OPINIONS

OF THE

ATTORNEY GENERAL

AND

REPORT

TO THE

GOVERNOR OF VIRGINIA

From July 1, 1952, to June 30, 1953

Commonwealth of Virginia
Division of Purchase and Printing
Richmond
1953
Letter of Transmittal

August 11, 1953

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 statements of cases now pending and 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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<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>
<td>Assistant</td>
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<td>D. Gardiner Tyler</td>
<td>Charles City</td>
<td>Assistant</td>
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<tr>
<td>C. Champion Bowles</td>
<td>Goochland</td>
<td>Assistant</td>
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<td>Frederick T. Gray</td>
<td>Chesterfield</td>
<td>Assistant</td>
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<td>Thomas M. Miller</td>
<td>Richmond City</td>
<td>Assistant</td>
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<td>H. Coleman McGehee, Jr.</td>
<td>Richmond City</td>
<td>Assistant</td>
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<td>Francis C. Lee</td>
<td>Hanover</td>
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<td>Clarence F. Hicks</td>
<td>Caroline</td>
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<td>Nerhea S. Evans</td>
<td>Charlotte</td>
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<td>Eleanor W. Tilley</td>
<td>Smyth</td>
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<td>Madge V. Howell</td>
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</tr>
<tr>
<td>Anne Pitt</td>
<td>Richmond City</td>
<td>Receptionist</td>
</tr>
</tbody>
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ATTORNEYS GENERAL OF VIRGINIA
From 1776 to 1953

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

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

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

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

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

CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES


CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES


2. County School Board of Arlington County, Virginia, a body corporate, et al. v. State Milk Commission of Virginia.


CASES DECIDED IN THE SUPREME COURT OF APPEALS OF VIRGINIA


2. Bankers Trust Company of Rocky Mount, Virginia, etc. v. Commonwealth.


CASES PENDING IN THE SUPREME COURT OF APPEALS OF VIRGINIA


2. Evans, Russell v. C. F. Joyner, Jr., Commissioner, etc. Circuit Court City of Richmond. Disposition of funds deposited under the Safety Responsibility Act.


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


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


27. Hall, Walter Lee et als. v. John S. Battle Governor, etc. Circuit Court of Richmond. Suit brought by union to recover damages allegedly suffered because of State seizure of bus line. Pending.
43. Schwartz, Sam v. E. T. White, Clerk, Circuit Court of Norfolk County. Court of Law and Chancery City of Norfolk. Petition for refund of certain recordation taxes. Relief granted in part, denied in part. Appeal by both parties indicated.
51. Unemployment Compensation Commission v. Arcadia, Incorporated, and 95 other similar suits. Circuit Court City of Richmond.


CASES TRIED OR PENDING IN THE CIRCUIT, LAW AND EQUITY, CHANCERY AND CORPORATION COURTS OF THE STATE IN WHICH THE DIVISION OF MOTOR VEHICLES WAS INVOLVED.


2. Badalson, Frank v. C. H. Lamb, Acting Commissioner, etc. Hustings Court City of Richmond, Part II. Bill for injunction to restrain Commissioner from revoking driver's license. Pending.


29. Green, Thomas Lewis v. C. H. Lamb, Acting Commissioner, etc. Circuit Court of Roanoke County. Appeal from action of Commissioner in revoking driver's license. Pending.


40. Langner, C. J. v. C. F. Joyner, Commissioner, etc. Circuit Court of Stafford County. Appeal from action of Commissioner in revoking driving license. Affirmed.

41. Langner, Herbert W. v. C. H. Lamb, Acting Commissioner, etc. Hustings Court City of Richmond, Part II. Suit to enjoin revocation of driving license. Judgment for the complainant.

42. Leake, William Lee v. Commissioner of Division of Motor Vehicles. Circuit Court of Stafford County. Appeal to avoid filing security under provisions of Section 46-436. Pending.


44. Lowe, Carl Glenn v. C. H. Lamb, Acting Commissioner, etc. Hustings Court City of Richmond, Part II. Bill for injunction to restrain Commissioner from revoking driver's license. Relief granted.


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


52. Patterson, John Meredith v. C. H. Lamb, Acting Commissioner, etc. Hustings Court City of Richmond, Part II. Bill for injunction to restrain Commissioner from revoking driver's license. Pending.


57. Scearce, James Elson v. C. H. Lamb, Acting Commissioner, etc. Hustings Court City of Richmond, Part II. Bill for injunction to restrain Commissioner from revoking driver's license. Pending.

58. Shapiro, Charles v. C. H. Lamb, Acting Commissioner, etc. Hustings Court City of Richmond, Part II. Bill for injunction to restrain Commissioner from revoking driver's license. Judgment for the Commissioner.

59. Shiflett, Ashton Eugene v. Commissioner of Division of Motor Vehicles. Circuit Court of Fairfax County. Appeal from order of Commissioner revoking driver's license. Remanded to the Commissioner for further action.


61. Smith, Oscar, III v. C. H. Lamb, Acting Commissioner, etc. Law & Chancery Court City of Norfolk. Bill for injunction to restrain Commissioner from revoking driver's license. Relief granted.


64. Tabakin, Burnley Milton v. Commissioner of Division of Motor Vehicles. From Circuit Court City of Norfolk. Bill to enjoin Commissioner in revoking driver's license. Pending.

65. Tate, Clay Vincent v. C. H. Lamb, Acting Commissioner, etc. Hustings Court City of Richmond, Part II. Bill for injunction to restrain Commissioner from revoking driver's license. Judgment for the Commissioner.


73. White, Joshua W. v. C. H. Lamb, Acting Commissioner, etc. Court of Law and Chancery of City of Norfolk. Bill for injunction to restrain Commissioner from revoking driver's license. Pending.

74. Williams, Raymond v. C. H. Lamb, Acting Commissioner, etc. Circuit Court of Fairfax County. Appeal from action of Commissioner in revoking driving license. Judgment for the Commissioner.
CASES TRIED OR PENDING BEFORE THE STATE CORPORATION COMMISSION


CASES TRIED OR PENDING BEFORE THE STATE INDUSTRIAL COMMISSION


HABEAS CORPUS CASES

5. *Fitzgerald, Arthur William v. W. Frank Smyth, Jr., Superintendent, etc.* Circuit Court of Augusta County. Writ discharged and dismissed. Appeal to Supreme Court of Appeals reversed the Trial Court in part and affirmed in part and remanded petitioner to Amherst County.
14. Willoughby, James v. W. Frank Smyth, Jr., Superintendent, etc. Corpora-
tion Court City of Norfolk. Appeal to Supreme Court of Appeals affirmed
Trial Court's discharge and dismissal of writ.
15. Wyatt, Kaiser v. W. Frank Smyth, Jr., Superintendent, etc. Hustings Court
City of Richmond, Part II. Writ discharged and dismissed.

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

July 2, 1952 George T. Finch
July 15, 1952 S. B. Ward
July 31, 1952 William Trader
Aug. 28, 1952 William J. Cartwright
Sept. 5, 1952 Jack Moss
Sept. 15, 1952 Fred Hall
Sept. 16, 1952 J. J. Wilkinson, Jr.
Oct. 2, 1952 Gilliam A. Bratcher
Nov. 14, 1952 Roosevelt Haskins
Feb. 4, 1953 Albert Henry
Feb. 18, 1953 Joseph Verghano
Mar. 5, 1953 Charles Callahan
Apr. 15, 1953 William P. Cox
Apr. 23, 1953 James Warren Wright
Apr. 30, 1953 Russell Cooper
May 7, 1953 Calvin Roger Freih
May 19, 1953 James Collier
May 21, 1953 Charles Davis McAnulty
June 17, 1953 Glenn Farley
June 22, 1953 George W. Carey

REVOCATIONS OF PARDONS

Ballard.
Crider.
Stansbury.
McCarthy.
Richardson.
Fields.
Scott.
Watkins, Jr.
OPINIONS

AGRICULTURAL FAIRS—American Legion carnival subject to taxation if held at same time. F-196 (22) July 21, 1952.

HONORABLE BENJAMIN L. CAMPBELL,
Member of State Senate.

I am in receipt of your letter of July 11, from which I quote as follows:

"American Legion Post No. 136, Ettrick, Virginia, has for the past few years sponsored a 'Fun Festival' to enable them to raise money for the benefit of the Post. The festival consists of agriculture exhibits, games of skill, various concession stands and usually a show made up of local talent only. In addition to these stands and show, which are operated exclusively by local members of Post 136, they have contracted for three rides particularly for the benefit of young children. The dates this year, September 8th-13th, were set in January, and the contract for the three rides executed at that time. All of the money derived from the operation of this 'Fun Festival' is used exclusively for the benefit of Post 136.

"It has just come to the attention of the local Post that the dates they selected in January conflict with those of the Chesterfield County Annual Fair, the fair being held on September 11th, 12th, 13th.

"The question now arises as to whether or not under Section 58-284 of the Code of Virginia the American Legion Fun Festival, including the agriculture exhibits, would be in conflict with the Chesterfield County Fair, and the Post thereby subject to the provisions of this section. In my opinion, it was not intended that this section should apply to a program of this kind, but rather to a professional traveling circus or carnival and, therefore, the Ettrick Post could legally proceed with their program even though it will be held at the same time of the Chesterfield County Fair."

I have carefully considered your inquiry and must advise that in view of the three rides to which you refer, which I assume are operated by a traveling organization, such organization is a traveling carnival within the meaning of Section 58-284 of the Code. While the "Fun Festival" sponsored by the American Legion does not appear to come within the spirit of the section, yet in view of the definition of a carnival contained in Section 58-277 of the Code I can see no escape from the conclusion that the three rides bring the enterprise within a literal construction of Section 58-284. A carnival is defined as "an aggregation of shows, amusements, concessions, eating places and riding devices or any of them * * *."
The districting Act has given rise to questions upon which I would appreciate your opinion.

"The member heretofore appointed from the First District was appointed for a term to expire in 1953. Under the Redistricting Act, he becomes a resident of the Eighth District. The Eighth District is represented by a member heretofore appointed for a term to expire in 1955. Should both of these gentlemen continue service as members of the Board upon the expiration of their terms of appointment or should the term of the member from the First District be considered as vacated by the Redistricting Act and someone be now appointed to represent that District? In another instance, a member was appointed from the Second District for a term expiring in 1955; and under the Redistricting Act this member is transferred to the Fourth District, where there is a vacancy on the Board. Do you think that this member should continue to serve as a member of the Board until the expiration of his term and be regarded as a representative from the new Fourth District?

"I have similar situations with reference to the Game Commission so that your opinion will be valuable in connection with appointments to that Commission. You may recall that I mentioned this matter informally to you several days ago, but at that time I did not have the detailed information before me which I have outlined above. I would greatly appreciate your giving me the benefit of your views on this subject."

Section 3-1 of the Code provides that the Board of Agriculture and Immigration shall be composed "of one member from each congressional district * * * appointed by the Governor for a term of four years and confirmed by the Senate." The General Assembly in amending and re-enacting Section 24-3 of the Code (Chapter 282 of the Acts of 1952), relating to apportionment of the State for representation in the House of Representatives, did not take care of the situation by which you are confronted. Nor is there any general statutory or constitutional provision dealing with such a case.

It is to be assumed that the appointments to the Board were valid when made. They were for definite terms. While it was unquestionably the intention of the General Assembly that each congressional district should have representation on the Board, a member of the Board is not a district or local officer, but a State officer with State-wide jurisdiction. While the present situation is unique and confusing, I do not feel that I can hold that, because the Redistricting Act results in there now being two members of the Board from the new Eighth District, the office of one of these gentlemen is now vacant. Even if it could be so held, how could it be determined which member is now out of office? Nor can I say that there is a vacancy on the Board from the Fourth District when there is now a duly appointed member living in that district, even though he was not a resident thereof before the Redistricting Act.

My conclusion is that the duly appointed members of the Board of Agriculture may continue to serve the terms for which they were appointed, and that the existing situation may only be remedied by the members themselves (by resignation) or by the General Assembly.

What I have written is on principle applicable to the Commission of Game and Inland Fisheries. Section 29-3 of the Code establishes this Commission and is another illustration of the necessity for legislative action in the light of the Redistricting Act, since the section now limits the Commission to nine members.
HONORABLE JOHN PAUL CAUSEY,
Attorney for the Commonwealth, West Point.

This will acknowledge receipt of your letter of May 2, from which I quote as follows:

"King William County at present has an ordinance prohibiting the sale of wine or beer on Sundays. There are two private clubs in the County which hold club type licenses and request has been made to me to ascertain whether, in your opinion, the County by ordinance could permit the on-premise sale of beer on Sundays by club type licensees while prohibiting all other types of sale. "Your opinion in this matter will be greatly appreciated."

As you know, the authority of counties to adopt ordinances regulating the sale of wine and beer is set forth in section 4-97 of the Code. You will recall that in February, 1952, this office advised you on the question as to whether or not a county might adopt an ordinance under section 4-97, which affected only a certain part of the county, that in our opinion the statute had fixed the county, city or town as the governmental unit, and that any ordinance would have to be general in scope and operation.

On June 20, 1950, in an opinion to the Honorable W. O. Fife, Attorney for the Commonwealth of Albemarle County (Opinions Attorney General 1949-1950, Page 2), dealing with the question as to whether or not the county could under this section of the Code prohibit the on-premise sale of wine and beer but permit the off-premise sale, the view was expressed that as the governing body had the right to refuse all types of sales it could refuse part and permit part, as the greater power includes the lesser.

Somewhat analogous to this question is the situation involved in the power of the Virginia Alcoholic Beverage Control Board to fix the hours and on what days wine and beer shall not be sold. The authority of the Board in such matters is to be found in section 4-36 of the Code.

In publishing its regulations governing the retail sale of wine and beer throughout the State, the Board has in what is known as Regulation 7, used the following language:

"Section 7. Restricted hours; club-type licenses.—The provisions of the two preceding sections shall not apply to persons holding club-type licenses issued by the Board."

It appears, therefore, that the Board, in thus exercising its authority, has recognized the distinction between persons holding club type licenses issued by the Board and other types of licenses, and has seen fit to make an exception to its closing hours in favor of club type licenses.

It is my opinion therefore that a club type is a particular type of license, embodying distinctly different privileges from those of other retail licenses, and that in view of this fact a county, in adopting an ordinance prohibiting the sale of wine and beer on Sunday, could exempt from its provisions those persons holding club type licenses issued by the Virginia Alcoholic Beverage Control Board.
This is in reply to your letter of August 20, 1952, in which you enclosed a letter from State Senator Harry F. Byrd, Jr., a letter from Roy V. Peel, Director of the Bureau of the Census, a certification from Mr. Peel of the results of a special census for the Town of Strasburg on April 16, 1952, and Special Census Form—1.

Section 4-22 of the Code of Virginia, which provides for such apportionment and distribution, directs that such profits shall be distributed "on the basis of the population of the respective counties, cities and towns, according to the last preceding United States Census."

You are, of course, aware of the fact that the method of apportionment is that each county, city or town receives, as its part of the profits, a pro rata share. The fraction in each case is obtained by comparing the population of the particular town, county or city with the total State population. It becomes immediately apparent that any increase in the population of one of the political subdivisions without a corresponding increase in the total State population would result in a distributing calling for more than 100% of the amount to be distributed. This can perhaps be best explained by means of a simple and greatly exaggerated example:

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<th>Population</th>
<th>Percent of profits</th>
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<td>Town B</td>
<td>100</td>
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<tr>
<td>Town C</td>
<td>100</td>
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Total: 300 100

Then suppose by a special census Town A showed a population of 200, but no change in the total State population was indicated. The results, if Town A is credited with the increased population, would be as follows:

<table>
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<th>Population</th>
<th>Percent of profits</th>
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<tr>
<td>Town A</td>
<td>200</td>
</tr>
<tr>
<td>Town B</td>
<td>100</td>
</tr>
<tr>
<td>Town C</td>
<td>100</td>
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Total: 300 133 1/3

Of course, everyone is forced to agree that under these conditions the division would be impossible.

It might be argued that the total State population should be increased by the same amount that the political subdivision has increased, but I know of no authority for such action. We have no assurance from any source that there has been an increase in the total State population.

You will observe from the letter from Mr. Peel regarding the results of the special census that:

"* * * the results of the special census of Strasburg do not take the place of the results of the preceding decennial census, taken as of April 1,
1950, they are certified as official and correct for the date to which they relate, (April 16, 1952) and would be supplied in response to a request for the latest official population total for the area.” (Emphasis added)

Section 4-22 demands a distributing predicated on the last preceding United States census. The last such census for the State of Virginia was the decennial census of 1950. For the purpose of distributing A. B. C. profits the total State population shown by that census must be used for we have no other official figure. It, therefore, becomes mathematically impossible to permit an increase in the population of any subdivision (except by annexation which is provided for by statute).

We have assured the officials of Strasburg that, if the Bureau of the Census would certify the new figure as a correction of the 1950 census along with a corresponding correction in the total State population, the proper adjustment could be made. Otherwise, it cannot, for distributing must be by the last United States census—provision is not made in our law for distribution according to a special census for a particular locality.

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APPROPRIATIONS ACT—Item 194; definition of “family” and “relative.”
F-188 (292)

June 10, 1953.

DR. DWELL J. HOWARD,
Superintendent of Public Instruction.

This is in reply to your letter of June 9, 1953, which is with further reference to the meaning of certain language contained in Item 194 of Chapter 716, Acts of Assembly, 1952 (Appropriation Act). Your specific question is whether or not the word “family”, as used in paragraph (3), would include stepmother, stepfather, and/or foster parents.

I have no doubt that the section in question includes foster parents inasmuch as such persons occupy the same position with the child as would its natural parents. However, the question is not free from doubt as pertains to stepparents. Inasmuch as the purpose of this section is to grant leaves of absence to teachers in case of sickness within the family, and the Legislature has not limited parents by designating “natural parents”, I am of the opinion that the doubt should be resolved in favor of the teacher in cases involving stepparents.

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APPROPRIATIONS ACT—Item 194; definition of “family” and “relative.”
F-188 (285)

June 4, 1953.

DR. DWELL J. HOWARD,
Superintendent of Public Instruction.

This is with reference to your letter of May 29, 1953, the contents of which are quoted:

"Item 194 of the Appropriation Act, Acts of Assembly, 1952, reads in part as follows:

“(3) As used herein ‘family’ shall only include parent, husband, wife, brother, sister, child, or other relative living in the household of a teacher."
"I shall appreciate it very much if you will advise me as to whether or not the word 'family' would include father-in-law, mother-in-law, sister-in-law, brother-in-law, stepmother, stepfather, and/or foster parents.

"I shall also appreciate it if you will advise me as to whether or not 'other relative' would include any of the persons described in the preceding paragraph."

The word "relative," when used in the general sense, is broad enough to encompass all kinsmen both of affinity and consanguinity. As used in the foregoing section of the Appropriation Act, I am of the opinion that for the purposes therein the phrase "or other relative living in the household of a teacher," is limited only in that the relative, however distant, must live in the household of the teacher.

APPROPRIATIONS ACT—Item 331; last paragraph invalid. F-233 (15)

July 14, 1952.

HONORABLE JOHN S. BATTLE,
Governor of Virginia.

This is in reply to your letter concerning the last paragraph of Item 331 of the Appropriation Act of 1952, from which I quote as follows:

"You will note that the Item of $250,000 each year is to be paid 'out of this appropriation'—later on in the paragraph, it is provided 'to be paid out of unexpended balance in the game protection fund at the close of business, etc.' These two provisions appear to be in direct conflict and give rise to the thought that, the language being so uncertain of proper interpretation, the whole provision may be invalid. I will appreciate your opinion on this question."

Item 331 reads as follows:

"For administration of the laws relating to game and inland fisheries $1,531,015
the first year, and $1,385,308 the second year.
Out of this appropriation the following salary shall be paid:
Executive director $8,500
It is further provided that out of this appropriation there is hereby appropriated:
For additional equipment $50,000
the first year, and $33,000 the second year.

"It is further provided that out of this appropriation there is hereby appropriated for refund to counties and cities on a prorata basis on account of payments made by said counties and cities as supplements to salaries of State game wardens, to be paid out of the unexpended balance in the game protection fund at the close of business on June 30, 1952, and not out of the general fund of the State treasury $250,000 each year"

It may be seen that the last paragraph of Item 331 requires the Commission of Game and Inland Fisheries to refund to the cities and counties on a pro-rata basis the sum of $250,000.00 each year on account of payments made by such cities and counties as supplements to salaries of State game wardens. This sum
is directed to be paid "out of this appropriation" which of course, is the appropriation for the "administration of the laws relating to game and inland fisheries" and for which there has been set aside $1,531,015.00 the first year of the present biennium and $1,585,308.00 the second year. This same sum is also directed to be paid out of the "unexpended balance in the game protection fund at the close of business on June 30, 1952". Since the game protection fund is separate and distinct and the unexpended balance thereof is not included in the appropriation for the "administration of the laws relating to game and inland fisheries" there is an apparent conflict which should be so construed, if reasonably possible, as to carry out the intent of the Legislature.

The unexpended balance of the game protection fund consists entirely of amounts received from the sale of hunting, trapping and fishing licenses and the appropriation to the Commission of Game and Inland Fisheries includes amounts to be received from the Federal government, estimated to be approximately $600,000.00 each year. These federal grants are received in accordance with the Pitman-Robertson Act (16 USC 699) and the Dingell-Johnson Act (Public Law 681-81st Congress) on the condition that they be used only for the protection, preservation and investigation of game and fish. To this end, the General Assembly enacted legislation in 1938 (section 29-2 of the Code) and again in 1952 (chapter 680 of the Acts of 1952) to prohibit the diversion of these funds to any other purpose than the administration of the game and fish laws.

Cities and counties supplement the salaries of the State game wardens for certain dog work done for the localities and services so rendered have no relation whatsoever to the game and fish laws. Therefore, if the last paragraph of Item 331 is a valid enactment the State would be denied participation in federal funds already allocated to it for game and fish work for the biennium ending June 30, 1954.

In my opinion it was not the purpose or intent of the General Assembly, by its enactment of Item 331, to divert game and fish funds, which diversion would result in the withdrawal of federal allocations, especially when such allocations were specifically recognized in the appropriation to the Commission of Game and Inland Fisheries by including an estimate of them in the Appropriation Act itself. Furthermore, the legislative intent not to lose these federal funds is manifested by chapter 680 of the Acts of 1952, referred to above, which Act was signed by you as Governor on April 4, 1952, only four days before the Appropriation Act was so signed. For these reasons I do not feel that the inconsistencies found in the last paragraph of Item 331 can be harmonized to reach a conclusion which would embody the underlying legislative intent. Therefore, I must hold that the last paragraph of Item 331 of the Appropriation Act of 1952 is invalid on the ground that its provisions are inconsistent and irreconcilable.

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APPROPRIATIONS ACT—Transfer of funds from designated project to another. F-13 (231)

March 26, 1953.

Honorably Richard W. Copeland, Director,
Department of Welfare and Institutions.

This is in reply to the inquiry raised in your letter of March 11, 1953 addressed to His Excellency, the Governor of Virginia, and his reply thereto under date of March 13, 1953.

I quote from your letter to the Governor as follows:

"A house is badly needed at Bon Air Training School for use as a residence for the Superintendent of the institution. The present provisions for housing the Superintendent are inadequate and unsatisfactory."
"We propose to construct a duplicate of the home in which the Assistant Superintendent resides at Southampton Farm and for which we have plans. It is estimated that this house can be built for approximately $16,000. Since we already have our plans and will provide supervision from the Bureau of Engineering and Production of this Department, we will save approximately $1,400 in architects’ fees.

"The 1952 Appropriation Act contains in Item 663 an appropriation for renovating the school building for staff quarters in the amount of $30,000. It has been decided that it would be to better advantage to make other provisions for staff quarters and to use the old school building for storage purposes. As part of the plan for providing additional and better staff quarters we would like to have your approval to request bids for construction of the superintendent's residence. Bids in excess of $16,000 will not be considered. If one of the bids is acceptable we would like to request an allotment of the funds required from the amount of $30,000 appropriated in the 1952 Appropriation Act referred to above."

I have examined § 14 of the Appropriation Act which is the only section of which I am aware that might possibly be construed as authorizing such action by the State Board of Welfare and Institutions. That section reads, in part, as follows:

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

You will observe from the language which I have italicized that such a transfer of capital outlay appropriations may be made under certain conditions but only to the capital outlay appropriations for another building or project. The difficulty confronting us in the present situation is that there has been no capital outlay appropriation for the construction of a residence for the Superintendent of the Virginia Home and Industrial School for Girls.

The substance of your discussion of this problem with a member of my staff has been related to me and I must confess that, in view of the reasons which have motivated your request, it is with reluctance that I must say that, in my opinion, there is no authority for such transfer.
HONORABLE JOHN S. BATTLE,
Governor of Virginia.

I am in receipt of your letter of November 6, in which you enclosed a copy of one from President Chandler, of William and Mary College, which for purposes of reply it is necessary to quote in full below:

"Item No. 570 of the Appropriation Act provides $28,000 for the construction of a student activity room at the Richmond Professional Institute (Richmond Division, College of William and Mary).

"The Division of Institutional Engineering of the Budget Bureau in the Governor's office has drawn tentative plans and estimates as to costs have been made by a local contracting firm. As a result of these studies, we have concluded that it will be much more satisfactory and much more economical to convert an existing building into student activities rooms than it will be to build a new structure. More specifically, this study shows that in this way we can secure 6,200 square feet of floor space for the same money as 2,000 square feet in new construction.

"The Bureau of Institutional Engineering has checked our estimates and we recommend as follows:

"1. That 819 West Franklin Street, which the college now owns and uses as a women's dormitory, be converted into a Student Activity Building. This building is already joined to the new Gymnasium Building; and when this conversion is made the student activities rooms will be an integral part of the gymnasium rooms. The plumbing in the new gymnasium will be used, which will effect a considerable saving.

"It is estimated that the cost of this conversion and purchase of necessary recreational equipment will be approximately $4,000.

"2. To house the women students who are now living in 819 West Franklin Street, we recommend that 826 Park Avenue be purchased and converted into a dormitory. This building has been put up for sale at $23,000. It is only six feet from 828 Park Avenue, another women's dormitory. We propose to build a one story connection between these two buildings and administer them as one unit. This will save about $1,500 per year in hostess salaries. This connection corridor will cost about $1,000, which added to the $4,000 and $23,000 listed above, total $28,000, the amount of the appropriation. Funds are available in the operating budget to meet expenses of alteration which will be small as the building has recently been remodeled.

"I enclose a map showing the location of this property. As you will see, this building is in the area included in the long term plan for the R. P. I. campus.

"Permission is, therefore, requested to use Item 570, $28,000 as described above."

You ask for my opinion as to the validity of the transfer of funds requested by President Chandler.

The question would seem to be controlled by Section 48 of the Appropriation Act of 1952, the pertinent portion of which is as follows:

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

Undoubtedly I think that Item 570 of the Appropriation Act, or a part thereof, for a student activities room may be used to convert 819 West Franklin Street into a student activities building. However, I question your authority to authorize the transfer of a portion of Item 570 to be used for the purchase of a new building to be converted into a dormitory. My reason for this view is that the Appropriation Act contains no appropriation for the purchase of a building for a new dormitory at the Richmond Division of the College of William and Mary. Thus the requested transfer does not meet the requirement contained in Section 48 that such transfer may be made "only if an appropriation is also made by this act to said related object."

** APPROPRIATIONS—Regional Planning Commissions; Governor may make funds available. F-13 (191) **

February 17, 1953.

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

I have your letter of February 13, from which I quote as follows:

"On January 3, 1951, you wrote the Governor that in your opinion the provisions of Section 15-891.3 of the Code, as amended, may be construed as an appropriation by the General Assembly for the benefit of the various commissions established pursuant to Chapter 455 of the Acts of the General Assembly of 1950, relating to the creation of regional planning and economic development commissions.

"I wish to ask your opinion as to whether, in view of the provisions of Section 186 of the Constitution of Virginia, Code Section 15-891.3 can now be construed as authorizing the Governor to make available to regional planning commissions—

"(a) monies in the State treasury not otherwise appropriated,

"(b) monies available to the Governor."

My letter of January 3, 1951, to which you refer, expressed the view that Section 15-891.3, as enacted in 1950, should be construed as an appropriation by the General Assembly from the general fund of the State treasury for the benefit of the various commissions established pursuant to Chapter 455 of the Acts of 1950. However, this appropriation was not renewed by any Act of the General Assembly of 1952. I am, therefore, of the opinion that in view of Section 186 of the Constitution, the appropriation has expired and that, therefore, no monies in the general fund may be used for the purposes mentioned in Section 15-891.3.

Replying to your second question, it is my opinion that from the Governor's discretionary fund, as established by Item 21 of the Appropriation Act of 1952, the Governor may make available to the Regional Planning Commissions such amounts as he deems necessary, subject to the limitation of $5,000 to any one commission annually as prescribed by the said Section 15-891.3."
ARRESTS—Other jurisdictions; when and for what crimes, officers may without warrants. F-129 (86)

October 7, 1952.

HONORABLE HOWARD W. SMITH, JR.,
Attorney for the Commonwealth, Alexandria.

This is to acknowledge receipt of your letter dated October 3, 1952, which I quote as follows:

"Virginia Code Section 19-78.1 provides that certain 'officers may arrest, without a warrant, persons duly charged with crime in another jurisdiction upon receipt of a telegram, radio or teletype message, in which telegram, radio or teletype message shall be given the name or a reasonably accurate description of such person wanted, the crime alleged, and an allegation that such person is likely to flee the jurisdiction of the Commonwealth'.

"Section 19-52 of the Code provides for the arrest of a person 'without a warrant, upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year'.

"However, the local police frequently receive teletype or telegraphic requests from other states requesting the arrest of an individual in this jurisdiction who is charged with a misdemeanor in the state from which the request is forwarded; the latter is most notably incidented in non-support cases.

"The question now arises as to whether an arrest may be made in Virginia for a misdemeanor on the basis of such a message. It appears that interpretation of the words 'another jurisdiction' would be controlling. I should be glad to have your opinion thereon at your convenience."

In reference to Section 19-52 of the Code, you will observe that any peace officer or private person is authorized to make an arrest without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year. It seems that this statute only contemplates an arrest for a felony. However, Section 19-78.1 of the Code authorizes State police, sheriffs, city and county police, when in uniform or displaying a badge of office, to arrest, without a warrant upon reasonable grounds, based upon personal information, including information obtained from eyewitnesses, that a crime has been committed, any person then and there present, at the scene of any motor vehicle accident or any person charged with the theft of any motor vehicle. This section further provides for the arrest of fugitives from other jurisdictions upon receipt of such officer of a telegram, radio or teletype message. The arrest authorized by this latter section has reference to all crimes and, therefore would include both misdemeanors and felonies.

I am, therefore, of the opinion that an arrest may be made in Virginia on the basis of the message provided for in Section 19-78.1 of the Code for either a misdemeanor or felony if the person is duly charged with a crime in another jurisdiction.

You state in your letter that the interpretation of the words "another jurisdiction" would be controlling. The Supreme Court of Appeals of Virginia has not, insofar as I have been able to determine, passed upon this precise phase of the statute. The court, in the case of Mullins v. Sanders, 189 Va. 624, 54 S. E. 2d 116, did construe the words "a state" as used in Code Section 19-52 (5070-n) to have reference to a state other than the State of Virginia. The Court in this case said:

"Since the Kentucky warrant on its face charged Mullins with the commission of a felony, it constituted 'reasonable information' to the deputy sheriff of Dickenson county that Mullins stood charged in the courts of
another State with a crime punishable by 'imprisonment for a term exceeding one year', and justified the local officer in arresting without a warrant within the meaning of this section. * * *"

In construing the words "another jurisdiction" as used in Section 19-78.1 of the Code, it is significant to note that State police, local police and sheriffs are included. The inclusion of both State officers and local officers leads me to the conclusion that the legislature intended the phrase "another jurisdiction" to apply to both local jurisdictions within the State and jurisdictions without the State.

Since State police officers have jurisdiction anywhere in the Commonwealth of Virginia, it is evident that the words "another jurisdiction" as applied to them would mean another state. I am advised that the State Police Department has administratively so interpreted this statute.

While this question is not entirely free from doubt, in view of what I conceive to be the legislative intent, the administrative construction and practice and the holding in the above case, I am of the opinion that the words "another jurisdiction" as used in Section 19-78.1 of the Code has reference to other jurisdictions within the State and also to a state other than the State of Virginia.

BAIL AND RECOGNIZANCES—Cash bail may be used to pay fine when person present. F-27 (198)

February 26, 1953.

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

This is in reply to your letter of February 18, in which you ask my opinion on the following question:

"The question arises under Section 19-108 of the Code in reference to a cash bond. I notice your ruling in your report from July 1, 1948, to June 30, 1949, page 5, but my question refers particularly to, when the person is present and is found guilty, whether I can apply the cash bond to the payment of fine or costs."

You further state that your inquiry is "where another supplies the cash."

The section to which you refer is 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, as may be adjudged against the defendant, and the residue thereof, if any, shall be paid over to the defendant, or upon his order; * * *.

It is my opinion that the section may be said to deal with two classes of cases: first, where there is no default in the observance of the conditions of the recognizance and the defendant is tried, and, second, where there is default in the observance of such conditions and the defendant is tried in his absence. That part of the section dealing with the disposition of the money deposited is applicable to both cases, that is to say, if the defendant be found not guilty, the money deposited shall be refunded to him or upon his order, but, if he be found guilty, the money or so much thereof as is necessary shall be applied to the payment of the fine and costs. While the language of the statute is not as clear as it could be, I
think it is plainly susceptible of the construction I have indicated. While I do not find that the question you raise has been specifically passed on by this office, yet in a number of opinions dealing with the construction of the section it has been assumed that this is the proper construction, and my information is that this practice has been followed in many jurisdictions.

I note that you say that in the case before you "another supplies the cash." I do not think that this is material and this has been expressly passed on in a letter dated June 6, 1949, to the Clerk of the Circuit Court of Pittsylvania County, a copy of which I enclose.

BLUE RIDGE PARKWAY—Jurisdiction; traffic violations and drunk driving. F-353 (149)

HONORABLE CURTIS A. SUMPTER,
Commonwealth's Attorney for Floyd County.

This in reply to your letter in which you certified two questions for my opinion. They are as follows:

"1. Do the officers and courts of this Commonwealth have jurisdiction to enforce Sections 18-75 and 18-76—Driving automobile, etc., while intoxicated—Code of Virginia, upon the Blue Ridge Parkway?

"2. Do the officers and courts of this Commonwealth have jurisdiction to enforce Section 46-208—Reckless driving—Code of Virginia, upon the Blue Ridge Parkway?"

As you pointed out, section 4 of chapter 3 of the Acts of Assembly of 1936 ceded to the United States the power and jurisdiction "to regulate traffic" upon the Blue Ridge Parkway. Section 4 also reserved unto the Commonwealth of Virginia exclusive jurisdiction "in all civil and criminal matters, except in so far as same may be in conflict with the jurisdiction and powers herein ceded to the United States."

On May 16, 1946 my predecessor, the late Honorable Abram P. Staples, held, in an opinion addressed to the Superintendent of State Police, that his Department had no jurisdiction to regulate traffic on the Blue Ridge Parkway. Therefore, the question to be determined is whether or not the enforcement of the drunken driving statute and the reckless driving statute by the officers and courts of this Commonwealth on the Blue Ridge Parkway is considered as a regulation of traffic thereon. If it be so considered it is my opinion that section 4 of chapter 3 of the Acts of 1936, mentioned above, deprives the Commonwealth of Virginia of such enforcement powers.

In an opinion to the Honorable Charles G. Stone, rendered on July 26, 1950, it was held that the offense of drunken driving may be committed not only upon a highway but also upon private property. Sections 18-75 and 18-76 to which you refer are not found in the Motor Vehicle Code but are found in Title 18 dealing with crimes and offenses generally. Therefore, it is my opinion that they are general criminal statutes which the Commonwealth of Virginia may enforce by virtue of the reservation of exclusive jurisdiction in all criminal matters upon the Blue Ridge Parkway.

In answer to your second question, it is my opinion that the officers and courts of this Commonwealth do not have jurisdiction to enforce section 46-208 which deals with reckless driving. This section appears in the Motor Vehicle Code and is directly related to the regulation of traffic since, for example, a person may be convicted of reckless driving because of excessive speed.

For your information I might add that the Trial Justice of Patrick County

December 15, 1952.
recently convicted a person for the offense of drunken driving which occurred on that part of the Blue Ridge Parkway located in Patrick County and stated at the time of conviction that he did not feel that he had any jurisdiction over reckless driving which might occur on the Blue Ridge Parkway.

BOARD OF EDUCATION—Authority to be designated as receiver of surplus property. F-228 (272)

HONORABLE DOWELL J. HOWARD, Superintendent of Public Instruction.

This is in reply to your letter of May 18, 1953 in which you enclosed a copy of an Executive Order of the Governor dated May 14, 1953. This Executive Order designated the State Board of Education as the official agency of the Commonwealth of Virginia to acquire, allocate and distribute personal property to eligible claimants under § 203 (j) of the Federal Property and Administrative Service Act of 1949, as amended. You request my opinion as to whether the Governor has authority to issue such an Executive Order.

Section 55-27 specifically states that the State Board of Education may take and hold any gift, grant, devise, or bequest made to it, and that said gift, etc., shall be held for the uses prescribed by the donor, grantor or testator. Therefore, the State Board of Education is authorized by law to receive any gifts or grants, including surplus property of the United States Government. However, § 28 of the Appropriation Act of 1952 states as follows:

"It is further provided that no donations, gifts, or Federal grants, whether or not entailing commitments as to the expenditure, or subsequent request for appropriation or expenditure, from the general fund of the State treasurer shall be solicited or accepted by or on behalf of any department, institution or agency without the prior written consent and approval of the Governor."

It is my opinion that the above referred to statutes give the Governor authority to designate and approve the State Board of Education as the official agency to acquire and distribute this property which the Commonwealth of Virginia is eligible to receive under § 203 (j), as amended, of the Federal Property and Administrative Service Act of 1949.

BOARD OF EDUCATION—Authority to transfer allocated funds following an annexation. F-228 (31)

HONORABLE DOWELL J. HOWARD, Superintendent of Public Instruction.

This is in reply to your letter of July 16, 1952, from which I quote as follows:

"Section 5, Chapter 14, Acts of Assembly 1950 reads as follows:
“ 'If any city or town annexes any part of a county after the effective date of this Act, the court entering the order providing for the annexation shall provide in the order for an equitable distribution between county and the city or town concerned of the funds which said county, city or town is entitled to receive under paragraphs 2 and 3 of this Act.'"
“The General Assembly at its 1952 session (Item 484, Page 1262) appropriated $15,000,000 for each year of the 1952-54 biennium and re-appropriated the unexpended balance at the close of business on June 30, 1952, in the appropriation provided by Chapter 14, Acts of Assembly 1950. The Appropriation Act of 1952 amended the original Act in order to substitute certain dates for use in the distribution formula.

“In the spring of 1951 an Annexation Court rendered a decision in favor of the City of Alexandria, and in October 1951, the Virginia Supreme Court of Appeals rendered its decision on an appeal from Fairfax County. The said court provided for the transfer of funds from Fairfax County to the City of Alexandria based on actual enrollments on December 1, 1949 and December 1, 1950. However, the decision made no provision for funds made available by the General Assembly at its 1952 session, and the School Board for the City of Alexandria has asked the State Board of Education to transfer the sum of $20,827.33 based on 942 pupils who are residents of the area awarded to the City of Alexandria. The State Board of Education has previously construed section 5 to mean that it has no authority to make adjustments resulting from annexation, and only the Annexation Court can provide for an equitable distribution between the county and the city or town concerned of the funds which said county, city or town is entitled to receive under sections 2 and 3 of the Act, as amended. The Alexandria City School Board has requested the State Board of Education to authorize a transfer of $20,827.33 from the amount previously allocated to Fairfax County to be credited to the City of Alexandria for pupils enrolled in Fairfax County, as of December 1, 1952, and who later became residents of the City of Alexandria, by an annexation decree, effective January 1, 1952.”

The Appropriation Act of 1952, Item 484, reads in part as follows:

“...a. In lieu of the actual enrollment on the dates stated in paragraph 1, section 2, actual enrollment on December 1, 1951, shall be used as the basis of the allocation for the first year appropriation, and actual enrollment on December 1, 1952, shall be used as the basis of the allocation for the second year appropriation for this item;”

It is my opinion that, since the Legislature has made provision for an equitable distribution of the funds provided under this Act by action on the part of the court entering an order in an annexation proceeding between a county and city, and has further provided a fixed date on which the actual enrollment shall be determined for the purpose of allocating the funds provided by this Act, the State Board of Education has no authority to make a transfer of funds by reason of a change in enrollment figures brought about as a result of an annexation proceeding subsequent to December 1, 1951.

BOARD OF SUPERVISORS—Appropriations; can not provide and equip physician's office. F-33 (48)

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

August 11, 1952.

I am in receipt of your letter of August 7, in which you inquire as to the validity of an appropriation made by your Board of Supervisors to be used to supply a physician “with an office and equipment” as an inducement to said
physician to "locate and practice medicine" in a rural community of the County where the services of a physician are deemed necessary.

While I can appreciate and sympathize with the motive by which this action was inspired, I must advise that I know of no authority for such an appropriation. In effect it constitutes a donation of public funds to a private individual to enable him to practice his profession, and in my opinion public funds may not be so used. This office several years ago expressed the opinion that a Board of Supervisors did not have the authority to purchase hospital equipment to be given to a hospital operated by private individuals. On principle that opinion is applicable here.

BOARD OF SUPERVISORS—Appropriations; medical bills of sheriff injured while on duty. F-33 (162)

January 2, 1953.

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

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

"Recently the Sheriff of Louisa County was shot and injured while in line of duty. He was in a hospital for about three weeks and had a considerable hospital bill.

"The Board of Supervisors of Louisa County has requested that I write and get your opinion as to whether or not the said Board would have the authority to pay the Sheriff's hospital and doctors' bills or a part thereof out of the General County Fund. * * *"

I have given your inquiry careful consideration in the hope that I could point you to some authority for the Board of Supervisors to take the action suggested. Certainly this is a case that makes a most sympathetic appeal. However, I can find no basis for holding that the Sheriff has a legally enforceable claim against the County, and I must advise that I know of no authority for the Board to make the appropriation. If the Sheriff were covered by the Workmen's Compensation Act, the matter could be handled in that way, but, being an elective officer, he is not an employee within the meaning of the Act. It may be that the Board will desire to seek legislative authority for the relief of this officer.

BOARD OF SUPERVISORS—Authority to create fire zones; how boundaries defined. F-33 (247)

August 11, 1952.

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

I am in receipt of your letter of April 11, in which you ask my opinion on two questions, the first of which is as follows:

"The Board of Supervisors of Campbell County are contemplating the creation of one or more fire zones or districts in Campbell County, and from a reading of Section 27-26 of the Code, it is my interpretation of this section that the Board of Supervisors themselves have the right to set up the district without application to the court for the creation of such a district as is ordinarily required. However, since this procedure seems unusual, I am writing to ask your official opinion on the question."
The section to which you refer, Section 27-26 of the Code, gives to the Boards of Supervisors of the several counties of this State the power to "create and establish by defined metes and bounds, fire zones or districts in such counties, within which may be located and established one or more fire departments, to be equipped with apparatus for fighting fires and protecting property within such zones or districts from loss or damage by fire." The section makes no provision for any application to the court in connection with the creation of these fire zones or districts, but grants the power to the governing body of the county. I am, therefore, of the opinion that no application to or approval by the court is necessary.

Your second question is:

"It is proposed in one district to create a fire zone including the entire district with the exception of a town located within the district and to set up a sufficient levy in that district to pay the Town for the use of its fire fighting equipment when they make trips outside of the Town into the district, and it has occurred to me that for the purpose of this ordinance the district might be described as the metes and bounds of the present district as constructed, eliminating therefrom the property located within the corporate limits of the Town. This would eliminate a difficult description of the district by metes and bounds, and I am frank to say that I will probably have difficulty in locating a description of the district by metes and bounds, and I would like to know whether or not it is your opinion that the above procedure would meet the requirements of the above section."

The section under consideration goes on to provide that, in the event of the creation of a fire zone or district, the governing body shall also have authority to contract with any individual corporation, organization or municipal corporation for fire protection. The section does not prescribe any method for determining the boundaries of these fire zones or districts except to say that they shall be established "by defined metes and bounds * * *. Thus, broad power is given to the governing body in establishing these boundaries and, in view of the language used, it is my opinion that the procedure you suggest meets the statutory requirements.

BOARD OF SUPERVISORS—Authority to lease water systems in county.
F-140 (280)

HONORABLE EDMUND W. HENING, JR.,
Commonwealth's Attorney for Henrico County.

May 29, 1953.

This is in reply to your letter of May 18, 1953 in which you ask my opinion concerning the authority of the County of Henrico to enter into an agreement with a private concern whereby the County would operate a water supply system constructed by the concern. A copy of the proposed agreement is attached to your letter, and I quote from your letter as follows:

"Your opinion is therefore requested on the question of whether or not this type of contract can be entered into by the County of Henrico under Chapter 22, (Article 5, Title 15) of the Code of Virginia, and specifically whether or not the provisions of Section 15-749 of the Code of Virginia of 1950 granting to the Board of Supervisors the power to acquire by purchase, condemnation, lease or otherwise are broad enough to cover the contract."

It is my opinion that the contract you submitted is in reality a lease, with an irrevocable option to purchase at any time, of the water system by the County
from the owners. To answer your specific question, I do not feel that Henrico County is given this power under § 15-749 of the Code, for Henrico County does not have a population of five hundred persons per square mile. However, § 15-756 provides:

"Chapter 175 of the Acts of 1946, approved March 12, 1946, as amended by Chapter 56 of the Acts of 1948, approved February 27, 1948, relating to water supply systems in counties adjoining a city having a population of more than one hundred and twenty-five thousand is continued in effect."

Chapter 175 of the Acts of Assembly of 1946 provides, in part:

"Section 1. The board of Supervisors of any county adjoining any city within or without this State having a population of more than one hundred and twenty-five thousand, according to the last preceding United States census, shall be and it hereby is authorized and empowered to construct, reconstruct, maintain, alter, improve, add to and operate water supply systems in said county.

"Section 2. Said boards shall have the following additional powers and duties subject to the conditions and limitations hereinafter prescribed.

"(a) To acquire by gift, condemnation, purchase, lease or otherwise water supply and water supply system or systems, provided that the right of condemnation granted herein shall be subject to the same provisions as are provided in section thirty-eight hundred thirty-two of the Code of Virginia concerning the condemnation of any property belonging to a corporation possessing the power of eminent domain by another public service corporation.

"(b) To furnish water from any such system or systems to any sanitary district, village, town, community, individual, firm, corporation or partnership, and to make such charge for such supply of water as the board may from time to time determine upon.

"(c) To lay a levy for the purpose of raising funds for the construction, maintenance, operation, improvement, acquisition and reconstruction of any such water systems or in lieu thereof to appropriate from the general county fund for such purposes."

It is my opinion that the lease with option to purchase as provided for in the contract which you attached to your letter of May 18 comes within the provisions of the above-cited Act of the General Assembly.

BOARD OF SUPERVISORS—Authority to regulate feeding of garbage to swine. F-33 (207)

Dr. W. L. Bendix,
State Veterinarian.

March 5, 1953.

This is in reply to your letter of February 27, 1953 from which I quote as follows:

"Do County Boards of Supervisors in Virginia presently have sufficient authority to require all persons feeding commercial garbage to swine within their jurisdiction to secure a permit from the county for this operation? In addition, if they do have such authority, would it extend to placing restrictions on such feeding before granting a permit? These restrictions would include a requirement that all garbage be cooked before feeding; that minimum sanitation requirements would be observed and that garbage
would be transported in approved vehicles; and lastly, would the counties have authority to charge a fee for such permits?

"The matter of the spread of disease through the feeding of uncooked garbage has become a serious threat to our swine industry. It is also a threat to public health and some means must be found to control this operation."

Section 15-8 of the Code of Virginia provides, in part, that the board of supervisors of every county shall have the power "to adopt the necessary regulations to prevent the spread of contagious diseases among persons and animals," and further "to adopt such measures as they may deem expedient to secure and promote the health * * * of the inhabitants of their respective counties not inconsistent with the general laws of this State."

Under these provisions, it is my opinion that the boards of supervisors in Virginia counties have sufficient authority to enact ordinances regulating the feeding of uncooked garbage to swine, since it has apparently been definitely established that such feeding bears a direct relation to the spread of disease in these animals. Having the authority to regulate, a board may require that a permit be secured before such activity is engaged in and may place such conditions upon the granting of the permit as are consistent with a sound policy in the prevention of such diseases. Some question could conceivably be raised as to the board's authority in view of the fact that the Legislature has granted regulatory powers to the State Board of Agriculture and the State Veterinarian, however, in view of the fact that there are no State regulations in this specific field at the present time, it is my opinion that it is unquestionably within the power of the boards of supervisors to act.

In answer to your last question, I do not believe that the county should attempt to charge a fee for such permits, as I know of no specific authority for such action on their part and I am unable to ascertain that such would bear a direct relationship to the public health or to the prevention of the spread of disease.

I appreciate the seriousness of the threat to our swine industry which the current outbreak of disease presents and should like to take this opportunity to offer any assistance which we may be able to afford you in your efforts to find some suitable control.

BOARD OF SUPERVISORS—Compensation; chairman not entitled to for service on Finance Board. F-33 (153)

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

December 18, 1952.

I am in receipt of your letter of December 16 in which you ask the following question:

"I am writing to ask if you will give me an opinion on whether or not the Chairman of the Board of Supervisors and Clerk can be paid a per diem by the County, for their services as Chairman and Clerk of the County Finance Board."

The Chairman of the Board of Supervisors of a county is made a member of the County Finance Board by section 58-940 of the Code. The Board consists of the Chairman of the Board of Supervisors, the County Treasurer and a citizen of the county appointed by the Circuit Court. Provision is made by section 58-942 for compensation for the citizen member of the board. No provision is made for
any additional compensation for the Chairman of the Board of Supervisors, but this officer receives compensation as Chairman of the Board under section 14-56 of the Code. In the absence of any legislative authority to pay him additional compensation as a member of the County Finance Board I am of the opinion that such additional compensation may not be paid. Apparently it is contemplated that the duties imposed upon him as a member of the County Finance Board are by virtue of his office as Chairman of the Board of Supervisors.

BOARD OF SUPERVISORS—Compensation; local officers; must act within 30 days after fixed by Compensation Commission. F-57 (222)

March 17, 1953.

HONORABLE GEORGE A. ALLEN, Treasurer, Bland County.

This is to acknowledge receipt of your letter dated March 14, 1953, requesting my opinion on the following:

"Last December the State Compensation Commission at their regular meeting approved a $200.00 increase for office help in my office. I was unable to attend the January, 1953, meeting of the Board of Supervisors for Bland County, Virginia, when the matter was discussed, but no formal action or resolution passed or order entered on the Supervisors' records kept in the Clerk's Office of the Circuit Court. This matter was brought to the attention of the Board of Supervisors at its February, 1953, meeting, and again no definite action was taken or resolution passed. Please give me your opinion as to whether or not the Board of Supervisors at their February meeting had a right to approve or disapprove of the increase in office expenses. Also, in view of what I have stated whether or not I am entitled to the $200.00 at the present time without any further action taken."

It is provided in Section 14-63 of the Code of Virginia that all salaries and expenses and allowances of officers within the jurisdiction of the Compensation Board shall, if possible, be fixed and determined on or before December 31 of each year for the following year. The portion of this section pertinent to your inquiry is as follows:

"When the salaries for the several counties and cities have been tentatively fixed by the board they shall notify the governing body of each city and county of the amounts so fixed. Within thirty days thereafter, but no later, the governing body may file with the compensation board any objection it may have to the salary so fixed. When such objection is filed the board shall fix a time for a hearing on such objection, of which time the governing body as well as the officer affected shall have at least thirty days' notice. * * *"

Section 14-65 of the Code provides that:

"Any officer whose salary or expenses of office are affected by any decision of the board under this article, or any county or city affected thereby, or the Attorney General as representative of the Commonwealth, shall have the right to appeal from any such decision of the board, within forty-five days from the date of such decision. * * *"

It appears from your letter that to this date the Board of Supervisors of
Bland County has taken no action regarding the decision of the Compensation Board in fixing your salary and expense allowance.

In view of the plain language of the foregoing sections of the Code, I am of the opinion that the time has expired for the Board of Supervisors to take any action regarding this decision of the Compensation Board.

BOARDS OF SUPERVISORS—Expenses; reimbursement to members for official business. F-33 (83)

September 29, 1952.

HONORABLE A. A. RUCKER,
Commonwealth's Attorney for Bedford County.

I am in receipt of your letter of September 26, in which you raise the following question:

"From time to time members of the Board of Supervisors of Bedford County, in the course of the discharge of their duties as members of the Board of Supervisors of the County, make trips on county business in connection with which they incur various expenses such as transportation expense, expense for meals, hotel rooms and toll telephone charges. I should appreciate your advising me as to whether it is proper for such members of the Board of Supervisors to be reimbursed from the county funds for these expenditures which they may have made in the course of the transaction of county business."

There is no statute, so far as I can find, which specifically deals with the problem you present. However, I should think that it is certainly within the implied powers of a Board of Supervisors to authorize the reimbursement to a member of the Board for traveling expenses incurred in the transaction of official county business where the trip which the member of the Board makes in connection with such business has been previously authorized by the Board. I am referring, of course, as I presume you are, to expenses incurred other than in attending meetings of the Board, since for this purpose a specific mileage allowance is provided.

BOARDS OF SUPERVISORS—General county funds; requirements if check signing machine used. F-54 (184)

February 2, 1953.

HONORABLE H. C. DEJARNETTE, Clerk,
Circuit Court of Orange County.

