Act without confirmation and the filling of such vacancies as might occur is the prerogative of the appointing officers named in the Act, whenever such vacancy is among the personnel that the Speaker of the House, the President of the Senate or the Governor is charged with the duty of appointment in the first instance.

WARRANTS—Number of warrants issued for different offenses on same day. (F 381) 172

Honorable George F. Abbitt, Jr., Commonwealth's Attorney for Appomattox County.

This is in reply to your letter of April 1 requesting my opinion with regard to the interpretation of § 14-137 of the Code of Virginia in connection with the number of separate warrants that should be issued where there are charges of reckless driving and drunk driving on the same day against the same individual, and also in the case where there is a third charge against the same person arising from a speeding offense which occurred several days prior to the first mentioned offenses.

Section 14-137 of the Code of Virginia provides:

“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.”

Without expressing any view upon the validity or invalidity of warrants issued in noncompliance with § 14-137, it appears that the purpose of the section is to prevent the issuance of unnecessary warrants and also to reduce the charges involved. The first sentence of the section deals with one warrant concerning an offense of the same nature issued “against a number of persons” and also, while not precluding the issuance of separate warrants, the latter part of the first sentence prohibits the receipt of “more than one fee for issuing more than one warrant * * * against the same party * * *, when such warrants are issued or trials * * * (are) had on the same day.” The second sentence of the section is similar to the first portion of the first sentence in that it requires “the names of all parties defendant” to be included in one warrant for charges or offenses of the same nature committed at the same time.

In regard to your specific questions, it appears that, while separate warrants may be issued for separate misdemeanor offenses, only one fee may be charged for their issuance on the same day against the same person and similarly, (although this presents more of a problem) where the various charges are to be tried on the same day. It would further appear that, if the offenses are of the same nature and are committed on the same day, it would be a proper practice to include them in the same warrant. The recent case of Hundley v. Commonwealth,
Record No. 3926, rendered by the Court of Appeals at its last session, sustains convictions upon careless and reckless driving and drunk driving charges which were included in one warrant and which offenses were charged as occurring on the same day. While the Court's opinion did not discuss the question of the charging of the several offenses upon one warrant in connection with § 14-137, it did, nevertheless, sustain the convictions upon one warrant containing the several charges.

WARRANTS—Search Warrant—Does not authorize search of person not under arrest. (F 381) 65
October 3, 1951.

HONORABLE WILLIAM L. CARLETON,
Commonwealth's Attorney for Newport News.

I have your letter of September 28 in which you ask for my opinion on the following question:

"The Chief of Police of this city has requested me to procure an opinion from your office as to whether or not a police officer armed with a search warrant has a right to search any or all persons within a public or private place so designated in the warrant or anyone who might come into such place when they are not under arrest."

The purpose for and the manner in which search warrants may be issued are set out in Chapter 3 of Title 19 of the Code. Generally speaking, they are issued for the purpose of discovering property on described premises as an aid in the detection of crime. The mere fact that there may be a person present at a public or private place for the search of which a warrant has been issued does not, in my opinion, authorize the officer to search such person in the absence of a warrant for his arrest or cause for arrest without a warrant.

WELFARE AND INSTITUTIONS — Authority of board to authorize small expenditures by the Director of Department. (F 231) 11
July 12, 1951.

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

This is in reply to your letter of July 9, in which you raise the following question:

"Chapter 21 of the Acts of Assembly of the 1936-37 Extra Session gave to the former State Board of Public Welfare certain authority and responsibility in regard to the property of persons who were formerly residents of the Shenandoah National Park area. As you know, Section 63-4 of the 1950 Code of Virginia transferred the former powers and duties of the former State Board of Public Welfare to the Director of the Department of Welfare and Institutions and the Board of Welfare and Institutions.