I am in receipt of your letter of January 27, which I quote below:

"The Board of Supervisors of Orange County recently purchased a Todd Protectograph Certifier, which has one plate containing three names: Chairman of the Board, Clerk of the Board and County Treasurer. The certifier has two keys, an executive key and an operator key, and the machine cannot be opened to remove the plate, or be used to sign checks without using both keys.

"The machine and operator key are kept in the Clerk's office, while the executive key is held by the County Treasurer. The certifier is used only once a month to sign the checks drawn on the General County Fund for
payment of bills approved by the Board; the checks are written and signed in the Clerk's office on the day the Board meets.

"A question has been raised as to the legality of this one-plate machine, we respectfully request the opinion of your office as to the legality of this practice."

In an opinion given to the Auditor of Public Accounts by former Attorney General Abram P. Staples under date of March 21, 1938 (Opinions of the Attorney General 1937-38, page 15) the following was said:

"I have your letter of March 19, in which you request my opinion upon the question whether it is permissible for county officers, such as clerks of boards of supervisors, county treasurers and others, who are required in the course of their duties to sign checks, to use for the purpose of signing the same a check signing machine. It appears that these machines are provided with separate signature plates for each officer who has to sign the check, and these plates are separated from the machine and may be kept securely locked up when not in use.

* * * * * * * * * *

"I am unable to find any court decisions bearing upon the question of the use of a signing machine by any other officer, but it is my opinion that such use is proper and lawful provided each officer retains the custody of his own plate and does not allow its use by any other than himself, or in his personal presence. In other words, I am of opinion that none of these officers has the authority to delegate to another the right to sign his name on a signing machine.

"Used in the manner above stated, it is my opinion that this machine is lawful for the purpose of signing county warrants and checks in the due course of business."

Section 15-253 of the Code requires that county warrants, excepts warrants of the County School Board, shall be signed by the Clerk of the Board of Supervisors or his Deputy and by the Chairman or Acting Chairman of the Board of Supervisors and by the Treasurer or designated Deputy Treasurer. The purpose of requiring these warrants to be signed by three officers is obvious and the requirement should be strictly observed. Mr. Staples fully recognized the importance of the requirement and the necessity for surrounding the use of a check-signing machine by proper safeguards when he said that: "Such use is proper and lawful provided each officer retains the custody of his own plate and does not allow its use by anyone other than himself, or in his personal presence * * *", and he made this a condition to the use of the machine.

The machine which you describe does not meet the conditions laid down in the opinion cited. There is but a single plate with all three names thereon and so each officer does not retain the custody of his own plate. As I understand the situation, it is entirely possible for two of the officers, by the use of this machine, to sign warrants without the third officer being present. Indeed, one of the officers could use the machine and sign the names of the other two in their absence. It is my view that the use of such a machine would establish a dangerous practice, and the possibilities which I have mentioned would tend to make ineffective the object sought to be accomplished by the requirements of Section 15-253 of the Code as to the signing of county warrants. While I agree with the opinion of Mr. Staples, I do not think the opinion should be extended to cover the machine you describe.
BOARD OF SUPERVISORS—Members; ineligible to serve on Board of Assessors.  F-33 (155)

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

I am in receipt of your letter of December 17, which I quote as follows:

"Will you please advise me if a member of the County Board of Supervisors could be legally designated by the Court and subsequently act and receive compensation from the County therefor as an assessor of real estate when a general reassessment is made in a County."

Section 15-486 of the Code provides in part that no member of a Board of Supervisors shall hold any other office, elective or appointive, at the same time. The section contains certain exceptions which are not pertinent here. In view of the above prohibition, it is my opinion that your question must be answered in the negative.

The question you raise came up several years ago and at that time this office expressed the view that it was very doubtful that a member of the Board of Supervisors was eligible as a member of the Board of Assessors.

BOARDS OF SUPERVISORS—No authority to contribute to Virginia Council on Health and Medical Care.  F-33 (297)

MR. J. GORDON BENNETT, Auditor of Public Accounts.

This is with reference to your letter of June 16, 1953, which I quote:

"Mr. W. S. Werkheiser, Executive Secretary of the Bedford County Board of Supervisors, has written us asking whether it would be proper and legal for the Board of Supervisors of Bedford County to make a contribution to the Virginia Council on Health and Medical Care, a non-profit organization.

"In order that you might be thoroughly familiar with work of this agency, I asked its Director, Mr. Edgar J. Fisher, Jr., to furnish me with some material relating to its functions. Enclosed herewith is my complete file in connection with this question, and I should appreciate it if you would review it and advise me whether, in your opinion, it would be proper and legal for the Board of Supervisors of Bedford or any other Virginia county to make a contribution to or to secure a membership in this organization."

As you may recall, on April 12, 1949, I addressed a letter to you in regard to a proposed appropriation by the Board of Supervisors to private organizations, a part of which is herein quoted:

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

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

"While the above deals with municipal corporations, the principle is equally applicable to counties. That the welfare clause of Section 2743 does not, in itself, authorize an outright appropriation to a private organization not subject to the control of the county is indicated by the fact that specific legislative enactment has been deemed necessary and has been adopted to authorize such appropriations in particular instances, such as appropriations to charitable hospitals, voluntary fire-fighting organizations, organizations building war memorials, and the like. See Sections 2743-g, 2743-h, 2742, 2743-l of Michie's 1948 Cumulative Supplement to the Code of Virginia."

This office has previously expressed the opinion that a Board of Supervisors does not have the authority to purchase hospital equipment to be given to a hospital operated by private individuals, nor make an appropriation to supply a physician with an office and equipment as an inducement to the physician to establish himself in the county.

In view of the constitutional prohibition against the State lending its aid to a private corporation and the general principles embodied in the foregoing, I am of the opinion that it would be improper for the Board of Supervisors of a county to make a donation to the Virginia Council on Health and Medical Care.

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**BOARD OF SUPERVISORS—No authority to impose license tax on agricultural fair. F-196 (211)**

March 6, 1953.

Honorable Julius Goodman,
Commonwealth's Attorney for Montgomery County.

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

"Montgomery County has legitimate County Fair Association, being a stock corporation, in which legitimate agriculture exhibitions, etc. are held once each year at the fair grounds, which fair grounds are owned by the Montgomery County Fair Association. The Fair Association always contracts with a carnival to permit the same to be housed on the inside of the fair grounds and, of course, the Montgomery County Fair Association derives a certain percentage or benefits from the take-in of the carnival shows, and carnival concessions.

"It would seem that since the State exempts such carnivals when being shown within the fair grounds, as hereinabove outlined, as I construe it, that the Board of Supervisors of the County would not be permitted to enforce its County tax ordinance on such carnivals; however, I would like to have your opinion on this by the 9th of March, for which I will thank you."

Section 58-283 of the Code permits the governing bodies of counties to impose a license upon every person, firm, etc. which exhibits a carnival, and does not expressly limit such authority. However, as you point out, the State licensing law does provide certain exemptions. Section 58-279 of the Code reads in part as follows:

"* * * nor shall any * * * license be required * * * of any agricultural fair or the shows exhibited within the grounds of such fair or fairs, during the period of such fair, whether an admission be charged or not. * * *"
While the question is not entirely free from doubt, it is my opinion that the language quoted above clearly indicates the intent of the Legislature to exempt persons, firms, etc. which exhibit carnivals in the manner described above from the payment of both State and local license taxes.

This legislative intent is further evidenced by the language of Section 58-280 of the Code which qualifies Section 58-279 as follows:

"* * * nor shall the provisions of the preceding section be construed to allow, without the payment of the State and local taxes imposed by law, exhibition or performances by a company, association, persons or a corporation, other than a bona fide local association or corporation organized * * *." (Italics supplied)

I agree with your construction, therefore, that the Board of Supervisors of Montgomery County is not authorized to collect the license tax in question.

BOARD OF SUPERVISORS—No authority to rescind brush fire law once adopted. F-60a (304)

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

June 29, 1953.

This is with reference to your letter of June 25, 1953 which I quote in part:

"Sec. 10-62 of the Code of Virginia provides in (b) as follows:

"(b) During the period beginning March first and ending May fifteenth of each year, even though the precautions required by the foregoing paragraph shall have been taken, it shall be unlawful in any county or portion thereof organized for forest fire control under the direction of the State Forester, for any person to set fire to, or to procure another to set fire to, any brush, leaves, grass, debris or field containing dry grass or other inflammable material capable of spreading fire, located in or within three hundred feet of any woodland or brushland, except between the hours of four o'clock post meridian and twelve o'clock midnight.

"The concluding paragraph of this statute is:

"The Board of Supervisors of Pittsylvania County has adopted subsection (b) to be effective in Pittsylvania County. Can the Board now adopt another ordinance rescinding the ordinance adopting subsection (b), and thus render subsection (b) no longer operative in Pittsylvania County?"

Section 10-62 is a general statute applicable throughout the state even though the Legislature has delegated to the counties the power to determine when such statute shall become effective within such county. Upon enactment of an ordinance accepting the provisions of the statute it becomes effective as a law just as any other enactment of the Legislature. Once such law is adopted by the county I am of the opinion that it may be repealed only by the General Assembly. As stated in 20 C. J. S., section 93, page 872:

"Under a statute permitting counties to elect whether they shall come under it, a county board, after electing to come under the statute, cannot rescind its action, since the power to suspend laws is inherent in the legislature only. * * *"
BOARD OF SUPERVISORS—Ordinances relating to open air theaters.
F-60a (58)
August 21, 1952.

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

I quote your letter dated August 15, 1952, in part, as follows:

"The Appomattox Board of Supervisors has requested me to determine from you the following question:

"A citizen of Appomattox has constructed an open air theater with the screen being located about 100 yards from Highway No. 24, the screen also facing the Highway. The Board desires to know if it can pass resolutions and ordinances requiring the operator of the theater to either move the screen so it will not face the highway or require the said owner to erect sufficient structures so that motorists using the State highway can not see the said screen.

"Also, we would like to know to what extent and what way the Board may regulate the above problem for the purpose of promoting safety at this point on the highway."

In my letter addressed to you, dated June 16, 1952, you were advised that I was of the opinion that the Board of Supervisors, pursuant to Section 15-8, paragraph 5, could adopt an ordinance prohibiting the construction of theater screens facing the highway until a permit had been obtained, providing such ordinance contained proper standards for the issuance of a permit. If such an ordinance has been adopted by the Board of Supervisors before the erection of the theater referred to in your letter without a permit, you would, of course, proceed as therein provided; however, if such ordinance has not been adopted and the theater has been so erected, there is grave doubt if an ordinance could now be passed affecting the vested rights of this property owner unless provisions were made for compensation. This would seem to follow because at the time of the erecting of such theatre, unless an ordinance had theretofore been adopted, the same would be a legal structure. If, of course, such theater constitutes a public nuisance, you could proceed under the provisions of Section 48-1 through 48-6 of the Code to abate the same.

You inquire to what extent and in what way the Board may regulate the above problem for the purpose of promoting safety at this point on the highway. The Board of Supervisors would, under the provisions of the aforementioned Section 15-8 of the Code, undoubtedly, have authority to adopt an ordinance containing reasonable regulations for the purpose of promoting safety at this point. Not being familiar with the particular problem, I cannot undertake to point out specific ways in which the regulatory measures may be desirable.

BOARD OF SUPERVISORS—Rabid dog; treatment of person bitten by own dog. F-33 (163)

HONORABLE A. L. MARCHANT,
Commonwealth's Attorney for Mathews County.

I am in receipt of your letter of December 24, in which you ask if the Board of Supervisors of a County, under the provisions of Section 29-203 of the Code, may pay the cost of treatment for rabies to a person bitten by his own rabid dog.

The section in question makes no distinction between paying the cost of treatment of a person bitten by his own rabid dog or by a dog belonging to another.
It is my opinion, therefore, that the Board of Supervisors may pay the cost of treatment for rabies to a person bitten by his own rabid dog.

You also raise the following question:

"Section 29-203 appears to apply where a person has been bitten by a rabid dog. What in your opinion would be the liability of Supervisors for payment of treatment where a person is bitten by a dog suspected of having rabies but in fact did not and as a result of the bite injured party took the usual treatment for the disease?"

The first part of Section 29-203 of the Code provides that "Any person bitten by a rabid dog shall be paid the cost of necessary treatment * * *." The second paragraph of the section further provides that the governing body of a county "may appropriate a sum sufficient for the care, treatment and transportation of any person of such county * * * who has been bitten by or exposed to an animal suspected of having rabies or hydrophobia."

Construing the whole section, it is my view that a Board of Supervisors may pay for the treatment of a person bitten by a dog suspected of having rabies.

BOARD OF SUPERVISORS—Sanitary district cannot loan to. F-33 (186)

February 2, 1953.

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

This is in reply to your letter of January 22, in which you present the following question:

"The voters of Triangle Sanitary District in 1951 approved bonds in the amount of $180,000.00 for construction of a sewerage system. It now develops that there is a deficit in construction costs, and there remains unpaid about $10,000.00 incurred for extras.

"Our Board of Supervisors wants to know if the cost of such extras can be paid from the county general fund by way of a loan to the Sanitary District, provided the Board of Supervisors lays a land tax levy in that Sanitary District to repay the loan; and if such loan and levy can be made, can it be spread over more than the current year—In other words, would the loan have to be fully covered in the levy for the current year?"

I presume that the Triangle Sanitary District was created pursuant to the provisions of Chapter 2 of Title 21 of the Code. The pertinent provisions of this Chapter contemplate that the cost of constructing, maintaining and operating the named facilities of a Sanitary District, including a sewerage system, shall be borne by the owners of the property or the property itself in the District. The funds may be raised either by a charge for the use of a facility or by a special tax upon property in the District or by both.

I can find no authority for a Board of Supervisors to make a loan to a Sanitary District from the general county fund. While the amount of money involved in your inquiry is a comparatively small one, yet, if the Board of Supervisors could make such a loan as you describe from the general county fund, it could make such a loan in any amount that it saw fit, even to the extent of financing the construction of an entire facility. I do not believe that the law contemplates such action.

It is my opinion, therefore, that the money necessary to pay the deficit in the construction cost to which you refer should be raised by one or both of the methods prescribed in law.
Mr. J. Gordon Bennett, Secretary,
State Commission on Local Debt.

This is with reference to your letter of May 19, 1953, in which you ask for my advice in connection with a letter addressed to you from Mr. George W. Moore, Jr., Treasurer of Chesterfield County, which letter is herein quoted:

"The voters of Chesterfield County approved a $3,000,000.00 School Bond Issue on April 7, 1953. The proceeds derived from the sale of these bonds will be used for additions to existing school buildings and the construction and equipping of new school buildings.

"Due to the magnitude of the program considerable time will elapse before all of the work can be completed, in which case there will be a large sum of money unexpended. Since the Treasurer is custodian of all monies belonging to his county, I would like to know if I may, as Treasurer, invest this money and if so the kind of investments that can be made and to what fund the income from such investments should be credited."

Section 15-22 of the Code of Virginia of 1950 provides, in part, as follows:

"So long as a state of war exists between the United States and any foreign power the board of supervisors of any county or the council of any city or town may by resolution or ordinance direct the treasurer of such county, town or city, or the custodian or manager of any sinking fund, to purchase out of any moneys available in the general fund, or in any sinking fund, or any special fund of such county, city or town, bonds or other evidences of debt of the United States of America, or of the State or any political sub-division or institution thereof, the amount of such purchases to be prescribed in the resolution or ordinance directing the purchase of same. Any such treasurer or custodian of such funds shall comply with any such ordinance or resolution. Any bonds or other evidences of debt purchased under the provisions of this section shall be held by the treasurer, or other proper custodian thereof, until such time as the board of supervisors or council, by resolution or ordinance, directs the sale or other disposition thereof. No county treasurer, town treasurer, city treasurer or other custodian or manager of such funds shall be held liable for any loss of public money which may occur as a result of depreciation in the value of securities purchased pursuant to the provisions of this section."

On a former occasion this office has expressed the opinion that a state of war now exists between the United States and foreign powers even though it be not a "solemn war" which has been formally declared. There is ample authority on which to base this conclusion which I feel it unnecessary to discuss at this time.

In view of the foregoing I am of the opinion that the Board of Supervisors of Chesterfield County may, by appropriate ordinance, authorize the Treasurer to invest such funds as mentioned in his letter in bonds or other evidences of debt of the United States of America, or of the State or any political subdivision or institution thereof.
BOARD OF SUPERVISORS—Trial justices; provide quarters for.  
F-33 (85) 

October 2, 1952.

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

This is in reply to your letter in which you state that the Board of Supervisors of Amherst County has rented an office building to be used by you as Trial Justice. Your question is whether or not the Board is required to pay for lights, water, sewage and janitor service for the said office.

Section 16-77 of the Code provides that the Board of Supervisors of each county "shall provide suitable quarters" for the trial justice's court. It is my opinion that the words "suitable quarters" must necessarily include the furnishing of lights, water, etc. for the office and, therefore, under authority of section 16-77 the answer to your question is in the affirmative.

BOARD OF SUPERVISORS—Taxation; may not exempt local industries without legislative authority.  F-33 (199) 

February 26, 1953.

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

I am in receipt of your letter of February 20, in which you ask "if the Board of Supervisors of Montgomery County may exempt manufacturing establishments and works of internal improvement from local taxation."

Section 189 of the Constitution provides that the General Assembly may by general law authorize the governing bodies of cities, towns and counties to exempt manufacturing establishments and works of internal improvement from local taxation for a period not exceeding five years as an inducement to their location. Formerly, I believe, there was an enabling act passed pursuant to the authority of the constitutional provision, but the only statute on the question now in effect is Section 58-17 of the Code, which, of course, is not applicable to Montgomery County. Section 189 of the Constitution clearly contemplates that there must be legislative authority for the granting of the exemption by the localities and in the absence of such authority it is my opinion that your question must be answered in the negative.

BOARD OF SUPERVISORS—United States bonds; purchasing with county funds.  F-107 (74)  

September 10, 1952.

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

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

"Prince William County School Board has just recently delivered school bonds in the principal sum of $2,700,000.00, which with premium and accrued interest amounted to $2,714,102.00."

"We desire to know whether the County Treasurer can place these funds or any portion thereof in a safe-keeping department of a bank under an agreement whereby for the usual consideration the depository bank, for
and on behalf of the Treasurer, can invest and re-invest such funds in 91
day United States Government bills, and like Governments bonds and bills.
"If this can be done, will the depository bank have to place collateral
in escrow to cover such funds?"

As to investment of the proceeds of the sale of these bonds, I direct your
attention to Section 15-22 of the Code providing that so long as a state of war
exists between the United States and any foreign power the Board of Super-
visors of a County may authorize the purchase, out of any monies available in the
general fund, or in any sinking fund, or in any special fund of such County, bonds
or other evidences of debt of the United States. This office has previously ruled
that, since treaties of peace have not been signed with all of the countries involved
in the recent conflict and since there has been no official proclamation terminating
hostilities, a technical state of war still exists. It is, therefore, my opinion that,
if a School Board desires to invest this money, it may request the Board of
Supervisors under this section to direct the Treasurer to purchase from these
funds bonds or other evidences of debt of the United States, and the Board of
Supervisors may do so. I know of no authority which the County Treasurer
has to authorize a bank to invest and re-invest these funds.

My reply to your first inquiry makes it unnecessary for me to answer your
second. However, I will state that in my opinion a County depository should
at all times comply with the provisions of Chapter 20, Article 2, Title 58 of the
Code relative to securities pledged for the protection of County deposits. Mani-
estly the amount of securities pledged depends on the amount of money on
deposit, so that this amount will decrease as Government bonds are purchased
pursuant to the direction of the Board of Supervisors.

BOARD OF WELFARE AND INSTITUTIONS—Reimbursement for as-
sistance granted; permanently and totally disabled. F-231 (125)

Honorable Richard W. Copeland, Director,
Department of Welfare and Institutions.

This is in reply to your letter of October 31, 1952, from which I quote as
follows:

"Section 63-220.1 of the Code of Virginia empowers the State Board of
Welfare and Institutions to 'make applicable such provisions of Chapter
6 of this Title as the State Board finds necessary for the purpose of ena-
bling the State to receive reimbursement for assistance granted' to persons
eligible under the extension of the Social Security Act. On June 10, 1952
the Board unanimously adopted the following resolution:

"WHEREAS, § 63-220.1 of the Code of Virginia constitutes the
authority for establishing the category of assistance known as Aid to the
Permanently and Totally Disabled, and

"WHEREAS, the State Board of Welfare and Institutions has been
empowered with the right and duty of making applicable to this category
of assistance such provisions of Chapter 6, Title 63, of the Code as may
be necessary to effectuate the purposes of this act and to protect the grants
made thereunder:

"NOW, THEREFORE BE IT RESOLVED, that the recovery pro-
visions of Chapter 6, Title 63, Code of Virginia, namely § 63-127, § 63-128,
and § 63-129 of the Code, shall on and after October 1, 1952 become ef-
fective and made applicable to the category of Aid to the Permanently and
Totally Disabled in the same manner as heretofore applicable to the category of Old Age Assistance.

"Would you kindly consider this matter and give me your official opinion as to the validity of the above State Board regulation."

Inasmuch as §§ 63-127, 63-128 and 63-129 all deal with "reimbursement for assistance granted" and the distribution of the proceeds of such reimbursement, it is my opinion that the regulation of the State Board is within the power granted in § 63-220.1.

BOND ISSUES—Park Authorities Act; authority for issuance of revenue bonds. F-21 (201)

HONORABLE SIDNEY S. KELLAM, Director,
Department of Conservation and Development.

This office has made an extensive search of the laws and decisions of Virginia and of the other States upon your inquiry of February 12, which is as follows:

Under Chapter 401, Acts of Assembly of 1952 the Fairfax County Park Authority is preparing to issue some bonds for the development of a Park. It would like to know if it has the authority under this Act to issue revenue bonds and, if not, what amendments to the Act will be necessary so that this can be done.

Under Section 5 of the Act, entitled "Powers of Authority," it is provided:

"Each authority created hereunder shall be deemed to be an instrumentality exercising public and essential governmental functions to provide for the public health and welfare, and each such Authority is hereby authorized and empowered:

* * * * * * * * * *

"(h) To issue revenue bonds of the Authority, such bonds to be payable solely from revenues derived from the fees and charges collected by the use of the facilities;

* * * * * * * * * *

""

It is my opinion that the Legislature has expressly given the Fairfax County Park Authority, and any other such Authority which might be formed under Chapter 401, express powers to issue revenue bonds. There is nothing in the Constitution, Code or court decisions of this State which would indicate that the General Assembly should have been more specific or detailed in the granting of this power to make such a bond issue valid.

There are two specific requirements set out by the General Assembly in regard to any bond issue under this Chapter:

(1) They must be solely for the necessary development and maintenance of the Authority as defined in the statute.

(2) The principal and interest of such bonds must be payable solely from the revenues derived from the use of the facilities of the Authority.

In order to lessen the possibility of litigation contesting the bond issue and to increase the marketability of the bonds, it is my suggestion that the interest rate, maturing dates, refunding provisions, and other necessary provisions of the bonds be made to conform to the general practices which are followed today by other Authorities and municipalities when they have a revenue bond issue.
I am enclosing a memorandum of court decisions of other States which show that the Legislature does not have to provide:
(a) maximum interest rate;
(b) maturing dates;
(c) sinking fund and refunding provisions;
(d) negotiability;
(e) denomination;
(f) recitals;
(g) form and content
when granting a political subdivision of that State the power to issue bonds. However, I do feel that in order to increase the marketability of future revenue bond issues under the "Park Authorities Act" it would be advisable for the General Assembly to review the present Act and to be more specific concerning some or all of the above listed details which arise in the course of a revenue bond issue.

CHECKS—Passing bad checks; when larceny; payment on account.
F-54 (294)

This is in reply to your letter of June 10, 1953 requesting my opinion as to the following:

"1. Is section 6-129 applicable to a bad check given in payment of an account or in payment on an account?
"2. Is section 6-129 applicable to a bad check given in part of payment of an account or on an account and in part for a cash purchase?"

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

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

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

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

As may be seen from the above, the Virginia statute does not expressly require that one who passes a bad check receive anything of value in return. The statute requires only a pass with "intent to fraud". It may well be argued that one who passes a bad check with intent to defraud is guilty though he receives nothing in return. However, in accordance with the problem of proving intent and in accordance with the discussions contained in Rosser v. Commonwealth, 192 Va. 813, and Cook v. Commonwealth, 178 Va. 251, I must concur in your view that
section 6-129 would not appear to apply where a bad check is given in payment of an already existing account.

With regard to the applicability of section 6-129 to a bad check given in part payment of an account or on an account and in part for a cash purchase, it is my opinion that section 6-129 is applicable to the extent of the cash purchase. The situation appears to be different where something is received in a cash purchase transaction from the situation where nothing is actually accomplished by an attempt to erase a prior debt or account.

CHILD LABOR—No person under 18 to work in or around mine.  
F-56 (216)  
March 9, 1953.

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

This is in reply to your letter of March 3, in which you point out that section 45-16 of the Code provides that no male person under eighteen years of age “shall be permitted to work in or around any mine or quarry”. You have requested my opinion as to whether the following set of facts would constitute a violation of such section:

“A boy, age 16, owns a truck and is engaged in hauling coal from the coal tipple to the loading dock. While loading the truck at the tipple, the boy shovels and rakes the coal on the bed of the truck so the load will be evenly distributed. This boy is presently working for his father, who is a commercial operator.”

On the set of facts given, it is my opinion that this is a violation of section 45-16 of the Code. A coal tipple is in direct contact with the mine and, therefore, the loading and operating of a truck around a tipple comes within the statute and is a violation of it.

CHILD LABOR—Places of amusement; swimming pools included regardless of operator.  
F-56 (237)  
April 2, 1953.

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

I have your letter of March 27, in which you state that “We have a number of swimming pools in Virginia that are primarily owned and operated on a commercial basis and open to the public. It has been our policy to classify these establishments as ‘places of amusement’ where boys must be 16 and girls 18 years of age to be employed * * *. We also have institutions that open recreational facilities and swimming pools to the public for both daily and evening instruction and recreation on a membership basis; the public is eligible for membership after physical examinations are given the prospective members and dues are paid * * *. Various cities throughout the State operate community pools and play grounds.” You desire my opinion “as to whether or not educational institutions and municipal organization recreation and swimming pool establishments should be differentiated in classification as ‘places of amusement’ from private commercial establishments of the same type * * *.”
The statute involved in your inquiry is Section 40-109 of Chapter 5 of the Code dealing with child labor, which section, among other things, provides that "no boy under sixteen and no girl under eighteen years of age shall be employed, permitted or suffered to work in any * * * place of amusement * * *."  

Undoubtedly, I think, a swimming pool privately owned and operated on a commercial basis and open to the public is a place of amusement and thus embraced in Section 40-109. The child labor laws were enacted for the protection of the children of the Commonwealth and when the objectives sought to be accomplished by these laws are considered, it is my opinion that insofar as the particular provision to which you refer is concerned, it is immaterial whether a "place of amusement" is operated by an educational institution, a municipal corporation or even the State, and that the prohibition of the section is still applicable. There is nothing in the law to indicate that the Legislature considered it less harmful for children within the prescribed ages to work in a "place of amusement" operated by one agency than by another.  

Of course, what is a "place of amusement" is primarily a question of fact and must be determined by the situation existing in each paraticular case. But where a swimming pool is conducted as a "place of amusement" and is open to the public or a large segment thereof, I am of opinion that the children described may not be employed there no matter by what agency it is operated.

CHILD LABOR—Restaurant; soda fountain included in definition. F-56 (295)  

HONORABLE ALFRED L. MARCHANT,  
Commonwealth's Attorney for Mathews County.  

This is in reply to your letter of June 15, 1953, in which you ask my opinion regarding the applicability of section 40-109 of the Code of Virginia, 1950, in the following instance: A girl under eighteen years of age being employed in a drug store in which there is a soda fountain but in which no soups or sandwiches are served.

You have referred to an opinion expressed by this office on June 6, 1950, in which I referred to the Webster's Dictionary definition of "restaurant" as being any establishment where refreshment or meals may be procured by the public. I am of the opinion that this definition would be applicable in the case stated in your letter even though no meals or sandwiches are served at the soda fountain.

I am informed by the Commissioner of the Department of Labor that this interpretation has been the uniform administrative practice with regard to similar instances. This is not to say, however, that such a person could not be employed by the drug store to perform other duties unrelated to the soda fountain.

CHILDREN—Adopted; marriage licenses; names of adopted parents to be used. F-223 (263)  

HONORABLE H. PAGE SCOTT,  
County Clerk, Bedford.

This is with reference to your letter of May 11, 1953, which I quote:

"I would like to have your opinion on the question of the proper name to be inserted on a marriage license in the case of an adopted child. Should
the natural parents be shown or should the name of the people who adopted
the child be given as the father and mother of the child:

"I would appreciate your opinion on this matter as soon as possible as
I know at this time the question will arise in the near future."

Although there is no statute which specifically states which parents of adopted
children should be entered on a marriage license, section 63-357 of the Code of
Virginia provides as follows:

"The natural parents, and the parents by previous adoption, if any, other
than any such parent who is the husband or wife of one of the petitioners,
shall, by such final order of adoption, be divested of all legal rights and
obligations in respect to the child, and the child shall be free from all legal
obligations of obedience and maintenance in respect to them. Any child
adopted under the provisions of this chapter shall, from and after the entry
of the interlocutory order or from and after the entry of the final order
where no such interlocutory order is entered, be, to all intents and purposes,
the child of the person or persons so adopting him, and, unless and until such
interlocutory order or final order is subsequently revoked, shall be entitled
to all the rights and privileges, and subject to all the obligations, of a child
of such person or persons born in lawful wedlock."

You will note from the above quoted section that for "all intents and purposes"
an adopted child is the child of the adopting parents and entitled to all the rights
and privileges of a child of such parents born in lawful wedlock. In view of this
very broad and inclusive language I am of the opinion that it would be proper to
state the child's adopted parents on such child's marriage license.

CIRCUIT COURT—Confirmation of appointments; not necessary for
depuies of local officials. P-244 (196)

February 26, 1953.

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

This will acknowledge receipt of your letter of February 25, from which I
quote as follows:

"It has been the practice here for all public officials to personally pre-
sent his deputies to the judge of the Circuit Court for confirmation of the
appointments. Is this required by section 15-485?"

Section 15-485 of the Code vests in the officials named therein full authority
to appoint their deputies. The officer making the appointment is required to
certify same to the court in the clerk's office where the oath of the principal is
lodged. The clerk makes a record of the appointment in the order book.
The deputy must qualify before entering upon the duties of his office by
taking and subscribing to the oath provided by law for county officers. The
oath is filed with the clerk, and the clerk shall promptly label same and file it for
preservation.

It is permissible, of course, for the official to request of the judge of the
circuit court confirmation of these appointments. However, such confirmation
is not required by section 15-485.
CITIES—Election of local officials; time for; South Norfolk. F-69 (194)

February 20, 1953.

Honorable Jerry G. Bray, Jr.,
Commonwealth's Attorney for City of South Norfolk.

I have your letter of February 13, in which you ask when your present term of office as Commonwealth's Attorney for the City of South Norfolk expires.

Chapter 215 of the Acts of 1952 provides a Charter for the City of South Norfolk and declares it to be a city of the first class. The Chapter contains an emergency clause and it was, therefore, in force from its passage. Section 5.01 of the Charter provides among other things that there shall be a Commonwealth's Attorney for the City who "shall be elected in the manner and at the time, and to hold office for the time prescribed by law * * *". Section 8.04 of the Charter provides that "those officers required to be elected in November shall be elected in November, nineteen hundred and fifty-two." This section is in the Chapter of the Charter entitled "Transitional Provisions" and it was pursuant to this section that you were elected Commonwealth's Attorney in November, 1952.

The general law relating to the time of election of Commonwealth's Attorneys is to be found in Section 24-161 of the Code. This section provides that:

"On the Tuesday after the first Monday in November, nineteen hundred and forty-nine, and every four years thereafter, the qualified voters of each of the cities of the Commonwealth shall elect a city sergeant, an attorney for the Commonwealth, a city treasurer, and all other city officers elected by such qualified voters, whose election is not otherwise provided for by law, whose term of office shall begin on the first day of January next succeeding their election, and continue for four years thereafter."

Obviously, the provisions which I have quoted from Section 8.04 of the Charter was to enable the new City, among other things, to have a Commonwealth's Attorney prior to the time that that officer would otherwise have been elected pursuant to Section 24-161 of the Code, namely, in November, 1953. But Section 5.01 of the Charter, to which I have referred, provides that the Commonwealth's Attorney for the City shall be elected in the manner and at the time and to hold office for the time prescribed by law. I have pointed out that the general law contemplates that the next election for Commonwealth's Attorneys in cities shall be held in November, 1953.

Construing together the pertinent Charter provisions relating to the Commonwealth's Attorney for your City and the general law as found in Section 24-161 of the Code, it is my opinion that your present term of office as Commonwealth's Attorney will expire on December 31, 1953, and that pursuant to general law, a Commonwealth's Attorney for the four-year term beginning January 1, 1954, should be elected in November, 1953. In this way the Commonwealth's Attorney for South Norfolk, as contemplated by your Charter, will in the future be elected at the same time and for the same term as the general law provides for Commonwealth's Attorneys for other cities.
CITIES AND TOWNS—Licenses; contractors; basis for amount.
F-34 (182)

January 26, 1953.

HONORABLE FRANK L. MCKINNEY,
Commonwealth's Attorney for Halifax County.

I am in receipt of your letter of January 21, in which you ask the following question:

"I have before me the question, arising under Sections 58-298 and 58-299 of the Code of Virginia, whether a contractor who has his principal office in a city or town is chargeable under the city or town license ordinances with the prescribed license tax on all contracts entered into by him, whether the building contracted for is located within the city or town or in some other county, city or town. In other words, is it not true that the town in which his principal office is located has the right to require a license tax to be paid on all contracts which he enters into?"

I have considered Section 58-299 of the Code relating to State and local contractors' licenses and beg to advise that, in my opinion, the town in which the principal office of a contractor is located may impose a local license upon the contractor and may measure such license by the amount of all contracts accepted. I do not mean to say that the town must use all contracts accepted as the base of a license, but it may do so. I call your attention to the fact that Section 58-299 was amended by Chapter 528 of the Acts of 1952, allowing a contractor to take certain deductions in securing his local license. You are doubtless familiar with this amendment.

CITIES AND TOWNS—Ordinances; motor vehicles; parallel to state laws.
F-602 (77)

September 16, 1952.

MR. H. B. CHERMSIDE, JR.,
Attorney at Law.

Please pardon my delay in answering your letter of July 28. For some reason it was misplaced, and was only brought to my attention today.

In your said letter you state in part:

"The Council of the Town of Phenix, in this county, has asked me to inquire whether it is your opinion that, in the absence of specific authority in the town charter, a municipality has the power under section 46-198 of the Code to adopt ordinances making it unlawful 

(a) to drive a motor vehicle in said town without a state operator's license, and 

(b) to drive a motor vehicle in said town equipped with improper lights, brakes, horn, muffler or other equipment. 

In connection with (b) above, the council contemplates adopting ordinances parallel to the applicable state statutes regulating these matters if it is your opinion that the town has power to do so."

I shall answer the inquiry seriatim.

1. Your attention is invited to Section 46-198 of the Code of Virginia which reads as follows:

"In cities and towns the council may adopt ordinances to regulate the operation of vehicles on the highways in such cities and towns, as the case
may be, not in conflict with the provisions of this title and may provide penalties for violating the provisions of such ordinances. But no penalty thus fixed shall be greater than the penalty imposed for a similar offense under the provisions of this title.” (Italics supplied)

Section 46-349 of the Code expressly prohibits counties, cities and towns from issuing operators' licenses except to adopt regulations concerning the drivers of taxicabs. I feel that an ordinance of this character would not be contrary to the provisions of that section so long as there is nothing contained therein to require a person to secure a local permit to drive in addition to the State operator's license.

I am of the opinion that the powers delegated by Section 46-198 of the Code of Virginia does include the power or authority to enact an ordinance making it unlawful to drive a motor vehicle in the said town without a State operator's license.

1. The regulation of the operation of motor vehicles requiring certain standards to be met with reference to lighting equipment, brakes, horns and other mechanical equipment, is found in Articles 7 and 8 of Title 46, Code of Virginia. I am of the opinion that the city council could adopt ordinances not in conflict with the provisions of these articles concerning the subjects mentioned in paragraph 2 of your letter. It is not necessary that the town charters actually provide for the authority and power to enact such ordinances. However, as a matter of custom, most of the municipal charters do have provisions stating specifically that the municipalities are granted such authority.

CITIES AND TOWNS—Ordinances not effective beyond corporate limits. F-381 (76)

September 16, 1952.

Honorable S. Page Higginbotham,
Commonwealth's Attorney for Orange County.

This is in reply to your letter of September 8, in which you state that an officer of the Town of Orange arrested an individual for reckless driving within one mile of the corporate limits of the said Town and charged him with the offense of reckless driving in violation of Section 46-208 of the Code of Virginia.

Your specific question is

"Should, or could, the warrant be a Town of Orange warrant charging an offense to have been committed in the jurisdiction of the Town of Orange, with the fine in such case going to the Town, or must the warrant be a Commonwealth warrant with all fees going to the Commonwealth?"

In my opinion, the warrant under no circumstances could charge a violation of an ordinance of the Town of Orange, since the offense of reckless driving took place beyond the corporate limits. The case of Murray v. Roanoke, 192 Va. 321, to which you refer, stated that no statute gives extra territorial effect to town or city ordinances or empower a city or town to enact ordinances effective beyond its corporate limits, and held that Sections 15-560 and 17-139, which give jurisdiction over all offenses committed within any county within one mile of such city or town, are statutes enacted only for the enforcement of the effective law within the area specified.

This office, of course, has ruled many times that fines collected for violations of city, town or county ordinances are paid into the treasury of the city, town or
county whose ordinance has been violated, while all fines collected for violations of laws of the Commonwealth are paid promptly to the clerk of the court, who shall pay the same into the treasury of the State.

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**CLERKS—County warrants; purpose of signature on.** F-33 (268)

May 14, 1953.

HONORABLE RICHARD F. GEORGE, Clerk,
Board of Supervisors of Fluvanna County.

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

"I would appreciate your interpretation of the purpose of the signature of the Clerk on a County warrant (or check) issued in payment of a bill approved by the Board of Supervisors.

"Suppose the Board of Supervisors considered the bill just and proper and the clerk did not, would the clerk be compelled to sign? Or, does the clerk's signature on the warrant simply mean that from a clerical standpoint the warrant is correct? If a board of supervisors considers a bill just and proper and the clerk of the Board did not consider the bill proper and flatly refused to sign, what would the procedure be in such a case?"

Section 15-237 of the Code makes it the duty of the clerk of the board of supervisors "to sign all warrants issued by the board for the payment of money * * *." Section 15-253 of the Code provides that "the board of supervisors shall receive and audit all claims against the county, except those required to be received and audited by the county school board, and shall, by resolution or recorded vote, approve and order warrants issued in settlement of those claims that are found to be valid * * *. Every warrant issued pursuant to the provisions of this section shall bear the date on which the board of supervisors orders it to be issued and shall be made payable on demand, signed by the clerk of the board of supervisors or a deputy, countersigned by the chairman or acting chairman of the board of supervisors * * *.

It is my view that the clerk is performing a ministerial duty in signing warrants and that his signature thereon is indicative of the fact that the claim for which the warrant is issued has been audited and approved by the board of supervisors, in accordance with § 15-252. The pertinent statutes place upon the board of supervisors, in my opinion, the duty of passing on whether a claim is "just and proper," as you term it. I do not think that the statutes contemplate that there is any duty or authority in the clerk to pass on the validity of any claim presented to the board of supervisors. In other words, in a matter within the jurisdiction of the Board, and where the Board has acted pursuant to § 15-253 and ordered the issuance of a warrant, it is my view that it is the duty of the clerk to sign such warrant. If in such a case, however, the clerk should refuse to sign the warrant duly ordered to be issued by the board of supervisors, I am of the opinion that the proper proceeding to compel the clerk to perform his duty would be by mandamus.
HONORABLE THOMAS P. CHAPMAN, JR.,
Clerk of Circuit Court of Fairfax County.

This will reply to your letter of January 8, requesting my opinion as to when it is the duty of the clerk to docket a judgment rendered by the Circuit Court.

Section 8-373 of the Code of Virginia reads as follows:

"The clerk of the Chancery Court of the city of Richmond, and of every circuit and corporation court except the Hustings Court of the city of Richmond and circuit courts of cities, shall keep in his office, in a well-bound book a judgment docket, in which he shall docket, without delay, any judgment for money rendered in this State by any State or federal court, when he shall be required so to do by any person interested, on such person delivering to him an authenticated abstract of it; and shall also docket every judgment for money rendered in his court or office, and every such judgment, the abstract of which is delivered to him by the clerk of the circuit or other court of his city, and also upon the request of any person interested therein, any such judgment rendered by a trial justice whose book has been filed in his office under the provisions of section 16-25, or of which an abstract is delivered to him certified by the trial justice who rendered it; provided that the clerk of the circuit court of any county having a population of more than one thousand per square mile according to the last preceding United States census or of any county adjoining any such county, or any of them, may keep a card file in lieu of a book, from which file cards for satisfied or released judgments may be removed and placed in a second file and together the files shall constitute a judgment docket."

It is my opinion that the words, "he shall docket, without delay, any judgment for money rendered" should be taken to mean that the clerk should docket the judgment in the Judgment Lien Docket promptly after the entry of such order.

Section 8-386 of the Code of Virginia provides that a judgment becomes a lien on real estate either the first day of the term of court, or, in some instances, the day the judgment was actually rendered. Since section 8-390 of the Code of Virginia requires docketing a judgment to perfect a lien on real estate, it would appear that these two sections of the Code add further emphasis that the words "without delay" mean to be docketed promptly after the entry of such order.

HONORABLE H. P. SCOTT, Clerk,
Circuit Court of the County of Bedford.

This is in reply to your letter of October 15, which I quote below:

"The Town of Bedford on September 1, 1952 discontinued its Mayor's Court and now all of the cases for violation of Town Ordinances are tried in the Trial Justice Court of Bedford County. On October 1, 1952 the trial justice filed in my office all of the warrants and papers in the Town of Bedford cases.

"Does it become my duty to file and index these warrants as I do Commonwealth and County Warrants? Am I required to docket judgments..."
for fines and costs on these warrants? If the defendant is acquitted am I entitled to be paid for my services in these cases as I am by the Commonwealth? Am I entitled to the commission of 5% on collections for the Town of Bedford as is the case of collections for the Commonwealth and the County?

"In the case of an appeal on a Town warrant that is tried in the Circuit Court and convicted, am I entitled to the 5% commission for the collection of this fine and costs?"

I presume that the warrants for the Town of Bedford cases are being filed with you by the Trial Justice pursuant to section 19-310 of the Code (formerly section 2550). This section requires, among other things, a monthly report from the trial justice to the clerk, including the return of all warrants in criminal cases. In an opinion given by my predecessor, Justice Abram P. Staples, under date of November 29, 1946, to the Auditor of Public Accounts (Opinions of the Attorney General 1946-47, page 168) it was held that section 19-310 did not contemplate that a trial justice shall include in his monthly report cases tried by him involving violations of town ordinances. I enclose a copy of the opinion. With this opinion I am in entire accord for the reasons stated by Justice Staples.

There is another section of the Code, however, dealing with the disposition of papers connected with proceedings before a trial justice which must be considered. This is section 16-78, the first sentence of which reads as follows:

"All papers connected with any of the proceedings before the trial justice, except such as may relate to cases appealed or removed, or which by law are required to be sooner returned to the clerk's office of the circuit court, shall remain in the office of the trial justice or of the clerk appointed by him hereunder for six months after final disposition of the proceeding by judgment or otherwise by the trial justice."

This section uses all inclusive language, namely, "all papers", except in cases appealed or removed or which by law are required to be sooner returned to the clerk's office, but we have seen that papers in cases involving violations of town ordinances are not required to be sooner returned to the clerk's office. Therefore, construing the broad language of the section I must conclude that papers in cases involving violations of town ordinances should be returned by the trial justice to the clerk's office six months after the final disposition of the proceeding. If I am correct in holding that these papers should be returned to the clerk pursuant to section 16-78, then it follows, in accordance with the last paragraph of the section, that the clerk is entitled to a fee of twenty-five cents for filing and indexing the papers and, if this fee is not paid by the defendant, I am of the opinion that it should be paid by the town. I must comment that I do not think the question is free from doubt. As you know, in many towns, if not the majority of them, cases involving violations of the town ordinances are tried by the Mayor or other trial officer of the town. Certainly there is no requirement that the Mayor shall return to the clerk's office warrants involving violations of town ordinances. Thus we have the anomalous situation of warrants involving the violation of the ordinances of some towns being returned to the clerk's office while warrants involving violations of ordinances of other towns are not returned to the clerk's office. It is difficult to understand such an inconsistent policy but nevertheless, as indicated above, I cannot escape the wide scope of the language of section 16-78 relating to the disposition of "all papers". If any change is desirable it will have to be accomplished by the General Assembly.

As to whether or not you are entitled to a five per cent commission for the collection of fines imposed for violation of town ordinances, I should think that this question would only come up in appealed cases since section 14-54 of the Code provides that the trial justice shall promptly pay fines collected for violations of town ordinances into the treasury of the town whose ordinance has been violated. In the normal case, therefore, these fines do not pass through the clerk's office.
In cases appealed I see no objection to the clerk receiving a five per cent commission on fines actually collected by him. This question is also covered on principle by an opinion of Justice Staples under date of January 27, 1942 to the Auditor of Public Accounts, a copy of which I enclose.

I should have thought that the question of the disposition of the papers referred to in your letter would have been previously raised but I cannot find that this is the case. Nor am I advised as to what the prevailing administrative practice is. I shall be glad if you will consider what I have written and, if you or the trial justice disagree with me, I shall be happy to give the matter further thought in the light of your comments.

CLERKS—Powers; appoint guardian ad litem, enter orders of publication.
F-116 (119)

November 12, 1952.

HONORABLE GEORGE S. DESHAZOR, JR., Clerk,
Circuit Court of the City of Warwick.

This is in reply to your letter in which you requested my opinion as to whether or not a clerk may appoint guardians ad litem and enter orders of publication under the new Rules of the Supreme Court of Appeals.

You have called my attention to Rule 2:1 and have pointed out that it is your contention that this Rule abolishes rule days and memoranda for process only, and does not affect the authority of the clerk to appoint guardians ad litem or to enter orders of publication. I agree with your contention. However, as you undoubtedly know, Rule 2:6 does affect the established practice and procedure governing the maturing of causes by publication.

CLERKS—Records; furnishing copies before place in bound volume.
F-116 (27)

July 23, 1952.

HONORABLE FELIX E. EDMUNDS,
Member House of Delegates.

This will acknowledge receipt of your letter of July 22, from which I quote in part as follows:

"The 1952 Acts of Assembly, Chapter 286, page 380, amends and re-enacts 17-43 of the Code of Virginia so as to provide as follows: 'The certificate of the clerk to such copies shall, if the paper copied be recorded in a bound volume, contain the name and number of the volume and the page or folio at which the recordation of the paper begins.'"

You desire my opinion as to whether or not section 17-43 of the Code, as amended, precludes a clerk from delivering a certified or attested copy, with the seal of the court, of a court order or other paper to a person entitled to apply for same prior to the typing of such order or paper into a bound volume.

It is my opinion that this section, as amended, applies "if the paper copied be recorded in a bound volume." In that event, the copy delivered to the litigant or attorney requesting same should contain the name and number of the volume and the page or folio at which the recordation of the paper begins.
As you point out, copies of decrees, orders and other papers are frequently needed immediately upon entry of same by a judge of a court of record. The mere fact that the paper has not been recorded in a bound volume would in no wise affect the duty of the clerk to furnish a copy thereof when required.

CLERKS—Records; issuing certified copy before bound. F-116 (116)

Honorable Stuart M. Gibson,
County Clerk for Elizabeth City County.

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

"The question has arisen in my office as to whether or not I can legally certify copies of deeds which have been recorded but not actually spread in a deed book and therefore the number of the volume and the page or folio is of course not available.

"I shall greatly appreciate it if you will advise me whether or not in your opinion I can certify a deed or other paper from my office which is to be recorded in a bound volume without including thereon the number of the volume and the page or folio at which the recordation of the paper begins under Chapter 286, Acts of Assembly of 1952, Section 17-43 of the Code as amended."

Section 17-43 of the Code as amended in 1952 provides as follows:

"The records and papers of every court shall be open to inspection by any person and the clerk shall, when required, furnish copies thereof, except in cases in which it is otherwise specially provided. The certificate of the clerk to such copies shall, if the paper copied be recorded in a bound volume, contain the name and number of the volume and the page or folio at which the recordation of the paper begins. No person shall be permitted to use the clerk's office for the purpose of making copies of records in such manner, or to such extent, as will interfere with the business of the office or with its reasonable use by the general public."

You will observe that the certificate of the Clerk "shall, if the paper copied be recorded in a bound volume, contain the name and number of the volume and the page or folio at which the recordation of the paper begins." In the case you present the paper has not been recorded in a bound volume, although it soon will be.

Under the circumstances and in view of the language of the section, if a person desires a certified copy of a deed before it is actually recorded, I would give it to him and state in my certificate that the deed has been offered for recordation, but has not yet been spread upon the deed book. Personally, I would think it would be better for the person to wait until the deed is actually spread upon the deed book, but, if he desires a certified copy of the deed before it is so spread, I am inclined to think that you would be justified in giving it to him.
CLERKS—Office; days kept open; mandatory by law. F-116 (164)

January 5, 1953.

Honorable George R. Walters, Secretary-Treasurer,
Virginia Court Clerks' Association, Prince George.

I am in receipt of your letter of December 27, in which you direct my attention to Section 17-41 of the Code, relating to days on which Clerks' offices are to be kept open, and ask my opinion as to the authority of any officer or Board to authorize the closing of a Clerk's office on any day other than those prescribed in the Section.

Section 17-41 provides in part that "The Clerk's office of every Court shall be kept open on every day, except Sunday, the Fourth of July, Thanksgiving Day and Christmas Day, during convenient hours, for the transaction of business ***" There are certain exceptions in the section applicable to described counties.

The meaning of the section is perfectly plain and, in my opinion, it is mandatory, and it is, therefore, further my opinion that no officer or Board has the authority to direct the closing of a Clerk's office on any day other than as prescribed in the section.

COLLEGES AND UNIVERSITIES—Appropriations; use for scholarships and their conditions. F-264 (147)

December 15, 1952.

Mr. S. K. Cassell, Business Manager,
Virginia Polytechnic Institute.

I have your letter of December 11 in regard to the interpretation of Section 13-a of the Appropriation Act of 1952, authorizing certain State institutions to use a portion of the unobligated balance of the appropriation for student loans for scholarships. The section does not in terms answer the question you raise, but it does authorize the Institution "to establish a system of scholarships." I should think, therefore, that in establishing the system an Institution may attach reasonable conditions not inconsistent with the section upon which scholarships may be granted.

As to the student who enters the Institution at the beginning of the winter quarter, I should think it could be provided that the scholarship would be paid to him at the rate of one hundred dollars a quarter. Thus, if the student had not completed a full session until the beginning of the following winter quarter, he would not have been paid more than three hundred dollars for the session.

As to the student who fails to maintain the scholastic average required by the section, I should also think that this situation could be handled by paying the scholarship every quarter. Under this system, if a student failed to maintain the required average for a quarter, his scholarship could be cancelled. I doubt whether the statute contemplates that, if the student fails to maintain the average, the amount he has received should be refunded by him.
HONORABLE J. H. BRADFORD, Director, 
Division of the Budget.

This is in reply to your letter of October 24, 1952, which reads, in part, as follows:

"Pursuant to the provisions of Chapter 172 of the Acts of Assembly of 1952, the President of the Board of Visitors of the Virginia Military Institute has filed with the Director of the Division of the Budget a statement of the athletic receipts and disbursements of the Virginia Military Institute Athletic Association for the fiscal year ended June 30, 1952. This Athletic Association, I am told by General William H. Milton, Jr., Superintendent of the Institute, is an agency organized and controlled by the Institute, to administer its athletic program.

"Included in this statement of disbursements are two items amounting to $25,313, designated as payments to the Virginia Military Institute Education Fund. This money, according to information furnished by General Milton, was used to provide athletic scholarships for students of the Institute.

"General Milton tells me that additional athletic scholarships were provided during the fiscal year covered by the report, by a group of alumni interested in sponsoring athletics, to the amount of $25,000. This contribution was not included in the report of athletic receipts and disbursements filed with the Director of the Budget.

"General Milton has furnished a statement relative to this alumni contribution, from which I quote as follows:

"'The group of alumni interested in sponsoring athletics over and above such funds as may be derived from the Athletic Association approximate 1300 members. They have elected officers and by laws.

"'Their committee decides what boys should be granted athletic scholarships from this particular fund, and the amount of grant to be given, which may range from $100 per year to full Institute expense, but includes no spending money of any kind. Upon their direction, their secretary and treasurer sends in the name of the man selected, together with the payment, in identically the same way that the man's parents would have.* * *

"'Under no conditions do these funds go through the Athletic Association, and therefore are not in any way included in the Athletic Association accounting. It is a transaction from the alumni directly with the Treasurer of the Institute, and as such is put back into Institute funds, which, of course, are State funds. * * *'

"Will you please write me whether in your opinion—

"1. Contributions from the Virginia Military Institute alumni for athletic scholarships at the Institute should be included in the Institute's report to the Director of the Division of the Budget, of athletic receipts and disbursements.

"2. If, in your opinion, contributions of the Virginia Military Institute alumni for athletic scholarships should be included in the Institute's report of athletic receipts and disbursements, should this report include the name of each recipient of any such scholarships, and the amount thereof.

"3. Should the name of each recipient and the amount of the scholarship provided from funds paid to the Virginia Military Institute Education Fund from athletic receipts be included in the Institute's report to the Director of the Division of the Budget, of athletic receipts and disbursements."
Chapter 172, Acts of Assembly of 1952, added a new section to the Code of Virginia numbered § 23-1.1, which is as follows:

"It shall be the duty of the president or chairman of the board of visitors or trustees of every State institution of higher learning which maintains an intercollegiate athletic program to cause to be made out by the proper officer of such institution, and forwarded to the Director of the Budget annually by December thirty-first a detailed statement of all athletic receipts and disbursements of such institution and of any affiliated committee, group, corporation or association charged with administering the athletic program. Such report shall include all receipts from admission tickets, programs, refreshment concessions, radio, television, newsreel or movie rights, and all other receipts related to any athletic contest or event. The report of disbursements shall include the name of each person, firm or corporation to whom such disbursement was made and the amount thereof. The report shall be kept on file by the Director of the Budget and shall be open to public inspection at all reasonable times."

After a careful consideration of the language contained in the Code section and the factual situation presented by your letter, I have concluded that the answer to your first question must be in the negative. The Code section requires of each institution a report of all athletic receipts and disbursements of such institution and of any affiliated committee, group, corporation or association charged with administering the athletic program. As I understand the athletic scholarships in the amount of twenty-five thousand dollars provided by the alumni group at V. M. I., these funds were not paid to the institution or its athletic association as athletic receipts, but were paid directly to the treasurer of the institution as a partial or full payment of a particular cadet's expenses at the institution. These monies are not handled by the athletic association, which is the association charged with administering the athletic program, but rather are handled by the treasurer of the institute itself. It would appear, therefore, that, in the hands of the institution, these funds were not for athletic purposes. It can, of course, be argued that in providing these funds the alumni group was seeking to further the athletic program and that in its hands they were athletic funds and were disbursed by it for athletic purposes. However, the Code section requires a report of athletic disbursements only by a group charged with administering the athletic program. This responsibility does not lie with the alumni group and, therefore, there is no requirement that the alumni group give an account of its expenditures.

The negative reply to your first question makes it unnecessary to answer your second question. In my opinion the answer to your third question must be in the affirmative. The Code section specifically provides that the report of disbursements made by the institution and affiliated association charged with administering the athletic program "shall include the name of each person, firm or corporation to whom such disbursement was made and the amount thereof." I do not believe that a report showing that a certain sum was paid to a particular fund which fund was in turn used to provide athletic scholarships satisfies the requirement of the statute. The athletic association, being charged with the responsibility of administering the athletic program, must make a full and complete report of its expenditures, going into detail as to the persons and amounts as specifically required.
REPORT OF THE ATTORNEY GENERAL

COLLEGES AND UNIVERSITIES—Extension courses; when open to negroes. F-354 (79)

September 18, 1952.

DR. GEORGE J. OLIVER,
Head, Department of Education and Director of Extension,
College of William and Mary.

This is to acknowledge receipt of your letter of September 16 in connection with the possibility of offering extension courses on Army posts in which negro students may be enrolled.

Your specific question is whether or not the College of William and Mary may legally award academic credit to negro students for work done in extension courses offered off campus and on Army posts.

Assuming that the extension courses to which you refer are not offered as such by the Virginia State College, it is my opinion that it is proper and legal to enroll negro students in classes conducted on Army posts and to award academic credit to them.

COLLEGES AND UNIVERSITIES—Group insurance plan; may subscribe to for benefit of employees. F-162 (258)

May 5, 1953.

MR. ROBERT P. DANIEL, President,
Virginia State College.

This is with reference to your letter of April 28, 1953, from which I quote as follows:

"The faculty of Virginia State College has been giving consideration to a group insurance plan such as administered by the Teachers Insurance and Annuity Association or one of the private insurance companies such as the Prudential, Metropolitan or similar company.

"We prefer the type of group insurance written on the contributory basis which means that employer and employees share the cost, and that a specified percentage (such as 75%) of the eligible members be enrolled.

"The College understands that no funds appropriated by the Legislature would be used for such a purpose; therefore, we propose to meet the employer's contribution from a special fund which employees have maintained for many years on the basis of payment by them annually as a pool to cover such special purposes as contributions to persons on the staff upon occasions of illness, death, anniversaries, and the like. This fund may also be supplemented, if necessary, by income from other special projects. This fund is handled in a separate bank account and would not be a part of the budget or financial operations of the College.

"The purpose of this letter is to ascertain if there are any legal prohibitions to prevent the execution of such a proposed group plan by the faculty and staff of this institution. We understand that we should clear such an opinion through your office prior to securing authority to do so by the State Board of Education, our governing board."

Section 38.1-475 of the Code of Virginia of 1950, as amended, provides as follows:

"A policy of group life insurance may be issued, with or without medical examination, covering not less than twenty-five employees of the federal, state or any county or municipal government, or of any federal,
state, county or municipal department, bureau, board, commission or institution. The policy shall be issued to the governor of the state, the mayor of the municipality, the governing body of the county, or to the head of any federal, state or county or municipal department, bureau, board, commission or institution, as the case may be, and the premium shall be paid by the employees, or employer and employees jointly. The policy shall insure only all employees, or all of any class or classes thereof determined by conditions pertaining to the employment, for amounts of insurance based upon some plan which will preclude individual selection, and for the benefit of persons other than the employer. When the premium is to be paid by the employees or by the employer and employees jointly and the benefits of the policy are offered to all eligible employees, not less than seventy-five per centum of such employees may be so insured."

Inasmuch as the statute clearly contemplates group life insurance for employees of state institutions, I see no legal objection to such a policy being written to cover the faculty of the Virginia State College, assuming there are at least twenty-five persons desiring such insurance.

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COLLEGES AND UNIVERSITIES—Scholarships under 1952 Appropriations Act for sophomores. F-264 (271)

May 22, 1953.

HONORABLE G. TYLER MILLER, President, Madison College.

This is with reference to your letter of May 20, 1953, in which you inquire as to whether it is permissible to award scholarships authorized by section 13 of the Appropriation Act of 1952 (Chapter 716) to sophomore students who are otherwise qualified for such scholarships, but who received such scholarships in their freshman year. Provided such sophomores are qualified for scholarships, you inquire as to whether a number of such scholarships is limited to ten percent of the total amount of scholarships or to ten percent of the number of different individuals to whom scholarships may be awarded.

Section 13a of Chapter 716 of the Acts of Assembly of 1952 provides as follows:

"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:

"(a) Any freshman student granted any such scholarship shall maintain at least a 'C' average in his classes, without failure in any class.

"(b) Not more than ten per centum of such scholarships shall be reserved for students in the sophomore year who have maintained at least a 'C' average in their classes, without failure in any class, in their freshman year. The institution may award such a scholarship to a student in the sophomore year who did not receive such an award in his freshman year provided such student maintained in his freshman year at least a 'B' average in his classes without failing any class.

"(c) The scholarships for freshmen shall be granted only to Virginia high school graduates who (a) rank in the upper fourth of their graduating class or (b) score at least 106 or more on the American Council of Education test or (c) score in the upper half of their class, on a national basis, on a similar test."
“(d) No scholarship provided for under this section shall be awarded to any person not a graduate of a Virginia high school nor then unless and until the applicant is needy and has satisfied the institution as to his lack of financial resources. No such scholarship shall exceed five hundred dollars or be less than three hundred dollars.”

It would appear from the foregoing that sophomore students may be awarded scholarships under two different sets of circumstances, namely:

1. Not more than ten percentum of the total scholarships must be reserved for “C” students in their sophomore year, not having failed a freshman course.

2. A scholarship may be awarded to a “B” student in his sophomore year who received no such scholarship as a freshman, and failed no freshman course.

Under the first classification above mentioned it would appear that sophomore students may be awarded scholarships, not to exceed ten per centum of the total scholarships, even though such students received such scholarships in their freshman year, provided, of course, that they are otherwise qualified. Although this section does not expressly authorize the awarding of scholarships to sophomores who received such scholarships as freshmen, the Legislature clearly implied such authority by establishing two classifications for sophomore students and placing a higher scholastic requirement on students who did not receive such scholarships as freshmen.

In answer to your second inquiry I am of the opinion that this section refers to the total number of scholarships available. It would, therefore, follow that only ten per centum of the total number of scholarships available could be awarded to sophomores who received such a scholarship in their freshman year.

COLLEGES AND UNIVERSITIES—State supported; debt due, same as due State when distributing an estate. F-268 (63)

August 27, 1952.

THOMAS H. WILLCOX, ESQ.,
Commissioner of Accounts,
Corporation Court of the City of Norfolk.

I am in receipt of your letter of August 25, from which I quote as follows:

“The estate of Edward Porter Soule is insolvent. The matter is now before me in my official capacity as Commissioner of Accounts of the Corporation Court of the City of Norfolk and I am called on to determine the method of distributing the available funds.

“The decedent was indebted to the Norfolk Division of the College of William and Mary. Under Section 64-147 of the Code of Virginia the College claims that its debt should be in the third classification upon the theory that it is a debt due to the State of Virginia.”

The Norfolk Division of the College of William and Mary is a branch of that institution. The College itself is a public corporation operated by the State as a part of its educational system and all of its real and personal property is the property of the Commonwealth. See Sections 23-14, 23-39 to 23-44, inclusive, of the Code. The institution is supported by appropriations made by the General Assembly. It is an arm and agency of the State. It is my opinion, therefore, that a debt due the College of William and Mary is clearly a debt due the State within the meaning of the third classification of Section 64-147 of the Code.
COLLEGES AND UNIVERSITIES—University of Virginia; admission of female students. F-268f (189)

February 11, 1953.

Mr. Barron F. Black,
Vandeventer, Black and Meredith, Norfolk.

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

"The Board of Visitors of the University of Virginia would greatly appreciate your rendering a legal opinion as to the validity of the passage of the following resolution:

"Be it resolved that daughters of members of the faculty of the University of Virginia may enter the School of Arts and Sciences, and, after passing the prescribed courses, and conforming to the other prescribed conditions, may be awarded the degrees of B. A. and B. S."

"The question I have propounded above arose from a hardship situation concerning a professor of mathematics who has received an offer from the University of Wisconsin of a higher salary than the University can pay him. He is willing to stay with us if we will allow him to enroll his daughters as candidates for B. A or B. S. degrees in the School of Arts and Sciences.

"However, our inquiry of you is not based on any question either of necessity or of policy, but rather on the point as to whether there is any statutory, constitutional or common law provision which would prevent the passage of the above resolution."

It is my understanding that for many years women have been permitted to take courses offered in the College of Arts and Sciences and that credit for that work has been allowed them in the Department of Education and the Department of Graduate Studies of the University. It is also my understanding that while heretofore women have not been allowed to receive a so-called liberal arts degree from the College of Arts and Sciences, they have been awarded B. S. in Commerce degrees earned in the Schools of Commerce and Economics which in fact are a part of the College of Arts and Sciences.

I am unable to find any statute that expressly and specifically prohibits the adoption of the proposed resolution quoted above. However, my attention has been called to Article 4 of Chapter 9 of Title 23 of the Code (sections 23-86—23-91) which converted Mary Washington College at Fredericksburg into a liberal arts college for women and affiliated it with the University as an integral part thereof by transferring the supervision, management and control from the State Board of Education to the Rector and Visitors of the University of Virginia.

Section 23-89 of the Code provides that "Mary Washington College of the University of Virginia shall have the same standards of admission and graduation as obtained for male students in the college of arts and sciences of the University" and that "the tuition charges * * shall not exceed those which are * * * fixed by the rector and visitors * * * for male students in such college of arts and sciences". (Italics supplied). It is urged that the use of the words "male students" indicate that the General Assembly recognized and approved the Board’s policy of limiting liberal arts degrees to male students and that such recognition and approval has the effect of law, thus prohibiting the award of such degrees to women. I agree that the language used in section 23-89 may well indicate that the General Assembly approves of the past and present policy of the Board on this question. However, it must be pointed out that such policy was established by a state institution and not by the Legislature. Under such circumstances it is my opinion that the mere recognition of such a policy and the approval thereof by the General Assembly does not have the force and effect of a law restricting the Board in the formation of its future policy.
Section 23-76 of the Code prescribes the powers and duties of the Board and contains, among other things, a provision authorizing it "to make such regulations as they [it] may deem expedient, not being contrary to law". It is my conclusion that this provision has not been amended or restricted by Article 4 of Chapter 9 herein referred to and that the Board of Visitors of the University of Virginia may in its discretion adopt the resolution set forth in your letter.

COMMISSIONER OF REVENUE—May not open motor vehicle registration list to public. F-58 (218)

March 13, 1953.

HONORABLE E. GLENN JORDAN,
Commissioner of Revenue.

This is in response to your letter of March 12, which I quote as follows:

"I am advised that several Commissioners of the Revenue have received requests from individuals or business interests, that they be given the privilege of copying the list giving the names and addresses of those owning automobiles in their localities, which is furnished the Commissioners of the Revenue by the State Division of Motor Vehicles, under Section 46-33 of the Tax Code.

"I have taken the position that this information is furnished the Commissioners of the Revenue to assist them in making assessments, and the list is not to be copied by any person for resale or other use.

"I will appreciate an opinion from you regarding Sections 46-33 and 58-46."

Section 46-33, Code of Virginia, directs the Commissioner of the Division of Motor Vehicles to prepare a list of motor vehicle registrations and titles. The Commissioner is authorized to offer such list for sale to the public at a price to be determined by him. He may furnish the list to the Commissioner of the Revenue of each county and city without cost.

I am informed by the Commissioner of Motor Vehicles that, pursuant to the provisions of section 46-33, he has, after advertisement to the public and through the process of sealed competitive bids, made sale of the list of registrations and titles.

Section 58-46 of the Code makes it "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."

The only purpose to be served in furnishing the list to a Commissioner of the Revenue is to supply him with information relative to the property of another as an aid to him in the performance of his public duties. It is clearly information acquired within the scope of his official duties in respect to the property of a person, firm or corporation. The divulging of such information by a revenue officer or employee would, in my opinion, constitute a violation of the provisions of section 58-46.

While not decisive of your inquiry, it would seem pertinent to point out as indicative of firm policy that aside from the authority conferred upon the Commissioner of the Division of Motor Vehicles by section 46-33 that official is enjoined under the terms of section 46-34 from "furnishing information to others" to be used for commercial or trade purposes.
COMMONWEALTH’S ATTORNEYS—Fees; representing boards of supervisors in chancery suits. F-69 (181)

HONORABLE CHARLES S. SMITH, JR.,
Commonwealth’s Attorney for Middlesex County.

I am in receipt of your letter of January 21, which I quote below:

“The Board of Supervisors of Middlesex County condemned a public road over the land of Mr. A. J. Chewning. After a final order had been entered by the Board, Mr. Chewning brought a suit in equity to set aside the action of the Board alleging errors which he claimed made the action of the Board void and after a full hearing of the case the Court dismissed the suit at the cost of Mr. Chewning which have been paid to the Clerk of the Circuit Court.

“The Clerk and I will appreciate it if you will advise whether the $15.00 taxed attorney’s fee paid by Mr. Chewning goes to me as attorney for the Board in the chancery suit brought by Mr. Chewning or whether it should be paid in to the County treasury and State treasury under Section 14-67 of the Code. This section applies to fees paid to the Commonwealth’s Attorney under Section 14-130 and Section 14-131, but I do not think it contemplates that the attorney’s fee taxed in a chancery cause under Section 14-193 of the Code shall be paid into the County and State treasuries.”

Section 14-67 of the Code provides for the Attorneys for the Commonwealth to continue to collect the fees to which they are entitled, but that these fees shall be divided between the County or City and the State. This section is a part of the Act placing Commonwealth’s Attorneys and certain other officers on a salary basis. The fees referred to in Section 14-67 are, in my opinion, fees to which the Commonwealth’s Attorney is entitled when he is acting in his official capacity, such as fees prescribed in Section 14-130 and 14-131 of the Code. The fees specified in Section 14-193 of the Code are fees for attorneys in civil cases generally, which are taxed as a part of the costs.

In representing the Board of Supervisors in the suit to which you refer, I assume that you were not acting in your official capacity as Commonwealth’s Attorney, but as a practicing attorney employed by the Board. I, therefore, do not think that the applicable statutes to which I have referred contemplate that the fee about which you write shall be paid into the County and State treasuries.

COMMONWEALTH’S ATTORNEYS—Leasing building to county, board, or agency thereof. F-69 (120)

HONORABLE S. PAGE HIGGINBOTHAM,
Commonwealth’s Attorney for Orange County.

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

“I am part owner of a building that has recently been renovated and made into an office building. The Board of Public Welfare of this county is not satisfied with its present quarters and wishes to locate on the ground floor and has indicated a desire to rent three offices in said building. I would like your opinion as to whether Section 15-504 of the Code or any other provision of the law prohibits the Board of Public Welfare from leasing these offices, on the grounds that I am Commonwealth’s Attorney of this county.

* * * * * * *

November 12, 1952.
"By an opinion from your office, reported in the opinions of the Attorney General on page 112 for the year 1944-45, it was ruled that a member of the Board of Supervisors could not sell insurance to that Board, but could properly sell insurance to the School Board, since at that time the School Board was not included in said section. Since that time the School Board has been added, but the Board of Public Welfare has not. By the same reasoning, it would appear that since the Board of Public Welfare is not mentioned in Section 15-504, the lease in question is not prohibited thereby."

The opinion to which you refer was rendered to the Honorable Stanley A. Owens on July 1, 1944. Since that date, section 15-504 of the Code (section 2707 of Michie's Code of 1942) has been amended three times.

The 1948 amendment prohibits a Commonwealth's Attorney from becoming interested "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" (Chapter 286 of the Acts of 1948).

The 1950 amendment added the following paragraph to section 15-504:

"On application of the board of supervisors, board of public welfare, or school board, the circuit court may designate such attorney, who may be the attorney for the Commonwealth or trial justice of such county, to represent either or all such boards in matters requiring the services of an attorney, such attorney so designated to be paid such compensation by the county or school board or by the board of public welfare, as requisite, as the court prescribes." (Chapter 284 of the Acts of 1950).

It is my opinion that the language, "any board, commission or agency" used in the 1948 amendment includes a county board of public welfare. The General Assembly recognized this by its 1950 amendment, which permits a board of public welfare to employ a Commonwealth's Attorney by order of circuit court.

Therefore, I am of the opinion that section 15-504 of the Code, as amended, prohibits the board of public welfare from leasing offices in a building which is partly owned by you.

COMMONWEALTH'S ATTORNEY—Right of designated attorney to appear in court in place of. F-69 (197)

February 26, 1953.

HONORABLE HOWARD W. SMITH, JR.,
Attorney for the Commonwealth, Alexandria.

This will acknowledge receipt of your letter of February 24.

You desire my opinion on whether or not "a law clerk, duly licensed to practice law in Virginia, assigned to the office of the Attorney for the Commonwealth, as well as any other duly licensed attorney at law designated by the Attorney for the Commonwealth, may appear in the place of the Commonwealth Attorney" to act as his representative on the trial of a misdemeanor or a preliminary hearing for a felony before the Civil and Police Justice of the City of Alexandria.

You state there has never been an Assistant Attorney for the Commonwealth for the City of Alexandria. I presume that the charter of the City of Alexandria makes no provision for such an office. That being the case, you are correct in your conclusion that such an office would have to be created by an Act of the Legislature.

I can find no authority authorizing a law clerk to act for and in the place and stead of the Attorney for the Commonwealth under the circumstances pointed out in your letter. If a question is raised as to the propriety of the person so acting,
the determination of the matter would, in my judgment, lie within the sound discretion of the Civil and Police Justice of the City of Alexandria. As I view this matter, the law clerk has no official status and is merely present as the agent or employee of the Commonwealth's Attorney's office. The fact that he is duly licensed to practice law would not of itself be determinative.

COMPENSATION BOARD—Salaries of local officials; effect upon, when first class city formed. F-219 (179)

January 23, 1953.

HONORABLE R. B. STEPHENSON, JR.,
Commonwealth's Attorney for Alleghany County.

This is to acknowledge receipt of your letter dated January 15, 1953, requesting an opinion regarding the legality of the payment of compensation prescribed by the Compensation Board for the Treasurer and Commissioner of the Revenue of your County. I quote your letter as follows:

"On December 15, 1952, the Board of Supervisors of Alleghany County, Virginia, was notified by the State Compensation Board with regard to salaries fixed for the various officers of said County, for the year 1953. Subsequently, on or about December 22, 1952, the town of Covington, formerly a part of Alleghany County, became a City of the first class, and as a result the office of the Treasurer of Alleghany County and the office of Commissioner of Revenue of Alleghany County, no longer exercise authority within the corporate limits of said City. According to the last United States census, the County of Alleghany, prior to Covington's becoming a city had a population of slightly more than 23,000 persons. According to a census taken to determine the population of the new city, it was revealed that said city had a population of 11,402 persons, which apparently puts the population of Alleghany County in the bracket from 10,000 to 15,000.

"The salaries set by the Compensation Board for the County Treasurer and the County Commissioner of Revenue, are in excess of the maximum salaries permitted for the Counties with population between 10,000 to 15,000, as prescribed by Section 14-69 and Section 14-69.1 (as to Treasurers) and Section 14-71 and Section 14-71.1 (as to Commissioners of Revenue) of the 1950 Code of Virginia, as amended.

"It has been suggested by one or more of the supervisors of said County, that the Board of Supervisors could not legally authorize the payment of the salaries as set by the Compensation Board, because the same are in excess of the maximum prescribed by law, and I would appreciate a ruling from you as to whether or not such a payment could be legally made.

"I would greatly appreciate a ruling on this matter before the next regular meeting of the supervisors on February 5, 1953."

The Compensation Board, in determining salary brackets for fixing compensation for officers within its jurisdiction is governed by the provisions of Section 14-74 of the Code of Virginia as to population. This section is as follows:

"For the purpose of this article, the population of each county and city shall be according to the last preceding United States census; provided, if the area of any city has, since the last preceding United States census, been increased by annexation, the population of such city, for the purpose of this article, shall be the population thereof as shown by the last preceding United States census, plus the increase resulting from such annexation; provided, that whenever it is made to appear to the satisfaction of the Com-
pensation Board that the population of any county or city has, since the last preceding United States census, increased so as to entitle such county or city to be placed in a higher bracket prescribing the minimum and maximum salaries, then such county or city shall be considered as being within such higher brackets in fixing the salaries provided by this article."

It will be observed that no provision is made in the foregoing section for the Compensation Board to deduct the population of a municipality within a county when it becomes a city of the first class for the purpose of determining salary brackets.

I am, therefore, of the opinion that the Board of Supervisors of Alleghany County can legally authorize the payment of the salaries as set by the Compensation Board for the year 1953 for the Treasurer and Commissioner of Revenue of Alleghany County.

COMPENSATION BOARD—Salary of crier; no authority to contribute. F-136 (128)

November 20, 1952.

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

This is in reply to your letter of November 18, in which you present the following question:

"Mr. William C. Bickers, Sheriff of Louisa County, was shot and seriously wounded about two weeks ago. He is now and probably will be for some time to come in a hospital in Richmond. He had no Deputy. Louisa County at this time has no person acting in the County as Sheriff and no Deputy Sheriff.

"Judge Miller has stated that he would appoint a Crier under the provisions of Section 15-512, Code of Virginia, 1950, and we have contacted the Compensation Board as to whether or not it would pay two-thirds of the salary for such Crier, who would act as Sheriff, and the Board has informed us that it would have to have an opinion from your office as to its authority to make such payment.

"We would, therefore, appreciate a ruling from you on this question as promptly as possible. We are without any person in the County to serve papers in any civil action and we are without any person acting as Sheriff or Deputy Sheriff."

While it is true that a Crier appointed pursuant to Section 15-512 of the Code under the circumstances stated by you may perform practically all of the duties of the Sheriff, nevertheless, such Crier would be an officer independent of the Sheriff. I can find no statute authorizing the Compensation Board to approve the payment by the Commonwealth of any part of the salary of a Crier appointed by the Court. Section 14-81 et seq. of the Code deal with the salaries and expenses of Sheriffs and Sergeants and their Deputies and do authorize the payment by the Commonwealth of two-thirds of the salaries of such officers.

In view of the existing statutory provisions, I suggest that Sheriff Bickers appoint a Deputy as provided for in Section 15-485 of the Code. If this is done, there can be no question raised about the payment of the State's share of his compensation. As stated above, I can find no authority for the Compensation Board to approve the payment by the State of any portion of the salary of a Crier,
COMPENSATION—County officials; determination of increase in.
F-219 (46)

August 8, 1952.

MRS. REBEKAH F. ELDRIDGE,
Treasurer of Buckingham County.

This is to acknowledge receipt of your letter dated August 7, 1952, which I quote as follows:

“There is a misunderstanding among the county officers as to Chapter 479 Acts of Assembly 1952, section 14-70. The population of Buckingham is 12,274. The Commonwealth Attorney whose salary was $2500.00 was allowed a ten percent raise for July. The Commissioner of Revenue did not think he was due this 10% increase, another county officer thinks all raises have to come through the State Compensation Board.

“Will you please write me the maximum salary applicable for raise in this county.”

Chapter 479 of the 1952 Acts of the Assembly, Section 14-69.1 of the Cumulative Supplement to the Code, applicable to increase in salaries of county treasurers, is as follows:

“On and after July one, nineteen hundred fifty-two, the maximum salary applicable to each officer whose salary is prescribed by § 14-69 shall be raised by ten per centum of the amount prescribed by such section and all amendments thereof.”

I feel that you inadvertently referred to the foregoing section in your letter as Section 14-70.

Statutes similar to Section 14-69.1 were enacted by the Assembly regarding salaries of attorneys for the Commonwealth and commissioners of the revenue. You will observe by reference to Sections 14-62 and 14-63 of the Code of Virginia the manner in which salaries for attorneys for the Commonwealth, county treasurers, commissioners of the revenue, sheriffs, etc. are fixed by the Compensation Board. The enactment of Section 14-69.1, and related statutes, by the 1952 General Assembly in no way repealed or modified the procedure prescribed for fixing salaries by the Compensation Board. The new sections merely changed the maximum salary bracket applicable to each officer.

I am, therefore, of the opinion that the only effect of the 1952 act is to increase the maximum allowance by 10 per centum, and that the amount of salary to be paid such officer shall be determined by the Compensation Board pursuant to the provisions of Sections 14-62 and 14-63 of the Code of Virginia.

CONDEMNATION SUITS—Dismissal of pending suit. F-177 (130)

November 21, 1952.

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

In your letter dated November 19, 1952, you request my opinion and write me as follows:

“The following problem has just arisen in my office and so that I can advise the School Board their rights, I will appreciate it if you will give me the opinion of your office and yours personally on the following problem:

“The School Board instituted Condemnation Proceedings for the purpose
of acquiring some additional land to be used in connection with the schools; Commissioners were duly appointed by the Circuit Court, who in due time viewed the property and made a written report; their report allowed an unheard of sum for the property taken and also an unheard of resulting damages to the property not taken.

"What I would like to know is if under the law I can dismiss the present proceeding at the present stage thereof and within about 60 days institute a new proceeding or am I required to go on with the one now pending?

"Further I would like to know if I elected to take exceptions to the report and the Circuit Court were to sustain the report, could I then dismiss the pending suit and within a reasonable time reinstitute a new suit for the purpose of acquiring the same land.

"I will appreciate it if you will give me the benefit of your advice and opinion relative to the above problems."

You present two inquiries (1) can the School Board dismiss a condemnation proceedings brought by it if it is not satisfied with the award of the commissioners and (2) if the case can be dismissed, can another suit be brought within a reasonable time against the same parties to condemn the same property.

It is assumed, in reference to your first inquiry, that the proceedings were brought by the School Board pursuant to the power of eminent domain conferred in Section 25-232 of the Code of Virginia.

Your attention is called to the pertinent portion of Section 25-22 of the Code, which provides as follows:

"* * * If, in any such proceeding, the amount or amounts ascertained by the commissioners as aforesaid be not paid either to the party entitled thereto, or into court, within three months from the date of the filing of the report of the commissioners, the proceeding shall, on motion of the party condemning or of any defendant, be vacated and dismissed as to him, but not otherwise; but if such proceedings be dismissed on the motion of either party, judgment shall be entered against the condemning party for all costs and a reasonable attorney's fee actually incurred by any defendant."

In the case of Board of Supervisors of Louisa County v. Proffit, et al., 129 Va. 9, 105 S. E. 666, the court construed this section, which was at that time section 4387 of the Code, and said:

"* * * Bearing in mind that the right of the board to dismiss the proceeding in the circuit court under the eminent domain statute at any time before any rights have vested is absolute, expressly conferred by statute (Code 1919, sec. 4387) [25-22], it is clear that no right of the appellees was invaded by the exercise of that right in this case. * * *"

In the case of Keys v. Shirley, 153 Va. 461, 150 S. E. 401, the court said:

"It is true that 'at any time before any rights have vested,' the court had the absolute right, on motion of the chairman, to dismiss the proceedings."

However, in the last mentioned case, the State Highway Commissioner had filed a certificate and taken possession of the property. The court, therefore, said in this connection speaking of the lower court:

"* * * The court should not have dismissed the proceeding without either deciding the rights of the parties in this proceeding, or retaining the case until, in some appropriate proceeding, they could be determined."

In view of the language of the foregoing statute and the cases herein referred to, I am of the opinion that the School Board can have the condemnation proceed-
ings dismissed if the property sought to be condemned has not been taken, provided that upon dismissal the Board pays the cost of the proceedings and a reasonable attorney's fee which has actually been incurred by the defendant.

I am not advised of any precedent or statute regarding your second inquiry; however, if the suit is dismissed and brought again against the same parties involving the same subject matter, I am of the opinion that a plea of *res judicata* may be successfully interposed.

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**CONDEMNATION SUITS—Factors determining value of property.**

F-189 (203)  

March 3, 1953.

**Honorable John B. Boatwright, Jr., Secretary,**  
State Office Building Commission.

In your letter dated March 2, 1953, you present the following inquiry:

"The captioned Commission, of which Honorable Thomas B. Blanton, Bowling Green, is Chairman, is in the process of acquiring property to be used as the site for the new State Office Building. Appraisers are being retained for the purpose of guiding the Commission in setting the proper values for the tracts involved. Some of these parcels may have to be acquired by condemnation.

"Accordingly, I will appreciate your advising me as to the factors which the court in a condemnation case, can consider in arriving at the value of the property involved in the proceedings. Some of the property owners in the area included are faced with the necessity of moving at considerable expense, others with obtaining like facilities elsewhere in the city, and others have factors peculiar to their own situation.

"Your kindness in supplying the above will materially help the Commission and the appraisers in the event resort to condemnation is required."

Under the provisions of Section 58 of the Constitution of Virginia, the General Assembly is prohibited from enacting any law whereby private property shall be taken or damaged for public uses without just compensation. This language of the Constitution has been construed by the courts to mean that private property cannot be taken or damaged for public use without just compensation. *Boyd v. Ritter Lumber Company*, 119 Va. 348; *Roanoke Water Works Company v. Commonwealth*, 140 Va. 144

In a condemnation proceeding, in order to comply with the constitutional requirement, the court determines the fair market value of the property taken or damaged at the time of the taking. *Duncan v. State Highway Commission*, 142 Va. 135; *Appalachian Electric Power Company v. Johnson*, 137 Va. 12.

In determining the fair market value of the property in a condemnation proceeding, it is the present actual value of the land with all its adaptations to general and special uses and not its prospective or speculative or possible value based upon future expenditures and improvements. *Appalachian Electric Power Company v. Johnson*, supra.

You state that some of the property owners are faced with the necessity of moving at considerable expense and others with obtaining like facilities elsewhere in the city. While such conditions may work a hardship on the property owner, nevertheless, they do not have any bearing upon the value of the property taken, and such evidence is inadmissible because the constitutional guarantee of indemnity does not extend to business conducted upon the property taken. *Cauley et al. R. Co. v. Conley*, 84 W. Va. 489, 100 S. E. 290.
Damages to trade or business of the landowner are generally held to be too remote to be a subject of damages, because they depend upon contingencies too uncertain and speculative to be allowed. *Rd. etc. R. Co. v. Chamblin*, 100 Va. 401.

In view of the foregoing, I am of the opinion that in a condemnation case the court can only consider evidence tending to prove the fair market value of the property at the time of the taking and that evidence of the necessity of moving or obtaining like facilities elsewhere in the city is inadmissible to prove the fair market value of the property taken.

CONSERVATION AND DEVELOPMENT—State parks; conveying land for a school. F-21 (208)

March 5, 1953.

HONORABLE SIDNEY S. KELLAM, Director, Department of Conservation and Development.

I am in receipt of your letter of March 3, in which you present the following question:

"I am today in receipt of a letter from the School Boards of Princess Anne County and the City of Virginia Beach, requesting the Department of Conservation and Development to sell to them twenty or twenty-five acres of Seashore State Park, the site to be used for a school. "I would appreciate it if you would advise me whether or not the Department has the authority to sell any portion of the property without a special Act of the General Assembly permitting the same."

Formerly, I think a special Act of the General Assembly would have been necessary to authorize the conveyance you describe. However, Section 10-21.1 of the Code, which is in the Chapter dealing with State Parks, as amended by Chapter 416 of the Acts of 1952, provides in part as follows:

"(1) The Director is hereby authorized and empowered, subject to the consent and approval of the Governor, to convey, lease or demise to any responsible individual, organization, association or corporation for such consideration and on such terms as the Board may prescribe, by proper deed or other appropriate instrument signed and executed by the Director, in the name of the Commonwealth, any lands or other properties held for general recreational or other public purposes by the Commonwealth, for the Department, or over which it has supervision and control, or any part or parts thereof or right or interest therein or privilege with respect thereto. * * *"

You will observe that the amended section now authorizes you under prescribed conditions to convey to any responsible corporation any lands held for general recreational or other public purposes by the Commonwealth, for the Department. By Sections 22-63 and 22-94 of the Code, respectively, County and City School Boards are constituted bodies corporate.

My conclusion is, therefore, that, in view of the amended Section 10-21.1 and subject to the conditions prescribed therein, you have the authority to convey the land in question.
CONSTRUCTION OF STATE BUILDINGS—Governor to approve design and location. F-160 (112)

November 4, 1952.

HONORABLE JOHN S. BATTLE,
Governor of Virginia.

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

"For some time, the Board of the Virginia School for the Deaf and Blind at Staunton and the Art Commission have been in disagreement over the location of a building which it is proposed to erect on the school grounds and for which an appropriation was made at the last session of the Assembly.

"I have visited the School twice in an effort to work this matter out to the mutual satisfaction of both the Board and the Commission, but have failed to get them to reach an agreement. As it appeared that I would have to settle the matter, I have read the statute on the subject, Code Section 9-11, and it occurs to me that there is serious question as to the authority of the Art Commission so far as the 'location' of the building is concerned.

"* * * I am informed that heretofore the Art Commission has taken the position that they had a legal right to disapprove a location and they now take this same position."

The controlling law is to be found in Section 9-11 of the Code, the pertinent portion of which is as follows:

"No construction or erection of any building of any nature, which is to be paid for, either wholly or in part, by appropriation from the State treasury, or which is to be placed on or allowed to extend over any property belonging to the State, * * * shall be begun, unless the design and proposed location thereof shall have been submitted to the Governor and its artistic character approved in writing by him acting with the advice and counsel of the Art Commission, unless the Governor shall have failed to disapprove in writing the design within thirty days after its submission. * * *"

Section 9-11 of the Code of 1950 was formerly Section 582 of Michie's Code, and it is significant that under the latter section "the design and proposed location" of a structure to be erected on State property was required to be "submitted to the (Art) Commission and its artistic character approved in writing by the majority of the members of the Commission * * *," Thus, whereas formerly the approval of the Art Commission was required now the approval of the Governor is required, and it is contemplated that he shall avail himself of the advice and counsel of the Art Commission.

After considering the present and former law on the question involved, my conclusion is that the Governor is the final approving authority and that, whereas it is contemplated that he shall seek the advice and counsel of the Art Commission, he is not, as a matter of law, required to follow such advice and counsel. It must be assumed that the General Assembly had some intention in making the significant change in the statute to which I have referred, and I can only conclude that this intention was to make the Governor the final approving authority and the Art Commission purely advisory. If this was not the intention of the General Assembly and the Art Commission has the final say in the matter, then there has been no change in the law despite the substantial change in its language. I cannot believe that the law is to be so construed. Specifically answering your inquiry, therefore, I must advise that, even though the Art Commission may disapprove the location of a proposed building, the Governor is not bound by such disapproval.
It might be argued under the existing statute that, while the design and proposed location of a building is to be submitted to the Governor and its artistic character approved by him, acting with the advice and counsel of the Art Commission, it is not necessary for either the Governor or the Art Commission to approve the proposed location, but, in view of what I have written, it would not appear necessary to pass on this question.

CONTRACTORS' REGISTRATION—Jurisdiction over defense housing projects. F-79 (146)

December 15, 1952.

MR. CHARLES P. BIGGER, Secretary,
State Registration Board for Contractors.

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

"The question of the jurisdiction of the State of Virginia has been raised by the Public Housing Administration in connection with a construction project known as Defense Housing Project VA5D2 in the cities of Hampton and Warwick, Va. It is my understanding that unless the State of Virginia has formally ceded exclusive or joint jurisdiction over the particular site or land on which the construction work is to be done, then the provisions of the above mentioned chapter of the code are applicable and specifically the contractor must comply with the statute and be registered by this Board."

It is the opinion of this office that Chapter 7 of Title 54 of the Code of Virginia (sections 54-113 to 54-145) pertaining to the registration of general contractors and subcontractors in this state is applicable to construction work done on all lands lying in the territorial limits of the Commonwealth unless exclusive jurisdiction over a particular site has been formally ceded to the United States either by statute or a deed of cession.

CONTRACTS OF THE COMMONWEALTH—No authority to agree to arbitration. F-144 (129)

November 20, 1952.

GENERAL JAMES A. ANDERSON, Commissioner,
Department of Highways.

This is with reference to yours of November 18, 1952 in which you ask my opinion as to the authority of the Highway Commission entering into contracts with the Federal government which contain an "arbitration of disputes" clause, the arbitrator being the contracting officer for the Federal agency. You state that the only appeal to a court of competent jurisdiction from the decision of the arbitrator is on the ground that the decision was fraudulent, arbitrary, capricious or so grossly erroneous as necessarily to imply bad faith.

The General Assembly of Virginia has prescribed certain methods by which the Commonwealth may be proceeded against in the disputes arising from contracts or the actions of its agents. There is no provision in the law for submitting disputes to arbitration. I am, therefore, of the opinion that no officer or agent of the Commonwealth has authority to enter into contracts on behalf of the
Commonwealth which contain a clause agreeing to submit disputes to arbitration, regardless of the identity of the arbitrator. It follows that any such contract would be invalid as to the "arbitration of disputes" clause as set forth in your letter.

COSTS—Prosecutions; sheriff's mileage; transporting accused for examination. F-114 (175)

January 21, 1953.

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

This is in reply to your letter of January 20, 1953 from which I quote as follows:

"The Sheriff of this County was ordered by the Circuit Court to deliver a certain defendant, charged with a felony to the Southwestern State Hospital at Marion, Virginia, for observation and at a later date likewise ordered to return him. Subsequently he was convicted of the felony, imposition of sentence suspended however, and the Sheriff was again ordered by the Court to deliver him to the Children's Bureau of the Department of Public Welfare.

"The case is now about to be finally disposed of by the Court and I should like to know if the mileage of the Sheriff should be taxed as part of the costs of prosecution."

Section 19-296 of the Code of Virginia provides, in part:

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

Under the provisions of this section it is my opinion that the mileage of the Sheriff may be properly considered as an expense incident to the prosecution. The only remaining question is whether, in view of the apparent fact that the defendant involved was a minor, the usual procedures should be followed. Inasmuch as the court, acting under authority vested in it by law, elected to treat this person as an adult and convict him of a felony rather than proceed under the provisions of the juvenile law, it is my opinion that the taxing of costs would be proper.

COUNTRIES, CITIES, TOWNS—Ordinances paralleling state motor vehicles laws. F-60a (213)

March 9, 1953.

HONORABLE BERNARD MAHON, Commonwealth's Attorney for Caroline County.

This is in reply to your letter of March 6 in which you ask whether a town has the right to pass an ordinance covering reckless driving, paralleling the State law. Section 46-198 provides as follows:

"In cities and towns the council may adopt ordinances to regulate the operation of vehicles on the highways in such cities and towns, as the
case may be, not in conflict with the provisions of this title and may pro-
vide penalties for violating the provisions of such ordinances. But no penalty
thus fixed shall be greater than the penalty imposed for a similar offense
under the provisions of this title."

It is my opinion that this section expressly allows cities and towns to enact
parallel traffic regulations to those of the state. The term "on highways" is
meant to include streets also.

In regard to your second question:

"What authority does a county have to adopt an ordinance paralleling
the State law as to drunk driving?"

Section 15-553 expressly grants the Board of Supervisors of a county power
to enact such ordinances. That section says:

"Councils and other governing bodies of cities, towns and counties
may make ordinances prohibiting the driving of motor vehicles, engines
and trains in such cities, towns and counties by any person 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 other self-administered intoxicant or
drug of whatsoever nature, and may prescribe fines and other punishment
for violations of such ordinances. All fines imposed for violations of such
ordinances shall be paid to, and retained by, such cities, towns and counties.
The Commonwealth shall not be chargeable with any costs in connection
with any prosecution for any such violation nor shall any such costs be paid
out of the State treasury. No such ordinance shall provide for a lesser
punishment than that prescribed by general law for a similar offense. Such
ordinances may provide the same penalties for violations thereof as are
provided by general law for similar offenses, anything in the charter of such
cities or towns to the contrary notwithstanding, and the judgment of con-
viction for a violation of any such ordinance shall operate to deprive the
person convicted of the right to drive or operate any motor vehicle, engine
or train in this State to the same extent as if such conviction had been
under the general law of the State for a similar offense, or to a greater
extent if so provided in such ordinance."

COUNTIES—Ordinances; disposition of fines. F-60a (82)

HONORABLE EDGAR BACON,
Commonwealth's Attorney for Lee County.

September 29, 1952.

This is in reply to your letter of September 25, 1952, in which you enclose
a copy of an ordinance passed by the Board of Supervisors of Lee County in June,
1951. You point out that the ordinance makes no provision for the disposition of
fines collected and inquire whether warrants may be issued for violation of this
ordinance and trial had in the trial justice court and, if so, what disposition should
be made of the fines collected.

Section 14-54 of the Code provides, in part, as follows:

"*** Fines collected for violations of city, town or county ordinances
shall be paid promptly into the treasury of the city, town or county whose
ordinance has been violated. All fines collected for violations of the laws
of the Commonwealth shall be paid promptly to the clerk of the circuit
court, who shall pay the same into the State treasury."
In my opinion the failure to provide for disposition of fines does not invalidate the ordinance. You raise no other question with respect to its efficacy and I assume that is the only question which you desire me to deal with herein. In the event there are other questions with respect to the ordinance, I will be glad to consider them at your request.

COUNTY OFFICIALS—Legal acts are valid while right to hold office being contested. F-83 (28)

July 24, 1952.

HONORABLE WILLIAM J. HASSAN,
Commonwealth's Attorney for Arlington County.

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

"As you know, there is pending before the Supreme Court of Appeals, the matter of Paolicelli v. Dean, which covers the right of Alan Dean to hold his seat as a member of our County Board by virtue of his employment by the Federal Government. Argument has been heard, and the matter is under consideration. On our County Board, we have the Chairman, Robert W. Cox, who is also a Government employee, but whose seat is not directly attacked by litigation at this time. Also on our County Board is Daniel Dugan, who, at the time of his election and assumption of the duties of a Board member, was employed by the Federal Government, but who, since the first of the year, has been in private business. Daniel Dugan's seat on the County Board is not directly attacked by litigation at this time. The other two members of the County Board, Robert A. Peck and Al Frisbie, are not Government employees, but are in private business.

"As is usual, our County Board, regardless of its membership, at this time every year, finds it necessary to borrow money in anticipation of the collection of the tax levy for general maintenance and salary purposes. Two weeks ago, our County Board unanimously (four members in attendance—Cox, Dugan, Peck and Frisbie) voted to request bids from various banks in connection with this type of borrowing. In connection with the invitation to bid, I prepared an opinion on the authority of the County to contract for money in the usual manner for these purposes. A copy of that opinion is attached hereto and was forwarded to each of the banks with the invitation to bid.

"As a result of this invitation, two bids were received for action at the Board meeting held on July 12th, 1952. The Board voted to accept one of the bids, there being present Cox, Dugan, Peck and Frisbie. The vote for acceptance of the bid was participated in by Frisbie, Peck and Dugan: the Chairman, Robert W. Cox being present and refraining from voting. Now, the question arises as to whether our County Board can legally contract with this bank on the basis of their bid, and the bank has called upon my office for an additional opinion and have requested that I substantiate my opinion with an opinion from your office. I have refrained from writing such an additional opinion until I have heard from you. As you know, I will be in accord with your opinion.

"The questions involved, as I see it, are (1) whether the acceptance of the bid for the borrowing of this money are prohibited by Title 2, Section 33 of the Code, the last line of which reads as follows: 'But every contract or security made or obtained in violation of this chapter shall be void'; and (2) whether such a contract would come within the scope of
this Section when the vote at the County Board, a quorum being present, was passed by the unanimous vote of 3 members of the Board, two members being privately employed and not within the scope of Chapter 4 of Title 2, and the other member, Dugan, who voted, not being involved in litigation and being privately employed at this time, although having been a Federal employee at the time of his election and assumption of duties.

"Of course, I was advised that the banks would be notified to the effect that an attack would be made upon the authority of the Board to borrow this money. The borrowing of the money is absolutely essential to the meeting of the payroll of County employees, and would have to be done no matter who was a member of the Board. Consequently, it was upon my advice that the Board voted as they did, that is, a quorum being present, namely, Cox, Dugan, Peck and Frisbie. The vote was called for, and those present and voting, namely Dugan, Frisbie and Peck, constituted a quorum and a majority of those voting, although it was unanimous, were the two members, Peck and Frisbie, who in no sense come under the disabilities of Chapter 4 of Title 2 of the Code of Virginia."

Under the circumstances described in your letter the answer to your problem must necessarily depend on whether or not certain members of the County Board are at this time, at least, de facto officers. If they are, their act of borrowing money to meet a casual deficit in the revenue would be valid in so far as it involves the interests of the public and third persons, unless such third persons who desire to invoke the protection of the act of the de facto officers knew when the action was taken that it was not the act of a legal officer.

A de facto officer has been defined as one who acts "under color of an election or appointment by or pursuant to a public unconstitutional law before the same is adjudged to be such". (15 Michie's Jurisprudence, Sec. 56). In the case of Paolicelli v. Dean the Circuit Court of Arlington County held, among other things, that Section 2-29 (11), which permitted federal employees to hold office under the government of Arlington County, violated the Constitution of Virginia. However, the trial court suspended its judgment "for a period of thirty days, provided a petition for appeal be filed with the Supreme Court of Appeals within the said period and thereafter until such petition, if filed, shall have been finally disposed of by the Supreme Court of Appeals". (Circuit Court of Arlington County, Chancery Order. Book No. 40, page 18).

A petition was filed with the Supreme Court of Appeals within the time allowed and the case of Dean v. Paolicelli is now pending in that court. Therefore, it can be seen that a final adjudication of the constitutionality of the law which controls the question of whether or not certain members of the County Board are lawful officers has not been made. Under these circumstances, it is my opinion that, regardless of the decision of the Supreme Court of Appeals on the question of the validity of Section 2-29 (11), the members of the County Board who were federal employees at the time of their election are, at least, de facto officers and that their acts are as valid as if they were de jure officers.

I wish to point out that I have been unable to find a Virginia decision bearing on the specific points raised in your letter. However, the views I have expressed above appear to be in accord with the weight of authority on this subject and since, as you know, the de facto doctrine is based upon principles of public policy and is deemed essential for the protection of those who have business with public officials, it is my belief that, pending final adjudication by the Supreme Court of Appeals, any action taken by the officers in question would be upheld by the courts of this State. (See, 43 Am. Jur. Sec. 495).
CRIMES—Conviction of misdemeanor not bar to prosecution for a felony.
F-353 (161)

December 31, 1952.

HONORABLE MARK D. WOODWARD,
Commonwealth's Attorney for Page County.

This is in reply to your letter of December 12, 1952, from which I quote as follows:

"In your opinion dated February 10, 1949, numbered F-85, you held that convictions of a charge of reckless driving causing serious bodily injury to C did not preclude or bar a prosecution for involuntary manslaughter of B.

"The question arises as to whether your opinion would be the same if one person only had been killed, that is, if there was no personal injury to other than the deceased involved. Assuming grounds for a manslaughter charge, would conviction of reckless driving bar such a prosecution?

"In my opinion, the same reasoning would apply to section 4775 (now section 19-232) as stated in your opinion of February 10, 1949.

"However, it appears to me that it cannot be stated as in the former case that two acts were committed, as the recklessness resulted in one act only, namely manslaughter, the reckless driving is merged in that act; hence, conviction of reckless driving, the lesser included offense, would bar prosecution for manslaughter, the greater offense."

In the opinion referred to my specific ruling was to the effect that conviction for involuntary manslaughter would not be barred by the provisions of § 4774 (now § 19-232) of the Code. This ruling is predicated upon the fact that involuntary manslaughter is not a statutory offense but a common law offense, and the section under consideration does not deal with such offenses.

In that opinion I gave no consideration to the provisions against double jeopardy contained in § 8 of the Constitution of Virginia.

I have carefully considered the factual situation presented by your letter and must confess that I can give no dogmatic answer, however, I believe the case of Buford v. Commonwealth, 179 Va. 752, would be strong authority for the proposition that the conviction for reckless driving would not bar a prosecution for involuntary manslaughter.

In the Buford case the Court said:

"But even if the accused had been indicted and convicted of a mere assault and battery * * * the conviction would not have been a bar to an indictment for a felony in the perpetration of which the assault and battery was committed. The misdemeanor in such case is considered as merged in the felony. Where the prisoner has been convicted of a misdemeanor, and is afterwards indicted for a felony, the two offenses have been considered so essentially distinct, that a conviction of one was deemed no legal bar to an indictment of the other." (179 Va. 757) (Emphasis supplied)

I regret that I cannot give you a more positive answer, but I know of no Virginia decision directly in point on the facts similar to those presented.
CRIMES—Drunk driving; owner may be convicted even though not the operator. F-353 (188)  

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

This is in reply to your letter of February 4 from which I quote as follows:  

"I would like your opinion and advice on whether or not a person who is the owner of, and a passenger in, an automobile being operated by a person who is under the influence of alcoholic beverages in violation of Section 18-75 of the 1950 Code of Virginia can be convicted of the offense of driving under the influence when it can be shown that the operator is driving the automobile with the consent and approval of the owner who is present in the car.  

"By a recent opinion you ruled that driving under the influence was a crime of a general nature and not a traffic violation. Does it follow that the owner of the car, being present and knowingly permitting an intoxicated person to drive his automobile, is a principal in the second degree and thereby guilty of the crime of driving under the influence?"

I am of the opinion that the answer to your question is in the affirmative and my authority therefor is the case of James v. Commonwealth, 178 Va. 28. While this case involved the offense of leaving the scene of an accident, the following language of the court is pertinent:

"The accused contends that this evidence proves that the crimes were committed in his presence and nothing more. The fallacy of this contention is that it ignores the fact that the owner of the automobile is entitled to control its operation. Such owner, riding with a driver to whom he has temporarily surrendered the operation of the car, may or may not be criminally responsible for a single act of recklessness resulting in injury or death to a third party. An accident may happen in a split second, too quickly for the owner to exercise this right of control. The offenses in question were committed after the injuries had been inflicted upon the pedestrians. The accused, with full knowledge of at least two collisions, permitted the driver to leave the scene without protest. It was his duty to control the operation of the car. Failure to perform this duty made the owner a participant in the offenses proven to have been committed." (Italics supplied). (178 Va. 34-35).

CRIMES—Receiving stolen goods; accessory after the fact; what constitutes. F-149 (178)  

HONORABLE MARK D. WOODWARD,  
Commonwealth's Attorney of Page County.

This is in reply to your letter of January 15 in which you request my opinion as to the proper charge to make against a person designated as "B" under the following circumstances:  

"One E, who admits to receiving $2,000.00 of stolen money, purchased with a portion of this money a Pontiac automobile for $1500.00. When apparently he sensed the police were on his trail, he—according to his confessions—transferred title to the car to B and gave B $200.00, telling
B that the car had been purchased with the stolen money. B contends he paid some $800.00 for the car and owes the balance. The title certificate is in B's name and shows no lien. I do not feel I have sufficient proof that B knew the $200.00 said to have been given was part of the proceeds of the robbery.

In regard to the title to the automobile being transferred to B by E, I know of no provisions or sections of the Code of Virginia which would make B guilty of any criminal offense. The automobile is not stolen goods; therefore B could not be charged with receiving stolen goods.

To charge B as being an accessory after the fact for taking title to the automobile from E, would not, in my opinion, be within the scope of the criminal laws of the Commonwealth. The Supreme Court of Appeals of Virginia, as you suggested in your letter, has said in its decisions of *Buck v. Commonwealth* (116 Va. 1031) and *Wren v. Commonwealth* (26 Gratt. (67 Va.) 952) that the aid given by an accessory after the fact must be that of a personal nature to enable the principal to elude punishment. I do not feel that taking title to the automobile could be included as personal aid since the criminal laws are to be strictly construed against the Commonwealth. B could and should be charged with receiving stolen property if there is evidence that the $200.00 was part of the stolen money and that B had knowledge of this when he took possession of the $200.00.

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**CRIMINAL TRIAL—Admission of evidence; chief medical examiner's reports; alcohol content of blood. F-6 (177)**

January 22, 1953.

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

This is in reply to your letter of January 15, 1953, in which you stated the following question:

Does the admission in evidence in a criminal hearing of the report of the Chief Medical Examiner, concerning the chemical analysis of the alcohol content of a blood sample taken from the accused, violate the accused's constitutional rights as set out in section 8 of the Constitution of Virginia.