"It is still necessary to make expenditures of funds under the provisions of the 1936-37 Acts, and many of the amounts expended are very small. Would it be proper for the Board of Welfare and Institutions to adopt a resolution authorizing the Director to approve without Board action necessary expenditures in amounts not in excess of $100?"
Your office has further advised me that the expenditures to which you refer cover small items of repairs to and maintenance of the property mentioned in Chapter 21 of the Acts of the Extra Session of 1936-37.

In my opinion, it would be entirely proper for the Board of Welfare and Institutions to adopt the resolution described by you.

WELFARE AND INSTITUTIONS — Cost of social security is administrative expense. (F 231) 136

March 4, 1952.

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

This is in reply to your letter of February 20, 1952, from which I quote as follows:

"Section 5 of Chapter 2 of the 1952 Acts of Assembly makes it possible for the benefits of the Federal Old-Age and Survivors Insurance System to be extended to the employees of counties and cities of the State. Section 63-106 of the Code of Virginia provides in part as follows:

"'Administrative expenditures incurred by the localities in connection with aid to the needy aged, aid to dependent children, and general relief, shall be ascertained by the State Board, and the Commissioner shall monthly reimburse each county and city therefor out of State and federal funds in an amount not less than fifty per centum nor more than sixty-two and one-half per centum of such administrative costs.'"

"We would like to be advised as to whether or not expenditures by cities and counties under the provisions of Section 6 of Chapter 2 of the 1952 Acts for the costs of employer contributions for employees of their respective departments of public welfare shall be considered administrative expenditures for which the locality would receive reimbursement from the State in accordance with the provisions of Section 63-106 of the Code."

You will recall that, on October 27, 1949, in an opinion addressed to you, I expressed the view that if a locality adopts a pension plan under which it will make certain contributions in proportion to the salaries paid to the employees, such payments made in connection with employees of the local Department of Welfare would properly be considered administrative expenses incurred in connection with the administration of the Public Assistance Act. I said at that time that such payments are, in substance, a part of the compensation paid to employees and, as such, are as much a part of the administrative cost as the direct salaries paid. In my opinion the present question involves exactly the same principles and it is, therefore, my opinion that such expenses may be considered one for which reimbursement can be made by the State to the extent stated in § 63-106 of the Code."
REPORT OF THE ATTORNEY GENERAL

WELFARE AND INSTITUTIONS—Department has no authority to use funds belonging to children committed to it. (F 231) 111

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

I am in receipt of your letter of January 2, from which I quote as follows:

"This Department has on hand a sum of money totaling more than $10,000.00, which sum is deposited in a local bank in an account earmarked 'Wards' Deposit Fund.' All of this money has come to the Department for the benefit of certain children committed to it by the courts. Individual accounts are maintained here in the names of the children for whom the money was paid. The accounts are numerous, ranging in amounts from a few dollars to several hundred dollars. More than $1,000.00 of the total constitutes inactive accounts, many of which antedate to 1933, and being accounts maintained for children who have gone out from State custody and all track having been lost of their identity or whereabouts.

"A little over $600.00 of the total is maintained for boys still at Hanover Training School. This covers money earned by individual boys who were permitted to leave the school in the daytime and work on neighboring farms. We have about $1,300.00 paid in by the Veterans Administration for individual children under State care. The largest single source of income to this fund is from Old Age Survivors Insurance Benefits paid by Social Security. This block of accounts amounts to about $6,000.00. It is increasing all the time, as more and more children come under it also because the payments have been greatly increased. The present rate of income to this fund is running over $600.00 monthly.

"Army subsistence has contributed about $250.00 to the total on hand and railroad payments to one child amount to over $900.00.

"In the past we have been using this money only on the individual children having the accounts to supplement what the State has already provided such as hospitalization, dental costs, etc. No money from one child's account has to date been spent on another child in State care. Since the State is providing care and services to all children committed to it regardless of whether or not money is forthcoming from some outside source to pay for such maintenance, it is felt that this money should no longer be spent on the individual children having the accounts, but should go into a special fund to be used to supplement State appropriations and provide better care and services for all children coming to the State. I do not feel that an individual child whom the State has supported for say two years and has required no additional emergency services should be permitted to leave State custody and take with him several hundred dollars which has been set up for his support."