Section 8 of the Constitution reads, in part, as follows:

"That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence, in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty."

It is my opinion that section 8 of the Constitution of Virginia is not violated by admitting in evidence the report of a blood test made and attested by the Chief Medical Examiner. The Supreme Court of Appeals has given decisions in all three of the cases you mentioned, namely, *Cochran v. Commonwealth* (122 Va. 801); *Bracy v. Commonwealth* (119 Va. 867); and *Runde v. Commonwealth* (108 Va. 873), that this section of the Constitution is not meant to exclude from being admitted in evidence any proper documentary evidence. "The authorities show that where there is statutory authority for making a certificate by a public officer of acts which are within the scope of his duty as an officer, such certificate is receivable under the documentary evidence rule as an exception to the hearsay rule." *Bracy v. Commonwealth, supra.*
CRIMINAL WARRANTS—Fees; § 14-135(5) of Code does not apply to criminal warrants as defined in § 14-136. F-381 (6)

HONORABLE CHARLES K. HUTCHENS,
Member House of Delegates.

This is in reply to your letter of June 21, 1952, which reads in part as follows:

"Several of my constituents seem confused on the intent of HB 61 as it may apply to criminal warrants under section 14-135 (5).

"What seems to be uncertain is the fact that section 14-136 has not been amended unless the words 'Same in Criminal Cases' can be construed to mean that the amendment to the preceding section 14-135 also applies to 14-136."

In my opinion § 14-135 as amended and § 14-136 must be read separately. As you know, it is an established principle of statutory construction that repeal or amendment by implication is not favored and that unless statutes are in direct conflict, which conflict cannot be reconciled by a reasonable interpretation of the words used, they should be read and considered in whole and effect given to each expression of the Legislature. Section 14-136 provides the fees to be allowed in certain specific cases. All of these specific instances are criminal cases. In my opinion this specific legislation controls the fees for criminal cases, and § 14-135 (5) controls the issuance of warrants which are civil or any which might not fall within the specific classes established under § 14-136.

DESERTION AND NON-SUPPORT—Illegitimate child; court order against father for support. F-383 (212)

HONORABLE MARION B. WEST, Judge,
Juvenile and Domestic Relations Court, Alexandria.

This is in reply to your letter of February 23, 1953, in which you request my opinion on whether or not it is proper to issue a process of arrest for the father of an illegitimate child in a proceeding to enforce support and maintenance for such child when the father has not admitted parenthood before the court and when his whereabouts are not known, and he cannot be served with a summons in this State.

You call attention to the fact that § 20-61.1 of the Code empowers the court to enter and enforce a judgment for support and maintenance against the father of such child where he admits before the court that he is the father of the child. In my opinion the purpose of this section was merely to enable the court to enter and enforce judgments against persons who are before the court and who make such admissions, and does not in any sense broaden the power to issue process. That phase of the proceedings would remain exactly as it was prior to the enactment of the section referred to.
This is in reply to your recent letter regarding § 20-61.1 of the Code of Virginia of 1950 as amended. I quote from your letter as follows:

"Reference is made to Volume 4, Code of Virginia, 1952 Supplement, Sec. 20-61.1. We should like your opinion as to whether this Act applies to the father of a child (1) who was born prior to June 29, 1952; (2) a child who was conceived prior to June 29, 1952 but who was born after June 29, 1952. We should also like your opinion concerning a father who admits before the Juvenile and Domestic Relations Court that he is the father of the child, but later notes an appeal and denies paternity before the court of record. Would his admission before the Juvenile and Domestic Relations Court be admissible in the court of record?"

Section 20-61.1 reads as follows:

"Whenever in proceedings hereafter under this chapter the court finds that the parents of a child are not married but that the father admits before the court that he is the father of the child, the court may then enter and enforce judgment for the support, maintenance and education of such child as if the child were born in lawful wedlock."

In my opinion there can be doubt that the language of this section is broad enough to include both classes of cases referred to in your question. The problem which arises, of course, is whether such retrospective legislation is valid. In that connection I refer you to 11 American Jurisprudence, Constitutional Law, § 376, wherein the following statement of general principle appears:

"While in general a statute, operating upon facts existing at the time of its passage, which attempts to impose upon one person a debt or duty to another, where there was no right and no obligation in existence before the passage of the act, is unconstitutional; where a moral obligation exists, the legislature may give it legal effect by a retroactive statute. It is axiomatic that no man has a vested right to do wrong. * * * This maxim has also been referred to in upholding the general power of the state to call a liability into being where there was none before, if the circumstances are such as to appeal with some strength to the prevailing views of justice and if the obstacle in the way of the creation seems small. * * *."

In the light of the above authority it is my opinion that this section may be applied to cases involving a child conceived or born prior to June 29, 1952.

As to your second question, under the language of the section it appears that the admission must be made by the father before "the court" and that "the court" may then enter and enforce judgment for the support and maintenance of the child. For this reason I have very real doubt as to the advisability of attempting to proceed under this statute by introducing in the court of record evidence of an admission before the Juvenile and Domestic Relations Court.
DIVORCES—One year desertion statute not retroactive. F-223 (34)

HONORABLE HAROLD B. SINGLETON,
Member House of Delegates.

This is in reply to your letter of July 25, 1952, which reads, in part, as follows:

"The last session of the Legislature amended divorce laws by changing the desertion period from two years to one year.

"It was our thought in the Courts of Justice Committee that when this law went into effect, it would cover any desertion that was for one year last past. Some people are taking the position that it does not start until after the law goes into effect, and that a desertion which happened prior to taking effect of the law would not be covered."

I have been unable to find any Virginia case which would be authority for the question raised by your letter and have, therefore, referred to authorities elsewhere. I find that there is a definite split of authority on the question involved, and I cite as an illustration of the fact 17 American Jurisprudence, Divorce and Separation, § 29, which reads, in part, as follows:

"* * * According to the general rule, the legislature may authorize the granting of divorces for causes which occurred prior to the enactment of the statute and which, therefore, were not, at the time when they occurred, cognizable by the courts. According to the prevailing view, such statutes are not unconstitutional as impairing the obligation of any contract or as ex post facto laws. Similarly, it has been held that the legislature may add to the law allowing divorces for adultery a provision that the court may prohibit the remarriage of the guilty party during the life of the innocent party, although the acts of adultery occurred before such provision came into effect. Some courts, however, take the view that a statute attempting to confer authority on the courts to grant a divorce for matters already past and which, at the time they occurred, furnished no ground for a dissolution of the marriage or for other legal proceedings is unconstitutional. In some instances, these decisions have been materially influenced by constitutional provisions prohibiting the legislature from granting divorces by special acts. Certainly, if the cause for a divorce is continuing, such as desertion, there should be no objection to its application to a case where it begins prior to the enactment of the statute and continues for the statutory period thereafter."

In view of the fact that the law does not favor divorce, but rather places safeguards around the marriage institution by fixing definite requirements for divorce, among which is a time lapse for the purpose of encouraging reconciliation, and in view of the further fact that the dissolution of a marriage involves the termination of property rights, I am inclined to the opinion that the Virginia court would not favor a construction which would result in a final divorce being granted on the basis of a one-year desertion which occurred prior to the effective date of the amendment. On the other hand, I see no objection to a construction of the amendment which would permit the granting of a final divorce on the basis of a desertion which continued for one year following the effective date of the amendment, although such desertion might have commenced prior to the effective date and although desertion has not continued for a total of two years.

You will, of course, realize that I cannot give a categorical answer in response to this question, since the final determination must be made by the courts of the Commonwealth and I have attempted herein to set forth my belief as to what the courts might hold rather than make a ruling on the question presented.
HONORABLE R. H. L. CHICHESTER, Commonwealth's Attorney for Stafford County.

This is in reply to your letter of November 24, in which you raise the following question:

"Section 29-202 provides for compensation for livestock and poultry killed or injured by dogs. Section 29-183, subsection (a) defines livestock as including cattle, sheep, goats, swine and domesticated rabbits. The Board of Supervisors has asked me to get your opinion as to whether they can pay for injuries to a horse."

As you point out, Section 29-202 of the Code provides for compensation to the owner of livestock or poultry which is killed or injured by any dog not his own. Section 29-183 defines livestock as including "cattle, sheep, goats, swine, and enclosed domesticated rabbits or hares."

In view of this definition of livestock, which does not include horses, it is my opinion that the Board of Supervisors of a County may not use the dog fund for compensating the owner of a horse injured by a dog.

HONORABLE JAMES W. HARMAN, JR., Commonwealth's Attorney for Tazewell County.

This is in reply to your letter of November 6, from which I quote as follows:

"The Board of Supervisors of Tazewell County has requested me to submit to you the following proposed ordinance enacted under Section 29-292 of the Code of Virginia as amended, with the request that you advise whether or not, in your opinion, the same would be proper.

"BE IT ORDAINED by the Board of Supervisors of Tazewell County, Virginia, that any person who has any livestock or poultry killed or injured by any dog not his own shall be entitled to receive out of the Dog Fund of said County, as compensation therefor, a reasonable value of such livestock or poultry, the reasonable value to be ascertained by said Board from the fair market value of said livestock or poultry as reported by said taxpayer on his current State of Virginia personal property tax return. No compensation shall be allowed for any livestock or poultry killed or injured by any dog which livestock has not been assessed for taxation, other than lambs born after January 1st of ewes assessed for taxation as of January 1st."

"As you probably know, Tazewell County is a large sheep-raising county, and unless some provision is made for assessing the sheep, many unscrupulous persons would fail to assess their sheep for any tax purpose and still request the Board to pay them market value therefor, and the Board of Supervisors is desirous of prohibiting such a practice."

I presume that you refer to Section 29-202 of the Code as amended instead of 29-292. Section 29-202 as amended in 1952 provides in part that:

"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 * * *."
Formerly the section provided that the compensation to which the owner was entitled was "the assessed value of such livestock and fair value of unassessed lands or poultry, * * *". Under existing law, however, any person is entitled to compensation whose livestock or poultry is killed or injured by any dog not his own, and the measure of the compensation is the "reasonable value" of such livestock or poultry.

The last sentence of the proposed ordinance imposes a condition upon the recovery of the compensation that is not contained in the section providing for compensation. It is my opinion that, the General Assembly having imposed the conditions upon which the owner of livestock or poultry is entitled to compensation, the Board of Supervisors has no power to change these conditions or to impose new ones. Unquestionably in determining what is the "reasonable value" of livestock or poultry the Board may take into consideration the assessed value thereof, but it may not provide that no compensation will be allowed unless the livestock or poultry has been assessed for taxation.

**DOG FUND—Payment for damages to livestock and poultry when fund insufficient.** F-95 (53)

August 20, 1952.

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

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

"The Board of Supervisors of Smyth County, Virginia, have asked me to write you for a ruling concerning a problem which has arisen in this county.

"Since the enactment of the statute permitting farmers to file claims for the full value of sheep and lambs killed, rather than the assessed value, due to the increased value of this stock and the fixed assessment on dogs we do not have funds enough to pay off and discharge these claims. In fact, the claims already filed in this county this year will more than consume our dog fund.

"In reading Section 29-184 of the Code of Virginia it seems that the Board of Supervisors do not have authority to increase the dog license tax without a special act of the Legislature. I found some of these special acts but none that would permit Smyth County to increase its assessment.

"The Board would like to know whether or not there is any other fund out of which sheep and lambs may be paid for after the dog fund is exhausted. The Board would also like to know where the damage claims exceed the amount of the dog fund, in the event that no other funds can be made available to pay these claims, they should wait until the end of the year before any of them are paid and then pay them on a pro rata basis. To do otherwise would allow those who had claims in the early part of any year to receive full payment and those who had claims later in the year, after the funds are exhausted, would receive no payments."

I agree with you that the Board of Supervisors of your County, in view of the provisions of Sections 29-184 and 29-184.1 of the Code, does not have authority to increase the amount of the dog license. Nor do I know of any fund other than the dog fund which is available to the County for the payment of claims filed by persons whose livestock or poultry has been killed or injured by dogs, as provided in Section 29-202 of the Code.

Section 29-209 of the Code deals with the disposition of the dog fund and provides that, after paying fifteen per centum thereof to the State Treasurer and
after paying for treatment of persons for rabies, if the remainder "is sufficient" it shall be used for the payment of damages to livestock or poultry. Certain counties are authorized to appropriate additional amounts from the general fund of the county to provide for the payment of claims, but Smyth County is not one of those given this authority. I think it reasonably plain, therefore, as I have indicated, that in your County the dog fund is the only fund available for the payment of claims on account of damages to livestock or poultry.

Answering the question raised in the last paragraph which I have quoted from your letter, I call your attention to the fact that Section 29-202 of the Code fixes the amount of recovery for damages to livestock or poultry at the "reasonable value" thereof. It does not seem to me, therefore, that it is contemplated that these claims shall be paid on a pro rata basis. It is my view of the pertinent sections that it was the intention of the General Assembly that the Board of Supervisors should consider each claim on its own merits and compensate the claimant on the basis of a reasonable value of his livestock or poultry. I am fortified in this view by the following quotation from Section 29-209: "In the event the remainder is not sufficient to pay such damages, the claims shall be filed and paid in the order of presentation out of the first available money coming into the fund."

DOG FUND—Raising license tax; insufficient to pay damage claims.

January 22, 1953.

HONORABLE BRANTLEY B. GRIFFITH,
Commonwealth's Attorney for Russell County.

I have your letter of January 20, in which you refer to Section 29-184.2 of the Code as enacted by Chapter 55 of the Acts of 1952. This section provides that in certain described counties, which you state include Russell County, enforcement of the dog laws shall be vested in dog wardens and deputy dog wardens locally appointed. The section further provides that the amount of the dog license tax, in no event to exceed five dollars per dog, shall be fixed by the governing body of the county and thereafter the tax imposed under Section 29-184 of the Code shall not apply in the county.

You state that your Board of Supervisors has fixed the dog license tax at one dollar for male dogs and unsexed dogs and three dollars for female dogs. You state that the tax fixed will not yield an amount sufficient, after paying the items having priority by statute, to pay all claims filed for damages to livestock or poultry killed by dogs. My opinion is desired on the question of whether or not it is mandatory that the Board of Supervisors fix the dog license tax in an amount which will yield sufficient revenue to cover all claims filed for damages to livestock or poultry.

It is my view that your question must be answered in the negative. Section 29-184.2 gives to the Board of Supervisors complete authority to fix the amount of the tax not to exceed five dollars per dog. No minimum tax is prescribed. Furthermore, Section 29-209 of the Code, as amended, provides that, if the remainder of the dog fund "is sufficient", it shall be used to pay for damages to livestock or poultry. I note also that the amount of the license imposed by your Board of Supervisors is the same as that imposed by general law in Section 29-184 of the Code. In my opinion, if the dog fund of your county is not sufficient to pay these claims, there is nothing else to do but file the claims and pay them out of the first available money coming into the dog fund, as contemplated by Section 29-209 of the Code.
REPORT OF THE ATTORNEY GENERAL

DOG FUND—Surplus; transfer to general fund. F-33 (70)

BOARD OF SUPERVISORS—Referenda; authority to order, local fence law. F-33 (70)

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

September 4, 1952.

I am in receipt of your letter of September 2, in which you ask two questions, the first of which is:

“The first section concerns the Dog Fund and the disposition of said fund. Section 29-209 of the 1950 Code states that, ‘Any funds in excess of $250.00 remaining in the hands of the Treasurer on December 31, may on that date be transferred into the general funds of the County or City * * *.’ The Board of Supervisors of this county transferred the money in the Dog Fund into the general fund in June of this year. The reason for this was that the Treasurer of this County had advised them that the Dog Fund accounts were carried in the same manner as other accounts on a fiscal year basis from June to June. The question is, ‘Did the Board of Supervisors have the authority to transfer the fees collected the first six months of 1952 to the general fund?’”

Section 29-209 of the Code, to which you refer, dealing with the disposition of the Dog Fund provides in part that ‘Any funds in excess of two hundred and fifty dollars remaining in the hands of the Treasurer on December thirty-first may on that date be transferred to the general fund of the county or city * * *.’ I see no escape from the conclusion that the section means what it says when it provides for the transfer of funds remaining in the hands of the Treasurer on December thirty-first, and so the only 1952 funds that may be transferred into the general fund of the county are those remaining in the hands of the Treasurer on December 31, 1952. To be specific, I am of opinion that your question must be answered in the negative.

Your second question is:

“The second question that the Board has asked that I put before you is whether or not a special election can be held on the following question, ‘Should the voters of the Grundy District adopt the Stock Law?’ I have found no provision for an election of this sort in the Code, therefore, I could not advise the Board. If such an election can be had, would you please advise as to what steps to take to bring about same.”

I assume you refer to the authority given to the Board of Supervisors by Section 8-880 et seq. of the Code to adopt a local fence law. The sections dealing with this subject do not provide for the Board of Supervisors or any other authority to order a referendum or special election on the question. In the absence of such a provision, I am of opinion that the Board does not have such authority. For your information I enclose copy of an opinion of this office under date of June 20, 1950, to the Commonwealth’s Attorney for Nelson County, dealing with the authority of the Board of Supervisors to order an advisory referendum in the absence of specific legislative sanction. It is my view that the reasoning of the enclosed opinion is applicable to the question you ask.
REPORT OF THE ATTORNEY GENERAL

DOG LICENSE—Must wear license if roaming at large; fiber tags are a substantial compliance with law. F-95 (32)

July 30, 1952.

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

This is in reply to your letter of July 15, in which my opinion is requested upon the questions hereinafter set forth:

1. Is it required to have a dog wear license tag at all times, except when engaged in lawful hunting in the open season and accompanied by the owner or custodian?

2. What is the interpretation of § 29-191 with reference to the prohibition against permitting dogs four months or over to run or roam at large at any time without a license tag?

In response to the foregoing questions, it is my view that, in accordance with § 29-191, Code of Virginia, "it shall be unlawful for the owner to permit any licensed dog four months old or over to run or roam at large * * * without a license tag, except that when engaged in lawful hunting, in the open season and accompanied by the owner or custodian, the collar and tag may be temporarily removed." It is noted that the foregoing statute prohibits the running or roaming "at large" of dogs without a license tag with the exception, when engaged in hunting, as provided. By decisions from the various states, the term "at large" is generally defined as running or roaming outside of the owner's or custodian's premises or outside of the actual control of the owner or custodian if away from such premises. 4 Words and Phrases, 672.

3. Does the fiber license tag currently issued fulfill the standard provided in § 29-189, stating that a dog license shall consist of * * * a metal tag, so as to require compliance with the various dog license laws?

The office of the Executive Director of the Commission of Game and Inland Fisheries advises that metal license tags were not procurable for 1952 issue and that hard fiber tags had to be adopted by the Commission.

In consideration of the foregoing and in reply to your question, it is my view that the hard fiber tags adopted by the Commission and currently in issue for the year 1952 are in substantial compliance with the provisions of § 29-189 so as to render effective the various dog license laws and the requirements placed upon the owners of dogs contained in these statutes.

DOG LICENSE—State's share; always at least 15%. F-95 (157)

December 23, 1952.

HONORABLE JAMES W. HARMAN, JR.,
Commonwealth's Attorney for Tazewell County.

I have your letter of December 20, from which I quote as follows:

"The Treasurer of Tazewell County has requested me to write you in connection with the interpretation of Section 29-184.2 of the Code of Virginia passed at the recent Session of the Legislature.

"This section provides for the enforcement of the dog laws in certain counties, of which Tazewell County is one, by a new official known as a dog warden, and also permits the County Board of Supervisors to set their own dog licenses' tax for the County, provided that no tax shall be more
than $5 per dog. The section goes on to state 'provided that (1) the amount payable to the State Treasurer as the State's share of the dog license taxes shall not in any year be less than an average of the amount so paid in any such county for the fiscal years nineteen hundred and forty-nine and nineteen hundred and fifty; * * *'.

"It is my contention that the Treasurer of this County need only to remit to the State Treasurer an amount equal to the average remitted to the State Treasurer for the years 1949 and 1950, and that the State is not to receive fifteen per centum of the higher license taxes as set by the Board of Supervisors of this County."

I also quote below that portion of the section which you desire to be construed:

"* * * The funds collected for dog license taxes shall be paid into a special fund and may be disposed of as provided in this section and in §§ 29-206 and 29-209, provided that (1) the amount payable to the State treasury as the State's share of the dog license taxes shall not in any year be less than an average of the amount so paid in any such county for the fiscal years nineteen hundred forty-nine and nineteen hundred fifty; * * *"

Sections 29-206 and 29-209 of the Code require that fifteen per cent of the dog license taxes shall be paid to the State Treasurer. In view of this provision, I can see no escape from the conclusion that fifteen per cent of these taxes collected in Tazewell County shall be so paid. The purpose of the proviso is simply to insure that there shall be paid to the State not less than the average amount paid from dog license taxes for the fiscal years 1949 and 1950. Any other construction would render meaningless the reference to Sections 29-206 and 29-209 of the Code.

ELECTIONS—Absentee ballots; challenge for voting in primary must be made at time of application. F-100 (11)

SENATOR A. S. HARRISON, JR., Lawrenceville.

This is in reply to your letter of July 7 in which you requested my opinion as to whether or not an individual, who has made application to the registrar for an official ballot under the Absent Voters Law and who has signed such application and returned his ballot to the Electoral Board, may be challenged under the provisions of section 24-368 of the Code and required to take an oath that he is a member of the Democratic Party.

Section 24-368 provides, among other things, that any person offering to vote at a primary may be challenged and section 24-325 of the Code provides that an application for an official ballot shall be construed as an offer to vote. Therefore, it is clear in my opinion that it is too late to challenge the person to whom you refer on the ground that he is not a member of the Democratic Party.
ELECTIONS—Absentee ballots; delivery to the precincts. F-100h (52)

HONORABLE E. HAGAN RICHMOND,
Commonwealth's Attorney for Scott County.

This is in reply to your letter of August 13, 1952, from which I quote as follows:

"We are particularly anxious to know whether or not a member of the Armed Forces who may be on furlough at his home in Scott County, Virginia, may personally go before the Secretary of the Electoral Board of Scott County, and make his application and vote in person before the said Secretary of the Electoral Board, or would he have to make application for a ballot with Virginia State Board of Elections? The Secretary of the Electoral Board is likewise confused as to the manner of the delivery of the ballots on the day of the election. The general absent voters statute directs the Secretary of the Electoral Board to take the ballots on the day of the election and deliver them to the judges of the elections at the precincts. The special statute relating to members of the Armed Forces apparently directs the Secretary of the Electoral Board to deliver the absentee ballots to the registrars of the various precincts. We do not understand the conflict in the two statutes in this regard. When are the ballots to be delivered to the registrars?"

Your first question has been previously considered by this office and I enclose a copy of an opinion under date of June 11, 1952, addressed to the Secretary of the State Board of Elections which, I believe, will answer that inquiry.

As to your second question, Section 8 of Chapter 509 of the Acts of Assembly 1952 provides in part:

"It shall be the duty of the secretary of every electoral board receiving any such return ballot envelopes to deliver the same unopened to the registrar of the precinct within the boundaries of which the voter resides as shown by said return envelope, or as may be known to the electoral board chairman, secretary, or any member thereof. The registrar shall deliver said envelopes to the election judges of the proper precinct, in the same manner and along with other absentee ballot envelopes. * * *"

It is quite true, as you point out, that Section 24-340 of the Code provides that, in case of the regular absentee ballots, they shall be delivered by the electoral board to the judges of election, whereas, in the case of "war ballots", the electoral board is directed to deliver them to the registrar, who in turn is directed to make delivery to the judges in the same manner and along with the other absentee ballot envelopes. This, of course, raises a conflict since the registrar does not have the "other absentee ballots" and, therefore, could not deliver the "war ballots" along with them.

In my opinion the mandate of the statute should be complied with in so far as is possible. The electoral boards should deliver the ordinary absentee ballots to the judges of election and the "war ballots" to the registrar. In many cases delivery could be made at the voting place to both the judges and the registrar, in which event the registrar could then deliver the "war ballots" to the judges at the same time as the regular absentee ballots are delivered to them. Where this is possible, the law will be satisfied to the letter. Where it is not possible, I believe the clause "along with the other absentee ballots" would, of necessity, have to give way due to impossibility of performance.
ELECTIONS—Absentee ballots; servicemen; correct precinct to be determined. F-100h (109)

October 30, 1952.

HONORABLE W. W. TRIMBLE, Secretary,
Augusta County Electoral Board.

This is in reply to your letter of October 24, 1952, from which I quote as follows:

"I have talked with Mr. Levin Nock Davis, Secretary of State Board of Elections about the ballots which are being cast by the men in the armed services.

"Many of these men do not know their registrar or what precinct they should vote in. Would it be legal for us to take the ballots of these boys who do not know their precinct or registrar in event we can't place them to any precinct in the County and have them counted and recorded as the vote from the men in the service?"

I assume you are referring to voting by members of the armed forces under Chapter 509 of the Acts of 1952, commonly referred to as the "War Voters Law". Section 5 of that Act requires that in applying for a ballot a member of the armed forces must state his home address and his legal residence and section 7 of the Act requires that upon the reverse side of the envelope in which the ballot is placed the voter shall furnish information as to the city or county, street and number or place of residence within such county in which he claims residence. In my opinion it is the duty of the Electoral Board, acting upon this information, to ascertain the proper precinct to which the ballot should be distributed and to make distribution to such precinct.

ELECTIONS—Candidates; filing deadline for primary. F-100b (185)

February 2, 1953.

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

This is in reply to your letter of January 22, 1953, in which you inquire as to the last day on which a candidate may file in order to have his name appear on the ballot for the July 14 primary election. Under the provisions of Chapter 13.1 of the Code of Virginia, § 24-345.3, any candidate required to file a declaration of candidacy under the provisions of Chapter 14 of Title 24 must file as a candidate in a primary election at least ninety days before the primary in order to have his name appear on the ballot. This is true regardless of whether the candidacy is for an office to be filled by the voters of the State at large or of a district, county or city. The Statewide primary this year falls on July 14, therefore, the last day for filing the notice of candidacy is April 15, 1953, which is ninety days prior to July 14.

You also state that you have informed certain city officials that the ninety-day qualification period also applies to any primary that would be held for county or city offices and that any city that failed to meet the ninety-day provision would be unable to hold a primary. I am advised of no procedure whereby a primary could be held with blank ballots and, in those localities in which no candidate has filed for office prior to the ninety-day deadline, it would appear that the conclusion that you have reached is correct.
ELECTIONS—Candidates for Congress must file 60 days prior to date of general election. F-100f (23)

July 21, 1952.

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

This is in reply to your letter of July 15, 1952, from which I quote as follows:

"Section 24-130 of the Code provides that 'any person who intends to be candidate for any office, State or national, to be elected by the electors of the State at large or of a congressional district, shall, at least sixty days before the election if it be a general election, and at least thirty days before the election if it be a special election, or within five days after the issuance of any writ of election or order calling a special election to be held less than thirty-five days after the issuance of the writ or order, notify the State Board of Elections, in writing, attested by two witnesses, of his intention, designating the office for which he is candidate.' Under this section the notices of candidacy of all persons would have to be filed at least 60 days prior to the general election to be held on November 4, 1952.

"However, Chapter 509 of the New War Voters Law, Section 3, provides that 'during the effective period of this act, in order that ballots may be printed in ample time for the transmission of same to absent members of the armed forces overseas, and their return, all political parties desiring to nominate candidates for members of the General Assembly, Governor, Lieutenant Governor, Attorney General, and all county and city officers except mayor and councilmen, shall make and complete their nominations in the manner provided by law on or before the Tuesday after the second Monday in July next preceding the election for such offices unless a second primary be required in which event any party for which such second primary is required shall complete its nominations on the fifth Tuesday following the first primary, and for mayor and members of councils in cities on or before the first Tuesday in April next preceding such election, and the proper authorities of each political party shall certify the names of its candidates to the chairman of the electoral boards, if required, and to the Board not later than ten days after said day. All candidates for said offices other than party nominees shall file their notices of candidacy and petitions, if same are required by Chapter 8 of Title 24 of the Code of Virginia, within ten days after the Tuesday after the second Monday in July unless a second primary be required, in which event any such candidate shall file his notice of candidacy and petition within ten days following the day of such second primary, or within ten days after the first Tuesday in April, as the case may be, with the Board, and also with the clerk or other officer, when same is required by law.'"

In addition to § 24-130 of the Code and Chapter 509 of the Acts of 1952, which are referred to in your letter, I believe reference should also be made to §§ 24-132 and 24-134 of the Code which read as follows:

"Persons not announcing candidacy, etc., not to have names printed on ballots.—No person not announcing his candidacy as above, or who is not qualified to vote in the election in which he offers as a candidate, shall have his name printed on the ballots provided for the election, unless he be a party primary nominee."

"The name of any candidate for office who has been nominated by his party, either by convention, primary or by being declared the nominee of the party when no primary has been held, shall be certified by the chairman of the party to the State Board of Elections or the clerk or clerks of the
proper court or courts as the case may be, and no further notice of candidacy or petition shall be required." (Italics added)

From the foregoing it may be seen that there are two methods whereby a candidate for office at a general election may satisfy the requirements for having his name appear on the ballot; by notice of candidacy and petition or by being certified as a party nominee.

A careful reading of § 3 of Chapter 509 of the Acts of 1952 will reveal that, in so far as primary elections are concerned, it applies for any office filled by election by the voters of the State at large, or of a district, county or city. But with regard to general elections it appears to apply only to members of the General Assembly, Governor, Lieutenant Governor, Attorney General and all county and city officers. The Act does not mention district, state or national officers in regard to general elections. I am, therefore, forced to the conclusion that, with respect to candidates for the United States Senate and House of Representatives, the time for filing the notice of candidacy and petition for candidates who are not party nominees is fixed by § 24-130 of the Code as being at least sixty days before the election, which this year would mean that such filing must be done on or before September 5th. With respect to party nominees, it is my opinion that they should be certified as such by the proper party official on or before September 5th. It is my further opinion that a party nominee is not precluded from filing a notice of candidacy and petition, though such is not required, and, out of an abundance of precaution, I would recommend that even party nominees take such action on or before September 5th in order that they may be assured of having their names appear on the ballot in the event the party official, through some oversight, failed to certify them as party nominees.

ELECTIONS—Candidates' petitions; filing prerequisites for city council.
F-100b (224)

March 18, 1953.

HONORABLE WILLIS E. COHOON,
Member House of Delegates.

This is in reply to your letter of March 16, 1953, in which you inquire whether candidates for the City Council in the City of Suffolk are required by the provisions of § 24-345.3 of the Code of Virginia to file a petition and notice of candidacy with both the Clerk of the Circuit Court and the State Board of Elections.

The pertinent portion of § 24-345.3 reads as follows:

"All candidates for said offices other than party nominees shall file their notices of candidacy and petitions, if same are required by chapter 8 of this title, within ten days after the Tuesday after the second Monday in July unless a second primary be required, in which event any such candidate shall file his notice of candidacy and petition within ten days following the day of such second primary, or within ten days after the first Tuesday in April, as the case may be, with the Board, and also with the clerk or other officer, when same is required by law. The name of no candidate for any State or local office required by this section to be certified to the Board whose name is not so certified, or whose notice of candidacy, if the filing of such a notice is required by such chapter of the Code is not filed within the time required by this section, shall be printed on any official ballot for said election." (Italics added)
Chapter 8 of Title 24 provides in § 24-131 that a candidate for an office, such as that of which you inquire, shall file notice with the clerk of the court and § 24-133 provides that such candidate shall also file a petition.

It appears, therefore, that such candidates “are required by Chapter 8” of Title 24 to file such notice and petition. The provisions of the Charter of the City of Suffolk do not relieve candidates from such filing but instead substitute another procedure which is “deemed the equivalent” of such filing.

I understand that this construction has the effect of requiring duplicate notices and petitions; however, that appears to have been the intent of the General Assembly for all save party nominees. The purpose of this is to permit the State Board to prepare ballots in the event the locality fails to do so at least forty days prior to the election. (§ 24-345.4)

It is, therefore, my conclusion that candidates should complete their filing with both the Clerk and the State Board as provided in § 24-345.3

ELECTIONS—Capitation taxes; conviction does not exempt person from payment of. F-100c (243)

April 9, 1953.

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

You discussed with me on yesterday an inquiry submitted to you under date of April 2, 1953, from Honorable J. T. Martz, Clerk of the Circuit Court for Loudoun County. The facts set forth by Mr. Martz are substantially as follows:

A candidate for a town council was convicted of embezzlement some years ago and is now in the process of having his voting rights restored by the Governor. The question is whether or not he is relieved from the payment of the capitation tax by virtue of the disfranchisement under the terms of section 23 of the Virginia Constitution.

The capitation tax is levied pursuant to the provisions of section 58-49 of the Code on every resident of the State not less than twenty-one years of age, with an exception not here material. In the absence of a specific exemption granted to a person disfranchised by reason of conviction, he is assessable with the capitation tax the same as any other resident of the State. As you know, the capitation tax as provided for in section 173 of the Constitution is independent of the exercise of the elective franchise.

It is my opinion, therefore, that the individual under consideration, if a resident of the State for the three years next preceding that in which he offers to vote, would be required to pay the tax for the entire period. Restoration of his rights by action of the Governor would not, in my opinion, relieve this obligation.

Section 24-132 of the Code provides, in substance, that a candidate who is not qualified to vote in the election in which he offers as a candidate shall not have his name printed on the ballot provided for the election.

It would seem to be the duty of the clerk, upon receipt of the notices of candidacy required by law, to notify the secretary of the local electoral board, as required by section 24-135, and that it would be within the prerogative of the electoral board to determine the qualification of the candidate, as this body is charged with the responsibility of printing the ballots.
ELECTIONS—Capitation tax; not required of person becoming of age after January 1 of present year. F-100c (2)

July 1, 1952.

HONORABLE HUGH H. KERR,
General Registrar, Staunton.

This will acknowledge receipt of your letter of June 30, from which I quote as follows:

"John Doe, Jr., became twenty-one years of age January 10, 1952 and applied for registration on June 10, 1952. What year's poll taxes should he be required to pay?"

It is my opinion that a person becoming of age in 1952, and after January 1 of that year, is entitled to register and vote without paying any capitation tax. No capitation taxes are assessed or assessable against him for any of the three years next preceding the year in which he offers to vote.

Section 20 of the Constitution provides that, if a person become of age at such time that no poll tax shall have been assessable against him for the year preceding the year in which he offers to register; has paid one dollar and fifty cents in satisfaction of the first year's poll tax assessable against him, and if his other qualifications are present, he is entitled to register. There is no tax assessed or assessable at this time against a person who becomes of age during the year 1952 and after January of that year.

ELECTIONS—Capitation tax; payment deadline of voter becoming of age. F-100c (30)

July 30, 1952.

HONORABLE G. W. MITCHELL, Treasurer,
Culpeper County.

This is in reply to your letter of July 17, 1952, from which I quote as follows:

"Can a person who was twenty-one years of age in August 1951 pay their capitation tax now and qualify for the November 1952 election?"

I am enclosing a copy of an opinion of this office rendered on December 19, 1949, to Miss Hazeltine M. Settle, General Registrar for Roanoke, Virginia, in which it was held that a person becoming of age during a particular year might register during that year without the payment of any taxes, but that if such person does not register until the following year he will have to pay his capitation tax for that latter year in order to register.

From this opinion it can be seen that by the payment of his 1952 capitation tax a person who became twenty-one years of age in August, 1951, may become eligible to register and such registration may be done at any time prior to the closing of the registration books. The further question arises as to whether such person would be entitled to vote since it is now too late to pay such taxes six months prior to the election, as required under § 21 of the Constitution. However, it should be observed that § 21 of the Constitution does not deal with the poll taxes assessed or assessable during the year in which a person offers to vote but is confined to the taxes assessed or assessable during the three years next preceding that in which he offers to vote.

It is, therefore, my opinion that the person described in your letter may pay his 1952 capitation tax, register and qualify to vote in the November 1952 election.
ELECTIONS—Capitation taxes; treasurer can not refuse to accept.
F-100c (242)

April 7, 1953.

HONORABLE A. C. FULLER, JR.,
Treasurer of Russell County.

I have your letter of April 2, from which I quote as follows:

"I enclose herewith a blank form which is being distributed in Russell County by a political party to accompany the remittance of poll tax.

"I would like for you to advise me whether I have the authority to refuse to qualify a voter whose poll tax is remitted by the use of one of these forms in cases where I have reason to believe, that the tax being remitted is not being paid by the individual voter but from the funds of a political party."

The form which you enclose is nothing more than a letter of transmittal enclosing the amount of the capitation tax and signed by the tax payer.

I assume that your inquiry is made in view of the provisions of § 24-129 of the Code, making it unlawful for any person to pay or to offer to pay the State poll tax of another under such circumstances as to show or indicate a purpose of intent to have the name of such other person placed upon the treasurer's list. The section goes on to make it the duty of the treasurer, to whom such payment is made, to report the fact of such payment and the circumstances relating thereto to the Commonwealth's Attorney. The section does not make it the duty, or even authorize the treasurer to refuse, to accept the payment, even though he may believe it to be made contrary to the provisions of the section. My advice is, therefore, that you should accept the payment and report the matter to the Commonwealth's Attorney if you believe the circumstances under which the payment is made are such as to justify such a report under the provisions of § 24-129.

ELECTIONS—Changing election districts; thirty days notice to be given.
F-100 (279)

May 29, 1953.

HONORABLE EDMUND W. HENING, JR.,
Commonwealth's Attorney for Henrico County.

This is in reply to your letter of May 18, 1953, from which I quote, in part, as follows:

"Your opinion is respectfully requested therefore, on the question of whether or not Section 24-51 of the Code of Virginia of 1950 requires the Court's order creating the changes under this Title to be posted for any length of time other than a reasonable time where such changes are made in advance of a primary election instead of a general election."

Section 24-51 of the Code provides:

"No change shall be made in the name of any election district, or in any of the boundaries or voting places, within thirty days next preceding any general election, nor until notice has been posted for thirty days at the front door of the courthouse and at each voting place in each election district to be affected by the change."

It is my opinion that the last portion of this section, that specifying that notice is to be posted for thirty days before a change is to be effective, applies in all
instances, regardless of whether it be before a primary or general election. This section does not require that a court order be posted for thirty days before the change becomes effective; however, it does require notice of the change to be posted thirty days. If an order were entered making these changes in election districts without the thirty days' prior notice, then, it is my opinion that notice or a copy of the order would have to be posted at least thirty days before the order making the changes could be effective.

ELECTIONS—Congressional contest; state has no applicable recount provisions. F-100 (140)

December 5, 1952.

HONORABLE JOHN A. K. DONOVAN,
State Senate.

This will acknowledge receipt of your letter of December 5, from which I quote as follows:

"You are no doubt familiar with the fact that we recently had a Congressional race in the Tenth District, which was closely fought and narrowly won. I understand that a Congressional committee is interested in looking into the returns of this election from the standpoint of the credentials of its members.

"I understand further, however, that the federal mechanism is not available at any time when state laws can properly operate in the matter. Therefore, it is most important that I have from you at the earliest possible moment an opinion as to whether or not, after a Congressional candidate has been certified a winner, there are any State statutes which would enable either candidate to call for a recount."

Also on this date I received a request from Honorable Hale Boggs, Member of Congress from the State of Louisiana, and Chairman Special Committee to Investigate Campaign Expenditures, for an opinion relative to this subject. Inasmuch as under Virginia law I am not permitted to give Congressman Boggs an official opinion, I am taking the liberty of sending to him a copy of my reply to you.

A careful examination of the Virginia statutes relative to the recount of votes and contest of elections reveal that we have no statute applicable to the recount of votes or the contest of an election conducted in Virginia for the selection of members of the United States House of Representatives. It is my view, therefore, that after a Congressional candidate has been certified a winner there is no machinery provided in Virginia which would enable either candidate to call for a recount.

The statutes dealing with the subject of contested elections (section 24-419, 24-439, Code of Virginia) relate to candidates for the General Assembly, Governor, Lieutenant Governor and Attorney General, as well as to county, corporation and district officers. The term "district officers" does not apply to candidates for the Congress of the United States.

The reason why the General Assembly of Virginia never enacted legislation on this subject is to be found in Article I, section 5, of the United States Constitution which provides in part: "Each House shall be the judge of the elections, returns, and qualifications of its own members * * *."
ELECTIONS—Electoral boards; compensation; limits and expenses.
F-100g (167)

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

This is in reply to your letter of December 12, 1952 in which you question whether the Secretary and other members of the Electoral Board of Rockingham County may receive more compensation than the statutory limit of One Hundred and Fifty Dollars per year. Section 24-37 of the Code of Virginia provides:

"The secretary of the electoral board shall receive from the county, city or town for each day of actual service the sum of ten dollars. Each other member of the electoral board shall receive from the county, city or town, respectively, for each day of actual service the sum of seven dollars and fifty cents, and the same mileage as is now paid to jurors; provided that no member of such board shall receive from the county, city or town, respectively, more than one hundred fifty dollars in any one year, exclusive of mileage, and provided further that in any county adjoining any county having a density of population of one thousand or more a square mile each member of the board shall receive for each day of actual services the sum of ten dollars, and may receive as much as but not in excess of three hundred dollars in any one year, exclusive of mileage; provided that in any county having a population in excess of two thousand inhabitants per square mile and in any county adjoining a city lying wholly in the State and having a population of more than one hundred ninety thousand each member of the board shall receive for each day of actual services the sum of ten dollars and may receive as much as, but not in excess of, three hundred dollars in any one year, exclusive of mileage; and provided further that in the event one or more special elections be held in any county, city or town in any year, the members of the electoral board shall be paid additional amounts at the same per diem, and mileage."

The very last portion of this section states "in the event one or more special elections be held in any county, city or town in any year". This very explicitly refers to any and all of the counties in the Commonwealth and not only the class of more densely populated cities and counties. Therefore, if the Secretary or other members of the Electoral Board had received per diem compensation totaling in one year the amount of the statutory limits for services rendered for regular elections, then they would be entitled to additional per diem compensation, over and above the statutory limitations, for each day of service performed in regard to special elections.

You mentioned primary elections in connection with special elections. In as much as primary elections are not regarded as special elections within the meaning of the election laws, I do not believe it would be permissible under this statute to allow any extra compensation on account of such elections. Primary elections are regularly held at the days prescribed by statute and I do not believe they can be classified as special elections. Section 24-137 of the Code of Virginia defines special elections as follows:

"Special elections shall be deemed to be such as are held in pursuance of a special law, and also such as are held to supply vacancies in any office, whether the same to be filled by the qualified voters of the state or of any county, city, town, magisterial district, or ward, and the same may be held at such time as may be designated by such special law or the proper officer duly authorized to order such election."

Our laws providing for the holding of primary elections are not special but general laws.
In answer to your second question, "Does the three hundred dollar expense allowance (of the Secretary of the Electoral Board) include mileage, or is mileage additional?" I refer you to section 24-38 of the Code of Virginia, which provides:

"The Secretary of the board shall in addition to the per diem provided for in the preceding section be allowed his expenses not to exceed three hundred dollars in any one year."

The statute says "in addition to the per diem provided for"; it does not say in addition to per diem and mileage; therefore, we must conclude the intention of the statute to be that mileage is to be included within the three hundred dollars expenses provision.

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**ELECTIONS—Electoral boards; members entitled to additional compensation for certain duties. F-100g (39)**

August 5, 1952.

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

This is in reply to your letter of August 1, 1952, in which you inquire whether the secretary of the electoral board who meets with the board for official business on a specified day and who, after the board meeting is concluded, stays on to see that the ballots are properly printed and the law relative thereto strictly complied with, as provided under § 24-219, is entitled to receive the sum of $10.00 for a day's service as secretary of the electoral board and also $6.00 for the faithful discharge of his duty relative to the printing of the ballots. You also ask a similar question with reference to a member of the board who attends a meeting and later on the same day performs the duty of sealing the ballots as required by § 24-225.

Sections 24-219 and 24-225 both contemplate that a member of the board may be designated to perform the respective duties required by such sections and, in each case, it is provided that such person shall receive compensation of $6.00 for the faithful discharge of that particular duty. It is therefore, my opinion that, in those cases where that particular service is rendered on the same day that the member or secretary of the board performs the services required of him as a member of the board or secretary of the board, he is entitled to receive the specified compensation for each service performed. I am returning the letter addressed to you by the Honorable Charles H. Ross as requested.

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**ELECTIONS—Electoral board; member may be presidential elector. F-100g (25)**

July 23, 1952.

HONORABLE EDWARD MCC. WILLIAMS, Attorney for the Commonwealth for Clarke County.

This is in reply to your letter of July 14, 1952, from which I quote as follows:

"Please be kind enough to advise me whether or not the chairman of the county electoral board may properly continue in office and have his name appear on the ballot in the presidential election as an elector."
"It has been noted that the electors for the several presidential nominees appear on the ballot in one single block and are voted for together."

I am aware of no provision of law which would prevent the name of such person appearing on the ballot as an elector. The further question which arises is whether acceptance of the office of elector would *ipso facto* vacate the office of chairman of the county electoral board.

On May 27, 1947, in an opinion to the Secretary of the State Board of Elections, the former Attorney General, the late Honorable Abram P. Staples, dealt with the problem of whether acceptance of another office operates to vacate the office of members of the electoral board. I quote his letter as follows:

"Section 84 of the Code provides for the appointment of members of the electoral board, and contains this provision:

'No person, nor the deputy of any person, holding any office or post of profit or emolument under the United States government, or who is in the employment of such government, or holding any elective office of profit or trust in the State, or in any county, city, or town thereof, shall be appointed a member of the electoral board or a registrar or judge of election.'

"In Section 86 of the Code relating to the appointment of registrars there is a provision to the effect that the acceptance by a registrar of any other office, either elective or appointive, except that of precinct judge of election, during his term of office shall *ipso facto* vacate the office of registrar.

"In Section 84, there is no provision that the acceptance of an office or post of profit or emolument under the United States Government will *ipso facto* vacate the office. The prohibition in section 84 seems to be limited to the appointment of a person already holding such an office or post, and I do not believe it can be said that the acceptance of such a post during the term of office would necessarily vacate same."

I am in accord with that opinion and believe that the principles there expressed are controlling in the instant case.

ELECTIONS—Electoral board: mileage for secretary; allowable expense. F-114 (202)

March 3, 1953.

HONORABLE GEORGE HINSON PARKER, JR.,
Commonwealth's Attorney for Southampton County.

This is in reply to your inquiry of February 24, 1953, in which you ask for an interpretation of § 24-37 of the Code of Virginia, as amended by Chapter 540 of the Acts of Assembly of 1952, in regard to the payment of mileage to the Secretary of the Electoral Board. It would appear that you are correct in your construction of § 24-37 as amended that it does not allow mileage to the Secretary of the Board; however, § 24-38 of the Code of Virginia provides as follows:

"The secretary of the board shall in addition to the per diem provided for in the preceding section be allowed his expenses not to exceed three hundred dollars in any one year."

It is my opinion that this section of the Code is broad enough to allow mileage to be paid to the Secretary of the Board, such payment for mileage to be included within the $300.00 limitation provided by § 24-38.
September 26, 1952.

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

This will acknowledge receipt of your letter of September 26, 1952, propounding certain inquiries relative to the special election to be held on November 4, 1952, to fill the vacancy for the unexpired term in the office of Lieutenant Governor of Virginia.

Candidates for this office subject to the November election must comply with the provisions of Chapter 8, section 24-130, et seq., of the Code of Virginia. Those candidates who are not the nominees of a political party must notify the State Board of Elections, in writing, attested by two witnesses, of his intention to become a candidate for this office. Such notice shall be signed by the candidate as required by law. In addition to this notification, candidates who are not party nominees shall file along with their notice of candidacy a petition signed by two hundred and fifty qualified voters of the State at large, as provided by section 24-133.

Any candidate who has been nominated by his party shall be certified to the State Board of Elections by the chairman of such party. This certification by the party chairman dispenses with the requirements of the notice provided for under section 24-130, and the petition of qualified voters required under section 24-133.

Thirty days before the November 4 election falls on October 5, which is Sunday. This office has consistently ruled through the years that in such event the last filing date is the day immediately preceding Sunday, or in this case Saturday, October 4, 1952.

As pointed out in my memorandum to Governor Battle, there is no authority vested in anyone to issue a writ of election in this instance, for the reason that the office and function of the writ has been dispensed with by the mandatory requirements of section 24-152, which section fixes the day of the election and designates the vacancy.

Immediately after the time for the filing of the notices and petitions required by law, it becomes the duty of the State Board of Elections to notify the secretary of each electoral board of each county and city of the State, and to certify to said boards the name of each and every candidate which has been duly filed so that the official ballot may be prepared in accordance with law.

Since this is a special election, the name or names of such candidate or candidates for the office of Lieutenant Governor should appear on an official ballot separate from any other ballot or ballots which may be used in the election of November 4.

Section 121 of the Code of 1919 provided only that the President Pro Tempore of the Senate should discharge the duties of Lieutenant Governor when a vacancy occurred in that office. No provision was made therein for filling the vacancy. However, in 1942 the General Assembly amended section 121 by adding a sentence which reads as follows:
"If there shall be a general election held during the unexpired portion of the term of such Lieutenant Governor, the vacancy shall be filled at such general election." (Emphasis added).

The above mentioned section is now found as section 24-152 of the Code of 1950 and it is my opinion that the last sentence thereof, which is quoted above, is self-executing. Therefore, no action is necessary on the part of the Governor.

Section 24-137 of the Code defines special elections as those "as are held in pursuance of a special law, and also such as are held to supply vacancies in any office". Therefore, it is clear that an election to fill the vacancy in the office of Lieutenant Governor is a special election.

I am aware of the fact that the General Assembly has provided in certain instances for a writ of election to issue before a special election. However, it is my opinion that the issuance of such a writ is not a necessary or constitutional prerequisite in so far as this election is concerned. The purpose of a writ of election is to designate the office to be filled and the time when an election is to be held. The General Assembly has accomplished this and has ordered the election in question by enacting the last sentence of section 24-152 which, in effect, states that the vacancy now existing in the office of Lieutenant Governor must be filled at an election to be held on November 4 of this year.

For your information and guidance I call your attention to some of the pertinent statutes which must be followed in holding the election to fill the vacancy in the office of Lieutenant Governor. First of all, this election must be held in accordance with the provisions of section 24-140 of the Code, the pertinent part of which reads as follows:

“All special elections, and all elections to fill vacancies in office, shall be superintended and held, notice thereof given, returns made and certified, votes canvassed, results ascertained and made known, and commissions and certificates of election given, by the same officers, under the same penalties, and subject to the same regulations as prescribed for general elections, * *.”

As to the candidates, section 24-130 of the Code is applicable and requires notice to the State Board of Elections at least thirty days before the election in question. If the candidate be a party nominee he himself does not have to give the notice, but the chairman of the party must certify his name to the State Board of Elections in accordance with section 24-134 of the Code.

Section 24-135 of the Code is also pertinent. It requires the State Board of Elections to certify the names of the candidates from whom notices have been duly received to the secretaries of the proper electoral boards.

As already noted, all statutes pertinent to conducting general elections are applicable to the election to fill the vacancy in the office of Lieutenant Governor and I have not attempted to mention all of them in this Memorandum. I only wish to indicate that the General Assembly has provided ample machinery for this election.

ELECTIONS—Polls closing; persons in line at time. F-100 (95)

HONORABLE LEWIS H. VADEn, Clerk,
Circuit Court of Chesterfield County.

This is in reply to your letter of October 15, 1952, in which you request my opinion as to whether persons who are standing in line awaiting an opportunity to vote when the time is reached for the closing of the polls should be permitted to vote.
Sections 24-182 and 24-183 of the Code of 1952 control the time for the opening and closing of the polling place. Both of these sections provide that "the judges of the election shall ascertain and make a list by name of the qualified voters if any in line before the polling place at the hour of closing, and shall permit such voters and no others to cast their ballots." From the quoted language you can see that the answer to your question must be in the affirmative, and that those persons actually in line and awaiting an opportunity to vote should be given such opportunity. While the statutes do not provide the exact procedure to be followed by the judges of election in ascertaining the names of the persons in line, I am advised that election officials generally follow the practice of going to the far end of the line and making their list, starting with the last person in line and working up to the first person in line. In this way they are able to prevent other persons from going into line after the hour for closing the polls has arrived.

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ELECTIONS—Primaries; eligibility to participate; must have voted for nominees of party. F-100 (248)

HONORABLE ROBERT WHITEHEAD,
Member House of Delegates.

This is in reply to your recent letter in connection with my opinion of April 24, 1948 to the effect that presidential electors are not "nominees" of the party within the meaning of Chapter 14 of Title 24 of the Code.

Specifically you ask seven hypothetical questions directed at those citizens who "did not vote the straight party ticket" at the last general election, and request my opinion as to whether or not such citizens are rendered ineligible to vote in the Democratic primary election to be held on July 14, 1953.

You are quite correct in understanding that I held, in the opinion to which you refer, that an individual who votes for Republican presidential electors is not thereby rendered ineligible to participate in the next Democratic primary. Therefore, how a person voted for presidential electors is not material in determining his right to participate in a primary. With this in mind I feel that all of your questions may be answered by examining section 24-367 of the Code, the pertinent part of which reads as follows:

"No person shall be permitted to vote for the candidates of any party in any primary unless such person is a member of such party and in the last preceding general election, in which such person participated, he or she voted for the nominees of such party; and, upon challenge, such person shall declare on oath that he or she is a member of such party and supported such nominees as hereinbefore required before being permitted to vote."

It is clear that the above quoted language refers to those who have been nominated by a political party for congressional, state and local offices and, to my knowledge, no one has ever urged a contrary view.
ELECTIONS—Primaries; petitions; number of signers for General Assembly. F-100b (195)  
February 24, 1953.

HONORABLE FELIX E. EDMUNDS,  
Member House of Delegates.

This is in reply to your letter of February 20, 1953, from which I quote as follows:

"The last sentence of Section 24-373 1952 Supplement to the Code of Virginia as published by Michie, reads as follows:

'The name of any candidate for the General Assembly, or for any city or county office shall not be printed upon any official ballot used at any Primary unless he filed, along with his declaration of candidacy, a petition therefor signed by fifty qualified voters of his district, city or county witnessed as aforesaid and with like affidavit attached thereto.'

"Please advise if in your opinion a candidate for a seat in the General Assembly could qualify upon the filing of a petition of fifty qualified voters of his district, where the district is composed of say two cities and one county or two counties and two cities."

As you point out in your letter, § 24-373 has been amended by the addition of the word "district" and, in my opinion, a candidate for the General Assembly may qualify, in so far as his petition is concerned, by filing a petition signed by fifty qualified voters of his district regardless of the number of political subdivisions included in the district.

ELECTIONS—Registrar may serve as precinct judge or clerk. F-249 (276)  
May 26, 1953.

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

Pursuant to your telephone call on yesterday I have given consideration to your question as to whether or not a registrar may lawfully serve as a precinct election clerk.

Section 24-52 provides that the “registrar shall not hold any other office, by election or appointment, during his term, except that of precinct judge of election.”

Section 24-53 provides, in part, that “The acceptance of any other office either elective or appointive by such registrar, except that of precinct judge of election, during his term of office shall, ipso facto, vacate the office of registrar.”

Since a registrar may lawfully serve as a precinct judge of election, and since the functions of a judge of an election and a clerk are so closely interrelated in the discharge of similar functions, it is my opinion that a registrar may be lawfully appointed either as a judge or clerk of an election. If a fine line were to be drawn, it might be logically stated that any incompatibility would apply more to the registrar serving as judge than as clerk.

It seems clear to me that in making the exception set forth in section 24-52 it was clearly the intention of the Legislature to embrace clerks as well as judges, inasmuch as a judge may administer the oath to the clerk, and the same oath is prescribed for a judge and clerk by section 24-199.
ELECTIONS—Registration books; removing names of persons who have left precinct. F-100 (141) December 9, 1952.

HONORABLE WM. M. MCCLENNY,
Commonwealth's Attorney for Amherst County.

I have your letter of December 3 relative to the purging of registration books. You ask:

"Should the respective Registrars strike from their registration books anyone who has moved from their precinct and established residence elsewhere in the County or State of Virginia, as being improperly on their registration books?"

Section 24-97 of the Code provides that:

"When such books are directed to be purged, it shall be the duty of the registrar within ten days previous to either of the regular days of registration, to post printed notices at not less than three places in the district, including the voting place therein, of the names of all persons who, in the judgment of the registrar, or those who may be alleged by any three qualified voters of the election district, to be improperly on the registration books of that district. The notice shall be signed by the registrar."

Section 24-98 also provides in part:

"On the regular day of registration, the registrar shall hear the testimony produced for or against the right of the persons, named in the notice, to be retained on the registration books, and if he be satisfied that any person mentioned in the notice has removed from the election district, has died, or for any other reason is not entitled to be on the registration books of the district, he shall strike his name from the registration books. * * *

Under the authority of the latter section I am of opinion that the registrar may strike from the registration books the name of any person mentioned in the notice who has removed from the election district. You will observe that Section 24-99 affords to any person whose name is stricken from the registration books the right of appeal from the action of the registrar. I think it proper to say, however, that I think a registrar should exercise extreme caution in removing a person's name from the registration books on the ground that he has removed from the election district. As you know, legal residence or domicile controls in determining the right of a person to vote and it frequently happens that a person may be temporarily physically residing outside of his election district, but still maintaining his domicile in such district.

ELECTIONS—Registration; local residence requirements. F-100d (89) October 8, 1952.

MISS HAZELTINE M. SETTLE,
Central Registrar, Roanoke.

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

"I know you are getting many inquiries but I am taking the liberty of asking you to assure me that I am right on one matter.

"Recently we had many people coming to the office to register who
had lived in the County less than six months and who had failed to register in the City before they moved to the County. They could not register in the County on account of the law that says one must be a resident of the City or County six months prior to an election and they could not register in the City because they were not residents of the City.

"In one case I refused a person and she came the next day and applied to the assistant in the office, giving a Roanoke address. Since I know she has lived in the County since May 20, 1952, would I be right in not accepting the application to register?"

As to the persons mentioned in the second paragraph of your letter, of course, they may not register in Roanoke City, since they are not residents of the City.

The last paragraph of your letter presents a question of fact. If the person applying to you for registration, pursuant to Section 24-67 of the Code, states that he or she has been a resident of the State for one year and of the City for six months, I think you would be justified in registering him or her. However, if you are satisfied that the statements as to residence are not correct, then, pursuant to Section 24-69 of the Code, you may require the applicant to answer such questions as you may propound relating to residence. If after considering the answers to the questions asked you believe that the applicant does not possess the requisite residential qualifications, you may refuse registration and, pursuant to Section 24-12 of the Code, the applicant has the right of appeal from your action.

ELECTIONS—Registration; member of armed forces establishing domicile here entitled to. F-100d (228)

March 20, 1953.

HONORABLE B. D. PEACHY,
Commonwealth's Attorney, Williamsburg.

I have your letter of March 19, in which you present the following question:

"A member of the armed forces stationed at Fort Eustis resides in James City County and has been an actual resident of the said County for more than twelve months. He owns his home and has been assessed and paid capitation and property taxes for the years 1951-52. He claims James City as his domicile and residence. I have advised the Registrar that he is entitled to registration for the purpose of voting, but the Registrar states that he will not accept this ruling and will not register anyone in the armed services, which, of course, I know is absolutely absurd. Therefore, I will appreciate it if you will give me your ruling on this question."

I am in thorough accord with the advice you have given the Registrar. While it is true that the fact that a member of the armed services is stationed in Virginia, standing alone, does not establish such person's domicile in Virginia, yet, when the facts are as stated by you, namely, actual residence in Virginia accompanied by the intention of establishing his domicile here, registration is clearly permissible provided, of course, the other statutory requirements are met. There is, of course, no merit to the view that membership in one of the armed services deprives a person of the right to register and vote.
ELECTIONS—School bond referendum; who is eligible to vote.  
F-100 (234)

April 1, 1953.

HONORABLE W. H. ELLIFRITS, Clerk,  
Shenandoah County Circuit Court.

This is in reply to your letter of March 24 concerning the special election  
to be held in Shenandoah County on May 19, 1953 on the question of whether or  
ot county bonds shall be issued for public school construction. You ask who  
is qualified to vote in this election, in regard to payment of poll taxes and  
registration.

Section 24-22 of the Code of Virginia contains the following provision:

"The qualifications of voters at any special election shall be such as are  
hereinbefore prescribed for voters at general elections, but at any such  
special election, held before the second Tuesday in June in any year, any  
person shall be qualified to vote who was so qualified at the last preceding  
regular November election, or who is otherwise qualified to vote, and has  
personally paid, at least six months prior to the second Tuesday in June of  
that year, all State poll taxes assessed or assessable against him during  
the three years next preceding that in which such special election is  
held, * * *.

Since your special election is to be held before the second Tuesday  
in June, i.e., May 19, anyone who paid his poll tax on or before December 9, 1952  
has met the poll tax qualifications. As to the registration requirements, they are  
the same as for a general election. Section 24-17 of the Code reads as follows:

"Every citizen of the United States twenty-one years of age, who has  
been a resident of the State one year, of the county, city or town, six  
months, and of the precinct in which he offers to vote thirty days next  
predicting the election, in which he offers to vote, has been duly registered,  
and has paid his State poll taxes, as required by law, and is otherwise  
qualified, under the Constitution and laws of this State, shall be entitled  
to vote for members of the General Assembly and all officers elective by the  
people. Removal from one precinct to another in the same county, city  
or town, shall not deprive any person of his right to vote in the precinct  
from which he has moved, until the expiration of thirty days from such  
removal."

ELECTIONS—Servicemen; residence requirements; definition of state of  
war.  F-100h (107)

October 28, 1952.

HONORABLE LOUIS LEE GUY,  
Member House of Delegates.

This is in reply to your letter of October 23, 1952, in which you request my  
opinion on several questions regarding the status of members of the armed forces  
of the United States stationed in and near Norfolk.

I shall not attempt to answer each question individually, but rather shall  
set forth the general principles which I believe will govern all of these questions.

You first inquire whether the United States at present is "in time of war"  
within the meaning of § 24-23.1 of the Code Virginia. I have recently had  
called to my attention the President's Proclamation No. 2974, dated April 28,  
1952, which indicates that all treaties necessary to end World War II have been
concluded. As of this date I have been unable to verify the fact that all of the states of war arising out of World War II have been terminated but, assuming that all such wars have been terminated, there remains the question of whether the present struggle in Korea is such as to place this nation in a state of war for the purpose of our constitutional provisions regarding the registration of voters and payment of capitation taxes. In my opinion, the nation is now "in time of war" within the meaning of these constitutional provisions and within the meaning of § 24-23.1 of the Code of Virginia. The obvious purpose of the constitutional provisions and the legislation referred to is to enable members of our armed forces, who are rendering military service to the nation under such conditions as to make it difficult or impossible for them to comply with all of the requirements for voting, to exercise the privilege of the elective process.

There is abundant authority, both in the texts and in the decisions of the courts of this nation, to the effect that a state of war does not necessarily require a formal declaration of war. In 56 American Jurisprudence, War, § 4, we find the following statement:

"Every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If war is formally declared it is called 'solemn' war and is of the perfect kind; all the members of the nation declaring war are authorized to commit hostilities against all the members of the other, in every place and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition. But hostilities may subsist between two nations, more confined in nature and extent, being limited as to places, persons, and things; and this is more properly termed 'imperfect' war, because not solemn, and because those who are authorized to commit hostilities act under special authority, and can go farther than to the extent of their commission. Still, however, it is a public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, although all the members are not authorized to commit hostilities as in a solemn war where the government restraints the general power. ** * * * ."

A federal district court in New York has defined war as hostile contentions by means of armed forces, carried on between nations, states, or rulers or between parties in the same nation or state. Vattel says "war is a state in which a nation procures its rights by force of arms." The battle at San Ygnacio between the United States troops and expeditionary forces of Mexico, in which soldiers were killed, wounded and captured, was ruled by the Supreme Court of Texas to constitute a state of war, though an incomplete state.

I am fully aware of the fact that there has been no declaration of war with respect to the Korean struggle, and I realize that such declaration is necessary in order to bring into play many of the legal aspects of war. Such a declaration is not necessary, however, in order for the conditions existing in Korea to constitute a war in the sense which I believe the people of this State had in mind when they liberalized the voting requirements for men in the armed service. A formal declaration of war would neither add to nor detract from the difficulties confronting the members of the armed forces in exercising their right to vote. Our Court has said time and again that our laws should be liberally construed in order that the right to vote should not be denied the citizens, and that that right should not be defeated by a mere formality. It is my considered opinion that, to declare the constitutional provisions relative to voting by members of the armed forces in time of war and the provisions of § 24-23.1 inoperative, merely because there has been no formal declaration of war, would be denying the right to vote to thousands of our young men merely because of a formality, and, therefore, I conclude that we are "in time of war" in a very real sense, and certainly in the sense intended by our constitutional and statutory provisions referred to.
With respect to the residence of members of the armed forces stationed in and near Norfolk, I call your attention to § 24-19 of the Code of Virginia, which reads as follows:

"No officer, soldier, seaman or marine of the United States army or navy, shall be deemed to have gained a residence as to the right of suffrage in the State, or in any county, city or town thereof, by reason of his being stationed therein."

In my opinion that section should be construed to mean that a member of the armed forces claiming the right to vote in Virginia must be able to establish the fact that he is a bona fide resident of Virginia without regard to his being stationed within this State. In other words, I do not think that this section means that a serviceman shall be unable to establish residence in Virginia while stationed here, but I do feel that he must have in fact established a bona fide residence in this State and must be able to prove that residence by the existence of conditions other than residence on a military or naval post.

You finally inquire whether if a member of the armed forces files an affidavit certifying that he is a citizen of Virginia and a resident of a particular city or county, he will not make himself liable to the assessment for the appropriate taxes to the Commonwealth of Virginia and of the particular city or county. In my opinion the liability of any person for taxes, if dependent upon residence, would depend upon whether such person is in fact a resident and if the member of the armed forces in good faith filed such affidavit but was not in fact a resident of Virginia, I doubt that he could then be "estopped" from denying such residence, since, in the final analysis, the determination of whether one is a resident is a legal determination based upon facts rather than a purely factual question.

ELECTIONS—Time for filing candidacy; candidates nominated by convention. F-100b (305)

June 30, 1953.

HONORABLE VERNOY B. TATE, Secretary,
Wise County Electoral Board.

This is in reply to your letter of June 29, 1953, from which I quote as follows:

"In Wise County all candidates are nominated by the Convention methods, and I am writing to request some clarification as the date notices of candidacy must be filed in the Clerk's Office of this County for the candidate for the House of Delegates.

"Chapter 509 of Acts 1952 provides that such notices must be filed under some circumstances 90 days prior to the date of the Election, and Section 24-131 of the Code provides 60 days prior thereto.

"Do the provisions of Chapter 509 of the Code of Virginia, enacted in 1952, require that all candidates for the House of Delegates and State Senate be filed 90 days prior thereto or prior to the date of the election in November, 1953?

"Also, I wish you would please advise if the provisions of Chapter 509 of 1952 apply to candidates in the general election nominated by conventions."

Chapter 509 of the Acts of Assembly of 1952, which is codified as Chapter 13.1 of Title 24 of the Code of Virginia, provides in § 3 thereof as follows:

"During the effective period of this act, in order that ballots may be printed in ample time for the transmission of the same to absent members
of the armed forces overseas, and their return, all political parties desiring to nominate candidates for members of the General Assembly, Governor, Lieutenant Governor, Attorney General, and all county and city officers except mayor and councilman, shall make and complete their nominations in the manner provided by law on or before the Tuesday after the second Monday in July next preceding the election for such offices unless a second primary is required in which event any party for which such second primary is required shall complete its nominations on the fifth Tuesday following the first primary, and for mayor and members of councils in cities on or before the first Tuesday in April next preceding such election, and the proper authorities of each political party shall certify the names of its candidates to the chairman of the electoral boards, if required, and to the Board not later than ten days after said day. (Italics supplied)

Section 12 of the Act provides "All acts or parts of acts inconsistent with this act are, during the effective period of this act, with respect to the elections mentioned in this act, suspended to the extent of such inconsistencies, * * * ." In my opinion any party desiring to nominate candidates for the November election must comply with the provisions of the Chapter 509, and, in my opinion, the provisions of the Act are applicable to candidates in the general election nominated by conventions where such persons are candidates for office embraced by the provisions of the Act. The provisions of § 12 which I have quoted makes it apparent that the provisions of Chapter 509 supersede those of § 24-131 of the Code.

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ELECTIONS—Veterans must register if discharged more than 30 days prior to election. F-100h (3)

HONORABLE PHILIP P. BURKS,
Treasurer, Bedford.

This will acknowledge receipt of your letter of June 30, from which I quote as follows:

"Does the law of Virginia permit a veteran of the armed forces of the United States to vote in the Primary on July 15, 1952, when the said veteran was honorably discharged on May 15, 1952; he will be 21 years of age on July 2, 1952, and the said veteran has not registered?"

Section 1 of Article XVII of the Constitution provides, in substance, that no member of the armed forces, while in active service in time of war, shall be required to pay a poll tax or to register as a prerequisite to the right to vote.

While a person honorably discharged is exempt from the payment of the poll tax for any part of the year in which he was in active service, yet, he is not relieved from the prerequisite of registering after his discharge. You will note from section 1 of Article XVII that relief from the requirement to pay a poll tax or to register applies only while in active service.

Section 3 of this Article provides that a person who is exempt from the payment of poll taxes shall be entitled to vote, provided he shall have registered or is exempted from registering by the provisions of this Article.

The veteran in this instance was discharged on May 15, 1952. It is my opinion that in order to vote he must have complied with the prerequisite of registering. Had he been discharged on a date within thirty days of the election, when the registration books were closed, I am inclined to the view that he would be entitled to vote without registration.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—War Voters Act; does not affect town elections.
F-100b (239)

April 3, 1953.

Mr. Vernoy B. Tate,
Secretary of the Wise County Electoral Board.

This is in reply to your letter of March 31, 1953 in which you request my opinion as to whether § 24-345.3 of the Code of Virginia [which is a part of the Act passed in 1952 and commonly known as the War Voters Act] is applicable to town elections. I have very carefully considered the section and, as you have no doubt noted, those elections either primary or general to which the Act is applicable are listed therein. At no place in the Act are town elections mentioned. You state in your letter that from your reading of the Act it is not clear whether it is applicable to town elections, and I can well agree that the last sentence of § 24-345.3 raises some doubt. That sentence reads as follows:

"The name of no candidate for any State or local office required by this section to be certified to the Board whose name is not so certified, or whose notice of candidacy, if the filing of such a notice is required by such chapter of the Code, is not filed within the time required by this section, shall be printed on any official ballot for said election."

In my opinion the purpose of this sentence was to provide the "penalty" for failure to comply with its provisions, and was not intended to broaden the scope of the foregoing provisions. Therefore, it is my opinion that town elections are not affected by this section.

ELECTIONS—War Voters Act; school board elections come within.
F-203 (250)

April 20, 1953.

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

This is in reply to your letter of April 10 in which you asked the following questions:

"As you know, School Board members are elected in Arlington County. I cannot find a date by which candidates must file. When is the latest date for filing by candidates for offices of school board members for the November election?"

"Does Chapter 509 of the Acts of the Assembly of 1952 apply to school board elections in Arlington County in November?"

It is my opinion that Chapter 509 of the Acts of Assembly of 1952, sections 24-345.1 to 24-345.15 (the War Voters Act) does apply to the school board elections in Arlington County. The members of the Arlington School Board are county officers. Section 24-131 requires candidates for this office to file notices with the county clerk. Section 24-345.3 of the Code provides in part:

"During the effective period of this act, in order that ballots may be printed in ample time for the transmission of same to absent members of the armed forces overseas, and their return, all political parties desiring to nominate candidates for members of the General Assembly, Governor, Lieutenant Governor, Attorney General, and all county and city officers except mayor and councilmen, shall make and complete their nominations in the manner provided by law on or before the Tuesday after the second
Monday in July next preceding the election for such offices unless a second primary be required in which event any party for which such second primary is required shall complete its nominations on the fifth Tuesday following the first primary, and for mayor and members of councils in cities on or before the first Tuesday in April next preceding such election, and the proper authorities of each political party shall certify the names of its candidates to the chairman of the electoral boards, if required, and to the Board not later than ten days after said day. All candidates for said offices other than party nominees shall file their notices of candidacy and petitions, if same are required by Chapter 8 of Title 24 of the Code of Virginia, within ten days after the Tuesday after the second Monday in July unless a second primary be required, in which event any such candidate shall file his notice of candidacy and petition within ten days following the day of such second primary, or within ten days after the first Tuesday in April, as the case may be, with the Board, and also with the clerk or other officer, when same is required by law. The name of no candidate for any State or local office required by this section to be certified to the Board whose name is not so certified, or whose notice of candidacy, if the filing of such a notice is required by such chapter of the Code, is not filed within the time required by this section, shall be printed on any official ballot for said election."

Therefore, the school board elections come within the War Voters Act. The latest date for filing by candidates for the November election is within ten days after July 14 or by July 24 unless there be a run off primary; then within ten days following that second primary.

EMPLOYEES OF STATE—Status upon completing military service.

May 25, 1953.

MR. HARRIS HART,
Director of Personnel.

This is with reference to your letter of May 22, 1953, a portion of which I quote:

"An employee resigned from a State institution in 1951 'to enter the military service'. He did not request military leave at the time of his resignation and was not offered military leave of absence since he did not indicate he would return at the end of his military duties; he withdrew his retirement contributions. Directly upon completion of his military service he applied to the institution and employed in his former work. Had this employee not entered military service, had he continued in this position and had his work continued satisfactory, he would now be receiving the maximum salary for the work.

"Is this employee entitled, upon his return to State service, to the maximum salary as a matter of statutory right, or is the determination of salary a matter for application of administrative discretion?"

Section 2-79 of the Code of Virginia of 1950 provides, in part, as follows:

"Persons who, on such date, had left the service of the Commonwealth for service in any of the armed forces of the United States shall be deemed to have held the positions which they had thus left as though they had received appointment under the terms of this chapter, and all such persons, as well as persons who thereafter leave the service of the Commonwealth
for service in such armed forces, shall be entitled to be restored to such
positions upon the termination of their service with the armed forces, and
thereafter to hold such positions as though they had received appointment
under the terms of this chapter, except as to any such position which, in the
meantime, may have been abolished; and any such former employee re-
turning to, or applying for, employment in the State service, at any time
in the future, shall be considered as having at least as favorable a status
with reference to this chapter as he would have occupied if his service had
been continuous."

It is noted that the statute does not specify that the person leaving State
service for military service must indicate his intention of returning to State ser-
vie at the time of his leaving. However, the statute does specify that any such
employee returning to, or applying for, employment in the State service must be
given at least as favorable consideration as if his service had been continuous.
The Legislature apparently contemplated such cases as the one set forth in your
letter by making the statute applicable to former employees, whether they be re-
turning to, or applying for, State employment.

When construing this statute in the light of the opinion of the Supreme
Court of Appeals of Virginia in the case of Norfolk v. Key, 192 Va. 694, that
such legislation has for its purpose a humanitarian end and is to be liberally con-
strued, I am of the opinion that the person mentioned in your letter is entitled to
maximum salary as a matter of statutory right.

EXECUTION SALES—Amount and disposition of fees; sheriff and medical
examiner handling sale. F-136 (306)

HONORABLE CURTIS A. SUMPTER,
Commonwealth's Attorney for Floyd County.

This is in reply to your letter of May 22, 1953 in which you state that, pursu-
ant to court decree, the sheriff and medical examiner held a sale of property
to satisfy three executions which had previously been levied upon the property.
You ask the following questions:

"Information is requested as to:
"First, whether commissions on collection should be allowed the medical
examiner and sheriff in accordance with the basis set forth in section
8-429, or in section 14-120.
"Second—whether, since the abolition of the fee system, the sheriff's
share of the commissions on collection should be paid to the sheriff for his
use, or to the Treasurer of the County for credit to such State and County
funds as other sheriff's fees are credited.
"Third—the same query as to the medical examiner as is embodied
in Second, above."

In answer to your first question, commissions are allowed under § 8-429 in
some localities and in others the commissions are computed under § 14-120. In
other words, the practice varies from locality to locality as to which section of
the Code they operated under when computing these commissions. We are in-
formed by the State Auditor's office that so long as the commissions are correctly
computed under either § 8-429 or § 14-120, that office will approve them.

It is my opinion that the sheriff's share of the commissions on collection
should be paid to the treasurer of the county for credit to such State and county
funds as other sheriff's fees are credited.
The medical examiner is not a salaried officer, but is specifically a fee officer. Therefore, any commissions accruing to his account as a result of his acting under the decree of the court to hold a sale to satisfy the execution should be paid to him for his use.

EXTRADITION—Transfer of persons arrested by Maryland authorities.

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

This is in reply to your letter of July 21, 1952, in which you request my opinion if, without the process of extradition, Maryland authorities have a right to transport a person arrested on a pier in the State of Maryland through a portion of the Commonwealth of Virginia in the course of their return to the State of Maryland.

Kindly be advised that I am of the view that the proper Maryland authorities would have the right to transport persons in their custody by lawful arrest in the State of Maryland through such areas within the Commonwealth of Virginia as they may be reasonably required to travel in delivering such persons from one point inside of the State of Maryland to another point within that State. Moreover, § 7-7, Code of Virginia, providing authority for the crossing of the boundary line by the authorities of both states and providing permission for limited pursuit within the adjoining state, would appear to be indicative of an intent by both states for mutual cooperation and for a grant of reasonable authority by the one state to the other for the accomplishment of effective law enforcement.

FEDERAL EMPLOYEES—Ineligible to be commissioners in chancery; eligible for notary public.

HONORABLE A. A. RUCKER, Commonwealth's Attorney for Bedford County.

This is in reply to your inquiry of March 28, in which you ask whether an individual receiving a pension as a retired civil service employee of the United States Government is eligible to be (a) a Notary Public and (b) a Commissioner in Chancery.

Section 2-27 of the Code provides that any person holding an office or post of profit, trust or emolument, or who receives any emolument under the government of the United States, is not eligible to hold any office of honor, profit or trust under the Constitution of Virginia. Section 2-27 lists the exceptions to section 2-27. It provides:

"Section 2-27 shall not be construed:

(6) To prevent any civilian employee of the United States Government from being appointed and acting as Notary Public.

(7) To prevent any United States Commissioners or referees in bankruptcy from holding the office of Commissioner in Chancery, bail
It is my opinion that exception (6) of section 2-29 is meant to apply to a retired civilian employee also. Therefore, the individual referred to in your question could be a Notary Public.

Exception (7) specifically states that United States Commissioners or Referees in Bankruptcy may be Commissioners in Chancery. Therefore, it is my opinion that the General Assembly has excluded by implication all other Federal Government employees and retired employees from being eligible to be Commissioners in Chancery.

FEES—Clerk; certification of motor vehicle conviction; violation of ordinance. F-116 (255)

April 29, 1953.

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.

I am in receipt of your letter of April 28, in which you refer to Section 46-414 of the Code as amended and then ask the following question:

"Will you please refer to this section and advise me if you concur in my interpretation that the fee of 50 cents payable from the State treasury is payable from the State treasury whether the certified copy or abstract required therein to be furnished to the commissioner of motor vehicles be applicable to a State law or a local ordinance. As I interpret the law a certified copy or abstract of any forfeiture of bail or collateral deposited to secure a defendant's appearance in court—unless the forfeiture has been vacated—is a report made for the benefit of the commissioner and it is the intent of the statute to pay the clerk the 50 cents fee out of the State treasury whether the certified copy or abstract be applicable to a State law or to a local ordinance.

"I should appreciate your advice as to whether you concur in this interpretation."

Section 46-414 of the Code reads as follows:

"The clerk of the court, or the court when it has no clerk, shall forward to the Commissioner a certified copy or abstract of any conviction and of any forfeiture of bail or collateral deposited to secure a defendant's appearance in court unless the forfeiture has been vacated, upon a charge of a violation of any provision of chapters 1 to 4 of this title or of any law of this State pertaining to the operator or operation of any motor vehicle, or of any similar ordinance of any city, county or town, and a certified copy or abstract of any judgment for damages, the rendering and nonpayment of which judgment, under the terms of this title, require the Commissioner to suspend the operator's or chauffeur's license and registrations in the name of the judgment debtor, every such copy or abstract to be forwarded to the Commissioner immediately upon the expiration of fifteen days after the conviction or forfeiture or judgment has become final without appeal or other action in the time within which appeal or other action might have been perfected, or has become final by affirmance on appeal, and has not been otherwise stayed or satisfied.

"There shall be allowed to the clerk of a court of record a fee of fifty cents for each report hereunder to be paid out of the State treasury from
funds appropriated for criminal charges. Such payment shall be made on warrants of the Comptroller issued upon an allowance made by the court."

It will be observed that certified copies of abstracts are required in cases of violations of State law "or of any similar ordinance of any city, county or town * * *." A fee of 50 cents is allowed to the clerk of a court of record for each report, this fee to be paid out of the State treasury, and it is my opinion that the fee is to be paid whether a violation of a State law or a similar local law is involved. In other words, I entirely concur in your interpretation.

FEES—Garnishment; officer entitled to, when collects money from debtors.

August 6, 1952.

HONORABLE ROBERT B. DAVIS,
Civil and Police Justice.

This is in reply to your letter of July 31, from which I quote as follows:

"You have previously received from Mr. Donald T. Stant a letter concerning Section 14-120 of the Code as well as Sections 14-104-106 and 14-116.

"It was the custom of the Civil and Police Court here in Bristol when I took office for the Clerk to add 10% commission on to the amount of any garnishment issued therefrom as commissions owing to the officer in event of collection and in addition to the fee otherwise provided in Section 14-116.

"This custom has been carried on through the years and some question has now arisen as to the validity of same and if this be in error we would certainly like to correct it immediately.

"It is the writer's feeling that when Section 14-120 of the Code says that '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 $100.00 of the money paid out of proceeds from sale * * *, etc., that the words 'or other process' include a garnishment proceeding. I am not unmindful of the fact that the words 'from sale' are also a part of this same sentence, but it appears that if the meaning of the statute was to confine it strictly to sales that the words 'or other process' would have been unnecessary.'"

Undoubtedly the officer is entitled to the fee provided by Section 14-116 of the Code for serving the process, the question being whether such officer is entitled to the commission provided by Section 14-120 of the Code. The pertinent portion of the latter section reads as follows:

"An officer receiving payment under an execution or other process in money, for selling goods, shall receive the like commission of ten per centum of the first hundred dollars of the money paid of proceeds from sale, five per centum on the next four hundred dollars, and two per centum of the residue; * * * ."

The above quoted language, literally construed, is quite ambiguous. I cannot believe that when the whole section is considered it means that an officer is only entitled to a commission when he actually makes a sale. The meaning of the section becomes plain if the word "of" which I have underscored is construed to mean "or". Certainly the phrase "or other process" was intended to have some significance, and the construction that I have suggested gives this phrase
meaning. It is my conclusion, therefore, that where an officer actually makes a collection in money under a garnishment he is entitled to the commission specified in the section. I am somewhat fortified in this view by the last sentence of Section 14-121 of the Code, applicable only to certain cities. This section, however, makes it plain that an officer receiving payment in money or selling goods is entitled to a commission on the money paid or proceeds from the sale.

I emphasize, however, that the officer serving the process is only entitled to the commission where he actually collects money from the judgment debtor. I do not think that this commission should be taxed by the Clerk in advance as a part of the costs, nor do I think that the Clerk should add the commission "to the amount of any garnishment" as suggested in your letter. The judgment debtor could, of course, pay the money into court, or even pay the judgment creditor, and in neither of these situations would the officer serving the garnishment be entitled to any commission.

FEES—Sheriff; disposal of when acting in fiduciary capacity.  
HonorablE Robert D. Bauserman,  
Commonwealth's Attorney for Shenandoah County.

March 30, 1953.

HONORABLE ROBERT D. BAUSERMAN,  
Commonwealth's Attorney for Shenandoah County.

I am in receipt of your letter of March 27, in which you ask the following question:

"Garland E. Weaver, Sheriff of Shenandoah County, Virginia, in a number of cases has been appointed Administrator, Committee and Guardian because of relationship to parties in interest and otherwise through his personal connections with parties in interest. When he acts in these capacities he is acting as an individual and not in his official capacity as Sheriff Administrator as shown by the fact he gives personal bond and does not employ his Sheriff's bond. Sheriff Weaver has asked me to advise whether the fee received by him from these individual estates and trusts are paid to him individually or is he required to account for them in his official capacity as Sheriff."

If the Sheriff is acting in the fiduciary capacities mentioned by you as an individual entirely independent of the position as Sheriff, it is my opinion that he is entitled to retain the fees and commissions received by him. I think that in each case where the Sheriff retains such fees and commissions it should be entirely clear and he should be satisfied that he is acting in his individual and not his official capacity.

FEES—Sheriff; for making levies and returns.  
Mr. C. O. Mullins,  
Sheriff of Mecklenburg County.

August 21, 1952.

Mr. C. O. MULLINS,  
Sheriff of Mecklenburg County.

I am in receipt of your letter of August 19, in which you ask if a plaintiff may be required to pay in advance of obtaining judgment a fee of $1.50 for the sheriff for making a levy and a fee of 50 cents for making a return.

In my opinion, the fee for making a levy can only be demanded by the sheriff when the request for a levy is made by the plaintiff. In many cases, of course, after obtaining judgment no levy is necessary. Furthermore, I can
find no authority for a fee of 50 cents for making a return where a levy is made. However, where no levy is made under an execution in an officer's hands, but a return is made by the officer, such officer is entitled to a fee of 50 cents for making the return as provided by Section 14-404 of the Code. For your information I enclose copy of an opinion of this office dated January 20, 1943, to the Auditor of Public Accounts, relating to an officer's fee for making a levy and for making a return where no levy is made.

I am not entirely clear as to what you have in mind when you speak of costs of "$2.50 for obtaining the judgment." I assume that this amount is made up of fees taxed by the Trial Justice, but, as I am not sure as to what are the items included, I am not passing on the correctness of this amount. In any event, I take it that you are primarily interested in the fee of the sheriff for making a levy and for making a return.

HONORABLE R. DIXON POWERS,
Trial Justice.

This will acknowledge receipt of your letter of June 24, from which I quote as follows:

"I shall appreciate it if you will advise me at your earliest convenience as to whether or not the State of Virginia should advance fees for warrants, service of process, and trial fees in these cases. If the State of Virginia is not required to do so, then advise whether or not I shall tax the usual costs of Trial Justice Court fees for issuing warrants, service of process by the Sheriff, and trial fees in my court against the defendants in these cases where the State has not advanced such costs. Or, if the defendants in these cases should desire to settle same before the trial date, should he be taxed with the costs?"

This office has heretofore expressed the opinion that the Commonwealth, or one of its agencies, is not required to pay fees of officers for services rendered in civil cases, except where the fees belong to the officers rendering the service. It is clear that in the proposed actions to be instituted in your court the Commonwealth of Virginia will be party plaintiff.

As you are aware, section 14-54 of the Code provides that all fees paid to and collected by the Trial Justice, but not including fees belonging to officers other than the Trial Justice, his clerk or clerks, shall be paid promptly to the clerk of the Circuit Court, who shall pay same into the State Treasury. As a practical matter if the Commonwealth were required to pay such fees, they would eventually find their way back into the State Treasury.

Since the State of Virginia is not required to advance these fees, then the question arises whether or not the court should tax the usual costs of Trial Justice Court fees for issuing warrants, service of process by the sheriff, and the authorized trial fees. It is my opinion that, where the machinery of the court is invoked and judgment is entered against the defendant, the usual and customary costs should be taxed against the defendant, notwithstanding the fact that the State has not advanced such costs.

You indicate that some of the defendants might desire to settle and pay these claims before the trial date. In that event, it is my opinion that only such costs
REPORT OF THE ATTORNEY GENERAL

should be taxed as are actually earned. It would seem that costs for the warrant and service of process would have been actually earned. I do not believe that it would be proper to tax a trial fee in the event that the matter was compromised and adjusted prior to trial.

You will note that this opinion is somewhat at variance with the informal views expressed by me in our telephone conversation. After mature reflection, it is my considered judgment that the costs should be taxed as indicated above.

FOREST FIRE LAWS—Recovery of expenses; caused by municipal corporation. F-220 (210)

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

March 6, 1953.

This is in reply to your letter of February 28, in which you ask the question of whether the word “person” in Section 10-61 of the Code of Virginia includes a municipal corporation, such as the Town of Exmore.

Section 10-61 of the Code provides as follows:

“Any person who negligently, carelessly, or intentionally without using reasonable care and precaution to prevent its escape, starts a fire which burns on forestland, brushland or wasteland, shall be liable for the full amount of all expenses incurred, both by the county and by the Commonwealth, for fighting or extinguishing such fire, all of which shall be recoverable by action brought by the State Forester in the name of the Commonwealth. It shall be the duty of the Commonwealth’s attorneys of the several counties to institute and prosecute proper proceedings under this section, at the instance of the State Forester.

“The provisions of this section shall cover every manner or way in which forestland or brushland or wasteland fires may be started, whether by direct act, or by an appliance or by indirect.

“The term ‘person’ as used in this section shall include individuals, associations, partnerships, joint stock companies and corporations, and their officers, servants, agents and employees. Every county in which a fire has occurred for the suppression of which any costs are collected pursuant to this section shall be reimbursed by that proportion of any amount so collected which the cost incurred by such county in the suppression of such fire bears to the entire cost of its suppression.”

It is my opinion that the General Assembly did not intend that a municipal corporation should be held liable under this section for the negligence of one of its employees in allowing a fire to escape. The statute gives a list of what is to be included under the word “person” and municipal corporations are not among this list. To include municipal corporations within the meaning of this statute would make it one in derogation of the common law and one, therefore, to be strictly construed. Construing it strictly, it does not appear on the face of Section 10-61 that it is to be applied to municipal corporations.
HONORABLE A. B. CORRELL, Clerk,
Circuit Court of Montgomery County.

This is in reply to your letter of June 25 requesting my opinion regarding the appointment by the Commission of Game and Inland Fisheries of agents for the issuance and sale of licenses in counties and cities as provided in Chapter 5 of Title 29, Code of Virginia.

As set forth in your letter, the applicable legislation appears to be contained in the two following statutes:

"The clerks of the corporation courts of cities shall issue State licenses and the clerks of the circuit courts of counties, and such agents as the Commission may otherwise designate, shall issue State licenses and county licenses for their respective counties as provided for in this title and shall date and sign the same."

"The Commission shall have authority to appoint agents for the issuance and sale of the permits provided for in this title; the Commission may designate agents in towns for the issuance and sale of licenses provided for in this title. If the clerk of any court desires to be relieved of this duty, or gives his consent thereto in writing, the Commission shall have authority to require its agents also to sell hunting, trapping and fishing licenses in the place of or in addition to the clerk. Such agents shall be subject to the laws covering the issuance and sale of licenses and the regulations of the Commission as to the issuance and sale of permits. The compensation of agents for issuing licenses and permits shall be fixed by the Commission but shall not be more for issuing licenses than provided in this title for clerks of courts. Before such appointment shall become effective, the agent shall deposit with the Commission a bond of a surety company entitled to do business in this State, payable to the Commonwealth, in the penalty of one thousand dollars, or such additional amount as the Commission may require, conditioned for the faithful performance of his duties." (Italicized portion added by 1950 legislative amendment.)

It is my view that, prior to the 1950 amendment to § 29-65, the above legislation clearly required that the clerk of the appropriate court manifest a desire to be relieved of the duty or give consent in writing before an agent designated in the various political subdivisions could lawfully issue and sell hunting, trapping and fishing licenses. However, it further appears that the insertion of the 1950 legislation has amended and altered the foregoing legislation to the extent that, in addition to the prior authority to appoint agents for the issuance and sale of permits, the Commission may now designate agents in towns for the issuance and sale of licenses, as provided for in Title 29 without first obtaining such consent as was formerly required. The rules of statutory interpretation require that each particular provision within a statute must be made effective and given full meaning.

It is to be further noted that the aforementioned legislation is not broadened to permit the designation of agents in counties or cities without such prior consent, but is limited to the designation of agents "in towns."
GAME AND INLAND FISHERIES—Fish bag limit; does not apply to lessees of privately stocked pond. F-233 (265)

May 11, 1953.

HONORABLE I. T. QUINN, Executive Director,
Commission of Game and Inland Fisheries.

This is in reply to your letter of April 29, 1953, inquiring if members of private fishing clubs qualify under the owner-lessee exemption from the requirements pertaining to "seasons, size and creel limits on game fishing" in connection with fishing in their privately owned or leased pond.

Section 29-150 of the Code of Virginia, exempting owners and lessees of private ponds stocked by themselves or the Commission not less than three years prior thereto, provides as follows:

"The open season during which it shall be lawful to take any species of bass and trout from the inland waters of this State, but only by angling with hook and line, attached to a rod or pole, either with or without a reel, and with or without the aid of a hand landing net, and the bag and size limit a person may take in any one day or in any one open season, including the first and last days thereof, shall be as follows:

"Bass, except rock bass, or redeye.—June twentieth to March fifteenth east of Blue Ridge, and June twentieth to December thirty-first west of Blue Ridge; bag limit ten a day—one hundred and fifty a season; not less than ten inches in length from tip of nose to tip of tail.

"Rock bass, or redeye.—June twentieth to March fifteenth east of Blue Ridge, and June twentieth to December thirty-first west of Blue Ridge; bag limit fifteen a day—one hundred and fifty a season.

"Trout, any species.—April first to September fifteenth; bag limit twelve a day.

"The owner, or lessee, of any private pond stocked by himself, or by the Commission of Game and Inland Fisheries not less than three years prior thereto, may capture any fish therefrom for his own use at any time."

( Italics added).

Moreover, as set forth in your letter, section 29-78 reads as follows:

"Nothing in this title shall be construed as permitting any person to hunt, trap or fish in or on the lands or waters of any public or private club, association or preserve of any description as a landowner or in any other capacity unless such person has a license."

It is significant, and indicative of the legislative intent in the matter in question, that the Legislature, by the foregoing statute, specifically placed the requirement of having a license on persons fishing on private club waters but, on the other hand, the Legislature did not enact similar legislation requiring adherence to season, size and creel limits by persons fishing in or on the lands or waters of private clubs.

Accordingly, in my opinion the club members of a private pond which they own or lease come within the provisions of section 29-150 exempting owners and lessees; and, pursuant to said statute, they may capture any fish therefrom for their own use at any time from such private pond stocked by themselves or by the Commission of Game and Inland Fisheries not less than three years prior thereto.
GAME AND INLAND FISHERIES—Fishing license required of non-owner of lake who by deed has free use of surface of waters. F-233 (17)

July 16, 1952.

HONORABLE H. SELWYN SMITH, Substitute Trial Justice for Prince William County.

This is in reply to your letter of July 12, 1952, in which you request my opinion on the following case as quoted from your letter:

"The facts of the case were as follows: A purchased a lot in a subdivision at Lake Jackson, Prince William County, Virginia, he has improved the lot and is living there, his title to the lot was taken subject to the restrictions and conditions, a copy of which is enclosed in this letter with the more important part indicated by red pencil. Between A's lot and the lake there is a dedicated public road. A, with the consent of the owner of the controlling rights of the lake, erected a pier out into the water. From the pier which he had erected in the lake, A is fishing at the time the county game warden arrives and makes an arrest, at the same time and charged him with fishing without a license. A produces in court a deed and alleged that he was owner of the property and copies of the laws concerning fishing which was furnished him by the state game warden which of course exempts an owner from the purchase of a license to fish upon his own waters. Realizing of course that the deed carried with it the free and uninterrupted use of the waters of Lake Jackson, I held that the man did not need a license and dismissed the warrant."

As you know, it is not my custom to render opinions regarding cases pending before courts of the Commonwealth, nor would I care to "review" a decision rendered by such court. However, you have indicated a desire that your decision be reviewed, especially as there is a strong possibility of other similar cases arising.

As I interpret the facts presented "A" does not own the lake or any portion thereof but is merely entitled to the free and uninterrupted use of the surface of the water owned by others.

Section 29-52 of the Code of 1950, as amended, reads in part as follows:

"(1) License shall not be required of landowners, their husbands or wives and their children, resident or nonresident, to hunt, trap and fish within the boundaries of their own lands and inland waters.

"(2) License shall not be required of bona fide tenants, renters or lessees to hunt, trap or fish within the boundaries of the lands or waters of which they are tenant, renter or lessee and on which they reside; provided such tenant, renter or lessee has the written consent of the landlord upon his person, and provided further that a house guest of the owner of a private fish pond shall not be required to have a fishing license to fish in such pond."

Our Supreme Court of Appeals has held in the case of Commonwealth v. Bailey, 124 Va. 800, 97 S. E. 774, that those claiming to come within this exemption to such license provisions must make it clearly appear that such is the case and that exemptions must be strictly construed.

Inasmuch as "A" is not the owner of the lake, sub-section (1) of § 29-52 is not applicable and may be disregarded. Subsection (2) is a bit more troublesome for it is there provided that a tenant, renter or lessee is not required to have a license if he has written consent of the landlord upon his person. However, it does not appear that, under a strict construction of the statute, "A" can be called a tenant, renter or lessee. He appears to have purchased property and acquired certain rights to use the lake, but does not appear to be a tenant, renter or lessee under the usual meaning attributed to those terms.
It is, therefore, my opinion that "A" does not bring himself within the strict meaning of the statute and exemptions therein contained do not apply to his case.

GAME AND INLAND FISHERIES—Hunting on highways, roadways; no permission needed.  F-233 (169)

January 14, 1953.

HONORABLE DOWNING L. SMITH,
Commonwealth's Attorney, Charlottesville.

This is in reply to your letter of January 9, 1953, requesting my opinion as to whether or not it is unlawful to hunt on highways and roadways, where the Commonwealth or the county owns the fee simple title to the property and where the fee is privately owned.

In response to your inquiry, it is very doubtful, in my opinion, that the Commonwealth or a county through its ownership of the fee in a certain highway or roadway could be classified as a "landowner" under the provisions of section 29-165, Code of Virginia, so as to provide a basis for criminal proceedings under the statute prohibiting hunting on the lands of another without the consent of the landowner.

As you point out, the 1953 enactment of section 18-147.2, making it unlawful to carry a loaded gun on public highways under certain conditions in counties of a specified population, and the enactment of section 33-287, prohibiting shooting within one hundred yards of a road, tend to imply that it was not the intention of the Legislature to make hunting in and along the public highways owned by the Commonwealth or a county unlawful as distinguished from shooting along such public highway. Moreover, penal statutes are strictly construed against the Commonwealth.

With regard to whether or not it would be unlawful to hunt on and along a roadway without the consent of the private owner of the fee therein, I am inclined to concur with your view that pursuant to section 29-165 it would be unlawful to hunt thereon without the consent of the private landowner, although I am unaware of any judicial interpretation on the specific question in Virginia.

GAME AND INLAND FISHERIES—License requirements; unnaturalized persons.  F-233 (66)

September 2, 1952.

HONORABLE I. T. QUINN, Executive Director,
Commission of Game and Inland Fisheries.

This is in reply to your letter of August 25 inquiring under what conditions, if any, may displaced persons, who have not been naturalized, obtain a license to hunt in Virginia.

County as well as State, resident hunting licenses may be obtained by unnaturalized persons under certain conditions and by natural born and naturalized citizens under other conditions, in accordance with the terms of § 29-57 of the Code of Virginia which provides, in part, as follows:

"The following persons shall be entitled to a county license to hunt, trap or fish in the county of which they are resident, or of which they are legal voters, or in which they are stationed or located, or to a State resident license;"
"(a) Any person born in the United States or who has been naturalized and who has been a bona fide resident of the county for six months next preceding the date of application for license in such county;

"(c) Any unnaturalized person who owns real estate in the county and who has actually resided therein not less than five years next preceding the date of the application for the license in such county;"

State resident licenses, but not county licenses, may also be obtained by persons not enumerated in § 29-57 in accordance with § 29-58 which provides:

"All persons not enumerated in the preceding section, who have resided in this State for six months or more next preceding the date of the application, shall be entitled to a State resident license to hunt, trap or fish."

It is my opinion that, pursuant to § 29-58, a displaced person who has resided in this State for six months or more next preceding the date of the application shall be entitled to acquire a State resident license to hunt and that, pursuant to § 29-57, a displaced person or any other unnaturalized person who owns real estate in a county and who has actually resided therein not less than five years next preceding the date of the application for the license in such county shall be entitled to acquire a county license to hunt.

GAME AND INLAND FISHERIES—Licenses; county residents fishing, etc., shoreline of stream. F-233 (72)

September 9, 1952.

HONORABLE I. T. QUINN, Executive Director,
Commission of Game and Inland Fisheries.

This is in reply to your letter of August 25 inquiring "Is the pool formed back of Philpott Dam [across the Smith River] under Section 29-60 classed as a stream?" and, "* * * can a resident of any one of the counties of Henry, Franklin or Patrick holding a county license hunt, trap and fish the entire shoreline of the other two counties?"

Section 29-60, Code of Virginia, provides:

"The residents of counties bordering a nontidal stream shall have the right to hunt, trap and fish when not otherwise prohibited by law or regulation in such stream opposite the shore line of the county for which such resident has a county license and the residents of counties bordering a tidal stream shall have such right to low water mark or as far as the county limits of the county for which he has license extends."

The word "stream" within § 29-60, extending hunting, trapping and fishing privileges should, in my opinion, be given a comprehensive and broad meaning rather than a restricted definition. Such a construction would also appear to be in order as such right may be prohibited by law or regulation by the terms of the same statute.

Accordingly, it is my view that § 29-60 applies to pool formed back of Philpott Dam in the Smith River and that the residents of any of the counties in question have the right to hunt, trap and fish in such nontidal stream or pool therein, opposite the shoreline of the county for which such resident has a county license.
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GAME AND INLAND FISHERIES—Licenses; stationary blinds; invalid if blind moved. F-233 (100)

October 22, 1952,

HONORABLE R. H. L. CHICHESTER,
Commonwealth’s Attorney for Stafford County.

This is in reply to your letter of October 6, 1952, inquiring if the moving from the original site to the various other shore sites of a duck blind, licensed under Article 3, Chapter 5 of Title 29 of the Code of Virginia as a “stationary” blind, renders such license invalid. You also inquire as to the priority between such movable blind licensed as described above and a properly licensed stationary off-shore blind located in the public waters out from adjoining property and within five hundred yards of such movable blind.

Statutes from the Code of Virginia pertaining to the questions raised are hereinafter set forth:

“§ 29-82. Stationary blinds.—Stationary blinds shall include blinds erected on the shores of the public waters and brush or stake blinds, or other stationary blinds permitted by law in the public waters at a fixed and stationary location the required distance from other blinds. No club or individual who does not own riparian rights shall be permitted to license more than two brush or stake blinds, or other stationary blinds in the public waters in any one season. Stationary blinds shall be erected not later than November first of each year.”

“§ 29-84. Fees for waterfowl blind licenses.—The fees for waterfowl blind licenses shall be as follows:

“(1) For a stationary blind erected on the shores of the riparian owner to shoot on or over the public waters, resident, five dollars; nonresident, ten dollars.

“(2) For a stationary brush or stake blind, or other stationary blind permitted by law, in the public waters, to shoot on or over such waters, resident, five dollars; nonresident, ten dollars.

“(3) For a mat blind, or other floating blind, permitted by law in the public waters, to shoot on or over said waters, resident, ten dollars; nonresident, twenty-five dollars.”

“§ 29-85. Stationary blinds on shore and in the public waters for owners of riparian rights.—The owners of riparian rights, their lessees or permittees, who desire to do so, shall, each year, have the exclusive privilege of licensing and erecting blinds on their shore line, and the prior right of licensing and erecting blinds in the public waters in front of such shore line, to shoot waterfowl on or over the public waters, and when such license has been obtained and a stake, or a blind, erected on the site with the metal license plate supplied with the license for that season affixed thereto, no other stationary or floating blind shall locate in the public waters within less than five hundred yards thereof without the consent of such riparian owner, lessee or permittee. Riparian owners, their lessees or permittees, may obtain licenses on and after July first and on or before August thirty-first of each year. A stake, or blind, shall be erected on the site and the metal license plate supplied with the license for that season affixed thereto within ten days.”

“§ 29-89. Obtaining licenses.—All applications for blind licenses under this article shall be made to the clerk of the circuit court of the county wherein or nearest which the blind site is located or in which it is to be used, who shall be paid similar fees as for issuing hunting licenses. With each license the clerk shall deliver a metal license plate bearing the number of the license, which shall be affixed to the blind where it may be easily observed. The Commission shall furnish the licenses and license plates
provided for in this article. The money arising from the sale of blind licenses shall be paid into the game protection fund.”

It is to be noted that information from the office of the Commission of Game and Inland Fisheries reveals that it has not enacted any regulations specifically defining “stationary blinds.”

While all facts pertaining to the questions presented would be very material, from the facts presented in your letter it is my view that the moving of a blind licensed as a stationary blind from its original site after license has been obtained and affixed to the blind or stake as prescribed would render invalid such license at any site other than the original site. The definition of stationary blinds, as contained in §29-82, provides for the inclusion of certain types of blinds, but does not specify all the types of blinds that might be considered as stationary blinds. However, in keeping with the generally accepted usage of the term “stationary” it appears that the blind should remain at one permanent site. This view would appear to be substantiated by other provisions contained in Article 3 prohibiting the location of certain blinds within five hundred yards of certain other blinds. Moreover, §29-89 provides that the license plate shall be affixed to the blind where it might easily be observed.

In accordance with the foregoing discussion it is my further view that a properly licensed off-shore blind would have priority over a movable blind licensed as a stationary blind, if the latter blind has been moved from its original site after a license for it had been obtained and affixed to it at its original site.

GAME AND INLAND FISHERIES—Regulations applicable to Claytor Lake.  F-233 (73)

Honorable I. T. Quinn, Executive Director,
Commission of Game and Inland Fisheries.

This is in reply to your letter of August 25 requesting my opinion whether the regulation heretofore issued by the Commission of Game and Inland Fisheries permitting the taking of nongame fish by trot lines in New River applies to that reservoir of water now known as Claytor Lake formed by Claytor Dam, being constructed across New River.

There appearing to be no other consideration under the regulation than the change arising by a subsequent designation of a portion of the same general body of water, it is my opinion that the aforementioned regulation pertaining to New River is applicable to the pool formed by Claytor Dam as well as the remainder of New River.

GAME AND INLAND FISHERIES—Squirrel season in Grayson County.  F-233 (296)

Honorable Joe W. Parsons, Clerk,
Circuit Court of Grayson County.

This is in reply to your letter of May 27, 1953, regarding the authority of the Commission of Game and Inland Fisheries to open the squirrel season in Grayson County September 15 to September 30 (1953). You also state that the Commission has adopted a resolution setting a squirrel season east of the Blue
Ridge Mountains and also another season west of the Blue Ridge Mountains beginning the third Monday in November to January 1, with the provision that the season shall be open in certain southwest Virginia counties, not including Grayson County, from September 15 to September 30 and November 20 to January 20.

Chapter 193, 1952 Acts of Assembly, which is pertinent to this inquiry, reads as follows:

"Notwithstanding the provisions of section 29-138 of the Code of Virginia or elsewhere to the contrary, it shall be unlawful for any person to hunt squirrels in Grayson County at any time other than prescribed as open hunting season for squirrels generally. Any person violating the provisions of this act shall be guilty of a misdemeanor and punished as provided by law."