You further state that you:

"* * * requested the Budget Director to establish a special fund in the State treasury so that funds on hand and future receipts may be deposited. We indicated to the Budget Director that this special fund may be classified as 'for maintenance of children'. We also proposed that as receipts accumulated in this special fund they could be used for the purchase of clothing, medical and dental services and other expenses for any and all children in our care for which we would otherwise be unable to provide due to the inadequacy of the State appropriation for children's activities.

"The Budget Director questioned the legality of such procedure. Therefore, I would like very much to have your opinion relative to the

January 16, 1952.
REPORT OF THE ATTORNEY GENERAL

authority of this Department to receive and disburse these funds through a special fund which we are requesting to be established in the State treasury."

While the children committed to the State Board of Public Welfare are wards of the State, the Board does not become the guardian of these children in the sense that it has supervision and control over their property. Provision is made by statute for the maintenance and care of these children at public expense. But their separate property, including the property mentioned by you, belongs to them, and I know of no provision of State law authorizing the Board to expend their funds which may come into its hands. Certainly there is no authority for setting up and using such a special fund in the manner suggested.

WELFARE AND INSTITUTIONS—Disposition of funds received by way of reimbursement for hospital care given needy person. (F 231) 194

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

I am in receipt of your letter of April 24, from which I quote as follows:

"The practice has developed in many of the Virginia county and city departments of public welfare of receiving and disbursing funds received from various sources other than from the regular appropriations of local, State and Federal funds. Certain questions have been raised concerning the receipt, disbursement and handling of these funds which usually come from the following sources:

* * * * * *

"Money paid in connection with installment refunds or repayment of hospital expenditures which have been made on authorization of the local department under State-Local Hospitalization of Indigents program as provided by Chapter 15 of Title 32 of the Code.

"In some instances the superintendents of public welfare are authorized by their local welfare boards to receive and disburse funds of the nature of those enumerated above. Can a local board of public welfare legally authorize a superintendent to accept such funds other than for deposit with the local fiscal officer?

"If the superintendent of public welfare is authorized to receive and disburse such funds, does the State Board of Welfare and Institutions have the authority to adopt rules and regulations governing the handling and accounting for these special funds?

"Would any acts relating to the misuse or mishandling of these funds by the local superintendent be covered by the official surety bond which is required for each superintendent under Section 63-81 of the Code of Virginia."

Section 32-295 of the Code, which is a part of Chapter 15 of Title 32 dealing with the hospitalization and treatment of indigent persons clearly provides what disposition should be made of the collections to which you refer. The section reads as follows:

"In any case where hospital care and treatment is provided under this chapter, except under § 32-296, the expense thereof shall be collected..."
whenever possible from such person or his estate or the person legally responsible for his care. If the whole amount cannot be collected, as much as possible shall be collected. The county or city from which such patient is sent shall provide for such collections and the proceeds therefrom shall be distributed one-half to the State and the remainder to the locality collecting the same.”

Applying the section, my opinion is that when collections are made from persons who have been furnished hospital care and treatment such collections shall be distributed one-half to the State and the remainder to the locality. The normal procedure, I should think, would be for such collections to be paid over to the county or city treasurer for distribution as specified by the section. I know of no authority which the local superintendent of public welfare or other welfare officer has to use these collections for hospitalization and treatment of other indigent persons. These collections undoubtedly constitute public funds and are, therefore, covered by the surety bonds of the officer handling them. I call your attention to the fact that, pursuant to Section 32-294 of the Code, the local superintendent of public welfare is not necessarily the agent to carry out the provisions of the Chapter. The governing body of the county or city has the authority to designate such agent, who may, of course, be the local superintendent of public welfare.

As to the procedure to be followed in distributing these collections as provided by Section 32-295, I suggest that this be worked out by your Department in cooperation with the Auditor of Public Accounts.

WELFARE AND INSTITUTIONS—Eighteen year old may be sent to road force for non-support of parent but parent receives no payments. (F 283) 40

HONORABLE JOHN W. SNEAD,
Trial Justice of Chesterfield County.

This is in reply to your letter of August 28, 1951, which reads as follows:

“Section 20-61 of the Code of 1950 provides that a husband or father, convicted of non-support, may be sentenced to the State Convict Road Force, and subsequent Sections of the Code provide for the payment of certain sums for each day’s work in the Road Force to be used for support of the defendant’s dependents.

“Section 20-88 makes it the duty of all persons sixteen years of age, or over, under circumstances as stated in said section, to provide for or assist in providing for the support of his or her mother or aged or infirm father, if in destitute circumstances. The third paragraph of this Section 20-88 states that ‘other provisions of this chapter shall apply to cases arising under this section in like manner as though they were incorporated in this section.’ The fourth paragraph of this Section 20-88 seems to provide either a fine or a jail sentence as the only penalty for violation of this Section.

“I would like to know whether, in your opinion, a son may be sentenced to the State Convict Road Force upon conviction of non-support of his mother, and if so sentenced, if the State Highway Commissioner may pay for work performed by the prisoner sums to be used toward the support and maintenance of the defendant’s mother.”

As you indicate § 20-88 of the Code seems to limit the punishment of a child for failure to support an aged or infirm parent to imprisonment in jail or a fine,
or both. However, the section declares such act to be a misdemeanor, and § 53-103 of the Code provides that whenever a male person over eighteen years of age is convicted of any misdemeanor for which a jail sentence might be imposed the trial justice may, in his discretion, sentence him to a like period on the public roads.

It would appear, therefore, that a son over eighteen years of age, may be sentenced to the State Convict Road Force for failure to support an aged or infirm parent.

The provisions relating to the payment of certain sums for support of the defendant's dependents to which you refer are found in § 20-63 of the Code. This section makes provision only for the wife and children of the defendant. I am advised of no provisions regarding the parents of a defendant and, while § 20-88 provides for the incorporation of other provisions of the chapter into § 20-88, I do not believe that by incorporating § 20-63 into § 20-88 we could say that support payment could be made to the defendant's parents. To so hold would be not only incorporating that section into § 20-88 but materially altering the words of the section as well.

In my opinion the son, if over eighteen, may be sent to the State Convict Road Force, but I am aware of no provision by which you can reach the desired result of providing support money for the parent.

WELFARE AND INSTITUTIONS—Handling funds for wards. (F 231) 183

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

This is in reply to your letter of April 24, from which I quote in part as follows:

"In many instances Virginia county and city departments of public welfare are called upon to receive and disburse funds where the procedures for handling them do not appear to be covered specifically by the statutes. We would like to be advised concerning the authority and procedures to be followed for the receipt, disbursement, handling and protection of such funds, which are usually of the following types:

"Contributions, legacies, or donations by citizens or organizations for the benefit of particular persons or particular groups, such as money for the purchase of Christmas baskets, emergency relief, eyeglasses, summer camps for underprivileged children, et cetera.

"In some instances the superintendents of public welfare are authorized by their local welfare boards to receive and disburse funds of the nature of those enumerated above. Can a local board of public welfare legally authorize a superintendent to accept such funds, and does such authorization and acceptance endow the funds with the status of public funds?

"Would any acts relating to the misuse or mishandling of these funds by the local superintendent be covered by the official surety bond which is required for each superintendent under Section 63-81 of the Code of Virginia?