Reference is made to an opinion under date of September 10, 1952 to Dr. J. C. Moxley, Member of the House of Delegates, expressing the opinion that in view of the restriction contained in chapter 193 "where the Commission fixes an open squirrel season throughout the State generally it could not fix a different season for Grayson County". The said opinion of September 10 was predicated upon an interpretation of the language of the aforementioned bill limiting Grayson County's open squirrel hunting season to the "time * * prescribed as open hunting season for squirrels generally" in conjunction with the provisions of section 29-125 authorizing the Commission to establish the time of the general open season throughout the state within the outside season limits as contained in section 29-138. Such construction, as I pointed out, is not entirely free from doubt but it appears to be the only construction which would give meaning to the language of the bill when considered in view of the other pertinent statutes as is required in matters of statutory interpretation. Had the Legislature determined to set Grayson's season the same as the outside season limits or had it determined to give Grayson a special season as fixed for the counties mentioned in chapter 689 of the 1952 Acts, the Legislature could have so provided. Dr. Moxley's letter, in reply to which the aforesaid opinion was rendered, advised that last year (1952) the Commission set a general open season making certain exceptions for several different counties.

It is noted from a copy of the Commission's resolution, dated May 22, 1953, and received by this office last week, fixing the open season for the hunting of squirrels, provides, as you state, for a certain season east of the Blue Ridge and another season for west of the Blue Ridge with special seasons for several counties.

While this office is still of the opinion, in view of the restricting language contained in chapter 193, that the Commission is prevented from expressly singling out Grayson County for "any (particular) time other than prescribed as open hunting season for squirrels generally", you might desire to take up with the Commission the feasibility of adopting a regulation prescribing the time of open hunting season for squirrels generally, which would operate to give Grayson County its desired open season but worded so as not to affect the seasons for such areas as otherwise provided.

GAME AND INLAND FISHERIES—Sunday hunting; prohibited to land owners, also. F-233 (68)

HONORABLE I. T. QUINN, Executive Director,
Commission of Game and Inland Fisheries.

This is in reply to your letter of August 25 inquiring of this office whether a resident land owner would be within the law in killing squirrels on Sunday.
While § 29-138, Code of Virginia, allows resident land owners and other enumerated persons to kill squirrels for their own use during closed season, § 29-143, specifically dealing with the subject of Sunday hunting, makes it unlawful "to hunt or kill any wild bird or wild animal, including any predatory or undesirable species, with a gun or other firearm on Sunday, which is hereby declared a rest day for all species of wild bird and wild animal life." It, therefore, appears that, by express provision, the Legislature has declared Sunday as a rest day for all species of wild bird and wild animal life.

Accordingly, it is my opinion that all hunting on Sunday of wild birds and wild animals with firearms is prohibited in accordance with the provisions of § 29-143.

GAME AND INLAND FISHERIES—Virginia has no authority to issue licenses for blinds beyond boundary in Potomac River. F-233 (33)

July 30, 1952.

HONORABLE L. B. MASON, Clerk,
King George County Circuit Court.

This is in reply to your letter of July 16, 1952, requesting my advice "if the States of Maryland and Virginia have a compact permitting people in Virginia to erect blinds beyond the low watermark in the Potomac River, and if [you] have the right to issue a Virginia waterfowl blind license [for blinds] to be erected in the Potomac River beyond the boundary line (low watermark)."

Kindly be advised that I know of no interstate compact providing for the erection of waterfowl blinds in the Potomac River beyond the low watermark on the Virginia side.

Moreover, as the original Maryland-Virginia Compact, as contained in § 7-6, Code of Virginia, establishes the boundary line between the two States at the low watermark, and along the line as provided therein, on the Virginia side; it is my opinion that the Commonwealth of Virginia possesses no authority to regulate or license waterfowl blinds beyond the boundary and inside of the State of Maryland. Accordingly, it does not appear that you, as Clerk, have authority to issue Virginia licenses for waterfowl blinds outside of the Virginia boundary line in the Potomac River.

GENERAL ASSEMBLY—Member not eligible for appointment to circuit court. F-253 (54)

August 20, 1952.

HONORABLE JOHN S. BATTLE,
Governor of Virginia.

On September 12, 1940, my predecessor, the Honorable Abram P. Staples, had an occasion to render an opinion on the eligibility of a member of the General Assembly to appointment by the Governor to fill a vacancy in one of the circuit courts of the State to the Honorable C. G. Quesenbery, of Waynesboro. I quote in full from that opinion:

"This is in reply to your letter of September 7, in which you request my opinion upon the eligibility of a member of the General Assembly to appointment by the Governor to fill a vacancy in one of the circuit or corporation courts of the State.

"Section 45 of the Constitution contains this provision:

"'No member (of the General Assembly) during the term for which
he shall have been elected shall be elected by the General Assembly to any civil office of profit in the State.'

"This provision has uniformly been construed as applying only to an actual election by the General Assembly itself, and does not affect the eligibility of a member to be appointed to any office.

"The only difficulty which might arise would be in case the Governor should appoint a member of the General Assembly and a special session should be called, in which event he would be ineligible to be elected at any special session held during the time for which he was originally elected as a member."

In my opinion it is clear that a member of the General Assembly "would be ineligible to be elected at any special session held during the time for which he was originally elected as a member". However it is also my opinion that the case of Norris v. Gilmer, 183 Va. 367, overrules by implication the penultimate paragraph of the opinion quoted above.

The Norris case was a mandamus proceeding to require the State Comptroller to issue a warrant for the petitioner's salary. The only controversy was whether or not the petitioner was de jure a member of the State Corporation Commission.

On August 30, 1944, the Honorable Colgate W. Darden, Jr., Governor of Virginia, appointed Senator R. O. Norris, Jr., subject to confirmation by the General Assembly, to fill a vacancy then existing on the State Corporation Commission. At the time of the appointment Senator Norris was a member of the General Assembly, having been elected to and having qualified as a member of the Senate for a term of four years commencing the second Wednesday in January, 1944.

The contention, in so far as is material to your inquiry, was that Senator Norris' appointment to the State Corporation Commission violated the provisions of sections 45 and 155 of the Constitution of Virginia.

The pertinent part of section 155 of the Constitution which relates to the appointment and qualifications of members of the State Corporation Commission reads as follows:

"* * Whenever a vacancy in the commission shall occur, the Governor shall forthwith appoint a qualified person to fill the same for the unexpired term, subject to confirmation by the General Assembly or until his successor be chosen as provided by law. * * The commissioners shall be elected by the General Assembly. * *"

It was urged that the words, "subject to confirmation" by the General Assembly was entirely different from an election by the General Assembly. However, the Supreme Court pointed out that section 155 provides in clear and unambiguous language that "The commissioners shall be elected by the General Assembly" and that "confirmation" was not used there in the ordinary meaning of that term. The court then went on to say:

"To adopt the interpretation urged on behalf of the petitioner and to hold that an appointee to a vacancy on the Commission may merely be confirmed, as that term is ordinarily used, and need not be elected, would require us to read out of the section and disregard entirely the unequivocal mandate requiring that all of the commissioners 'shall be elected by the General Assembly'. Moreover, it would drive us to the illogical conclusion that the General Assembly could confirm as an appointee a person whom it was forbidden by section 45 to elect." (183 Va. 374)

The argument was also made that the appointment of the petitioner did not violate section 45 of the Constitution since that section originally provided that no member of the General Assembly "shall be appointed or elected * *" while the present section omitted the prohibition against "appointment" upon the recom-
mendation of the revisors who said: "No good reason is seen why members of the General Assembly should not be eligible to appointive office". See, House Document No. 2, p. 30, House Journal, 1927 Extra Session. In answer to such a contention the Court said:

"A complete answer to this argument is that, as already indicated, a member of the State Corporation Commission holds an elective and not an 'appointive office'. Hence, the change in section 45 does not remove the ineligibility of a member of the General Assembly to that office. Examples of 'appointive' officers, each of whom is appointed by the Governor and merely confirmed by the General Assembly, and holds a 'civil office of profit in the state', are: Secretary of Commonwealth (Const. sec. 80); State Treasurer (Const., sec. 81); Superintendent of Public Instruction (Const., sec. 131); Adjutant General (Michie's Code of 1942, sec. 2673(12))." (183 Va. 377-78).

Section 96 of the Constitution of Virginia provides that a circuit judge "shall be chosen by the joint vote of the two houses of the General Assembly", and section 102 provides that "whenever a vacancy occurs in the office of judge, his successor shall be elected for the unexpired term".

It is perfectly clear, therefore, that a circuit judge holds an elective office rather than an appointive office, and in this connection the final conclusion of the Supreme Court in the Norris case is material. There, it was said:

"Since the petitioner, by reason of his membership in the General Assembly, is not qualified to be elected by that body to be a member of the State Corporation Commission for the unexpired term of his predecessor for which he was appointed (which election, in our opinion, is required by section 155 of the Constitution), it necessarily follows that he was not a 'qualified person' to fill the vacancy thereon for such term, and his appointment to the office was void ab initio." (183 Va. 378).

I am aware of the fact that section 73 of the Constitution and section 17-120 of the Code, which sections grant the Governor the power to fill pro tempore vacancies in the office of judge during the recess of the General Assembly, do not expressly provide that "a qualified person" shall be appointed to fill the office of judge, as does section 155 of the Constitution in providing for the appointment of a member of the State Corporation Commission. However, I do not believe that it can be seriously argued that simply because there is no specific provision in law that requires the Governor to appoint "a qualified person" to the office of a judge, he may appoint a person that does not meet all the qualifications prescribed by the Constitution of Virginia. In this connection I quote the following language found in the Norris case:

"It will be observed that here the Governor is not given an unlimited power of appointment to fill a vacancy on the Commission. He may appoint only 'a qualified person', and such appointment is 'subject to confirmation by the General Assembly'.

"While the second paragraph of the section [155] enumerates certain persons who shall not 'hold office as a member of said commission, or perform any of the duties thereof', there is no indication that the term, 'a qualified person', was intended merely to exclude such persons. Surely, an appointee must meet the other tests prescribed by the organic law,—that is to say, one who is disqualified under any other provision of the Constitution from being elected to or holding the office is not 'a qualified person'." (183 Va. 372).

It is my opinion that the above quoted language is equally as applicable to an appointment to the office of judge as it is to an appointment to the State Cor-
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poration Commission. The Governor must appoint a person who not only meets the test prescribed by section 96 of the Constitution, relating to qualifications of circuit judges, but one who also is not disqualified by virtue of section 45 of the Constitution. To hold otherwise would be, as already indicated above, to ignore the organic law, and would, furthermore, permit the Governor to appoint a person who could not be elected by the General Assembly.

Therefore, it is my conclusion, based on the constitutional provisions cited above and on the Supreme Court's opinion in the Norris case, that you do not have the authority to appoint a member of the General Assembly to fill a vacancy in one of the circuit courts of the State.

GOVERNOR'S OFFICE—Executive Journal; rubber stamp may be used in lieu of Governor's signature. F-253 (217)

Miss Martha Bell Conway, Secretary of the Commonwealth.

This will acknowledge receipt of your letter of March 11, from which I quote in part as follows:

"With reference to the Governor's Executive Journal, it has heretofore been customary, after the entry of each day's activities, for the Governor to sign his name, and for his signature to be attested by the Secretary of the Commonwealth.

* * * * * * * * * * *

"Would it be legal to use a rubber stamp at the end of each day's entry in the Governor's Journal, and to allow the Governor, at the close of his administration, to ratify and adopt these rubber stamp signatures as his own? If so, what would be the correct wording of the ratification? Could the attestation of the Secretary of the Commonwealth be handled in the same manner?"

I know of no requirement of law enjoining upon the Governor the duty of personally appending his signature after the entry of each day's activities recorded in the Governor's Executive Journal.

With the assent of the Governor first secured, it would, in my opinion, be legally proper to use a rubber stamp at the end of each day's entry in the Governor's Journal as indicated in your letter, with formal ratification by the Governor at stated intervals or at the end of his administration. I suggest the following form of ratification:

By direction and authority given and conferred by me, the Secretary of the Commonwealth has affixed my signature to this Journal at the completion of each day's activities by means of a rubber stamp approved by me. I do hereby approve and ratify same, and adopt said signatures as my own as if personally appended by me.

Given under my hand this day of 19 .

Governor

Attest-______________________________________

Secretary of the Commonwealth.

It is my view that the Secretary of the Commonwealth should, by personal signature, signify her attestation after the entry of each day's activities. This
would place responsibility upon the Secretary of the Commonwealth for the use of the stamp bearing a facsimile of the Governor's signature.

HIGHWAYS—Board of supervisors; construction of new road while appeal from commissioners' decision is pending. F-192 (106)

HONORABLE CHARLES S. SMITH, JR.,
Commonwealth's Attorney for Middlesex County.

October 27, 1952.

Reference is made to yours of October 23, 1952 in which you enclosed a certified copy of an order of the Board of Supervisors of Middlesex County condemning right of way for a public road and a copy of a petition for appeal from that order as provided by § 33-152 of the Code. You asked to be advised whether the Department of Highways has authority to commence construction on the road before final disposition of this appeal.

Chapter 2, Article 2 of Title 33 of the Code sets forth the powers and procedure for the establishment of new roads in the counties. When the Board of Supervisors has determined the public necessity for the establishment of a road, commissioners must be appointed, if requested, to ascertain a just compensation for the land taken. An appeal from the commissioners' decision is provided by § 33-152 of the Code. The appeal is limited to the question of compensation and damages. Therefore, the outcome of such an appeal could not set aside the action of the Board of Supervisors in establishing the road.

Section 33-141 of the Code provides for the expenditure of State funds on the new road established by the Board of Supervisors when approved by the State Highway Commissioner.

In view of the foregoing, I am of the opinion that the State Highway Department may commence construction or maintenance on a new road established by the Board of Supervisors even though an appeal by a landowner pursuant to § 33-152 of the Code may be pending.

HIGHWAYS—Condemnation when road to serve one owner; private contributions. F-177 (302)

HONORABLE LYON G. TYLER,
Commonwealth's Attorney for Charles City County.

June 26, 1953.

The Attorney General is absent from the office on account of illness, and your letter dated June 24, 1953, has been referred to me. I quote your letter as follows:

“A petition has been presented to the Board of Supervisors of Charles City County requesting that the Board condemn right of way across the property of a citizen, hereafter designated as 'A' for a public road.

“The Board has directed me to secure your opinion as to the powers of the Board to condemn this property for road purposes.

“There is no chance of obtaining the right of way by agreement and little chance of obtaining the property under the general road law because of the policies of the Department of Highways. The property would have to be condemned under Title 25 by a suit in Circuit Court.

“The proposed public road would be a short extension of an existing secondary highway connecting said secondary highway to a private right of
way which petitioner has over the lands of 'A'. This right of way leads in turn to petitioner's private road. The land of petitioner to which this road would provide access is used for farming and hunting purposes only and at present no one resides thereon. The proposed road would serve no other property owner besides petitioner. At present petitioner claims he has no way of access to his property save over a road which he claims to be nearly impassable.

"I am of the opinion that a mere right of way for petitioner cannot be secured by condemnation. I doubt that petitioner could contribute towards obtaining or constructing a public road. I would appreciate your opinion as to whether a condemnation for this proposed road would be for a public use and if so whether the petitioner could contribute towards obtaining, constructing or maintaining a public road across the property of 'A'."

I agree with the opinion you express that a mere right of way for private use cannot be secured by condemnation proceedings.

You are familiar with the provisions of Section 58 of the Constitution of Virginia, the material portion of which I quote as follows:

"** * * It [the General Assembly] shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation, the term 'public uses' to be defined by the General Assembly. **"*

This section of the Constitution was amended in 1928 and, prior to the amendment, the power to declare what constituted a public use was a judicial question. *Richmond v. Carneal*, 129 Va. 388, 394; 106 S. E. 403. After the adoption of this amendment, the term public use became a legislative question and has been defined by the General Assembly in Section 15-702 of the Code as follows:

"The term 'public uses' mentioned in Section fifty-eight of the Constitution of Virginia is hereby defined to embrace all uses which are necessary for public purposes."

The term "public uses" mentioned in Section 58 of the Constitution of Virginia is hereby defined to embrace all uses which are necessary for public purposes.

In view of the constitutional provision and the definition of the term "public uses" by the General Assembly, I am of the opinion that private property cannot be condemned for a road if it is not necessary for public purposes. The facts in each case would have to be considered to determine whether in a given case the proceedings would be necessary for public purposes, and since this is a question of fact, this office should not undertake to make a determination.

Assuming the road is necessary for public purposes and could be condemned, you inquire if the petitioner could contribute toward obtaining, constructing or maintaining a public road across the property of another.

The provisions of Section 33-142 of the Code pertinent to your inquiry are as follows:

"** * * * provided, that the right of way for any public road shall not be less than thirty feet wide, except that in any case in which the cost of constructing and maintaining any such road is to be borne by an individual or individuals the right of way for such road may be less than thirty, not less than fifteen, feet in width." (Italics supplied)

It seems clear from the provisions of this section that the Legislature contemplates that the cost of constructing and maintaining a road in some cases may be borne by an individual. In view of this provision, I am of the opinion that an individual is permitted to bear the cost of constructing and maintaining a public road although it may pass across the property of another.
HIGHWAYS—Private road open for unlimited use by public comes within definition of as to state police authority. F-192 (18)

HONORABLE CHARLES S. SMITH, JR.,
Commonwealth's Attorney for Middlesex County.

This is to acknowledge receipt of your letter dated July 15, 1952, the material portion of which I quote as follows:

"Where a State Highway stops about two hundred yards short of a Store or Marine Railway and there is a good road and right of way leading from the end of the State road to the Store or Railway and in regular use by the public but owned by the owner of the Store or Railway, who has the right to close it, but has never done so, as long as the right of way is generally used by the public is it a Highway as defined by section 46-1(8) of the Code?; and,

"Does a State Police have the same right to make arrest for reckless driving on the right of way as he does for reckless driving on a primary or secondary highway?; and,

"Can a person be found guilty of reckless driving over the right of way?"

The section to which you refer, that is, Section 46-1(8) of the Code of Virginia, provides 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."

I have had occasion before to express an opinion on similar questions presented in your letter, and I am of the opinion that, in view of the plain language used in the definition of a "highway", it would include the portion of road to which you refer. Therefore, each of your questions must be answered in the affirmative.

HIGHWAYS—Secondary system; prerequisite steps for taking streets into. F-192 (252)

Mr. A. DUNSTON JOHNSON,
Commonwealth's Attorney for Isle of Wight County.

This is with reference to your letter of April 20, 1953, a portion of which is quoted:

"The Board of Supervisors of Isle of Wight County has been requested to take such action as may be necessary to have included in the secondary highway system certain streets in a subdivision made in 1943 and located outside of the towns of the County. All building lots in this subdivision have been sold and a plat thereof, showing the lots and streets, is recorded in the Clerk's Office of this County. A drainage problem has arisen in connection with some of the streets and the Highway Department feels
that adequate drainage is necessary before it can accept these streets into the system. Easements across some of the lots will have to be secured to provide such drainage. All of the lots were conveyed subject to rights of way and other easements shown on the aforesaid plat. The Board of Supervisors has not adopted Articles two and five of Chapter twenty-three of the Code.

"I will appreciate your opinion as to whether or not the recorded plat of said subdivision is sufficient to establish the streets shown thereon as a part of the secondary system without following the procedure set out in Section 33-142 of the Code."

You also request my opinion as to whether the Board of Supervisors of the county has authority to appropriate money from the general fund for the purpose of acquiring street right of way and providing certain construction and maintenance with respect to such streets.

Inasmuch as the Board of Supervisors of the county has not adopted the provisions pertaining to subdivision streets of Title 15, Code of Virginia, it will be necessary to refer to Title 33 of the Code in order to determine whether or not the streets of the subdivision in question constitute a part of the secondary system of highways. Section 33-141 places the power for the establishment of roads for the secondary system in the Board of Supervisors or other governing bodies. However, it is to be noted that the State Highway Commissioner is to be made a party to any proceeding for the establishment of such roads. Further it is noted that no expenditure by the State shall be required upon any new road so established except as may be approved by the Commissioner. It therefore follows that the mere recordation of a plat of a subdivision would not be sufficient to establish the streets shown thereon as a part of the secondary system. I am of the opinion that the secondary road laws contemplate some favorable action on behalf of the Board of Supervisors and the State Highway Commissioner as a condition precedent to streets becoming a part of the secondary system of highways.

Section 33-138 of the Code of Virginia prohibits counties making any levy of county or district road taxes or contracting any indebtedness for the construction, maintenance or improvement of roads except in specified instances. Section 33-141 provides for the expenditure from general county levy funds, the amounts necessary to award damages for the right of way for a newly established street or road. Prior to 1946, Section 1969e(1/2) of the Code (now Section 33-121) authorized the governing bodies in the counties to contribute one half of the costs of constructing sidewalks in such counties. In 1946 the section was repealed and reenacted, omitting the contribution clause.

In view of the provision of Section 33-138 of the Code prohibiting a levy of taxes for road purposes, I am of the opinion that it also prohibits an appropriation from the general fund for road purposes unless such appropriation is specifically authorized by the General Assembly. I am further of the opinion that since the repeal of the contribution clause in Section 1969e(1/2), the only instances in which the Board of Supervisors of the County of Isle of Wight may make expenditures from the general funds for road purposes are in connection with acquisition of the necessary right of way for the establishment of streets and roads. If interests in land are to be acquired for purposes of sidewalks and drainage facilities, I am of the opinion that the county may expend general funds in paying for such interests as this would be a necessary part of acquiring the necessary right of way for the streets.
HIGHWAYS—Taking into state system by dedication; necessary steps; duties of Commonwealth attorney. F-192 (262)

May 12, 1953.

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

Receipt is acknowledged of your letter dated May 11, 1953, with further reference to taking certain streets into the secondary system of highways.

In my letter to you dated April 23, 1953, you were advised that inasmuch as the Board of Supervisors of Isle of Wight County had not adopted the provisions of Title 15 of the Code that the proceedings to establish a public road to become a part of the secondary system of highways should follow the proceedings as outlined in Section 33-141 of the Code. This should not be interpreted to mean that a street or road cannot be taken into the system by proper dedication. You are, therefore, correct in stating that when a road or street is established by the process of dedication and acceptance, it is unnecessary to resort to the appointment of viewers.

In the case you present, it becomes a question of fact as to whether the streets in the subdivision to which you refer have been properly dedicated and accepted by the public authority. You state that the Board of Supervisors in 1947 passed a resolution requesting the Highway Department to take these streets into the secondary system and suggest that this action of the Board may constitute an acceptance of the dedicated plat on record. I am of the opinion that the resolution referred to would be strong evidence of acceptance of this dedication; however, it would not necessarily be conclusive.

If it is the intention of the Board to accept this dedication, it could do so by resolution setting forth its intention to accept the dedicated roads and streets in the subdivision as public roads and streets, provided they comply with the minimum standards set forth in Section 33-142 and 33-143 of the Code, and the State Highway Commissioner is notified of the Board's action. However, it should be borne in mind wherein Section 33-141 provides

"* * * that no expenditure by the State shall be required upon any new road so established or any old road the location of which is altered or changed by the local road authorities, except as may be approved by the Commissioner. * * *"

You further wish to be advised if it is your duty as Commonwealth's Attorney to acquire said street rights of way or if you can be appointed to do so pursuant to the provisions of Section 15-504 of the Code.

You, of course, are familiar with your duties as Commonwealth's Attorney to advise the Board of Supervisors regarding all legal matters affecting the County's interest. I am of the opinion that the provisions of Section 15-504 of the Code, as amended by the Acts of 1952, are not applicable because this section insofar as employment of attorneys for the Commonwealth is concerned only applies to proceedings for the collection of taxes and proceedings in equity to sell lands purchased by the Commonwealth.
HOSPITALS—Licenses; Richmond City Home subject to. F-224 (303)

DR. MACK I. SHANHOLTZ, Commissioner,
Department of Health.

June 29, 1953.

This is in reply to your letter of June 26, 1953 which I quote in part:

"The findings of the survey show that the City Home provides services which are commonly accepted as nursing home services. Approximately 75 per cent of the patients in the institution are bed patients receiving medical and nursing care from an organized staff. These bed patients are for the most part confined continuously to their beds and at all times to the wards to which they have been admitted.

"Medical activities of the Home are under the direction of a licensed physician. Nursing services are supervised by graduate nurses on duty twenty-four hours per day. Complete medical services are available within the City Home with the exception of x-ray and surgery. These latter services are provided by a general hospital nearby as needed. Arrangements are being made for use of resident interns and externs at the Home to provide a more complete medical service for patients.

"Admissions cover all age groups. Currently more than 30 per cent of the bed patients are less than 65 years old. Approximately 10 per cent are under 50 years of age."

Section 32-299 of the Code of Virginia of 1950 provides, in part, as follows:

"Establishment or operation of hospitals prohibited without license.—(1) No person shall establish, conduct, maintain or operate in this State any hospital as defined in and included within the provisions of this chapter without having a license so to do as provided in this chapter, where such hospital, under regulations of the Board, is required to obtain a license."

Section 32-298 defines "person" and "hospital" as follows:

"'Person' means and includes individual, partnership, association, trust, corporation, municipality, county, and local governmental agencies, and any other legal or commercial entity and every manager or operator of a hospital embraced in this chapter, as requisite, excepting the United States, its departments and employees, and agencies thereof solely owned or directly controlled by it;

"'Hospital' means any institution, place, building or agency by or in which facilities for any accommodation are maintained, furnished, conducted, operated or offered for the hospitalization of two or more nonrelated mentally or physically sick or injured persons, or for the care of two or more nonrelated persons requiring or receiving medical or nursing attention or service as chronics, convalescents, aged, disabled or crippled, including, but not to the exclusion of other particular kinds with varying nomenclature or designation, ordinary hospitals, sanatoriums, sanitariums, rest homes, nursing homes, infirmaries and other related institutions and undertakings, exclusive of maternity hospitals to the extent same are included within the scope of the provisions of chapter 10 of this title, so long as the licensing, inspection and supervisory provisions thereof remain in full force and effect but no longer, and exclusive of dispensary or first aid facilities maintained by any commercial or industrial plant, educational institution or convent, and exclusive of those institutions now or hereafter subject to control of the State Hospital Board, or medical or educational institutions of the State, and exclusive also of any home for indigent aged persons owned or operated by a county, city or town, or by two or more political subdivisions jointly; * * *."
It is noted that the definition of "hospital" expressly excludes a home for indigent aged persons owned or operated by a county, city or town. However, as disclosed in the survey, as stated in your letter, I am of the opinion that the primary function of the Richmond City Home is to provide medical and nursing service. Therefore, I feel that the Richmond City Home is subject to the provisions of Chapter 16 of Title 32 of the Code of Virginia.

JAILS AND PRISONERS—Committal fee; person received in jail. F-75a (123)  

November 14, 1952.  

Honorable Leonard H. Davis,  
Police Justice, Norfolk.

Mr. J. Gordon Bennett, Auditor of Public Accounts, has referred to this office your letter of November 7 in regard to the committal fee to be taxed where a person is received in jail.  

The fee in question is provided for by Section 53-162.1 of the Code and is described as "For receiving a person in jail when first committed, fifty cents." This office has previously expressed the opinion that the fee should be taxed when a person is received in jail under a warrant or order of commitment. The fee is, of course, not paid by the defendant unless he is ultimately convicted and is committed to jail to serve a jail sentence or for nonpayment of a fine and costs. Under existing law the fee is never paid by the State or the locality. You set out in your letter some facts which, from an administrative standpoint, make it difficult in certain cases to determine whether or not this fee should be taxed. I can only say in this connection that where a person is actually received in jail under a warrant or order of commitment the fee should be taxed and paid by the defendant if he is convicted. I do not think that he should be taxed where, as in Norfolk, the person is held at the Police Station and not sent to jail.  

Where there are several charges against the same defendant and the person is received in jail on account of these several charges, I think that only one fee should be taxed. Likewise, where a person as you describe "goes to jail on more than one occasion prior to trial because of one or more continuances of his case," I think that only one fee should be taxed. So, also, where a defendant is bailed from jail following his arrest and before trial and goes back to jail after trial and conviction, there should be only one fee.  

You are correct in your understanding that this committal fee should be charged in cases involving violations of city ordinances as well as those involving violations of State statutes.  

You are likewise correct in your understanding that these fees, when collected, should be remitted to the Treasurer of the City of Norfolk, to be divided between the locality and the Commonwealth.

JAILS AND PRISONERS—Confinement for failure to pay fine. F-75b (78)  

September 18, 1952.  

Honorable C. Roger Malbon,  
Sheriff for Princess Anne County.

In reply to your letter of September 16, 1952, I am enclosing the requested copy of an opinion rendered on August 28, 1952 to the Honorable L. G. Harding, City Sergeant of Charlottesville, Virginia, regarding our interpretation of § 53-151 of the Code of Virginia as amended in 1952.
You request my opinion as to whether a prisoner being confined in jail for failure to pay fine and costs in excess of $60.00 can be released with less than two months confinement. Section 19-309 of the Code does not prescribe the minimum time for confinement in such cases, but rather prescribes the maximum period for which a person may be confined until fine and costs are paid. In so far as material to your question, that section establishes a maximum of two months. In my opinion you should be guided in such cases by the order of commitment and the statute. If the court in committing such person to jail prescribes a definite period of confinement, you should, of course, abide by that order except that in no case should the confinement exceed two months, since the statute specifically authorizes the release of the defendant upon the expiration of the time prescribed by the statute without any further order or direction by the court. In the event the commitment order is indefinite with respect to the time element and merely orders confinement until fine and costs are paid, you should in all cases be governed by the time limitations imposed by the statute.

JAILS AND PRISONERS—Determination of "good time." F-75b (65)

HONORABLE L. G. HARDING,
City Sergeant, Charlottesville.

This is in reply to your letter of August 25, 1952, which reads as follows:

"I am writing asking for advice regarding the amount of 'Good Time' allowance to prisoners serving sentences according to Section 53-151 of the Code of Virginia amended in the 1952 Acts of the General Assembly, in the following cases:

"Prisoners serving less than thirty days.
"Prisoners serving thirty days.
"Prisoners serving more than thirty days."

Section 53-151 of the Code of Virginia, 1950, as amended in 1952 reads as follows:

"The jailer shall keep a record describing each person committed to jail, the terms of confinement, for what offense or cause he was committed, and when received into jail. The jailer shall also keep a record of each convict, and for every 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."

Under this statute it is my opinion that the prisoner must serve twenty days before he gets a credit. After serving twenty days, he is credited with ten additional days. He then commences another twenty-day period and no additional credits are earned until he has served another twenty days.

Answering your specific questions, if a prisoner is sentenced to twenty days or less he would receive no "good time" allowance. If he were sentenced to any term from twenty-one up to and including thirty days, he would, after serving twenty days without violating the rules, be entitled to a credit of ten days. Of course, he may only need a part of the ten days in order to have completed his term, but that condition does not serve to alter the fact he must serve twenty days before he earns
a credit. If he has a term of more than thirty days, for example fifty days, he would, after serving twenty days, receive a credit for ten days; that would leave twenty days to be served. He would have to serve this whole twenty because he earns “good time” only on the basis of twenty-day periods. If his sentence was fifty-five days, he would receive “good time” credits at the end of the twentieth day served and at the end of the fortieth day served.

JAILS AND PRISONERS—Escape of convict while temporarily held in jail. F-75 (160) December 30, 1952.
Honorable Robert C. Goad, Commonwealth’s Attorney for Nelson County.

This is in reply to your letter of December 17, 1952, from which I quote as follows:

“Can a person be successfully prosecuted for escape from the penitentiary under Section 53-291 of the Code, and the following Sections, if the escape is made from a County jail where the person is being held pending the final outcome of a trial held in that County, and where the person was already serving a sentence in the penitentiary at one of the State Convict Road Camps, and was brought from the Road Camp to the County jail for the trial, and at the time of the escape the sentence he was already serving had not been completely served?”

Section 53-114 of the Code provides, in part:

“All pertinent provisions of other chapters of this title, and all rules and regulations made by the State Board, governing the prisoners in the penitentiary, shall be applicable to the State convict road force and to the prisoners comprising the same, * * *.”

It is apparent then that the provisions of §§ 53-291 and 53-293 are applicable to one sentenced to the penitentiary and held in a convict road camp and, under the case of Ruffin v. Commonwealth, 62 Va. 790, it is my opinion that such a prisoner, even though temporarily held in jail awaiting trial on another offense, is still a penitentiary prisoner and amenable to the provisions of those sections.

JAILS AND PRISONERS—Good time; computation of. F-75b (115) November 7, 1952.
Honorable W. Frank Smyth, Jr., Superintendent, Virginia State Penitentiary.

This is in reply to your letter of November 3, 1952, in which you inquire whether the 1952 amendment to § 53-151 of the Code of Virginia should be given retroactive effect. As amended in 1952 the section reads as follows:

“The jailer shall keep a record describing each person committed to jail, the terms of confinement, for what offense or cause he was committed, and when received into jail. The jailer shall also keep a record of each convict, and for every 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."

The effect of the 1952 amendment in so far as is material to your question was that of substituting "twenty days" for the word "month." In other words, as the law now stands, the jail prisoner should receive ten days credit for each twenty days that he faithfully observes the rules, whereas formerly he received ten days for each month that he faithfully observed the rules.

We have been called upon to construe this section previously and have concluded that this law operates on a twenty-day basis. That is to say, that at the conclusion of each twenty days of a prisoner's sentence the jailer should determine whether he is entitled to the ten-day credit for having observed the rules during the twenty days preceding. In view of the manner in which the credits are to be computed, it is my opinion that this statute does not have a retroactive effect. It should also be observed that the Legislature did not, in express terms, see fit to make the statute retroactive and, under principles of statutory construction which are well settled, retroactive effect is not favored in the absence of an express provision demanding such.

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JAILS AND PRISONERS—Good time; not entitled to sentence under 20 days. F-75b (24)

July 22, 1952.

HONORABLE CURTIS A. SUMPTER,
Attorney for the Commonwealth, Floyd County.

This is in reply to your letter of July 21, 1952, which reads as follows:

"Information is requested whether or not persons convicted under Sections 18-78 and 46-347.1, current Code of Virginia, and given the minimum jail sentence of ten days are entitled to any credit for good time under Section 53-213 of said Code or any other current statute."

Good time credits for jail prisoners confined for misdemeanors are governed by § 53-151 of the Code of Virginia, as amended. That section, as amended by the Legislature in 1952, reads as follows:

"The jailer shall keep a record describing each person committed to jail, the terms of confinement, for what offense or cause he was committed, and when received into jail. The jailer shall also keep a record of each convict, and for every 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."

It would appear, under the provisions of this section, that a jail prisoner does not receive a credit for good behavior until he has served twenty days. It is, therefore, my opinion that persons sentenced to jail for ten days would not earn credit for good behavior.
JAILS AND PRISONERS—Nonpayment of fine; holding for. F-173 (134)

MR. M. L. ROYSTER, Superintendent,
State Farm.

This is in reply to your letter of November 20, 1952, in which you request my opinion as to what procedure should be followed when a prisoner is received by you who has been sentenced to a definite term, has been assessed with a fine and cost which have not been paid, but whose order of commitment does not specify that he shall be held an additional period for the fine and costs.

The statutes dealing with commitment for nonpayment of fine and costs, §§ 19-303, 19-307, 19-308, 19-309, 19-320, 53-103 and 53-221 all indicate that the court which commits the prisoner should specify whether he is to be held an additional period of time for nonpayment of fine and/or costs. In the absence of any language in an order which clearly indicates such intent upon the part of the court, it is my opinion that you have no authority to hold the prisoner for nonpayment of fine and costs.

JAILS AND PRISONERS—Reduction in sentence; credit for donation of blood. F-75b (113)

HONORABLE R. M. YOUELL, Director,
Division of Corrections, Department of Welfare and Institutions.

This is in reply to your letter of October 28, 1952, in which you inquire whether it is compulsory that a reduction in sentence be given a prisoner who donates blood to the Red Cross.

Section 53-220 of the Code of Virginia, as amended in 1952, reads as follows:

"The State Board, with the consent of the Governor, may allow to any prisoner under its control who renders assistance in preventing the escape of another prisoner or in the apprehension of an escaped prisoner, or who gives a blood donation to another prisoner, or who voluntarily or at the instance of the prison official renders other extraordinary services, or who while in the prison system suffers bodily injury, a credit upon his term of confinement of such period of time as the Board in its discretion determines for each such service or injury. Any such prisoner shall also receive a credit for each pint of blood donated by him, under regulations prescribed by the Board, to the Red Cross blood bank and such other blood banks as the Board may from time to time approve. Any credit allowed under the provisions of this section shall also be considered as reducing the term of imprisonment to which the prisoner was or is sentenced for the purpose of determining his eligibility for parole."

A careful study of the language contained in this section leads me to the conclusion that it is within the discretion of the State Board and the Governor whether a credit shall be given for blood donations. There are several aspects of the language used which lead to the conclusion, but the most compelling consideration is that the section does not prescribe any specific amount of time to be allowed for a blood donation which, of course, leaves it within the discretion of the Board to fix the credit and, in my opinion, that discretionary power would permit the Board to fix the credit at zero. Therefore, it is my opinion that, in the final analysis, the matter is one which lies completely within the discretion of the Board, subject, of course, to the consent of the Governor if a credit is given.
REPORT OF THE ATTORNEY GENERAL

JAILS AND PRISONERS—State Farm; transfer of misdemeanants from one side to other. F-75 (238)

April 3, 1953.

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

This is in reply to your letter of March 25, 1953, in which you request my opinion as to whether you may, with the approval of the Governor, house misdemeanor prisoners on the Goochland side of the State Prison Farm rather than on the Powhatan side. You state that after considerable thought it has been found that it would be advantageous in many respects to make this change.

As I understand the change, you would bring the misdemeanants from the Powhatan side to the Goochland side and move the felons from the Goochland to the Powhatan side. In my opinion § 53-82 is broad enough to permit this action with the approval of the Governor.

JUDGES OF CIRCUIT COURT—Vacancy; filling upon notice of retirement. F-151a (131)

November 24, 1952.

HONORABLE JOHN S. BATTLE,
Governor of Virginia.

I am in receipt of your letter of November 21 relative to the retirement of Judge J. R. H. Alexander, Judge of the Twenty-sixth Judicial Circuit. You desire my opinion as to whether or not Judge Alexander's successor should be elected at the approaching special session of the General Assembly.

Judge Alexander meets the requisites for retirement set forth in section 51-3 of the Code. It appears from your file that notice in writing has been given to the Governor of the Judge's intention to retire, which notice states the date upon which the retirement will become effective; that effective date is December 31, 1952.

Assuming that the date fixed by Judge Alexander will remain December 31, 1952, I am of the opinion that no vacancy by virtue of retirement will exist in the Twenty-sixth Judicial Circuit prior to December 31. Section 102 of the Constitution provides that "Whenever a vacancy occurs in the office of judge, his successor shall be elected for the unexpired term." Therefore, it is my opinion that no successor could be elected for the unexpired term prior to the actual existence of a vacancy.

JUDGMENTS—Abstract may be docketed in "foreign jurisdiction" before being docketed by clerk. F-136a (5)

July 1, 1952.

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

This is in reply to your letter of June 17, 1952, from which I quote in part as follows:

"I shall appreciate a ruling from you as to whether or not a judgment rendered in a Trial Justice or Police Court of some other county or city must first be docketed in the proper clerk's office of that jurisdiction, and a certified copy from said clerk's office sent to another county or city for
docketing, or whether an abstract of judgment may be sent directly from a foreign Trial Justice or Police Court without first being docketed there."

Section 8-373, to which you refer, provides in part as follows:

"The clerk * * * of every circuit and corporation court * * * shall keep in his office, in a well-bound book, a judgment docket, in which he shall docket, without delay, * * * upon the request of any person interested therein, any such judgment rendered by a trial justice * * * of which an abstract is delivered to him certified by the trial justice who rendered it."

This section must be read in conjunction with § 16-26 of the Code which provides in part:

"The trial justice rendering any judgment shall certify and deliver an abstract thereof at any time during his continuance in office to any person interested therein who may desire to have the same docketed * * * ."

Section 16-78 of the Code provides in part:

"All papers connected with any of the proceedings before the trial justice, except such as may relate to cases appealed or removed, or which by law are required to be sooner returned to the clerk's office of the circuit court, shall remain in the office of the trial justice or of the clerk appointed by him hereunder for six months after final disposition of the proceeding by judgment or otherwise by the trial justice. And executions and abstracts of judgment and additional executions in such proceedings may be issued by such trial justice or clerk at any time during a period of two years in accordance with the general law in relation to abstracts of judgment and executions. But in any county adjoining any city having a population in excess of two hundred twenty-five thousand, all such papers shall remain permanently in the office of the trial justice, or the clerk appointed by him hereunder, and executions and abstracts of judgment and additional executions in such proceedings may be issued by such trial justice or clerk at any time in accordance with the general law in relation to abstracts of judgment and executions."

After considering these sections together it is my opinion that the trial justice rendering the judgment may certify an abstract which may be docketed by a clerk in a "foreign" jurisdiction without having first been docketed in the clerk's office of the jurisdiction in which the judgment was rendered.

JUSTICES OF THE PEACE—Authority when town ordinance violated. F-136b (41)

Honorable George F. Abbott, Jr., Commonwealth's Attorney for Appomattox County.

August 6, 1952.

This is in reply to your letter of July 31, 1952, in which you request my opinion on three questions regarding the authority of a justice of the peace within the town of Appomattox. Your questions are as follows:

1. Can a justice of the peace issue a warrant at the request of an officer of the town of Appomattox for an offense based on a town ordinance?

2. Would such justice of the peace have authority to commit the accused to jail?
3. Would the justice of the peace have authority to admit the accused to bail?

Your first question has been previously dealt with by this office in an opinion rendered on January 11, 1949, to the Honorable W. H. Overbey, Trial Justice for Campbell County. In that opinion it was held that the justices of peace of a magisterial district in which is situated a town may issue warrants charging a violation of ordinances of the town. I call your attention to the fact that that opinion is based upon the general statutes of Virginia and would, of course, be subject to being inapplicable in cases where the charter of the town prescribes a specific procedure for the enforcement of town officers. This is true not only to answer your first question, but is also true with reference to the answers to be given to your second and third questions. Your third question has also been dealt with in the opinion referred to in your letter which was addressed to the Honorable Charles H. Funk, Commonwealth's Attorney for Smyth County, on June 20, 1951. In that opinion it was held that a justice of the peace may admit to bail persons charged with violating a town ordinance. That opinion was predicated on the language of § 19-88 of the Code of Virginia, and I believe this same section contains the answer to your second question, for it is there provided:

"A justice of the peace before whom a person is brought charged with a misdemeanor or a felony, if only a light suspicion of guilt falls on him in the latter case, may, pending examination before him, or upon committing such person for trial, admit him to bail; ** **." (Italics added)

It would appear from the language emphasized that the justice of the peace may commit such person for trial and it is then a question of admitting such person for bail arises. I am enclosing copies of the opinions referred to for your convenience.

JUSTICES OF THE PEACE—Jurisdiction; issue warrants in city for county. F-136b (59)

August 21, 1952.

HONORABLE J. T. RODGERS,
Justice of the Peace, Elkton.

This is in reply to your inquiry in which you requested a clarification of two former opinions of this office. The first of these opinions was addressed to the Honorable K. C. Moore, Trial Justice of Rockingham County and the city of Harrisonburg, dated January 7, 1946, while the second was addressed to you under date of May 29, 1952.

In the opinion of Judge Moore, which was rendered by my predecessor, the Honorable Abram P. Staples, it was held that when an accused is brought before the Justice of the Peace of Harrisonburg an arrest warrant could be issued by him for a crime that the accused committed in Rockingham County. The authority for this is section 19-78 of the Code of Virginia.

My opinion to you of May 29, 1952 simply held that a Justice of the Peace of a city has jurisdiction only within the corporate limits of such city and within one mile beyond. In other words, a Justice of the Peace of Harrisonburg would have no authority to go into Rockingham County and then proceed to issue warrants and grant bail.

Your specific question is whether or not a Justice of the Peace of Harrisonburg may issue a warrant at the request of a party who comes from Rockingham County. Without further identification of the "party" and without knowledge of the facts surrounding the charge of crime, I am able to answer your question only in general terms. The Justice of the Peace of Harrisonburg may issue a war-
rant only if the crime has been committed within the corporate limits as prescribed by section 39-1 of the Code or only if the person accused is within the corporate limits of Harrisonburg and is brought before him in accordance with section 19-78.

JUSTICES OF THE PEACE—May also be councilman, but not trial justice. F-249 (293)

HONORABLE ROBERT P. GOOD,
Justice of the Peace, Shenandoah.

This is in reply to your letter of June 10, 1953, which I quote:

"I am now a Justice of The Peace for the Shenandoah Iron Works District of Page County. Yesterday I was elected to the Shenandoah town Council, so, therefore, will I have to resign the office of Justice of The Peace?

"Also, I would like to know if I may hold the town office of Trial Justice, county office of J. P., and during the same term serve as a Councilman?

"Is there any State law that forbids this or would it be determined by County or Town Statutes?"

This office has previously expressed the view that the offices of Justice of the Peace and Town Councilman are not incompatible. However, with regard to your second inquiry I draw your attention to section 16-43 of the Code of Virginia of 1950 which provides as follows:

"Any person appointed to the office of trial justice shall not be eligible to hold the office of justice of the peace."

JUSTICES OF THE PEACE—Misdemeanants; admitting to bail discretionary. F-27 (278)

HONORABLE E. R. HUBBARD,
Justice of the Peace, Wise County.

This is with reference to your letter of May 22, 1953, in which you ask to be advised whether a person charged with the commission of a misdemeanor may be admitted to bail by a Justice of the Peace when the Justice of the Peace has knowledge that such person has a capias issued against him in another county. You also ask whether a doctor may make a sobriety test upon a person charged with driving under the influence of ardent spirits, he being alone.

Article 3, Chapter 5 of Title 19 of the Code of Virginia, 1950, provides authority for Justices of the Peace to admit to bail persons charged with misdemeanors, as well as felonies, in certain instances. This is a discretionary power, such power being limited only by the statute itself or by the general rule against abuse of such discretion.

The answer to your second inquiry would depend upon the circumstances of each individual case.
JUSTICES OF THE PEACE—State seal; use on badge. F-136b (101)

Miss Martha Bell Conway,
Secretary of the Commonwealth.

This is in reply to your letter of October 14, 1952, in which you requested a ruling as to whether a justice of the peace is entitled to use the seal of Virginia on his badge of office.

Illegal uses of the State seal are set forth in § 18-355 of the Code of Virginia of 1952. While the legality of the contemplated use of the seal by a justice of the peace is not entirely free from doubt, it is my opinion that, in view of the fact that this is a criminal statute which must be strictly construed, such use would not be considered to be in violation of the law.

JUSTICES OF THE PEACE—Traffic violations; may accept cash bail from state residents. F-173 (187)

Mr. E. W. Clark,
Justice of the Peace, Montvale.

This is in reply to your letter of February 3 in which you ask the following question:

“If a traffic violator who resides in this state requests of the arresting officer (State Police) that he be allowed to pay his fine, in order that he would not have to return for trial, could this officer bring the violator before a Justice of the Peace and place bond and be told that he does not have to return for trial, as it is our practice to handle out of state traffic violators?”

I know of no provision in the law or Code of Virginia which would prevent this practice of prepayment of fine and costs in the case of any traffic violations which are misdemeanors, whether the violator be a resident of this state or of another state. This practice is possible in this state under sections 19-106, 19-107 and 19-108 of the Code of Virginia, which read as follows:

“When a person charged with a criminal offense is admitted to bail by a court or an officer authorized by law to do so for his appearance before a court or trial justice having jurisdiction of the case, for a hearing thereon, he may instead of entering into a recognizance with surety give his personal recognizance and deposit, or cause to be deposited for him, in cash, the amount of bail he is required to furnish, with such court or officer, who shall give him an official receipt therefor.” (Section 19-106).

“In order that justices of the peace may be able to give such official receipts, it shall be the duty of the Auditor of Public Accounts to provide all such justices with official prenumbered receipt books in quadruplicate, consisting of an original and three carbon copies, the original receipt to go to the person posting the cash bond, the first carbon copy to go to the court or trial justice before whom such person is recognized to appear, the second carbon copy to the Auditor of Public Accounts and the other copy to remain in the receipt book; and the justice of the peace with whom such cash was so deposited shall deliver the same, along with the first carbon copy of the receipt, to the court or trial justice before whom such person is recognized to appear, or to the clerk of such court or justice, if authorized by law to receive the same, who shall give him an official receipt therefor;
provided, however, that no justice of the peace shall receive any such cash deposit unless and until he shall have given bond before the clerk of the circuit court of his county in the penalty of five hundred dollars, with approved security, and conditioned for the faithful performance of his duties and the proper accounting for all money that may come into his hands." (Section 19-107).

"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; provided, that if there be an appeal from the judgment of a trial justice trying any such case, or if it be a charge of felony and be sent on for investigation by a grand jury, the money so deposited shall be paid over by such trial justice to the clerk of the court to which such appeal is taken, or to which the case is sent on for investigation by a grand jury thereof, who shall issue to such trial justice his official receipt therefor.

"If there be default in any such recognizance, and if the case be not tried in the absence of the defendant and the money disposed of as herein-above provided for, the forfeiture thereof shall be noted of record and proceedings had thereon, as provided by law, and the money so deposited shall be held subject to the order of the court upon the final disposition of such proceedings." (Section 19-108).

It is left to the officials, Judge, Trial Justice, etc. of the various counties as to whether this practice of allowing prepayment of fines and costs for traffic violations is to be used in their city or county. In view of the new provisions of the traffic laws of the Commonwealth in regard to revocation of driving permits because of two convictions of speeding, etc., it is recommended that if the practice of prepayment of fines and costs is to be allowed in a city or county, that the violator should be required to sign a plea of guilty to the charge and a waiver of his right to appear in court and be tried upon the charge.

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JUSTICES OF THE PEACE—Vacancies may be filled by circuit court.

F-136b (241)

April 6, 1953.

HONORABLE EDWARD H. RICHARDSON,
Commonwealth’s Attorney for Roanoke County.

This is in reply to your letter of April 3, 1953, from which I quote as follows:

"Roanoke County is divided into four Magisterial Districts. There is one Justice of the Peace for Salem Magisterial District at the present time. At the last election no one offered for election as Justice of the Peace either Catawba Magisterial District or Cave Spring Magisterial District. One man offered for election and was elected Justice of the Peace for Big Lick District. This man resigned as of October, 1952, in order to become Clerk of the Trial Justice Court of Roanoke County. Since under the law each District in the County is entitled to three Justices of the Peace, does Judge Hoback have the right to appoint a Justice of the Peace for and in place of the one who resigned from Big Lick District, and to appoint Justices for the other Magisterial Districts?"
Section 24-145 of the Code of Virginia provides, in part, as follows:

"When a vacancy occurs in any county, city, town or district office, and no other provision is made for filling the same, it shall be filled by the circuit court of the county or corporation court of the city in which it occurs, or the judge thereof in vacation; ** **. The term of office of any person appointed under this section shall commence as soon as he shall qualify and continue for the unexpired term of such office. ** **

"Any appointment authorized by this section may be made by the judge thereof in vacation; and the appointment, when made in vacation shall be certified by the judge making the same to the clerk of his court, to be entered as a vacation order.” (Italics added)

In my opinion this section is broad enough to permit the Judge of the Circuit Court to fill the vacancies referred to in your inquiry.

JUVENILE COURT—New act can in no way be retroactive. F-239 (36)

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

This is in reply to your letter of July 23, 1952, from which I quote as follows:

"You will note that § 16-172.49 of the new juvenile court act was amended at the 1952 session of legislature. On March 6 of this year one Paul Bell was committed to the State Board by the juvenile court in Danville. Judge Moore of that court wants to know if he may still reopen this case as he might have done at any time prior to June 28, 1952, when the recent amendment became effective or whether or not he has lost his right to reopen this matter, since the new law had already taken effect and it has been more than thirty days since Bell was committed to the State Board of Welfare and Institutions."

The rule for construction of new laws of this State is stated in § 1-16 of the Code of Virginia as follows:

"No new law shall be construed to repeal a former law, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued, or claim arising before the new law takes effect; save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings; and if any penalty, forfeiture, or punishment be mitigated by any provision of the new law, such provision may, with the consent of the party affected, be applied to any judgment pronounced after the new law takes effect.”

I am not advised of any Virginia decision which is squarely in point with the question raised by your letter. However, from such cases as have been decided, and especially the case of Ferguson v. Ferguson, 169 Va. page 77, 192 S. E. 774, it is my opinion that the Virginia courts would hold that the right to reopen this case and the right of the person committed to request that it be reopened became fixed prior to the effective date of the new law and are not affected by that enactment.
LITERARY FUND—Loans from included within locality's limitation of indebtedness. F-199 (260)

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

I am in receipt of your letter of April 30, in which you ask as to whether or not obligations due the Literary Fund are to be included as existing indebtedness of cities and towns insofar as the 18 per cent maximum limitation of such indebtedness as prescribed by Section 127 of the Constitution is concerned.

In replying to your inquiry, it is probably best first to set out in full Section 127 of the Constitution, which is in the following language:

“No city or town shall issue any bonds or other interest-bearing obligations for any purpose, or in any manner, to an amount which, including existing indebtedness, shall, at any time, exceed eighteen per centum of the assessed valuation of the real estate in the city or town subject to taxation, as shown by the last preceding assessment for taxes; provided, however, that nothing above contained in this section shall apply to those cities and towns whose charters existing at the adoption of this Constitution authorize a larger percentage of indebtedness than is authorized by this section and provided further, that in determining the limitation of the power of a city or town to incur indebtedness there shall not be included the following classes of indebtedness:

(a) Certificates of indebtedness, revenue bonds or other obligations issued in anticipation of the collection of the revenues of such city or town for the then current year; provided that such certificates, bonds or other obligations mature within one year from the date of their issue, and be not past due, and do not exceed the revenue for such year;

(b) Bonds authorized by an ordinance enacted in accordance with section One Hundred and Twenty-three, and approved by the affirmative vote of the majority of the qualified voters of the city or town voting upon the question of their issuance, at the general election next succeeding the enactment of the ordinance, or at a special election held for that purpose for a supply of water or other specific undertaking from which the city or town may derive a revenue; but from and after a period to be determined by the council, not exceeding five years from the date of such election, whenever and for so long as such undertaking fails to produce sufficient revenue to pay for cost of operation and administration (including interest on bonds issued therefor), and the cost of insurance against loss by injury to persons or property, and an annual amount to be covered into a sinking fund sufficient to pay, at or before maturity, all bonds issued on account of said undertaking, all such bonds outstanding shall be included in determining the limitation of the power to incur indebtedness, unless the principal and interest thereof be made payable exclusively from the receipts of the undertaking.”