"Does the State Board of Welfare and Institutions have the authority to adopt rules and regulations governing the handling and accounting for these special funds?"
It is my understanding from your letter and from additional facts brought out in the conference with Messrs. Painter and Jones, of your Department, that these funds represent private charities and are not paid or donated pursuant to any statute. The individual donors invoke the assistance of the county and city departments of public welfare in distributing these gifts on account of the familiarity of the departments with local conditions and charitable needs. While I can appreciate the motive which prompts the donors and also the desire of the local public welfare officials to cooperate in every legitimate way with these charitably minded individuals and organizations, I can find no statute which makes it the duty of or even authorizes these officials to handle these funds in their official capacities. This being true, I do not believe that the local boards of public welfare or the State Board of Welfare and Institutions may impose this duty upon these officers as an official one. If these officers undertook to handle these funds as requested by the donors, they would be doing so purely unofficially and as individuals. The funds, in my opinion, would not constitute public funds and their misuse or mishandling by the local officials would not be covered by surety bonds conditioned upon the faithful performance of their duties.

WELFARE AND INSTITUTIONS—Handling funds of wards. (F 231) 184

May 5, 1952.

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

I have before me for reply your letter of April 24, from which I quote in part as follows:

"The practice has developed in many of the Virginia county and city departments of public welfare of receiving and disbursing funds received from various sources other than from the regular appropriations of local, State and Federal funds. Certain questions have been raised concerning the receipt, disbursement and handling of these funds which usually come from the following sources:

"By virtue of agreements with parents or relatives whereby the local board takes custody of a child either by an agreement or a court order, and an amount is to be contributed for board, clothing, et cetera.

"In some instances the superintendents of public welfare are authorized by their local welfare boards to receive and disburse funds of the nature of those enumerated above. Can a local board of public welfare legally authorize a superintendent to accept such funds other than for deposit with the local fiscal officer?

"If the superintendent of public welfare is authorized to receive and disburse such funds, does the State Board of Welfare and Institutions have the authority to adopt rules and regulations governing the handling and accounting for these special funds?

"Would any acts relating to the misuse of these funds by the local superintendent be covered by the official surety bond which is required for each superintendent under Section 63-81 of the Code of Virginia?"

I direct your attention to Section 63-73 of the Code, which reads as follows:

"Any county or city board of public welfare shall have the right to..."
accept for placement in suitable family homes or institutions, subject to the supervision of the Commissioner and in accordance with rules prescribed by the State Board, such persons under eighteen years of age as may be entrusted to it by the parent, guardian, or other person having legal custody thereof, or committed by any court of competent jurisdiction. Such county or city board of public welfare shall, in accordance with the rules prescribed by the State Board and in accordance with the parental agreement or court order by which such person is entrusted or committed to its care, have custody and control of the person so entrusted or committed and accepted until he is lawfully discharged, has been adopted or has attained his majority."

This section is plain and clearly authorizes county and city boards of public welfare to accept children for placement either by voluntary agreement with a parent or guardian or pursuant to an order of the court committing such children. Undoubtedly the agreement or order may provide for a parent or parents to contribute in whole or in part to the support of a child so accepted or committed. In carrying out the agreement or order of commitment the county or city board would be acting in its official capacity and discharging a duty contemplated by statute. The funds which are paid pursuant to the agreement or court order, while not tax funds, in my opinion clearly constitute public funds in the sense that they are paid under the authority of law, and so their misuse or mishandling would be covered by the surety bonds of the officials receiving and disbursing them. The section of the Code under review also gives to the State Board the authority to prescribe rules for the administration of its provisions.

As to the procedures for handling and accounting of the funds paid under the authority of the section, I suggest that these details be worked out by you and the Auditor of Public Accounts.

You are, of course, familiar with the opinion of this office given under date of August 20, 1948, to Honorable J. Gordon Bennett, Auditor of Public Accounts (Opinions of the Attorney General 1948-49, page 4), but this opinion relates to funds paid by defendants in non-support cases.