Loans from the Literary Fund to the School Boards of the counties, cities and towns are authorized by Sections 22-101 and 22-215 of the Code. It is entirely clear from a consideration of these sections that the School Boards of the counties, cities and towns are authorized to borrow money from the Literary Fund. The loans bear interest and the governing bodies of the counties, cities and towns are required to make provision for the payment of interest and of the principal in accordance with the contract. A consideration of the sections involved makes inescapable the conclusion that, when money is borrowed by a city or town from the Literary Fund, a definite loan agreement is entered into between the city or town and the State Board of Education, which administers the Fund.

Section 127 of the Constitution was before our Court of Appeals in the case
REPORT OF THE ATTORNEY GENERAL

of Town of South Hill v. Allen, 177 Va. 154, and the opinion comments on the
broad language of the first sentence of the section in the following words:

"The first sentence in the section quoted is clear, explicit and compre-
hensive. It states: 'No city or town shall issue any bonds or other interest-
bearing obligations for any purpose, or in any manner, to an amount which,
including existing indebtedness, shall at any time, exceed 18 per centum
of the assessed valuation * * *' (Italics supplied). The language is as
comprehensive as human ingenuity could devise. The expression 'no
city or town' is sweeping. Not only the specific word 'bonds' is used,
but the generic term 'obligations'. This is followed
by
the phrases, 'for
any purpose, or in any manner.' It is stated in one of the briefs that these
phrases are 'omnivorous'." (177 Va. at p. 160)

In my opinion, the reasoning of the Court in this case and especially that portion
of the opinion which I have quoted compels the conclusion that indebtedness of a
city or town on account of its borrowings from the Literary Fund must be con-
sidered in computing the limitation of 18 per centum of the assessed valuation
of the real estate in the city or town subject to taxation prescribed by Section
127 of the Constitution.

I am not unmindful of the decision of our Court in Board of Supervisors v.
Cox, 155 Va. 687, holding that Section 115-a of the Constitution, providing that
no debt shall be contracted by any county or by a county school board without
a vote of the people, has no application to Literary Fund loans to local school
boards; but this case, in my opinion, is not pertinent in considering the limitation
upon the bonded indebtedness of cities and towns prescribed by Section 127 of
the Constitution. Indeed, in the case of Almond v. Gilmer, 188 Va. 1, in a con-
curring opinion of five of the seven Justices of the Supreme Court, while the
question you put was not directly involved, it was clearly indicated that the Court
was of opinion that Literary Fund loans to cities and towns were to be considered
in computing this 18 per centum limitation prescribed by the section of the Constitu-
tion under consideration. This is evidenced by the following from this concurring
opinion:

"It will be noted that the provisions of section 115-a of the Constitu-
tion apply only to counties, districts of the counties, and to school boards
of the school districts and school boards of the counties. None of the
provisions applies to municipalities. The only constitutional limitation
placed upon municipalities regarding the issue of bonds or other interest-
bearing obligations, except for certain nonpertinent exceptions, is that the
total amount of such indebtedness shall not exceed 18% of the assessed
valuation 'of the real estate in the city or town subject to taxation as
shown by the last preceding assessment for taxes.' There being no constitu-
tional inhibition, the legislature has power to authorize the municipal sub-
divisions of the State to borrow money, within the limits stated, from the
State Board of Education or from other parties without submitting the
question to the electors of the respective municipalities for their approval."
(188 Va. at pp. 28-29)

After careful consideration it is my view that your question must be answered
in the affirmative.
This is in reply to your letter of June 5, 1953, in which you inquire as to the legality of a proposed contest in connection with an advertising program to be sponsored by a local radio station. The proposed plan is outlined as follows:

"(1) WROV will cause to be built a nice residence costing, including the lot, approximately $15,000.00.

"(2) It will sell participation in this campaign to various business concerns, primarily the smaller concerns in the community whose primary business is supplying materials and services for the construction and maintenance of a residence and household.

"(3) WROV will contract with each of the participating concerns for radio advertising at $100.00 per month for four (4) consecutive months, which advertising will consist of thirty (30) radio announcements per month for the four (4) consecutive months, plus participation in newspaper advertising for which WROV will contract.

"(4) Each of the participating concerns will be given, without further charge, one thousand (1000) keys, and among these keys will be some that will open the back door of the residence; and out of the total keys distributed approximately one hundred (100) will open the back door of the residence.

"(5) The participating concerns will distribute the keys to the general public during the course of the conduct of their businesses, but without obligation on the part of a recipient of a key to purchase or otherwise obligate himself. The recipient of each key will be registered. The purpose of the registration is to get a maximum distribution and prevent any one person from accumulating an excessive number of keys.

"(6) At a designated time at the end of the four-months' period, contestants holding keys will be given an opportunity to ascertain if any of the keys held will open the back door of the residence.

"(7) Contestants who open the door will be asked a quiz question, and those contestants who answer correctly will be eligible for the second quiz question.

"I should like to emphasize that the quiz will be a real test of knowledge and skill. In other words, the questions are going to be bona fide.

"(8) Contestants who are not eliminated by the first quiz will enter a continuing quiz, and by the process of elimination the winner of the property will be determined, and this winner will be given a key to the front door and a deed to the property, free from any liens; or, at the option of WROV the winner will be given the cash value of the property, as determined by a sale thereof."

As stated in the case of Maugh v. Porter, 157 Va. 415, there are three necessary elements embraced in a lottery, namely, consideration, chance and prize. This office has formerly advised that advertising value is sufficient to constitute the necessary consideration (see Opinions of the Attorney General, 1949-50, page 160).

In order to participate in the contest in the instant case it is first necessary that the person visit one of the participating concerns and receive a key. The lucky keyholders will be allowed to participate in the quiz program, the winner of which will receive the new house. It would thus appear that the necessary elements of chance and prize are also present in the proposed advertising program (for similar program see Opinions of the Attorney General, 1948-49, page 140).

Therefore, notwithstanding the fact that a certain amount of skill and
knowledge is necessary in order to win the house, the winner must also be the recipient of a lucky key as a prerequisite to his employing such skill and knowledge.

It would thus appear that the proposed advertising program would be violative of section 18-301, Code of Virginia, 1950.

MEDICAL EXAMINERS—No jurisdiction over deaths in federal institutions. F-78 (269)

May 20, 1953.

DR. GEOFFREY T. MANN,
Chief Medical Examiner.

This is with reference to your letter of May 19, 1953, which I quote:

"Your opinion on the following is respectfully solicited.

"The Federal Government owns and operates a Workhouse as a Penal Institution in the County of Fairfax. There has been considerable confusion as to whether the medical examiner for Fairfax County has jurisdiction over deaths occurring in this Institution which normally would be subject to a medical examiner's investigation.

"The question submitted for your consideration is as follows:

"Has the Federal Government acquired exclusive jurisdiction over penal institutions owned and operated by it outside of the District of Columbia so as to preclude the authority of the medical examiner to act upon such premises?"

By act of Congress of June 25, 1948, Chapter 645, cited as Title 18, Chapter 304 of USCA, the Federal Prison Industries, a government corporation of the District of Columbia, was established to provide for industrial operations and vocational training for inmates of federal institutions. Section 41-25 provides, in part, as follows:

"(e) All other laws of the United States relating to the imprisonment, transfer, control, discipline, escape, release of, or in any way affecting prisoners, shall apply to prisoners transferred to such camps."

I assume that the Workhouse owned and operated by the Federal Government in Fairfax County was established pursuant to this Act.

Inasmuch as the Federal Government has complete jurisdiction over inmates of federal institutions, I am of the opinion that the Virginia Medical Examiners have no authority to exercise any duties imposed on them by state law relative to deaths within such institutions.

MENTAL HOSPITALS—Legal liability for support of patients. F-383 (26)

July 23, 1952.

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

This is in reply to your letter of July 14, 1952, requesting my opinion as to whether or not the person legally liable for the support of a patient in the State Mental Hospital System would be liable for the expenses of such patient's treatment and support as provided in § 37-125.1, Code of Virginia, after the estate of the patient has been exhausted by payment of such expenses by the fiduciary acting in behalf of the patient.
It is my opinion that such legally liable person would be liable for such expenses, in accordance with the applicable Code sections in the same manner as if the patient, whose estate has been exhausted, had possessed no estate in the first instance. Accordingly, such legally liable person would be responsible after the estate of the patient has been exhausted.

MILK REGULATIONS—Both City of Richmond and State Milk Commission have authority to issue in Richmond. F-23 (14)

Honorable Albert O. Bosch, July 14, 1952.
Member of the General Assembly.

This is in reply to your recent letter in which you requested my opinion as to whether or not section 2.04(h) of the charter of the city of Richmond gives the city the right to regulate the preparation, distribution, sale and possession of milk by city ordinance without respect to the powers of the State Milk Commission.

Section 2.04(h) provides that the city shall have power to adopt ordinances:

"To regulate, in the interest of public health, the production, preparation, distribution, sale and possession of milk, other beverages and foods for human consumption and the places in which they are produced, prepared, distributed, sold, served or stored; * * * and make and enforce all regulations necessary to preserve and promote public health and sanitation and protect the inhabitants of the city from contagious, infectious or other diseases."

The city of Richmond may certainly enact ordinances under the above quoted language in the interest of public health and it has the right to regulate the production, preparation, distribution, sale and possession of milk in this connection without regard to the powers of the State Milk Commission.

It is to be noted that the State Milk Commission has no power to regulate the production or distribution of milk in the interest of public health, such power being vested in the Department of Agriculture and Immigration. As Mr. Israel Steingold pointed out in his letter to you, there is no conflict between the Milk and Cream Act and the Charter of the city of Richmond. Therefore, under well established rules of statutory construction both the Act and the Charter must be given full force and effect. It follows, then, that there can be no question of the jurisdiction of the State Milk Commission in the city of Richmond.

MISDEMEANORS—Double jeopardy; cannot be tried twice for same misdemeanor. F-85 (267)

Honorable Mark D. Woodward, May 14, 1953.
Commonwealth's Attorney for Page County.

This is in reply to your letter of May 12, 1953 in which you ask the following question:

"If a person is tried on a misdemeanor charge in the Trial Justice Court and acquitted in that court, can he then be indicted for the same misdemeanor?"
It is my opinion that this person cannot be tried again by any court of this State for the same misdemeanor. This would be a very definite violation of § 8 of the Constitution of Virginia which provides, in part:

"* * * he shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers; nor be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopardy for the same offense."

In Buford v. Commonwealth, 179 Va. 752, the Supreme Court of Appeals of Virginia held that a person could be acquitted of a felony in a trial justice court and later be tried in a court of record. This was held not to be double jeopardy for the trial court has no jurisdiction to try a felony and, therefore, no trial had ever been held. A trial justice court has jurisdiction over misdemeanors, therefore, it would be double jeopardy to try the person again if he had already been acquitted of the same misdemeanor.

MISDEMEANORS—Juries; one peremptory challenge allowed Commonwealth and prisoner. F-166 (8)

HONORABLE DOWNING L. SMITH,
Attorney for the Commonwealth for Albemarle County.

This is in reply to your letter of July 1, 1952, which reads as follows:

"Chapter 194 of the Acts of Assembly of 1952 amended Section 8-200 of the Code of Virginia to increase the peremptory challenges from one to three by the plaintiff and defendant in civil cases. I would appreciate your opinion as to whether this Section is applicable to misdemeanor juries or not.

"Section 19-181 of the Code of 1950 provides for jurors in misdemeanor cases, and incorporates the provisions of Section 8-200 by reference. However, Section 19-183 of the Code of 1950 providing for one peremptory challenge by the Commonwealth and the prisoner in misdemeanor cases was not amended by the Acts of Assembly of 1952."

Section 8-200 formerly read as follows:

"In every case the plaintiff and defendant may each challenge one juror peremptorily when the jury consists either of five or seven." (Emphasis supplied)

Chapter 194 of the Acts of 1952 amends this section by replacing the words "one juror" with the words "three jurors."

As you point out, § 19-181 of the Code provides that the provisions of § 8-200 shall apply to misdemeanor cases, and as you further point out, § 19-183, which was not amended, expressly provides that the "Commonwealth and the prisoner shall each be allowed one peremptory challenge" in every case of misdemeanor. It should also be noted that § 19-181, which was not amended and which is the very section which incorporates § 8-200 by reference, also provides that "seven jurors shall constitute a panel in the trial of misdemeanors."

It is a well settled rule of statutory construction that repeal by implication is not favored. To hold that the amendment to § 8-200 is applicable to misdemeanor cases would mean that the provisions of § 19-183 are being amended by implication rather than by express amendment and, further, that the amendment is not by direct implication but by implication incorporated by reference. It would further mean that the provision of § 19-181 relating to the size of the panel in
such cases has necessarily been changed without any express change by the Legislature.

In my opinion it is clear that it was the intent of the Legislature to change the provision of law relative to peremptory challenges in civil cases and not to make such change in misdemeanor cases. Since the provisions of §§ 19-181 and 19-183 were not altered, I believe those sections which deal specifically with criminal cases should control in spite of conflicting provisions in a more general statute.

MOTOR VEHICLES—Chauffeurs' licenses; when required. F-149 (226)

March 19, 1953.

MR. LIGON L. JONES,
Commonwealth's Attorney, Hopewell.

This is to acknowledge receipt of your letter of March 13, in which you state:

"The Police Department of the City of Hopewell has asked me for an opinion of the interpretation of Section 46-343, Sub-section 1 of the 1950 Code of Virginia and amendatory acts thereof. It appears that a certain contracting concern in this city that moves and hauls dirt have employed several crane, bulldozer and maintenance men in their concern. Occasionally they are called upon by the concern to drive their dump trucks in hauling dirt from one point to another on the public highways of the State.

"It is admitted that their principal purpose of employment was to operate their cranes, bulldozers or do work other than drive the trucks. Are these men required to have chauffeurs' licenses as provided by Section 46-343, Sub-section 1 of the 1950 Code of Virginia and amendatory acts thereof."

Section 46-343(1) of the Code of Virginia reads as follows:

"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."

From what you state, these parties occasionally drive dump trucks in hauling dirt, but their primary employment is that of operating cranes, bulldozers, etc. Hence, it would follow that the driving of the vehicles is incidental to their other employment, and they are not required to have a chauffeur's license.

MOTOR VEHICLES—Chauffeurs' licenses; when required. F-149 (301)

June 26, 1953.

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

This is to acknowledge receipt of your letter of June 15, in which you ask whether or not persons in the following categories are required to have a chauffeur's license:

"(a) Are drivers of trucks used primarily for delivery purposes, such as those of retail merchants or those of oil companies delivering fuel in bulk, required to have a chauffeur's permit?"
“(b) Is a man employed one day a week for the specific purpose of driving a farm truck and employed the balance of his time by other and separate parties for other and separate purposes required to have a chauffeur’s license?

“(c) An employer conducts a business which requires virtually daily truck hauling. He has approximately five employees assigned to different duties and he apparently picks whichever one of these is free at a given time to drive the truck. Driving of the truck would be a full time job for one man were one person assigned to it. If there were one man hired for the specific purpose of driving the truck, would he need a chauffeur’s license? If the responsibility for driving the truck is distributed among five people, do each of these need a chauffeur’s license?”

I invite your attention to Section 46-343.1 of the Code of Virginia, which reads as follows:

“(1) ‘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.”

In your said letter you made certain inquiries which will be answered seriatim:

(a) Yes. They are required to have chauffeurs’ licenses as it is obvious that such persons are employed with the principal purpose of operating a motor vehicle.

(b) Yes. Such a person is required to have a chauffeur’s license. The fact that he is only employed one day a week for the principal purpose of driving a motor vehicle and may engage in other activities of employment on other days for other employers does not obviate the requirement of having this type of license. It is the character of employment that he performs for one employer which determines whether he is required to have a chauffeur’s license, and not the duration of such employment.

(c) No. Such persons would not be required to be licensed as chauffeurs, inasmuch as it is obvious that the operation of this truck is merely incidental to the other duties assigned them.

I agree with you that the purpose for which a man is employed is the controlling factor in determining whether or not he should be licensed as a chauffeur. If the driving of a vehicle is merely incidental to the duties which he performs for his employer, then he is not required to have a chauffeur’s license, but on the other hand, if he is employed for the principal purpose of driving the vehicle, then he should be licensed as a chauffeur.

For your information, I am advised that the Division of Motor Vehicles does, during a single year, license more than 56,000 persons as chauffeurs. For your further information, I am enclosing herewith a copy of an opinion of theHonorable Abram P. Staples, on August 5, 1937, pertaining to the same subject.

MOTOR VEHICLES—Exceeding gross weight; court cannot suspend statutory fine. F-173 (44)

Honorable L. Brooks Smith,
Trial Justice for Accomack County,

I am sorry I have not been able to answer your inquiry of July 19, 1952, more promptly.

Your request concerns chiefly the proper construction to be given Section
46-338.1 of the Code pertaining to four matters: (1) marginal cases; (2) tolerance, if any, to be allowed; (3) authority of the court under this section to suspend payment of fine and cost; and (4) instructions to be given bail commissioners and justices of the peace regarding cash bond for violation of this section.

This section of the Code is contained in the 1952 Cumulative Supplement and reads as follows:

"Any violation of any provision of §§ 46-334, 46-335 or 46-336 shall constitute a misdemeanor and every person, firm or corporation convicted thereof shall be punished by a fine as follows: two cents per pound for each pound of excess gross weight over the statutory limit when the excess is five thousand pounds or less; and five cents per pound for each pound of excess gross weight over the statutory limit when the excess exceeds five thousand pounds.

"All fines or forfeitures collected upon conviction of, or upon forfeiture of bail by, any person, firm or corporation charged with a violation of any of the provisions of §§ 46-334, 46-335 or 46-336 shall be paid into the State treasury to be credited to the Literary Fund. Upon notification of the failure of such person, firm or corporation to pay the fine imposed under this section as provided above, the Division and the Department of State Police may thereafter deny to the offending person, firm or corporation the right to operate a motor vehicle or vehicles upon the highways of this State until the fines imposed hereunder have been paid. The penalty provided for by this section shall supersede the penalty imposed by § 46-335.1 and § 46-18."

I assume from your letter that a marginal or border-line case under the foregoing statute is one in which the court entertains some doubt as to the guilt of the accused person, firm or corporation. This statute is not unlike other penal statutes in this respect and, of course, where there is a reasonable doubt as to the guilt of the accused, this doubt would be resolved in favor of the accused and the case dismissed.

I am not advised of any statute which authorizes the court to take into consideration a tolerance feature. The statute makes it mandatory upon the court to fix the penalty as prescribed therein and does not confer upon the court any discretionary power in determining the fine to be imposed.

In regard to your third inquiry, you are advised that this office has heretofore given as its opinion that a court has the authority to suspend payment of a fine but not the cost in a criminal case. [Attorney General's Reports, 1940-1941, page 197] However, the section herein quoted differs materially from the usual statute prescribing a penalty for a violation. In the first place, it is noted, as hereinbefore pointed out, that the court has no discretion in the amount of the fine to be imposed, the same being dependent upon the excess gross weight over the statutory limit. It will be further noted that the Department of State Police may deny to the offending person, firm or corporation the right to operate a motor vehicle upon the highways of this State until the fine imposed under this statute has been paid. Therefore, if the fine is imposed and suspended by the court, nevertheless, the right of the offending person, firm or corporation to operate a motor vehicle on the highways of this State could be denied by the State Police until the same is paid. In view of the particular language used in this statute. I have reached the conclusion, and am, therefore, of the opinion, that a court does not possess authority to suspend either the payment of the fine or cost for a violation of this section.

Having reached this conclusion, it follows that it is not necessary to express my view upon the fourth inquiry regarding instructions to be given bail commissioners and justices of the peace regarding cash bond for violations of this section.
MOTOR VEHICLES—Farm equipment; laws relating to towing on highways applies. F-353 (118)

November 7, 1952.

MR. BASIL C. BURKE, JR., Commonwealth's Attorney for Madison County.

I have your letter of October 31, and the questions which you raised are answered seriatim:

(1) "Whether or not a farm tractor temporarily towing a farm wagon behind it on the highway is required to have an emergency chain hooked to the connection between the two vehicles".

Section 46-332 of the Code of Virginia reads as follows:

"The connection between any two vehicles one of which is towing or drawing the other on a highway shall consist of a fifth wheel, drawbar or other similar device not to exceed ten feet in length from one vehicle to the other and such two vehicles shall in addition to such drawbar or other similar device be equipped at all times when so operated on the highway with an emergency chain."

The term "vehicle", as used in this section, includes a farm wagon. It will be noted that, from paragraph 27 of Section 46-1 of the Code, the term "vehicle" is defined as—"Every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks".

I am, therefore, of the opinion that an emergency chain is necessary when a farm wagon is towed by a farm tractor.

(2) "Whether or not a farm tractor may tow an unlimited number of pieces of farm machinery and wagons behind it on the highway".

Your attention is invited to Section 46-331 of the Code of Virginia, which reads as follows:

"No motor vehicle shall be driven upon a highway drawing or having attached thereto more than one motor vehicle; provided, however, that in the cities of this Commonwealth, the councils may, in their discretion, by general ordinance, permit motor vehicles to be driven upon streets of their respective cities drawing or having attached thereto more than one other vehicle, trailer or semi-trailer."

It will be noted that in the first clause of this section the term "motor vehicle" is used and not simply "vehicle"; whereas, in the second clause the term "vehicle", "trailer" and "semi-trailer" are used. To say that the first clause only applies to motor vehicles as defined in Section 46-1 would place a meaning on the term "motor vehicle" not contemplated by the legislature, because obviously the purpose of this legislation is to prohibit the towing of more than one vehicle by another whether that vehicle be a motor vehicle or a vehicle as defined in Section 46-1. It is true that in Section 46-1 the term "motor vehicle" and the term "vehicle" have slightly different definitions, but we are not limited to the exact definition set forth therein, for you will notice that it is expressly stated therein that the words shall have the meanings respectively ascribed to them except in those instances where the contents clearly indicate a different meaning.

As you correctly stated, the limitations as to the size of the vehicle as set forth in Sections 46-327 to 46-330 do not apply implements of husbandry. It will
be noted that there is no such exemption relative to the prohibition contained in Section 46-331.

I am, therefore, of the opinion that no more than one vehicle, or implement of husbandry, can be towed by a farm tractor.

MOTOR VEHICLES—Farm tractor; operation on highways after operator's permit revoked.  F-149 (254)

April 27, 1953.

HONORABLE MARK D. WOODWARD,
Commonwealth's Attorney for Page County.

This is in reply to your letter of April 21, 1953, in which you asked if it is unlawful for a person whose operator's license has been revoked or suspended to drive a farm tractor on the public roadways during the period of such revocation or suspension.

It is my opinion that a person whose operator's permit has been revoked may still operate a farm tractor on a public highway when going from one tract of land to another. Section 46-348 of the Code, as amended by the 1952 session of the General Assembly, provides:

"No person shall be required to obtain an operator's or chauffeur's license for the purpose of driving or operating a road roller, road machinery or any farm tractor or implement of husbandry or vehicle defined in sec. 46-45, temporarily drawn, moved or propelled on the highways."

It is my opinion that this section of the Code exempts entirely the operation of farm tractors when being used as set out under section 46-348 from any and all provisions of the Code relating to the necessity of an operator's permit, or to the revocation of a permit.

MOTOR VEHICLES—Farm tractors included in drunk driving statute.  F-353 (277)

May 27, 1953.

HONORABLE WILLIAM A. COOKE,
Substitute Trial Justice, Louisa County.

I am in receipt of your letter of May 25th in which you make the following inquiry:

"I would like to have an opinion from you as to whether or not a farm tractor would be a motor vehicle within the contemplation of the laws relative to operating a motor vehicle under the influence of intoxicants."

Your attention is invited to Section 18-75 of the Code, which makes it unlawful to drive or operate any motor vehicle under the influence of alcohol.

Section 46-1(13) "Motor Vehicles"—Every vehicle as herein defined which is self-propelled or designed for self-propulsion.

I am of the opinion that the driving of a farm tractor under the influence of alcohol is in violation of Section 18-75. This, however, should not be interpreted to mean that a farm tractor should be licensed or titled under the provisions of the Motor Vehicle Code.
November 20, 1952.

MR. GEORGE F. ABBOTT, JR.,
Commonwealth's Attorney for Appomattox County.

This is to acknowledge receipt of your letter of November 14, in which you ask whether or not any crime has been committed in violation of Section 18-26 of the Code of 1950. Relative to this question, you state in part as follows:

"The facts briefly are as follows: X was stopped by a State Trooper and given a traffic summons to appear in the Trial Justice Court of Appomattox County on a charge of operating a motor vehicle without an operator's permit and operating a motor vehicle over the licensed load; X told the officer that his, X's, name was Y and that he had a valid permit at home; the trooper then had X sign the usual acknowledgment set forth on the traffic summons or ticket and X signed the summons or acknowledgment by writing the name of Y (the trooper, of course, assumed that the person involved was Y when, in fact, it was X, who had no operator's permit); neither X nor Y appeared in person to answer the said summons but a friend appeared and paid the fine after the Trial Justice Court convicted Y of the second above mentioned charge and dismissed the first charge; the Trial Justice forwarded to the Division of Motor Vehicles an abstract of the said conviction. I wish to know if any crime has been committed under the above set forth facts."

Section 18-26 of the Code of Virginia, 1950, reads as follows:

"If any person forge any writing, other than such as is mentioned in §§ 18-22, and 18-24, to the prejudice of another's right, or utter, or attempt to employ as true, such forged writing, knowing it to be forged, he shall be confined in the penitentiary not less than two years nor more than ten years, or, in the discretion of the jury or the court trying the case without a jury, he shall be confined in jail not less than six months nor more than twelve months. Any person who shall obtain, by any false pretense or token, the signature or another person, to any such writing, with intent to defraud any other person, shall be deemed guilty of the forgery thereof, and shall be subject to like punishment."

The first portion of this section was Section 3737 of the 1887 Code.

In the case of Commonwealth v. Gordon, 100 Va. 825, 829, the Court stated:

"Forgery at common law is defined by Blackstone as the fraudulent making or altering of a writing, to the prejudice of another's rights. (4 Bl. Com. 247.) And that definition is substantially embodied in section 3737 of the Code."

Obviously the signing by X of Y's name on the summons was to the prejudice of Y, as it lead to the conviction of Y in the Trial Justice Court. I am, therefore, of the opinion that X has committed the crime of forgery within the meaning of Section 18-26 of the Code of Virginiia, 1950.

You further state in your letter the following:

"X then went to A, an employee of the Division of Motor Vehicles, who is connected with the Bureau of Safety Responsibility and X signed an application for a lost permit, signing the name of Y; this application was not forwarded to the Division due to the fact that Y in person learned what was happening and contacted A and revealed the truth."
“Other than operating without a driver's permit is X in your opinion guilty of forgery.”

In this connection your attention is invited to Section 46-381 of the Code of Virginia, 1950, which reads as follows:

“Any person who shall use a false or fictitious name or give a false or fictitious address in any application for an operator's or chauffeur's license, or any renewal or duplicate thereof, or knowingly make a false statement or conceal a material fact or otherwise commit a fraud in any such application shall be guilty of a misdemeanor and upon conviction shall be punished according to the provisions of § 46-385.”

X, in using Y's name in the application to obtain a driving permit, has violated this section of the Code and can be punished accordingly. This offense is separate and distinct from the offense narrated in the second paragraph of your letter as quoted above.

MOTOR VEHICLES—License examiners are police officers with authority to enforce traffic laws. P-353 (35)

HONORABLE CARLETON PENN, II,
Trial Justice of Loudoun County.

This is to acknowledge receipt of your letter of July 25, in which you ask for an interpretation of Section 46-38 of the Code of Virginia, and in which you state:

“I ask that your office furnish me a ruling upon the following question: Are license examiners of the Division of Motor Vehicles police officers appointed by the Commissioner within the meaning of said statute, and if so, is the Commissioner required to enforce the statutes regarding speeding, reckless driving, and other offenses of a like character?”

Your attention is invited to Section 46-38, which reads in part as follows:

“The Commissioner, his several assistants, and police officers appointed by him are vested with the powers of a sheriff for the purpose of enforcing the laws of this State which the Commissioner is required to enforce. * * *”

Your attention is also invited to the following sections:

46-14. “Every county, city, town or other political subdivision of the State, as well as the State authorities and law enforcement officers, shall enforce the provisions of chapters 1 to 4 of this title through the agency of any peace or police officer, sheriff or deputy; * * *”

46-26 “The administration of the motor vehicle license registration and title laws, the issuance, suspension and revocation of operators' and chauffeurs' licenses, the examination of applicants for and holders of operators' and chauffeurs' licenses, the administration, training, disciplining and assignment of examiners of applicants for operators' and chauffeurs' licenses, the administration of the safety responsibility laws, fuel tax laws and such other laws or parts of laws involving the former Division of Motor Vehicles in the Department of Finance as are not covered by § 52-4 shall be in the Division of Motor Vehicles established by this chapter.”
"The Highway patrol, or State Police patrol as it is sometimes called, the police school, the State Police radio or communication system, the supervision of inspection stations and of inspectors of motor vehicles, the promotion of highway safety, the adoption of standards for motor vehicle appliances, accessories and safety devices and the registration of machine guns shall be in the Department of State Police."

"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. ** **]

License Examiners, upon appointment, take an oath of office and are bonded as required by the statutes. I am of the opinion that the Examiners are police officers, appointed by the Commissioner within the meaning of Section 46-38 of the Code.

The second question raised by you is whether the Commissioner of Motor Vehicles is required to enforce the statutes regarding traffic offenses and is somewhat more difficult to answer. When the Department of State Police was formed in 1942, the Superintendent of State Police assumed many of the duties theretofore performed by the Director of the Division of Motor Vehicles, and these duties are generally outlined in Section 52-4 of the Code, whereas the Commissioner of the Division of Motor Vehicles was empowered to continue the functions of the Director in performing various duties as outlined generally in Section 46-26 above. The Superintendent of State Police has the primary duty of enforcing traffic laws, but obviously, from Section 52-8 of the Code, other police officers, such as those appointed by the Commissioner of Motor Vehicles, can aid and assist in the enforcement of the traffic laws. Although the Commissioner's primary duties are those set forth in Section 46-26, neither he, nor his assistants, are excluded from enforcing the provisions of the Motor Vehicle Laws pertaining to the control of traffic. Under the provisions of Section 46-14, such police officers are charged with the duty of enforcing the provisions of the Motor Vehicle Laws.

It is well to point out that the Commissioner of the Division of Motor Vehicles is charged with the grave responsibility of the promotion of highway safety, and that successive sessions of the legislature have appropriated considerable sums to be administered by him for this purpose. It would follow that all police officers appointed by him, while traveling on the highways of Virginia, and who observe traffic violations, should take appropriate action in the individual cases which come to their attention.

I am, therefore, of the opinion that the Commissioner of the Division of Motor Vehicles has the authority to enforce the statutes relating to speeding, reckless driving and other offenses of like character, and the police officers appointed by him have full authority to make arrests in appropriate cases.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Licenses; exemption; farm equipment; definitions and construction of statute. F-353 (69)

September 4, 1952.

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

In your letter dated August 30, 1952, you request my opinion on the following:

“Some question has arisen in this County concerning the construction of Section 46-45 of the Code of Virginia (1950), which exempts from registration provisions of the Motor Vehicle Code certain vehicles used for agricultural or horticultural purposes.

“The first paragraph of this section, in substance, limits the exemption to vehicles used exclusively for agricultural or horticultural purposes on lands owned or leased by the owner of such vehicle and not operated upon the highway except between the owner’s land or for repairs or (in the case of trailers) for carriage of produce under the conditions stated.

“The second paragraph exempts farm machinery and tractors, regardless of whether they are going to lands of different owners. For the assistance of our law enforcement officers, your opinion is requested as to the application of the statute in the following situations:

a. Does the mileage limitation in the first paragraph limit the use permitted in the second paragraph?

b. By Section 46-1(6) ‘farm tractor’ is defined as ‘Every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines and other implements of husbandry’; there is no definition of farm machinery. Does the term ‘used primarily’ relate to the use of the particular vehicle involved or the primary use for which it is designed? In other words, does a vehicle generally recognized as a farm tractor, but which is used by its owner for other purposes than farming, qualify for the exemption?

c. Assuming that it is the use by the owner which determines the exemption under the statute, do the following uses, upon the property of other persons than the owner and for compensation, afford the vehicle owner exemption from the registration provisions:

1. Cutting of grass upon property not used for pasture or other agricultural uses;

2. Hauling logs or lumber;

3. Grading, dragging, or otherwise treating, driveways, walks, lawns or other areas not used for the growing of crops.”

The first two paragraphs of Section 46-45 of the Code of Virginia, as amended by the 1952 General Assembly, read 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 semitrailer, 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 other purpose other than for the purpose of operating across a highway or along a highway from one point of the owner’s land to another part thereof, irrespective of whether or not the tracts adjoin, provided that the distance between the points shall not exceed ten miles, 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 vehicle hereinbefore described or 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."

You ask if the mileage limitation in the first paragraph limits the use permitted in the second paragraph. I assume from this inquiry that you wish to be advised if farm machinery and tractors mentioned in the second paragraph can operate along a highway for a distance of ten miles for purposes not related to agriculture or horticulture. When the first and second paragraphs of this section are considered together, it seems plain that the intent is to exempt from registration and license requirements vehicles and equipment used for the purposes mentioned in the first paragraph. If the statute is otherwise interpreted, it would have the effect of removing the second paragraph from the context of the statute. I feel that such an interpretation would be erroneous. I am, therefore, of the opinion that the mileage limitation in the first paragraph limits the use permitted in the second paragraph.

You quote Section 46-1(6) of the Code and ask if the term "used primarily" relates to the use of the particular vehicle involved or the primary use for which it is designed. When this section is considered together with Section 46-45, which latter section furnishes exemptions to vehicles, tractors, etc., used for agricultural or horticultural purposes, it seems to be evident that term "used primarily" relates to the purpose to which the particular vehicle is devoted. I am, therefore, of the opinion that the term "used primarily" in Section 46-1(6) of the Code relates to the use of the particular vehicle involved and not to the primary use for which it is designed.

I am further of the opinion that the category mentioned in your last inquiry would not afford the vehicle owner exemption from the registration provisions of the statute.

MOTOR VEHICLES—Licenses; exemption of foreign diplomats and consular officer. F-149 (300)

HONORABLE C. H. LAMB,
Acting Commissioner Division of Motor Vehicles.

This is in response to your letter of June 9, in which you state in part as follows:

"Will you be good enough to advise me if, either under this Convention or under Section 46-48.1 of the Code of Virginia, I have the authority and whether it would be proper for free license plates to be issued to Mr. Mac-Donald, the British Consul at Norfolk, Virginia."

Pursuant to Article 13 of the Consular Convention between the United States of America and the United Kingdom of Great Britain and Northern Ireland,
which became effective on September 7, 1952, Mr. T. MacDonald, the British Consul at Norfolk, is exempt from the payment of taxes imposed by this State.

Section 46-48.1 of the Code of Virginia reads as follows:

“All motor vehicles owned and used for personal or official purposes by accredited consular or diplomatic officers of foreign governments, who are nationals of the state by which they are appointed and are not citizens of the United States, are hereby exempted from the provisions of this title requiring the payment of registration fees, but all such vehicles shall display license plates or identification markers approved by the Commissioner of Motor Vehicles. Every application for license plates or identification markers hereunder shall be accompanied by the certificate of the Secretary of State of the United States or his agent that the applicant is entitled thereto under the provisions of this section.”

According to the information at hand, apparently the Secretary of State cannot issue Mr. MacDonald a certificate, which is contemplated under Section 46-48.1, and notwithstanding this, MacDonald seeks to have the Commonwealth of Virginia register his vehicle and issue him a license tag free of cost. As it is true that the license fee is a tax and the collection thereof can be enforced by the State, it is nonetheless a tax paid for the privilege of operating motor vehicles upon the highways of this Commonwealth. Under the terms of the above treaty, I do not believe that the State of Virginia could compel this consular officer to pay the tax. On the other hand, there is no provision in our law which would permit you to issue him a tag without cost except under the provisions of the above cited act.

MOTOR VEHICLES—Licenses; farm tractors must have if traveling over ten miles on highway. F-149 (55)

August 21, 1952.

HONORABLE B. M. MILLER,
Trial Justice for Rappahannock County.

This is to acknowledge receipt of your letter dated August 6, 1952, in which you call my attention to Section 45 Title 46 of the Code of Virginia relating to exemption of motor vehicles, trailers, etc. used for agricultural or horticultural purposes, and asked to be advised whether or not a farm tractor with an implement attached or being towed may exceed a distance of 10 miles between one tract and another without being registered or licensed.

You state that a question has been presented as to whether the statute intends to limit all vehicles or only trucks, motor vehicles, trailers, and semi-trailers used exclusively for agricultural or horticultural purposes. The statute, insofar as material, provides as follows:

“No person shall be required to obtain the annual registration certificate and license plates or to pay the fee prescribed therefor, * * * for any truck * * * 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 other purpose than for the purpose of operating it across a highway or along a highway from one point of the owner’s land to another part thereof, * * * provided that the distance between the points shall not exceed ten miles, or for the purpose of taking it or other fixtures thereto attached, to and from a repair shop for repairs. * * *”
This statute further provides:

"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."

In view of the foregoing, I am of the opinion that a farm tractor with an implement attached may not exceed a distance of 10 miles of travel upon a highway between one tract of land and another tract of land without being registered and licensed as other motor vehicles unless it is for the purpose of taking it to and from a repair shop for repairs. The only distinction made in this statute between the exemption afforded trucks, trailers, semi-trailers, and that of tractors is that in the latter case the tracts of land between which the tractor travels on the highway are not required to be owned by the same person.

MOTOR VEHICLES—Licenses; reciprocity with District of Columbia.
P-149 (122)

November 14, 1952.

MR. STIRLING N. HARRISON,
Attorney at Law, Leesburg.

This is to acknowledge receipt of your letter of November 6 in which you state in part as follows:

"*** question of whether or not a nonresident, who allows an employee who is a resident of this state to use a vehicle belonging to the former for the purpose of transportation between the latter's home and the former's place of business, is required to register and purchase Virginia license plates for said vehicle. In other words there is a resident of Leesburg, Virginia who is now employed in Washington, D. C. and who commutes to and from his employer in a vehicle belonging to his employer and duly registered and licensed under the laws of the District of Columbia. Is the owner of this vehicle required to procure Virginia license for same?"

As you know, the honoring of tags issued by a foreign jurisdiction is a question of reciprocity existing between the two states. Certain privileges are extended by our statutes on condition that like privileges are extended the citizens of Virginia by the foreign jurisdiction. (Article 6, Chapter 3, Title 46 Code of Virginia). The Governor, with advice of the Reciprocity Board, has authority to enter into agreements with the other states (Section 46-22, Code of Virginia). In many instances, formal agreements have been executed. Although the District of Columbia does not enter into formal reciprocal agreements, the Commissioners of the District of Columbia, through their designated agent, can extend to the residents of a state similar privileges which are extended to residents of the said State by other jurisdictions. The Commissioners or their designated agent shall, from time to time, ascertain such privileges and cause their (his) findings to be promulgated. (Section 40-303, Code of the District of Columbia.)

Under date of September 24, 1947, the Commissioner of the Division of Motor Vehicles wrote to the Director of the Department of Vehicles and Traffic of the District of Columbia (designated agent of the Commissioners) that the Virginia Reciprocity Board met and set forth just what reciprocity would be extended to the residents of the District of Columbia by Virginia, provided similar privileges would be extended by the District of Columbia to residents of Virginia.
Under date of October 15, 1947, the Director of Vehicles and Traffic of the District of Columbia notified our Commissioner of the Division of Motor Vehicles that the proposals of the Reciprocity Board on September 24, 1947, would be recognized effective immediately. The following is an excerpt from the said letter concerning the licensing of privately owned vehicles:

“District of Columbia vehicles are permitted to operate in interstate commerce in the territory adjacent to the District (Arlington and Fairfax Counties and Alexandria) under District of Columbia license tags so long as such vehicles are garaged as many as four nights a week in the District of Columbia and the same privilege extended to Virginia vehicles operating in the District of Columbia, with the understanding that this arrangement applies only to private passenger vehicles and private commercial vehicles and that it does not apply to common carrier and contract carrier vehicles that are operated intrastate in either jurisdiction.”

In determining whether or not these reciprocity agreements apply to the vehicle, we must look to the use and the extent thereof made by the vehicle within the reciprocating state. From what you state in your letter, it is apparent that the vehicle is garaged in Virginia practically all of the time, and then too, the resident of Virginia who uses the vehicle lives in Loudoun County and not in Alexandria City or Fairfax County. Hence, this vehicle would not come within the exception outlined in the reciprocal agreement with the District of Columbia.

I am, therefore, of the opinion that the vehicle mentioned in your letter and used in the manner narrated therein, must be licensed in Virginia.

MOTOR VEHICLES—Licenses; Soldiers' and Sailors' Relief Act inapplicable when vehicle used by another. F-149 (158)

December 29, 1952.

Mr. H. T. Lovette, Jr.,
Chief of Police, Chase City.

This is to acknowledge receipt of your letter of December 19 in which you state in part:

“Under Virginia law can a motor vehicle registered for current year in the state of New York and owned by a serviceman stationed overseas be operated regularly and for an indefinite period of time by a resident of this state?

“In this particular case the serviceman is a native of New York and left his automobile with his girl friend here in Chase City. I am under the impression that a serviceman stationed in the State can operate on the registration of his home state and is not required to purchase Virginia license. I wish to know if this would make the operation of his automobile in this State by a person, not a member of his family, legal under State law.”

The honoring of foreign license plates is generally a matter of reciprocity between the state in which the car is licensed and the state in which the car is operated; however, inasmuch as the car in this particular instance is owned by a person in the Armed Services, the provisions of the Soldiers' and Sailors' Relief Act, 50 U.S.C.A., App. Sec. 501, et. seq., should be considered to determine whether or not the soldier is relieved from the obligation of purchasing Virginia license plates for his vehicle.

Your specific attention is invited to Section 574 of the above Act, which reads as follows:
"(1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, 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." (Underscoring supplied)

It has been held that a wife of a serviceman is not within the statutory definition of persons in the military service to which relief is granted under this act (Bronson vs. Chamberlain, 53 N.Y.S. 2d 172). It is, therefore, apparent that the operator of this automobile, which is the girl friend of the soldier, is not entitled to relief and will be required to purchase license tags for the vehicle owned by the soldier if she desires to operate the same in Virginia.

It is, therefore, the opinion of this office that the motor vehicle used as described above should be licensed in Virginia if it is to be operated upon the highways of Virginia.

MOTOR VEHICLES—Local ordinances may parallel; disposition of fines.
F-60a (144)

HONORABLE RALPH H. RICARDO,
Trial Justice of Norfolk County.

December 11, 1952.

This is to acknowledge receipt of your letter of December 4 in which you ask whether or not the Board of Supervisors of Norfolk County can lawfully adopt ordinances which read as follows:

(1) "It shall be unlawful for any person to operate upon a highway
in Norfolk County any motor vehicle without an operator's or chauffeur's license issued by the said Division of Motor Vehicles"; and

(2) "It shall be unlawful for any person to operate upon a highway in Norfolk County any motor vehicle which does not have attached thereto and displayed thereon the license plate or plates assigned thereto by the Virginia Division of Motor Vehicles for the current registration year".

You further make this inquiry:

"May I respectfully request your opinion of the following: In the event any person is summoned to court for the violation of either of the two sections above quoted, and where the summons is issued by an officer of the Norfolk County police is it proper to remit fine or fines imposed for such violation or violations to the treasurer of Norfolk County as county revenue?"

Your attention is invited to Section 46-198 of the Code of Virginia, 1950, which reads as follows:

"In cities and towns the council may adopt ordinances to regulate the operation of vehicles on the highways in such cities and towns, as the case may be, not in conflict with the provisions of this title and may provide penalties for violating the provisions of such ordinances. But no penalty thus fixed shall be greater than the penalty imposed for a similar offense under the provisions of this title." (Italics supplied)

I believe that an ordinance of the character described in (1) would not be contrary to the provisions of the above section so long as there is nothing contained therein to require a person to secure a local permit to drive in addition to the State operator's license. The issuance of operators' and chauffeurs' licenses by the State is a means by which the State regulates the operation of motor vehicles upon the highways, as such permits are only issued to those persons who are properly qualified to operate motor vehicles. Your attention is called, however, to Section 46-349 of the Code of Virginia which expressly prohibits counties, cities and towns from issuing operators' licenses except to adopt regulations concerning drivers of taxicabs.

The requirement that license plates be displayed on motor vehicles is required by Section 46-101 and the registration of motor vehicles is required by Section 46-42. These sections are included under Title 46, Code of Virginia of 1950.

I am, therefore, of the opinion that the powers delegated by Section 46-198 of the Code of Virginia of 1950 include the power or authority on behalf of a county to enact ordinances making it unlawful to drive a motor vehicle in the county without a State operator's license, and unlawful to operate a motor vehicle within the said county which is not properly registered and licensed by the State. Fines imposed for the violation of such ordinances should be turned over to the County Treasurer and used as county revenue.

MOTOR VEHICLES—Maximum length; interpretation of fifth wheel in regard to coupling. F-119 (200)

February 27, 1953.

Mr. Joseph A. Massie, Jr.,
Commonwealth's Attorney for Frederick County.

This is with reference to your letter of February 20, 1953 which I quote:

"Please advise me in regard to Section 46-328 of the Code of Virginia for 1950, as to whether or not the fifth wheel on tractor semi-trailer com-
bimations is considered a coupling, and the interpretation of that Section in regard to the wording 'exclusive of coupling', which appears at the end of the first phrase in the second sentence. In other words, would a tractor-trailer combination 45 feet in length be permitted to extend its length to 45 feet plus 34 inches, which is the diameter of the fifth wheel, if the fifth wheel is a coupling in accordance with the terms of said Section. Also construe Section 45-328 with Section 46-332 and inform me whether or not it would be permissible for a tractor-trailer to be 55 feet in length, the length consisting of a tractor, 10 foot coupling, and a trailer or semi-trailer, or whatever the rear vehicle may be."

On September 8, 1950 in response to a similar request from the Superintendent of State Police this office stated as follows:

"The words 'exclusive of coupling' were first enacted into law by the 1932 General Assembly of Virginia. At that time, the highways of this State were used to a great extent by combination of vehicles, unlike the present day tractor-trailer truck. In my opinion, the phraseology in question was intended to apply to devices such as you mentioned; specifically, tongue or draw-bars. The actual coupling mechanism (fifth wheel) now employed on tractor-trailer trucks constitutes the distance to be exempt from the total length measurement. Since this distance is taken up in the overlap of the semi-trailer and tractor, there is nothing further to be excluded. I can see no reason for construing the law to mean exclusion of the distance between the rear of the cab and the front of the trailer."

The illustration as suggested in your letter would only be permissible in cases of a tongue or draw-bar coupling inasmuch as the fifth wheel on a tractor-trailer combination does not extend beyond the end of the trailer when the tractor and trailer are connected.

MOTOR VEHICLES—Maximum speed limit; trucks; definition of. F-353 (97) October 21, 1952.

Mr. W. W. Richardson, Jr., Commonwealth's Attorney of New Kent County.

This is to acknowledge receipt of your letter of October 15 in which you ask for my opinion as to whether or not a ½ ton and a ¾ ton pickup truck is subject to the 45 mile maximum speed limit as prescribed in Section 46-212 of the Code of Virginia.

An examination of Section 46-212 of the Code of Virginia reveals that the following language is used: " **any truck** at a speed in excess of 45 miles per hour **". The term "truck" is not defined by statute in Virginia; however, the term "truck" is generally applied to a vehicle designed and used for the purpose of carrying cargo. In 60 C.J.S. 113, the term "truck" is defined as follows:

"An automobile truck is an automobile for transporting heavy loads, a vehicle for conveyance for commercial purposes over ordinary roads, and the average type of that kind of vehicle is especially designed both in its propelling mechanism and in its body construction for that function. Such a vehicle is also commonly known as an auto truck or motor truck".

As the statute used the term "any truck", I am of the opinion that this would include a ½ ton truck and a ¾ ton truck, commonly known as pickup trucks and, therefore, the speed limit for these types of trucks would be 45 miles per hour.
MOTOR VEHICLES—Operator’s license; driving after period of revocation has expired. F-149 (257)

April 30, 1953.

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

This is in reply to your letters of April 17 and April 25, in which you ask my opinion on the following question:

A person’s operator’s license was revoked for a period of three years for the second offense of driving while under the influence of intoxicants. During the period of revocation the operator’s license expired. He did not acquire a new operator’s license. After the three years had lapsed he was caught operating a motor vehicle. Is this person guilty of operating a motor vehicle after his license has been revoked under Section 46-484 of the Code of Virginia, or is he merely guilty of operating a motor vehicle without a permit as set out in Section 46-385?

Section 46-484 provides:

“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 operates 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,

I should like to call your attention to the words “and who, during the period of suspension or while the revocation is in effect.” It is my opinion that this Section 46-484 is not applicable to a person whose license has been revoked, but the period of revocation has expired. It is my opinion, therefore, that a person as defined by you in your letters is guilty of the offense of operating a motor vehicle without a permit and should be punished under Section 46-385 of the Code.

MOTOR VEHICLES—Operator’s license; driving after revocation of; punishment. F-353 (138)

December 5, 1952.

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

This is in reply to your letter of November 24, 1952, from which I quote as follows:

“Section 18-78 of the 1950 Code, which immediately follows the sections of the code pertaining to driving drunk and loss of license, provides in the 1952 amendment, as follows:

“If any person so convicted shall, during the time for which he is deprived of his right so to do, drive or operate any such vehicle, conveyance,
engine or train in this State, he shall be guilty of a misdemeanor and shall be confined in jail not less than ten days nor more than six months and may in addition be fined not exceeding five hundred dollars.'

"Section 46-347.1 of the 1952 Supplement pertaining to driving while license is suspended or revoked, states as follows:

"'No person whose operator's or chauffeur's license has been suspended or revoked by any court or by the Commissioner shall thereafter drive any motor vehicle in this State unless and until such suspension or revocation shall have been terminated. Any person violating the provisions of this section shall for the first offense be confined in jail not less than ten days nor more than six months, and for the second or any subsequent offense be confined in jail not less than two months nor more than one year; and may in addition be punished by a fine of not less than one hundred nor more than one thousand dollars.'

"I recently had a case before me as Trial Justice of a man who had been convicted twice for driving after his license had been revoked and I intended to sentence him under Section 46-347.1, but his attorney called my attention to Section 18-78 and was of the opinion that he should be sentenced under this section. I have studied both sections carefully and am unable to distinguish between them, therefore, would appreciate it if you would advise me of your opinion and the intent of the Legislature in passing both these sections, which apparently conflict."

In my opinion the attorney for the defendant in the case which you cited is correct. Since § 18-78 of the Code deals with the specific offense of driving after revocation of permit for the offense of drunken driving and § 46-347.1 of the Code deals with the offense of driving after revocation of permit for any cause, it would appear that the legislation dealing with the specific offense with which the defendant is charged should be applicable to his case, rather than the section dealing with a more general offense.

Your letter came to us at a time when we were preparing an amendment to § 46-347.1 of the Code at the request of the Governor, and we immediately called to his attention the situation presented by the existence of these two statutes. The Governor requested that we prepare an amendment to § 18-78 which would bring the punishments for violation thereof into line with the punishments prescribed by § 46-347.1. That amendment was prepared and has been presented to the General Assembly. If adopted it will, of course, erase the variance but, of course, we cannot predict the fate of the bill in the General Assembly.
immediately forwarded to the Division of Motor Vehicles. Two weeks after the conviction date John Jones was again arrested for driving while his license was revoked. He still had in his possession his operator's license, due to the fact that he did not appear in court and did not surrender his license to me. Further, that the Division of Motor Vehicles had not, as yet, sent a revocation order to John Jones.

"I would like to know if John Jones could be convicted of driving while his license was revoked, if he failed to appear in court and had no knowledge of my decision in the original trial. Secondly, I would like to know if John Jones could be convicted without the Division of Motor Vehicles having served their revocation order against him."

Section 46-195.1 was enacted to provide a procedure for proper disposition of operators' and chauffeurs' licenses which are suspended or revoked by compulsion of statute upon a conviction. This section applied only in those cases where the law requires revocation or suspension of the license. As your example relates to a conviction under Section 46-210 of the Code in which the suspension of license lies in the discretion of the trial justice or court, I am of the opinion that Section 46-195.1 would not be applicable. However, the inquiries in your letter can be disposed of by virtue of Section 46-347.1 of the Code, which I quote:

"§ 46-347.1 Driving while license suspended or revoked.—No person whose operator's or chauffeur's license has been suspended or revoked by any court or by the Commissioner shall thereafter drive any motor vehicle in this State unless and until such suspension or revocation shall have terminated. Any person violating the provisions of this section shall for the first offense be confined in jail not less than ten days nor more than six months, and for the second or any subsequent offense be confined in jail not less than two months nor more than one year; and may in addition be punished by a fine of not less than one hundred nor more than one thousand dollars."

This section contemplates a suspension or revocation either by the court or Commissioner. It, therefore, would apply from the time the operator's license has been suspended or revoked by the court. Assuming the conviction to be a valid one, the suspension or revocation would be binding on the defendant just as any other part of the sentence, irrespective of actual knowledge of same by the defendant. I would, therefore, answer both the inquiries in your letter in the affirmative. Since the rendering of the sentence against the defendant would operate to suspend his operator's license, it would not be necessary that a revocation order be first served on him by the Commissioner in order to effect the suspension or revocation.