WELFARE AND INSTITUTIONS — Interpretation of court orders and good conduct time. (F 75) 93

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

I am in receipt of your letter of November 15, from which I quote as follows:

"Occasionally court orders are received for the commitment of persons to the Penitentiary which contain the stipulation that the convict is to be confined in the Penitentiary for a specified portion of the total term of imprisonment to which he has been sentenced and released at the end of that period without having been given any credit for good conduct allowances. For your information copies of several court orders, which are examples of those referred to above, are attached hereto. However, it appears that there is a possible conflict between such court orders and the statutes. From our interpretation of Sections 53-211 and 53-213 of the Code all prisoners convicted of felonies and sentenced to the Penitentiary are entitled to an allowance for good conduct on their terms of sentences when such good conduct allowances have been earned and not forfeited.

"It has been the policy of this Department to always hold prisoners
committed to the Penitentiary in accordance with the terms of the commitment as set forth in the court orders.

"Your advice and interpretation of the law in this matter will be greatly appreciated in order that we may act in full compliance with the law."

I have also examined the copies of the court orders which you enclosed.

In my opinion, there is nothing in the court orders that is in conflict with the provisions for good conduct allowance contained in Sections 53-211 and 53-213 of the Code. The general effect of the orders is to impose a sentence on the prisoner for a prescribed term and then to suspend the remainder of the sentence (or place the prisoner on probation) after he has served a specified portion of the original sentence, this being a condition precedent to the suspension of sentence. In each case the specified time which the prisoner has to actually serve is less than the time he would have to serve but for the suspension of sentence, even taking into consideration the good conduct allowance. As a matter of fact, so far as your records are concerned the prisoner should be credited on the original sentence with the good conduct allowance to which he is entitled and, if for any reason he should have to be returned to your custody to serve the remainder of his term, he will still be entitled to his good conduct allowance.

My conclusion is that prisoners committed pursuant to the orders of the type you enclosed should be held in accordance with the terms of such orders.

WELFARE AND INSTITUTIONS—List of persons receiving public assistance cannot be given to School Board. (F 231) 35

HONORABLE DOWELL J. HOWARD, Superintendent of Public Instruction.

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

"We have been requested by the School Board for the City of Roanoke to secure an opinion concerning the authority of a local Welfare Department to furnish to the School Board a list of families who are on the public Welfare list. Such a list would be used by the School Board as a basis for furnishing free lunches under the National School Lunch Act.

* * * * * * *

"I shall appreciate it very much therefore if you will advise this office as to whether or not the Department of Public Welfare has the authority to furnish such information to the School Board for the purpose of furnishing free lunches to such children under the National School Lunch Act."

The law governing this question is found in §§ 63-67.1 and 63-67.3 of the Code of Virginia, 1950, as amended. These sections read 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."

"That part of each monthly report which pertains to the list of persons applying for or receiving public assistance, and the amounts so received by such person, shall not be placed upon the minutes of the governing bodies or spread upon their official records, but shall be filed in a special book provided therefor. Such book shall not be open to public inspection and if any person wilfully discloses any information contained therein, for purposes other than directly connected with the administration of the Virginia Public Welfare and Assistance law, he shall be guilty of a misdemeanor and, upon conviction, shall be punished accordingly."

I can fully appreciate the reasoning of the City School Board in desiring this information, however, a strict construction of the sections above would, in my opinion, make it unlawful for the local board of welfare to reveal the names of the persons receiving public assistance for any purpose which is not directly connected with the administration of the Virginia Public Welfare and Assistance Law. The National School Lunch Act is, of course, not a part of that law and, therefore, in my opinion, the local board of public welfare should not reveal such information for purposes of the national act.

WELFARE AND INSTITUTIONS—Old Age Assistance—May be paid through child capable of supporting parent. (F 231) 56

September 19, 1951.

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

This is in reply to your letter of September 17, 1951, which reads as follows:

"Please advise whether or not the Welfare Department is authorized under the law to contribute support for an old person who is in destitute circumstances even though they may have a child who might be in a position to contribute to his support while there is a warrant against said child who has not been apprehended and tried by a court."

Section 63-125 of the Code of 1950 reads as follows:

"The local board may proceed in the manner provided by law against any person who is legally liable for the support of an applicant or recipient of assistance to require such person, if of sufficient financial ability, to support the applicant or recipient." (Italics added.)

The italicized words clearly indicate that the Legislature has contemplated that in some instances it will be necessary for aid to be given by the Welfare Department while steps are being taken to require the legally responsible person to act. I know of no other provision which would prevent such a result and, therefore, am of the opinion that it may properly be done.
REPORT OF THE ATTORNEY GENERAL

WELFARE AND INSTITUTIONS—Records of prisoners may be withheld from public. (F 84) 90

HONORABLE R. M. YOUELL,
Director, Division of Corrections, Department of Welfare and Institutions.

This is in reply to your letter of November 9, 1951, from which I quote as follows:

"The Division of Corrections and the Parole Board have case folders on each inmate that are used jointly by both offices. Much of the information contained in these folders is received with the understanding that it will be kept confidential. All of the FBI reports are received as confidential matter. Much correspondence is received from the Army and Navy which is requested to be kept confidential. Much confidential information is received from other sources on most of these cases.

"In the office at the Penitentiary there is kept a copy of all legal information such as court orders, detainers, and official documents, about each case.

"There is enclosed herewith a folder on an inmate by the name of Nathaniel Washington, No. 58979. There is also enclosed herewith a folder in the case of Lloyd Hendrick, No. 50935, which is kept at the Penitentiary containing all legal papers.

"Occasionally attorneys visit this office and desire to inspect the administrative or case folder. It is the feeling of the Parole Board and this office that a case folder contains much information which is given to us with the understanding that it will be kept confidential and that these folders are not subject to inspection by attorneys or other persons. We do feel that they have a perfect right to inspect the folders involving court orders, detainers, and other legal information pertaining to the case.

"It would be appreciated if you would advise us whether our thinking is correct on this matter. It is respectfully requested that you return both of the enclosed folders since they are part of the records and should be retained."

In my opinion the Division of Corrections and the Parole Board are charged by law with the responsibility of obtaining and preserving information regarding the inmates in the penal system of the State for the purpose of intelligently arriving at decisions regarding the confinement of such prisoners. It is obvious that in seeking out such information much material of a confidential nature will be obtained if assurances of privacy can be given, but, if the records must be open to public inspection, many sources of vital and helpful information would become unavailable. It is, therefore, my opinion that the policy which the Parole Board and the Division of Corrections desire to follow is entirely proper and is, in fact, in the best interest of the Commonwealth and of the inmates of the institutions thereof.

WELFARE AND INSTITUTIONS—What constitutes "Child placing agency". (F 175) 28

HONORABLE HOWARD W. SMITH, JR.,
Attorney for the Commonwealth, Alexandria.

I have your letter of August 13, from which I quote below:

"Several questions have arisen here in connection with construction of the statutes relating to the placement of children in foster homes and
I seek your opinion concerning a construction of Sections 63-232, 63-233 and 63-252 of the Virginia Code in connection therewith, my inquiry being directed to the matter of placement as distinguished from adoption.

"It seems that persons have from time to time arranged with the unwed mother of an infant to place the child with foster parents at the time it is ready to leave the hospital. This has been done by doctors, lawyers, and others, who of course are not licensed as child placing agencies. In all instances the natural mother has signed a 'consent', which purports to give her consent to the adoption of the child by the proposed foster parents. In most instances the natural mother does not know the name of the proposed foster parents either because she is not shown the name or because the name is inserted after her signature.

"Two questions arise in determining whether or not these facts cause the third party who acts as intermediary to become a 'child placing agency' as defined in the statute and constitutes a misdemeanor:

1. Does the 'consent' (for which no particular form is used) signed by the natural mother make a placement under such circumstances a placement by the parent of the child which is specifically excepted under the statute, so that no guilt would attach to the negotiator or intermediary?

2. Does the placing of several children, or even just one child, by such intermediary constitute that person a 'child placing agency' and guilty of a misdemeanor?"

Your inquiry involves the interpretation of the definition of a "child placing agency" as found in Section 63-232 of the Code as follows:

"'Child placing agency' means any person who places, or obtains the placement of, or who negotiates or acts as intermediary for the placement of, any child in a foster home, except:

(1) The parent or guardian of the child;

* * * * * * * * * *

Section 63-233 provides for the licensing of child placing agencies, and Section 63-252 makes it a misdemeanor to operate such an agency without a license.

It would be quite difficult to lay down a hard and fast rule which would cover every case because of the great variety of situations that could arise. Generally speaking, however, I should say that a person, other than a parent, who took the initiative in placing a child and made the necessary arrangements therefor, and then merely obtained the "consent" of the parent in the manner described in the second paragraph of your letter, is covered by the definition. The words "negotiates or acts as intermediary" in the section are significant.

On the other hand, in a case where a person is acting for and advising with the parent at his or her request, the parent being thoroughly cognizant of every-thing that is done, and having a full knowledge of the proposed foster home and approving the same, I think it would be reasonable to hold that such a case comes within the exception for a parent.

I can understand how a law enforcement officer would feel that he should exercise discretion in instituting prosecutions under the statute for the reason that undoubtedly there arise from time to time cases where well-meaning persons with the best of motives may do things which the statute forbids. However, it also must be recognized that the General Assembly felt that for the best interest of all concerned child placing should be under the supervision of those trained to perform this activity.
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HONORABLE C. H. SHEILD, JR.,
Commonwealth's Attorney for Warwick County.

I am in receipt of your letter of August 8, in which you ask for my opinion on the following question:

"The County of Warwick, Virginia, is amending and reenacting its zoning ordinance and a legal question of great import has arisen. Section 15-859, Code of Virginia, provides, 'Notice shall be given of the time and place of such hearing by publication in at least two weekly issues of some newspaper published in the County and having a general circulation therein, the second weekly publication of such notice to be at least fifteen days prior to the holding of the hearing.'

"We shall appreciate your advice as soon as conveniently possible as to whether or not it is necessary to publish the entire zoning ordinance and map now being considered for adoption, under the aforesaid section for the purpose of holding a public hearing."

Section 15-859 of the Code, as you point out, does not require that a zoning regulation shall be published in its entirety in giving notice of a hearing to be held in connection with such regulation. The section simply provides that "notice shall be given of the time and place of such hearing ** *." Indeed none of the statutes dealing with notices of hearings on zoning regulations requires the regulations to be printed in full, and so I must conclude that such printing is not mandatory. I do think, however, that in order that the public might be informed it would be advisable for the notice to state in general terms the purpose of the regulation to be considered or at least to state the place at which such regulation may be examined.

I think I should direct your attention to Section 15-8 of the Code dealing with the general powers of Boards of Supervisors, and especially that portion of the section providing that no ordinance shall become effective until after it shall have been published in full once a week for two successive weeks in a newspaper. Thus the General Assembly has prescribed that the condition precedent to general ordinances enacted by Boards of Supervisors is publication of such ordinances in full; whereas, in Section 15-859 the condition precedent to a zoning regulation becoming effective is that a public hearing shall be held thereon after notice of the time and place of the hearing.

Under familiar rules of statutory construction I think the better view is that the General Assembly having prescribed the condition precedent to a zoning regulation becoming effective, the condition precedent relating to ordinances generally is not also applicable to zoning regulations. You state that the question you present is of "great import" and so, out of an abundance of caution, you might consider the advisability of having the zoning regulations, after it has been adopted, published as prescribed in Section 15-8.
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