MOTOR VEHICLES—Operator's license; revocation; third speeding conviction within year. F-149 (192)  
February 18, 1953.  

Mr. C. H. Lamb, Acting Commissioner,  
Division of Motor Vehicles.

This is to acknowledge receipt of your letter of February 13 in which you state in part:

"The following situation will undoubtedly confront us shortly:

"Assume that a licensee was convicted of two offenses of speeding, one offense occurring July 1, 1952, a second occurring September 1, 1952. As
a result, subsequent to September 1, 1952, the offender's license was revoked for sixty days, this revocation terminating, we will say, December 15, 1952. On February 15, 1953, the licensee was convicted of a third offense of speeding occurring February 10, 1953. Does Section 46-416.1 of the Code require the Division to revoke the offender's license for another period of from sixty days to twelve months upon receiving a record of the third offense for speeding within a period of twelve months, or must there be a fourth offense in the sequence before the Division is required to apply another period of revocation?"

Your attention is invited to Section 46-416.1, which reads in part as follows:

"* * * provided that if there be more than two such convictions the period during which such license may not be reissued shall be at least sixty days and not more than one year. * * *"

I am of the opinion that it is the mandatory duty of the Commissioner, under this section, to again suspend the offender's license for another period of sixty days upon receiving notice of a third conviction within any one year.

MOTOR VEHICLES—Operator's licenses; revocation by commissioner; beginning date. F-149 (111)

November 3, 1952.

HONORABLE JOHN A. K. DONOVAN, Falls Church, Virginia.

This is to acknowledge receipt of your letter of October 24, in which you ask my opinion as to the proper construction of Section 46-416 of the Code under the following circumstances: In this particular case, the Trial Justice Court, acting under the provisions of Section 46-210 of the Code, revoked the driving permit of the individual for a period of sixty days. Thereafter, the Commissioner of the Division of Motor Vehicles, being advised of the fact that the individual had been twice convicted of reckless driving within a year, revokes the driving license of the individual pursuant to Section 46-416 of the Code. It seems that the action by the Commissioner was taken some four or five months after the actual conviction of the individual, and the Court, instead of returning the permit promptly after the period of sixty days to the person concerned, sent the permit, together with the abstract of conviction, to the Division of Motor Vehicles.

As you correctly stated, Section 46-416 of the Code requires the Commissioner of the Division of Motor Vehicles to revoke the driving license for a period of one year upon the receipt of the abstract of conviction. Since the enactment of the Operators' and Chauffeurs' License Act in 1932, which act had a similar provision to 46-416 of the present Code, it has been the invariable practice of the Division of Motor Vehicles to revoke the license as of the date the abstract of conviction was received by the Division, the one year period of revocation beginning on said date. In the case of Anglin v. Joyner, 181 Va. 660, it was held that the courts should adopt that construction which has for a long period of years been placed upon the statute by the public officials administering it. I am of the opinion that this is the proper construction of the said act.

It is the duty of the Clerk of the Court, or the court if there is no clerk, under the provisions of 46-414 of the Code, to transmit to the Division an abstract copy of the report of the conviction upon the expiration of fifteen days after the conviction becomes final. Unfortunately, there are instances where there is a great
delay in sending these abstracts to the Division. There have been cases in which
the delay has been more than a year, but in those cases the Commissioner has
acted in accordance with Section 46-416, revoking the driving license for a period
of one year from the date on which the abstract was received. The question of
whether this practice was valid was raised in the case of Lawrence v. Common-
wealth, 190 Va. 960, but as the case turned on another point, this precise question
was not passed upon.

I find that 46-210 of the Code, which permits the Trial Justice of the Court
to suspend the driving license of a person convicted contains this language:
"Except in those cases for which revocation of license is provided under paragraph
5 of 46-416 of the Code, any Trial Justice or court may, in addition to the fore-
going punishment, suspend any license issued to such convicted person under
Chapter 5 of this title, for a period of not less than ten days nor more than six
months, and such Trial Justice or court shall require such convicted person to
surrender his license so suspended."

Paragraph 5 of 46-416 of the Code provides for a revocation by the Com-
mmissioner if the person has been convicted twice of reckless driving within one
year. Hence, it would seem that in the instant case the Trial Justice had no
authority to suspend this person's license, inasmuch as it was his second conviction
of reckless driving within a year. Furthermore, it is obvious before acting under
this section of the Code, a court should ascertain whether or not the person has
been heretofore convicted of reckless driving within the year. I do not believe
that the language of 46-210, as quoted above, imposes any limitation upon the
Commissioner of the Division of Motor Vehicles in acting under the provisions
of 46-416, nor imposes any duty upon him to ascertain what action, if any, the
court has taken with reference to the suspension of the driver's license before he,
the Commissioner, acts. It would seem to me that a person in such a predicament
as the individual in your letter, could procure the proper redress by appeal or an
appropriate proceeding against the Trial Justice or court, requiring the court to
return to him the driver's license improperly suspended.

I do not know of any procedure by which a court would have the authority
to diminish the time of the revocation ordered under 46-416 by the Commissioner,
by crediting the individual with the time during which he has complied with an
invalid order of the Trial Justice in suspending his driving license. The statute
is very clear that the action taken by the Commissioner under 46-416 is mandatory
and there is no discretion vested in the Commissioner in so acting, and the statutes
have been so construed by the courts in many cases.

I am, therefore, of the opinion that Section 46-416 of the Code vests the
Commissioner of the Division of Motor Vehicles with the power to revoke driving
privileges for a period of one year upon receipt by him of evidence of conviction
of the individual concerned of the offenses narrated in that section; and further
that the period of revocation should commence on the date when the abstract of
conviction is received by the Division of Motor Vehicles and not on the date upon
which the person was actually convicted, notwithstanding the fact that the
individual may have surrendered his driving license to the Trial Justice Court
pursuant to an order of that court made in accordance with Section 46-210 of
the Code.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Operator’s license; servicemen need no Virginia license if have one of another state. F-149 (87)

Mr. F. L. Wyche,
Commonwealth’s Attorney for Prince George County.

I am in receipt of your letter of September 29 in which you state:

"Will you please advise me whether or not a non-resident, who has a valid operator’s permit issued by the state of his legal residence, and who is a member of the United States Army, stationed at Fort Lee, in Prince George County, Virginia, which is a military reservation owned by the United States of America, on military assignment, and residing on the military reservation, is required to obtain a Virginia operator’s license to operate upon the highways of this state, an automobile owned by him and registered in Virginia."

The issuance of operators’ licenses is done pursuant to Chapter 5, Title 46 of the Code of Virginia. This chapter is commonly known as the Operator’s and Chauffeur’s License Act. Section 46-343 defines a nonresident as every person not a resident of this State. Persons in the military service and residing on military reservations pursuant to competent military orders are considered non-residents of the State.

Your particular attention is invited to Section 46-351 of the Code which reads as follows:

"A nonresident over the age of sixteen years who has been duly licensed as an operator and a nonresident over the age of eighteen years who has been licensed as a chauffeur, under a law requiring the licensing of operators or chauffeurs in his home state or country and who has in his immediate possession either a valid operator’s or chauffeur’s license issued to him in his home state or country shall be permitted without examination or license under this chapter to drive a motor vehicle upon the highways of this State."

I do not think the mere fact that the soldier has elected to register and license his automobile in Virginia makes him a resident within the meaning of this act. I am, therefore, of the opinion that the soldier in this incident is not required to obtain a Virginia operator’s license to operate his motor vehicle upon the highways of this State.

MOTOR VEHICLES—Operator’s licenses; suspension of for violation of city ordinances. F-353 (93)

Honorable C. F. Joyner, Jr., Commissioner,
Division of Motor Vehicles.

This will acknowledge receipt of your letter of October 15, from which I quote as follows:

"Recently a hearings officer of this Division had occasion to hear a case in Norfolk, Virginia, upon the following evidence:

"Speeding conviction of July 9, 1952, Police Court, Norfolk
"Speeding conviction—April 25, 1951, Police Court, Norfolk
"Failure to keep to right—March 7, 1951, Police Court, Norfolk
REPORT OF THE ATTORNEY GENERAL

"Speeding conviction—November 8, 1950, Police Court, Norfolk

"At the hearing, counsel objected to the introduction of abstracts in evidence, and to the hearing as a whole on the ground that it was not stated in the notice, nor was it stated on the abstracts that these convictions were violations of city or State ordinances or law. This particular subject was cited for hearing under 46-420 (5), from which I quote: '*** has committed a serious violation of the Motor Vehicle Laws of this State ***.'"

You desire my opinion as to whether the language contained in Paragraph (5) of Section 46-420 of the Code can be interpreted to include violations of city ordinances enacted pursuant to Section 46-198 of the Code.

I have examined the Formal Notice of Hearing which was mailed to the Defendant. This Notice is in substantial compliance with Section 46-421 of the Code, as amended. In response thereto the Defendant was present in proper person and by Counsel. There is no basis for the contention that the Defendant was not fully apprised of all material allegations upon which, if substantiated by proof, the Commissioner might sustain or revoke the operator's license.

Whether the suspension is predicated upon violations of State law or municipal ordinance is not material to the validity of the certification to the Commissioner by the Court or the authority of the Commissioner to act pursuant to Chapter 6 of the Motor Vehicle Safety Responsibility Act.

Section 46-198 empowers the governing bodies of cities and towns to adopt ordinances to regulate the operation of vehicles in such cities and towns. In conformity with this provision the City of Norfolk has adopted such ordinances.

Section 46-420, relating to when the Commissioner may sustain or revoke a license for not more than one year, provides, in part, that the Commissioner may, after due hearing, sustain or revoke the license of any person whenever it is satisfactorily proved that licensee "has committed a serious violation of the Motor Vehicle Laws of this State."

Ordinances of cities and towns adopted in conformity with Section 46-198 are "Motor Vehicle Laws of this State" as that phrase is used in Section 46-420.

If there could be any doubt as to the soundness of this conclusion, it is removed when we consider the scope of Chapter 6 as defined by Section 46-391, where it is provided, in part, that it includes "persons who have been convicted of violations of the provisions of any law pertaining to the operator, or operation, of motor vehicles, or of violations of any provisions of this title."

To sustain the contentions raised would virtually destroy the salutary purpose and design of the Motor Vehicle Safety Responsibility Act.

MOTOR VEHICLES—Overweight; special permit limit exceeded, penalty for. F-353 (71)

September 5, 1952.

HONORABLE WM. WELLINGTON JONES,
Trial Justice for Nansemond County.

This is to acknowledge receipt of your letter dated August 28, 1952, in which you advise that a special permit was issued by the State Highway Commission which contained a restriction or condition limiting the weight to 80,000 pounds. You advise that the gross weight of the truck and its cargo when apprehended was 138,900 pounds, thereby exceeding the terms and conditions of the special permit by 58,900 pounds. You wish to be advised if this should be treated simply as a violation of the permit and penalty imposed for a misdemeanor in accordance with Section 46-339 of the Code, or whether it should be treated as an overweight case and penalty fixed as provided in Section 46-338.1. as amended and reenacted.
For the sake of brevity, the statutes herein referred to will not be quoted. However, by reference to Section 46-338.1 of the Code and the sections therein referred to, it will be seen that no mention is made of a permit to exceed the legal weight limit. On the other hand, Section 46-339 empowers the State Highway Commission and the local authorities of cities and towns in their respective jurisdictions for good cause shown to issue a special permit authorizing the applicant to operate or move a vehicle upon the highways of a size or weight exceeding the maximum limit. This section also provides that it shall be a misdemeanor for any person to violate any of the terms or conditions of any such special permit.

In view of the foregoing, I am of the opinion that in the violation you describe, the penalty should be imposed in accordance with the provisions of Section 46-339 of the Code and that the penalty prescribed by Section 46-338.1 of the Code is not applicable.

MOTOR VEHICLES—Traffic laws; diplomatic immunity; who applicable to. F-353 (99)

HONORABLE C. F. JOYNER, Commissioner, Division of Motor Vehicles.

I have your letter of October 9 in which you state:

"Recently this Division has been concerned with several accident cases involving vehicles owned by the Washington Embassies of foreign powers and driven by United States Nationals in the course of their employment with the Embassy. We have also encountered cases where diplomatic consular officers and military and naval attaches have been involved in accidents while operating vehicles licensed in one of the political divisions of the United States. The motor vehicles in the latter instance have so far been privately owned automobiles, and the foreign officers may or may not be on official duty at the time of the accidents.

"In view of the above, I will thank you to give me your opinion as to the immunity of the attaches and representatives of foreign governments from civil processes in such cases, particularly with reference to whether such persons are immune from Section 46-436 of the Code of Virginia, and if so, under what circumstances.

"I would also appreciate your opinion as to whether United States Nationals in the employ of foreign governments are immune from the provisions of the same section of the Virginia Code when they are involved in accidents while operating vehicles owned by foreign governments and controlled by their Embassies."

While your specific inquiry has to do with whether or not ambassadors, public ministers, consuls, their employees and servants are amenable to Section 46-436 of the Code, I am going to discuss generally the situation in regard to these officers and officials with respect to their amenability to both civil and criminal law.

Your attention is invited to Sections 252, 253 and 254, Title 22, U.S.C.A., which sections read as follows:

Section 252:

"Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any Judge or Justice,
whereby the person of any ambassador a public minister of any foreign prince or state, authorized and received as such by the President, or any domestic or domestic servant of any such minister is arrested or imprisoned or his goods or chattels are distrained, seized or attached, such writ or process shall be deemed void."

Section 253:

"Whenever any writ or process is sued out in violation of Section 252 of this title, every person by whom the same is obtained or prosecuted, whether as party or as attorney or solicitor and every officer concerned in executing it, shall be deemed a violator of the law of nations and a disturber of the public repose, and shall be imprisoned for not more than three years, and fined at the discretion of the Court."

Section 254:

"Sections 252 and 253 of this title shall not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States, in the service of an ambassador or a public minister, and the process is founded upon a debt contracted before he entered such service; nor shall 253 of this title apply to any case where the person against whom the process is issued is a domestic servant of an ambassador or a public minister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State and transmitted by the Secretary of State to the Marshal of the District of Columbia who shall upon receipt thereof post the name in some public place in his office. All persons shall have resort to the list of names so posted in the Marshal's office, and may take copies without fee. (RS4065, 4866)"

Section 252 is simply a statutory expression of the law of nations which governs relations of this character. We find in Section 3 C.J.S., page 1021, the following:

"Broadly speaking, the person of a foreign ambassador is inviolable and he cannot be arrested save in cases where this is necessary to prevent him from committing acts of violence."

The immunity of the ambassador or public minister extends to members of his household, his domestic servants and members of his retinue. In the case of Carrera v. Carrera, 174 F2d 496 (1949), it was held that foreign diplomatic representatives are exempt from all local processes in court to which they are accredited and same immunity is not only given to an ambassador, but to his subordinates, family and servants as well. The court further held that where the Secretary of State has certified defendant's name as included in the so-called "white list", to which diplomatic immunity had been extended, judicial inquiry into propriety of its listing was not appropriate. Hence, it is for the State Department to determine whether the individual concerned is of a class to which diplomatic immunity extends and not for the courts. Once the State Department has spoken, the determination is conclusive on the courts.

The case of the City of New Rochelle on the complaint of Burhart v. Page Sharp, 91 N.Y. Supp. 2d, 290, held:

A member of the Australian mission to the United Nations, being entitled to privileges of ambassadors to the United States, city court, if such member refuses or fails to appear on charges of automobile speeding, cannot issue warrants for his arrest and will dismiss charge.
REPORT OF THE ATTORNEY GENERAL

In the case of Holland v. Baiz, 119/890 41F732, it was held that:

A suit cannot be dismissed on motion except on incontrovertal evidence that the defendant is a public minister.

United States v. Brenner, C.C.P.A. Fed. Case No. 14568 (1830) held:

A certificate by the Secretary of State, under seal, that the person has been recognized by the Department of State as a foreign minister is sufficient to prove his immunity from arrest.

In the case of Mongillo, et al v. Vogel (1949) 84 Fed. Supp. 1007, was a case for the recovery of damages arising from an automobile accident which occurred in Pennsylvania. The court stated:

"It appears that on July 6, 1948, the date of the accident, the defendant was press consular for the legation for the People's Republic of Romania. In that position he was entitled to diplomatic immunity.

"I think he was clothed with diplomatic immunity when the summonses were placed in his hand. For that reason the motion to quash the writ of service of summons will be granted."

In 3 C.J.S., 1021 and 1022, we find:

"(1) The privileges and immunities of foreign diplomats are founded on international law and custom, as recognized by statute or otherwise under domestic law, and extend to some degree to foreign diplomats temporarily in the United States although accredited to other countries. Broadly speaking, the person of the diplomatic officer is inviolable. His privileges may outlast his functions, and are generally regarded as those of the appointing government rather than the individual so as not to be subject to waiver by the latter."

Hence, the foreign nation of which the public minister is a representative can waive the immunity.

"(2) A foreign diplomat is ordinarily exempt from civil process of the country to which he is accredited. Under principles of international law a foreign diplomat accredited to a foreign nation may be sued while temporarily in the United States, although his diplomatic status exempts him from arrest on civil process."

"(3) Broadly speaking, a foreign diplomat is not subject to the criminal jurisdiction of the country to which he is accredited."

Military and naval attaches are public ministers and are immune from civil or criminal process. A consul occupies a different position from that of an ambassador. He is not entitled to immunity from suit unless the agreement or treaty with his country so provides.

In 3 CJS, 1024, we find:

"Consular officers lack the privileges and immunities granted diplomatic officers under international law. Except as their status may be otherwise affected by treaty or statute, consular officials are amenable to the ordinary processes of the civil and criminal law of the country wherein they are located.

Ouer v. Costa (1938), 23 Fed. Supp. 22 held:

Consuls of foreign countries are not entitled to immunity from suit accorded to ambassadors and ministers by statute."
**Carrera v. Carrera, 174 F2d 496 (1948)** held:

In the absence of express agreement therefor, diplomatic immunity does not extend to consuls who are merely commercial representatives of foreign states.

A citizen of the United States, if he is employed as a servant of an ambassador, is entitled to immunity from criminal and civil process provided the ambassador has registered the servant’s name with the Department of State in accordance with the provisions of Section 254, Title 22, U.S.C.A., Supra.

Section 46-436 prescribes that under certain circumstances the Commissioner of Motor Vehicles is to suspend the driving privileges, driving licenses and registration privileges of persons involved in automobile accidents. To enforce the provisions of this section, suitable process is issued and is enforceable by the courts. If any person enforces or attempts to enforce the provisions of said section, he is amenable to punishment under the provisions of Section 253, Title 22, U.S.C.A.

I am, therefore, of the opinion that Section 46-436 of the Code of Virginia of 1950 is not enforceable against ambassadors, public ministers, their servants, employees, members of their family and households.

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**MOTOR VEHICLES—Traffic laws; suspension of operator’s license for exceeding 40 m.p.h. when towing.** F-353 (42)

August 6, 1952.

HONORABLE H. B. CHERMIDE, JR.,
Trial Justice of Charlotte County.

I have your letter of July 31, in which you state:

“Section 46-212 (2) e of the Code of Virginia provides that any person who shall drive upon any highway in this state any motor vehicle at a speed in excess of forty miles per hour when towing a motor vehicle which is self-propelled or designed for self-propulsion in which there is no driver, shall be guilty of a misdemeanor. Section 46-215.1 provides for suspension of operator’s permit in addition to any other penalty, on conviction of speeding and a finding that the defendant exceeded the prescribed speed limit by more than five miles per hour. The following qualification is included in this section, ‘Nor shall the provisions of this section apply in any case unless the applicable legal speed limit is forty-five miles per hour or more’.

“This Court has in the past tried a good many cases of towed automobiles being operated in excess of the 40-mile limit, and it is anticipated that this type of violation will continue. Please advise me whether, in your opinion, the qualification as to applicable maximum speed limit set forth above, prevents the court from suspending the operator’s license of a person towing a motor vehicle at a speed more than 5 miles per hour in excess of the 40-mile limit?”

I believe the crux of this question is the definition given in Section 46-215.1 to the term “applicable legal speed limit”. The purpose of this qualification, or exception, was to exclude the operation of the act in those areas where the speed limit fixed by statute, by local authorities or by the State Highway Commission, was to be less than forty-five miles per hour. The purpose of 46-215.1 was to deter motorists from driving their vehicles at excessive rates of speed in rural areas where the mortality rate resulting from automobile accidents is very high.
I, therefore, agree with you that the term "applicable legal speed limit" in this statute means that speed limit which is fixed for the zone or area, and does not mean the speed limit for various classes or types of motor vehicles.

I am further of the opinion that where towed vehicles are operated on the highways, and such operation violates the speed limit of forty-five miles or greater, that the drivers are amenable to Section 46-215.1 of the Code, and their driving licenses can be suspended for the periods set forth in that section.

MOTOR VEHICLES—Weight limit; Governor; no authority to waive for defense purposes. F-119 (170)

HONORABLE JOHN S. BATTLE,
Governor of Virginia.

In the absence of the Attorney General from the office, I am taking the privilege of replying to your letter dated January 12, 1953, which I quote as follows:

"I have had conferences lately with federal officials and others relative to the operation on the highways of Virginia, without special permit, of trucks which exceed the length and width limitations provided in the statutes, and the defense officials have requested some tolerance in these measurements.

"I will be very much obliged if you will advise me of any provision in the law empowering me or any other State official to formally or informally agree that the statutory limitations as to length and width will not be strictly enforced as to trucks engaged in transporting defense material."

You are advised that Sections 46-326 and 46-328, as amended and contained in the 1952 Cumulative Supplement to the Code of Virginia, prescribe the maximum width and length of motor vehicles permitted to operate upon the highways of this State.

The provisions of Section 44-205 of the Code confer upon the Governor certain powers regarding traffic regulation whenever a state of war exists between the United States and any foreign country. Paragraph 3 of this section is as follows:

"This section shall be in effect only during the time a state of war exists between the United States and any foreign country."

I have also examined the provisions of the Civil Defense Act as contained in Sections 44-141 through 44-146 of the Code. However, I am unable to find any statutory authority authorizing or empowering you or any other State official to formally or informally agree that the statutory limitations as to length and width will not be strictly enforced as to trucks engaged in transporting defense material without a special permit from the State Highway Commission.
NATIONAL GUARD—Workmen's compensation; members entitled to benefits. F-225a (67)  
September 2, 1952.

Major General S. Gardner Waller,
The Adjutant General of Virginia.

This will acknowledge receipt of your letter of August 27, from which I quote below:

"A recent Act of the Congress authorized settlement of claims for accident, injury, death and hospitalization to the members of the National Guard, similar to the provisions applying to personnel of the Regular Army.

"Your opinion is requested:

"Under these circumstances, is it mandatory under the State law that Workmen's Compensation be carried on the Virginia National Guard?"

By Section 65-4 of the Code members of the National Guard are employees within the meaning of the Workmen's Compensation Act and thus entitled to the benefits thereof. Section 65-3 of the Code provides that the State and its political subdivisions are employers under the Act. Section 65-99 of the Code requires every employer to insure the payment of compensation to his employees. As applied to the State or any of its agencies, it has been held that, if insurance is not carried, the State or any agency is automatically a self insurer.

In making your inquiry I presume you have in mind the 1952 amendment of Section 65-4 providing that any award entered under the provisions of the Workmen's Compensation Act for members of the National Guard shall be subject to credit for benefits paid them under existing or future Federal law on account of injury or occupational disease covered by the provisions of the Virginia Workmen's Compensation Act. However, this provision does not dispense with the obligation of the State to pay awards made to members of the National Guard under the Act, although it may have the effect of reducing the amount of money which the State actually has to pay. This 1952 amendment, therefore, will probably reduce the amount of the premium which your Department will have to pay for insuring its liability under the Act, but this is an underwriting problem to be worked out between your Department and the insurance carrier.

Specifically answering your question, in my opinion it is contemplated by the law that the State insure its liability under the Act, but it has long been the practice of the Industrial Commission to hold that, if the State does not insure its liability, it automatically becomes a self insurer. Under existing law State employees, including members of the National Guard, are entitled to the benefits of the Workmen's Compensation Act and there is no way by which they can be deprived thereof.

Notaries Public—Commission issued for political subdivision expires when subdivision ceases to exist. F-246 (4)  
July 1, 1952.

Mr. Carter O. Lowance,
Acting Secretary of the Commonwealth.

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

"Will you please give us your advice on whether current Notary commissions issued for the counties will have to be renewed as commissions for the respective cities upon the effective date of the change-overs."
Your question arises over inquiries relative to the status of Notary commissions issued for a county, when through legislative authorization procedures are followed to transform the county into an incorporated city, with a charter granted by the General Assembly.

It is my opinion that, when a county by operation of law ceases to exist, a commission to an individual to hold the office and exercise the power and functions of a Notary Public would expire with the political subdivision which was the area of the jurisdiction in which the commission authorized the individual to act. I am strengthened in this view by the provisions of section 15-338 of the Code. This section provides that certain officers, including Notaries Public, shall not be affected by the adoption of either the county executive form or the county manager form of government.

If the Legislature deemed it necessary to preserve the office of Notary Public when there was a change only in the form of a county government, then it would seem that the Notary's authority, under a commission to serve as a Notary in a given county, would of necessity expire when the political subdivision ceased to exist. This would certainly be true in the absence of legislative action to preserve the authority under the commission.

This is a rather grave matter, as the taking of acknowledgment to deeds and other instruments requiring the exercise of the official function of a Notary, by a Notary commissioned only for a political subdivision which has ceased to exist, could give rise to serious questions as to the legal efficacy of their acts.

I know of no authority whereby the Governor, except for misconduct, incapacity, or neglect of official duty, could remove a Notary Public from office. I feel that I would have to hold that such Notaries as are embraced by your question no longer have authority to act. It would seem, therefore, that the only course open would be for the Governor, pursuant to section 47-1, et seq., of the Code of Virginia, to issue new commissions to those Notaries affected, who make proper application for same.

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NOTARY PUBLIC—Must qualify within four months of commission.
F-246 (150)

MISS MARTHA BELL CONWAY,
Secretary of the Commonwealth.

December 16, 1952.

I am in receipt of your letter of December 12, from which I quote as follows:

"On July 22, 1952, Steve Senic was commissioned a Notary Public for the County of Grayson, and the commission was mailed to the Clerk of the Circuit Court of Grayson County. Mr. Senic was advised by this office that this had been done, and was requested to appear in court and qualify at his earliest convenience.

"On December 6 Mr. Senic wrote us that he had moved about the time that he applied for his appointment as Notary Public and had not received any word about his appointment, and asked to be advised whether he had been accepted as a Notary. On December 9 we replied to this letter, advising that the commission was issued on July 22 and mailed to the Clerk of the Court, and that he was notified that this had been done. We further advised him that Section 47-1(4) of the Code of Virginia provides that a Notary shall give bond and qualify within four months from the date of the commission, and that if the Notary fails to qualify within that period, the Clerk shall return the commission to the Secretary of the Commonwealth."
"We are enclosing herewith a letter which we have today received from Mr. Senic. You will note that he wishes to know whether he can qualify under the commission of July 22, even though the four-months period has expired. I will appreciate a ruling from you in this matter."

As you point out, Section 47-1(4) of the Code requires that a Notary shall give bond and qualify before the Clerk of the Court within four months from the date of the commission and that, if the person appointed shall fail to qualify within this period, the Clerk of the Court shall return the commission to the Secretary of the Commonwealth. In view of this mandatory provision of the statute, it is my opinion that the Notary about whom you write may not qualify under the commission of July 22, and that the Clerk should return the commission to you. To hold otherwise would be to completely ignore this statutory provision.

OPTOMETRY—Unprofessional conduct; practicing under fictitious name.

F-207 (299)

June 23, 1953.

DR. W. W. Royall, JR., Secretary,
State Board of Examiners in Optometry.

This is in reply to your letter of June 22, 1953 in reference to the applicability of section 54-388-2(g) of the Code of Virginia to a situation in which an optometrist wishes to open an office under a fictitious trade name, which office will be operated by one other than himself.

Section 54-388 provides, in part, as follows:

"Grounds for revocation of certificate or censure of holder.—The Board shall revoke or suspend a certificate of registration or exemption, or censure the holder of such certificate, for any of the following causes:

* * * * * * * *

2. Unprofessional conduct.—The following acts shall be deemed unprofessional on the part of the holder of a certificate of registration to practice optometry.

* * * * * * * *

"(g) The advertising, practicing or attempting to practice optometry under a name other than one's own name as set forth on the certificate of registration; * * * * * * * *

In view of the very clear prohibition embodied in the foregoing I am of the opinion that the manner in which the optometrist proposes to practice is prohibited.

PHARMACY—Distributors of drugs; need no manufacturer's permit.

F-134 (180)

January 23, 1953.

MR. RALPH M. Ware JR., Secretary,
State Board of Pharmacy.

This is in reply to your letter of January 21, which I quote below:

"This office has an inquiry concerning whether it is necessary for a distributor only of drug products to have a permit to manufacture. The
inquiring firm obtains all products from an out of State firm and sells them at wholesale in original packages as received with their own label being attached by the firm manufacturing the drugs. Section 54-447 of the Code of Virginia of 1950 reads as follows in part:

"No drugs, medicines, toilet preparations, dentifrices or cosmetics, except soaps for which no curative or therapeutic claims are made shall be manufactured, made, produced, packed, packaged, or prepared within this state, except under the personal and immediate supervision of a registered pharmacist or such other person as may be approved by the State Board of Pharmacy." In this section no mention is made of distribution in original packages, with no actual packing or pre-packing being done.

"We are of the opinion that in the past not too much question has arisen over permits for such dealers, but with the added increase of distributors in the State, a clarification of the intent of the present law as written is required.

"This office desires an opinion as to whether this Board has the authority to require distributors of drug products as stated above to have permits to manufacture in accordance with Sections 54-447 and 54-448 of the Manufacturers Law."

Under the facts stated by you, it seems to me reasonably plain that the distributor in question is not manufacturing, making, producing, packing, packaging, or preparing drugs, medicines, toilet preparations dentifrices or cosmetics within the meaning of Sections 54-447 and 54-448 of the Code. It is, therefore, my opinion that this distributor is not required to secure from the State Board of Pharmacy the permit specified in Section 54-448.

PINE TREE SEED ACT—County may not withdraw after adoption of act. F-220 (49)

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

This is in reply to your letter of August 7, 1952, from which I quote as follows:

"Pursuant to § 10-80 of the Code of Virginia the Board of Supervisors of Pittsylvania County has, by resolution adopted by a majority vote declared Article 6 of § 10 of the Code of Virginia of 1950 effective in Pittsylvania County. This Act is popularly known as the Pine Tree Seed Act and is embraced in § 10-75 through § 10-83 of the Code of Virginia of 1950 as amended.

"Your official opinion is requested as to whether or not the Board of Supervisors of Pittsylvania County can rescind its original resolution and make said Act inoperative in Pittsylvania County."

Section 10-80 of the Code, as amended, reads as follows:

"This article shall not apply in any county unless and until the governing body of such county has, by resolution adopted by a majority vote, declared it to be effective in such county, and the State Forester has received a certified copy of such resolution duly attested by the clerk of the circuit court of such county; provided that this article shall be effective in Caroline, Hanover and King William counties without action on the part of the
governing body, and in all counties whose governing bodies adopted the provisions of §549al of the Code of 1919, or of this article, prior to January one, nineteen hundred fifty."

This section was amended in 1950 so as to eliminate a former provision for withdrawal by a county which had adopted the Article. Section 10-80, prior to its amendment, contained a clause, permitting such withdrawal and, in my opinion, the elimination of this clause by the 1950 amendment can only be interpreted to mean that a county no longer is able to withdraw from the terms of the Act.

PINE TREE SEED ACT—Violations; land not cleared within 12 months. F-220 (60)

MR. GEORGE W. DEAN, State Forester,
Virginia Forest Service.

August 21, 1952.

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

"A question has arisen concerning the pine seed tree law, Chapter 4, Article 6, Section 10-82. In a circumstance as described below, against whom should warrant for violation be procured?

"Mr. 'A' cuts all pine trees and states that he is planning to clear the land for pasture, and the law allows him twelve months in which to do the clearing. At the end of the eleventh month, without clearing the land or fencing same and sowing grass seed thereon, he sells the land to Mr. 'B'. On the thirteenth month, the land is devoid of seed trees, and has not been cleared for pasture."

Assuming of course, that Article 6, Chapter 4 of Title 10 of the Code is in force in the county to which you may have reference, in compliance with section 10-80 of the Code, and you have reason to believe that Mr. "A" has cut pine trees from one acre or more of land in violation of section 10-78 of the Code, he should be proceeded against in accordance with the provisions of section 10-79. Mr. "B" has cut no pine trees and has not, therefore, violated any of the provisions of Article 6.

Section 10-82 of the Code, which, in effect, provides that: (1) All pine trees may be cut when the land owner desires to clear his land for agriculture, pasture or subdivision purposes, and (2) evidence of intent of bona fide agriculture or pasture use shall require as a minimum and within twelve months from the date of completion of commercial cutting that the land intended for such use shall be cleared of all trees, brush, etc., or fenced and grass seed planted thereon, simply pertains to the proof or evidence necessary for a person accused of violating Article 6 to introduce at a forfeiture proceeding under section 10-79 in order to show his good faith.
April 24, 1953.

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

Receipt is acknowledged of your letter dated April 15, 1953, which I quote as follows:

"The following question has been propounded to me, and I would like to have the benefit of your advice before I undertake to definitely answer it. The matter is this:

A criminal warrant is sworn out by a member of the police department of the town of Lexington, Virginia in which warrant a person is charged with having committed a felony within the corporate limits of the said town. This accused person is arrested in a distant city in Virginia, and the police department in Lexington notified that he is being held pending an officer coming for him. The question is this: Should a member of the town police department go for the prisoner, or should the case be referred to the county sheriff's office, and the sheriff or one of his deputies make the trip for the accused? I have given an informal opinion that a member of the sheriff's force should be sent for this accused, but I am not certain that my view of this matter is correct. Does a member of the town police department have the authority and power to execute warrants and have prisoners in his charge beyond the one mile limit from the corporation? I realize that a police officer is a state officer with territorial limitations for the exercise of his powers as a police officer, but on the other hand it seems right that a police officer who swears out a criminal warrant should have the right to follow his case through his police department without having to enlist the aid of the sheriff's office in making the arrest and transportation of the accused.

"I will thank you for views on this matter so that I may be able to impart the correct law to the officers concerned."

Your attention is called to the provisions of Section 15-557 of the Code of Virginia relating to the powers and duties of police officers in cities and towns, which I quote, insofar as material, as follows:

"The officers and privates constituting the police force of cities and towns of the Commonwealth are hereby invested with all the power and authority which formerly belonged to the office of constable at common law in taking cognizance of, and in enforcing the criminal laws of the Commonwealth and the ordinances and regulations of the city or town, respectively, for which they are appointed or elected. And each and every one of such policemen shall use his best endeavors to prevent the commission within the city or town of offenses against the law of the Commonwealth and against the ordinances and regulations of the city or town; shall observe and enforce all such laws, ordinances, and regulations; shall detect and arrest offenders against the same; shall preserve the good order of the city or town; and shall secure the inhabitants thereof from violence and the property therein from injury.

* * * * * * *

* * * If, however, it shall become necessary or expedient for him to travel beyond the limits of the city or town in his capacity as a policeman, he shall be entitled to his actual expenses, to be allowed and paid as is now provided by law for other expenses in criminal cases"
It may be seen by reference to volume 15 C. J. S., page 1166, that a constable in modern English law is a public civil officer whose proper and general duty is to keep peace within his district although he may frequently be charged with additional duties.

It is a well recognized practice in the larger cities of the Commonwealth to send members of its police force to secure a person in another jurisdiction charged with an offense committed within the jurisdiction of the officer.

The provisions of the foregoing quoted section of the Code would indicate that such police officers would at times be expected to travel beyond the limits of their city or town because provision is made for the payment of their expenses in such cases. However, the power of such a policeman to make an arrest by virtue of his office is subject to well recognized territorial limits of his city or town and he can act only within such city or town or within one mile of its corporate limits. *Alexandria v. McClary*, 167 Va., 199, 188 S. E. 150.

In view of the foregoing, I am of the opinion that a member of the town police department has authority to go for and return a prisoner to his jurisdiction who is held on a fugitive warrant and to arrest him on the original charge when they arrive in the officer's jurisdiction.

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**PORTS AUTHORITY—Powers; issuance of bonds.** F-97 (142)

December 10, 1952.

**HONORABLE FRED W. McWANE, Chairman,**

Board of Commissioners,

Virginia State Ports Authority.

I am in receipt of your letter of December 1, from which I quote as follows:

"The bill creating the Virginia State Ports Authority does not seem to specify how we may finance its stated objectives other than by appropriations by the General Assembly or to accept funds from counties, cities and towns as is specified therein.

"It now appears that we must soon be presented with a proposal requiring some construction that could be financed by self-liquidating bonds and the question arises if we are permitted by law to engage in such financing. An official opinion will be appreciated."

The powers and duties of the Virginia State Ports Authority are set out in Chapter 6.1 of Title 62 of the Code of 1950 as amended. While in some respects the Authority has very broad powers, I do not believe the statute may properly be construed so as to authorize it to finance a project by the issuance of self-liquidating bonds. I feel that, if the General Assembly had intended to give this power to the Authority, it would have done so in specific terms and gone into some detail as to the procedure to be followed.

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**PUBLIC ACCOUNTS—Theft of; report to auditor.** F-136a (174)

January 16, 1953.

**HONORABLE J. GORDON BENNETT,**

Auditor of Public Accounts.

This is in reply to your letter of January 13, 1953, in which you enclose a letter of Miss Carrie Tate Aylor, Clerk of the Trial Justice Court of Pittsylvania
REPORT OF THE ATTORNEY GENERAL

County. These two letters set forth the facts surrounding a robbery, in which the sum of $33.85 was stolen from the office of the Trial Justice of Pittsylvania County. Following this robbery, Miss Aylor replaced the stolen money with her own personal check in order that the books might be balanced at the end of the month. She now inquires as to the proper procedure for recovering this personal money.

In my opinion, the better procedure for Miss Aylor to have followed would have been to immediately report to the person whose authority it is to audit her books the fact that a robbery had occurred. It would then be possible for the auditor to satisfy himself as to the facts and circumstances surrounding the robbery. However, you have stated in your letter that it appears that Miss Aylor did all that any prudent person could do within the facilities provided to protect the funds. Therefore I do not feel that it would be improper to permit her to withhold $33.85 from her next settlement and write off this amount as funds lost through robbery which was beyond the control of the officer involved.

I did not intend anything contained in this letter as a criticism of Miss Aylor’s conduct in replacing the money lost, but rather as suggesting a procedure which might be followed in future cases. Having had no past experience to guide her, I believe that her conduct in this case was completely understandable.

PUBLIC CONTRACTS—No official to contract with county; member of welfare board and justice of peace included. F-249 (286)

HONORABLE A. A. RUCKER,
Commonwealth’s Attorney for Bedford County.

June 5, 1953.

I have your letter of May 29, from which I quote as follows:

"The Board of Supervisors of Bedford County has directed me to request your opinion concerning the two matters set out below.

"Does the law of Virginia, and specifically Section 15-504 of the Code make it illegal for a member of the Public Welfare Board of Bedford County (which Board is composed of three members, each of whom receives as compensation from the county one hundred dollars per year) to act as agent for a hazard insurance company or companies with whom hazard insurance on county property is carried, the individual in question receiving pecuniary profit as agent from these insurance contracts?

"Does the law of Virginia, and particularly Section 15-504, make it illegal for a Justice of the Peace (who paid nothing by the county, but who receives certain fees for writing warrants, admitting individuals to bail, etc.) to represent as agent a hazard insurance company or companies with which company or companies county property is insured?"

The first paragraph of Section 15-504 is applicable to your inquiries. This paragraph reads as follows:

"No supervisor, superintendent of the poor, special policeman, commissioner of the revenue, treasurer, attorney for the Commonwealth, clerk of the court, trial justice, sheriff or any paid officer of the county shall become interested, directly or indirectly, in any contract, or in the profits of any contracts, made by or with any officer, agent, commissioner, or person acting on behalf of the supervisors, the county school board, or superintendent of the poor of the county, or in any contract, fee, commission, premium or profit therefrom, paid, in whole or in part, by the county or any board,
commission or agency thereof, or in the sale or furnishing of supplies or materials to such county, and shall not become interested, directly or indirectly, in any contract, or in the profits of any contract, made by or with any officer, agent, commissioner, trustee or overseer for working and keeping in repair the public roads in the county."

A member of the local Board of Public Welfare is, in my opinion, a "paid officer of the county" within the meaning of the above quoted paragraph. It is further my opinion that when such person acts as agent for an insurance company and sells insurance on county property, and as compensation receives a commission for selling such insurance, he is interested, directly or indirectly, in a commission paid by the county. Such a transaction, in my opinion, is forbidden by the section.

When a Justice of the Peace sells insurance on county property and receives a part of the premium as his compensation, the case is not quite so clear, yet it is my view, when the purpose of the statute is considered, that a Justice of the Peace is also a paid officer of the county and should not participate in such a transaction.

PUBLIC CONTRACTS—No official to have interest in firm awarded contract. F-203 (284)

June 3, 1953.

HONORABLE BASIL C. BURKE, JR.,
Commonwealth's Attorney for Madison County.

I have your letter of May 28, which I quote below:

"The School Board of Madison County is about to let to contract by competitive bids several proposed school projects.

"The County Clerk and a Deputy Clerk have an interest in a construction firm and are contemplating submitting bids on the proposed school projects.

"Would you kindly give me your opinion as to whether or not, under Section 15-504 of the 1950 Code of Virginia, as amended, the Madison County School Board may entertain a bid from the above-said construction firm?"

The applicable statute is, as you suggest, Section 15-504 of the Code, as amended, the first paragraph of which reads as follows:

"No supervisor, superintendent of the poor, special policeman, commissioner of the revenue, treasurer, attorney for the Commonwealth, clerk of the court, trial justice, sheriff or any paid officer of the county shall become interested, directly or indirectly, in any contract, or in the profits of any contracts, made by or with any officer, agent, commissioner, or person acting on behalf of the supervisors, the county school board, or superintendent of the poor of the county, or in any contract, fee, commission, premium or profit therefrom, paid in whole or in part, by the county or any board, commission or agency thereof, or in the sale or furnishing of supplies or materials to such county, and shall not become interested, directly or indirectly, in any contract, or in the profits of any contract, made by or with any officer, agent, commissioner, trustee or overseer for working and keeping in repair the public roads in the county."

It seems to me that it is reasonably clear that both the County Clerk and the Deputy Clerk are paid officers of the County within the meaning of the quoted
provision and that they are, therefore, prohibited from becoming interested, directly
or indirectly, in any contract made on behalf of the County School Board. Thus,
even if the firm to which you refer should submit the low bids on the proposed
school project, it would be unlawful for the firm to carry out the contract in view
of the interest of the Clerk and Deputy Clerk.

PUBLIC FUNDS—Depository banks; placing securities in escrow with
Federal Reserve Bank. F-113 (223)

March 17, 1953.

HONORABLE JOHN B. STERRETT, JR.,
Treasurer of Rockbridge County.

This is in reply to your recent communication in which you present the
following question:

"The 1952 General Assembly amended Section 58-946.1 of the Code of
Virginia to permit the deposit of securities covering deposits of public
funds with the Federal Reserve Bank of Richmond.

"Our depository banks have requested permission to do this and we
have received the necessary forms from the Federal Reserve Bank of Rich-
mond. We attach forms 'Cust.6' and 'Operating Circular No. 16' which
are the basis of agreement under which such securities are held.

"We have underlined on page 1 of 'Circular No. 16' a statement reading
'——— this bank ——— in no event will undertake to act as an escrow
agent.' Since Section 58-945 of the Code of Virginia specifically states
the securities 'shall be deposited in escrow with some bank ———' is
there a conflict between the conditions under which the Federal Reserve
Bank of Richmond will accept the securities and the Code above referred
to requires them to be held?

"Your opinion or reference to previous opinions on this matter will be
greatly appreciated by this office."

The statutes primarily pertinent to your inquiry are Sections 58-945 and
58-946.1 of the Code, the latter section having been added to the Code by Chapter
514 of the Acts of 1952. I quote the two sections below:

"§ 58-945. Deposit of securities pledged.—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."

"§ 58-946.1. Deposit of securities with Federal Reserve Bank of Rich-
mond.—Any depository under §§ 58-945 and 58-946, or the State Treasurer
if holding securities thereunder, or under any other statute or law, special
or general, is authorized to deposit such securities with the Federal Reserve
Bank of Richmond, to be held subject to the order of the State Treasurer
or depository, respectively."

Also pertinent is Operating Circular No. 16 of the Federal Reserve Bank of
Richmond.
It will be observed from Section 58-945 that securities pledged by a depository to protect county funds deposited with it shall be deposited in escrow with some bank or trust company in the State, and that there shall be a power of attorney authorizing the escrow bank or trust company, in the event of a default by the depository, to deliver the securities to the County Finance Board and empowering the Board to dispose of the pledged securities for the satisfaction of any claim that may arise from such default. Pursuant to the provisions of this section it has been the custom for years for an escrow agreement to be entered into between the Treasurer of the County, the County Finance Board, the depository bank and the escrow bank or trust company. One of the terms of the escrow agreement is that the escrow bank, upon demand of the Treasurer of the County accompanied by an affidavit by the Treasurer or the Chairman of the County Finance Board to the effect that there has been default on the part of the depository bank, shall deliver the pledged securities to the Board, and it authorizes the Board to sell or otherwise dispose of the securities in such manner as it may elect for the satisfaction of any claim that may arise from such default.

Turning to Section 58-946.1, apparently it was the intention of the General Assembly to permit the use of the Federal Reserve Bank of Richmond as the escrow bank contemplated by Section 58-945, although I must confess that I find it difficult to understand, if this was the intention of the General Assembly, why the section stipulated that the securities would be held subject to the order of the depository. To carry out the plan contemplated by Section 58-945 it would appear that the section should have provided that the securities would be held by the Federal Reserve Bank subject to the order of the County Finance Board, for, if the securities are held by the Bank subject to the order of the depository depositing the securities, they are not being held in escrow at all. However that may be, as you point out, we are confronted by this provision in Operating Circular No. 16 of the Federal Reserve Bank:

"* * * In any such case this bank will act solely as custodian or bailee of such securities, and in no event will undertake to act as an escrow agent."

In view of this stated policy of the Bank that it will in no event undertake to act as an escrow agent, I see no escape from the conclusion that Section 58-946.1 is ineffective to permit the Federal Reserve Bank to act as the escrow bank with which securities may be deposited by a depository of county funds, as provided by section 58-945. In other words, in so far as securities pledged for the protection of county funds are concerned, I do not see how the two sections can be reconciled. I conclude that the question asked in the third paragraph of your letter must be answered in the affirmative.

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PUBLIC OFFICE—Eligibility for; employees of the District of Columbia.
F-249 (221)

March 16, 1953.

HONORABLE HOWARD W. SMITH, JR.,
Commonwealth's Attorney, Alexandria.

This is in reply to your letter of March 9 in which you asked for my opinion concerning two problems. The first question is:

"Is an officer or employee of the District of Columbia prohibited from holding an office 'of honor, profit, or trust, under the Constitution of Virginia' by section 2-27 of the Code of Virginia?"
Section 2-27 provides as follows:

“No person shall be capable of holding any office or post mentioned in the preceding section, who holds any office or post of profit, trust, or emolument, civil or military, legislative, executive, or judicial, under the government of the United States, or who is in the employment of such government, or who receives from it in any way any emolument whatever; and the acceptance of any such office, post, trust, or emolument, or the acceptance of any emolument whatever under such government, shall, ipso facto, vacate any office, or post of profit, trust or emolument under the government of this Commonwealth or under any county, city or town thereof.”

It is my opinion that section 2-27 should apply to employees or officers of the District of Columbia in the same manner in which it does to other persons under the employment of the government of the United States. While there are decisions which have been rendered in the Federal Courts that officers and employees of the District of Columbia are not United States employees for civil service, retirement and tort claims purposes, I do not feel that these decisions are applicable to the instant question.

The purpose of the Virginia statute is that no person holding a position under the Constitution of this State should serve two separate governments. The District of Columbia is an agency of the United States government. Certain powers as a municipal corporation are exercised by the District government. However, the District of Columbia as the seat of government is controlled exclusively by Congress.

In answer to your second question, it is my opinion that retired employees of the District of Columbia who are receiving a pension or annuity are also disqualified from holding a state or local office under section 2-27 of the Code, as this annuity is a form of emolument from the government of the United States.
Federal employee comes within the tenth exception contained in Section 2-29 of the Code, which exception reads as follows:

"To prevent any United States government clerk from holding any office under the government of any town or city;"

PUBLIC OFFICE—Eligibility of federal employees to hold; bill relating to. F-249 (136)

December 3, 1952.

HONORABLE CHARLES R. FENWICK,
State Senator.

This is in reply to your request for my opinion as to whether or not a proposed Bill which amends and reenacts section 2-27 of the Code, relating to disability to hold certain offices, and amends the Code by adding section 2-29.1 providing under certain conditions that employees of the Federal Government shall be capable of holding office under governments of counties, in any wise conflicts with the Constitution of Virginia.

The amendment to section 2-27 of the Code simply provides for an exception to the prohibition against federal employees holding office in a county, city or town of the Commonwealth. Section 2-29.1 sets forth this exception by providing, in substance, that federal employees may hold office under the government of any county in this state if a petition of ten per cent of the qualified voters of any such county is filed with the Circuit Court in a form prescribed therein.

It is my opinion that the proposed Bill, if enacted, would be general legislation and in no wise would conflict with the Constitution of Virginia.

PUBLIC OFFICE—Eligibility for; retired civil service employee; retired army officer. F-249 (220)

March 16, 1953.

HONORABLE A. A. RUCKER,
Commonwealth's Attorney for Bedford County.

This is to acknowledge receipt of your letter of March 11 from which I quote as follows:

"I should like to know whether in your opinion the law of the State of Virginia, and particularly Section 2-27 of the Code of Virginia renders ineligible to hold public office a man who is:

"(a) A retired civil employee of the United States Government, and receiving a pension as such (but no longer employed by the United States Government); and also is

"(b) A retired Army officer under the provisions of Public Law 810 80th Congress, as a reservist, and receiving a pension as such (but no longer on active duty in the Army)."

It is my opinion that an individual who is a retired army officer would be eligible to hold an office under the Constitution of Virginia due to the exception provided in section 2-30 of the Code, which reads as follows:

"No person shall, by reason of being a member of the United States military or naval reserve force, or by reason of being a retired officer of
the United States army, navy or marine corps and receiving pay therefor, be disqualified from holding any office under the government of the Commonwealth, or under any county, city, town magisterial district or school district thereof."

However, I can find no exception to either active or retired civil service employees of the U. S. Government who receive compensation. Therefore, such persons are excluded from holding office under the Constitution of Virginia by section 2-27 of the Code which provides that "no person shall be capable of holding any office or post * * who receives * in any way any emolument whatever" from the government of the United States.

It is my conclusion, therefore, that the person to whom you refer is ineligible to holding office under the Constitution of Virginia by reason of the fact that he receives emolument as a retired civil service employee of the United States Government.

PUBLIC WELFARE—Boarding homes; retaining fee payable out of criminal fund. F-231 (165)

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

I have your letter of December 18, which I quote below:

"The problem of providing facilities for the care of children, especially the younger ones, pending action by the juvenile and domestic relations courts is of very real concern to the courts, the local departments of public welfare and this Department. It has frequently been found necessary for some agencies to provide a 'retaining' fee or otherwise insure a stipulated income in order to secure boarding homes which may be used for this purpose in the absence of publicly operated detention facilities. Where this has been done the retaining fee has usually been paid by the local department of public welfare.

"I should like to have your opinion as to whether any part of the state appropriation for the foster care of children as carried in item 397 of the Appropriation Act for 1952 may be used to reimburse local departments of public welfare for payments made to individuals (boarding home parents) on a guarantee basis to insure the availability of space for children needing emergency and temporary care."

Section 16-172.65 of the Code stipulates that provision shall be made for the temporary detention of children coming within the classification described by you in several ways, one being "in a private home or homes selected by and under the supervision of the court or local department of public welfare." Section 16-172.68 provides that, in case the local governing body arranges for the boarding of children temporarily detained in private homes, the cost of maintaining such children held awaiting trial or disposition under the juvenile laws of the State shall be paid monthly according to schedule prepared and adopted by the State Board out of funds appropriated for criminal costs. Manifestly, if it is decided that these children shall be temporarily detained in private homes, it is necessary that arrangements be made to have such homes available for the purpose. I suggest, therefore, that the fee which you describe as being necessary to have these homes available be paid out of the appropriation for criminal costs as pro-
vided in Section 16-172.68. It is my view that it is more appropriate to pay these costs out of the criminal fund than out of the appropriation for providing foster care for children.

PUBLIC WELFARE—Children; returning to state board from local board. F-231 (209) March 6, 1953.

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

This is in reply to your letter of February 17, 1953 in which you request my advice as to the procedures to be followed in those cases in which the State Board returns a child to the supervision of a local welfare department. You state that, in some instances, such child fails to adjust properly and, though he does not commit any new serious offense, it is sometimes felt that he should be returned to the State Board for care. The problem which concerns you arises by virtue of the fact that in some localities it is claimed that there is no authority and no procedure whereby such child can be returned to the State, and the courts refuse to issue warrants or attachments in such cases. You state that such an interpretation by the local authorities places an undue burden on the State department by requiring it to be responsible for apprehending such children in their respective localities.

I have examined the juvenile law in an attempt to ascertain statutory guidance for the procedure to be followed in such cases. The statutes provide for the return of the child to the locality for supervision, but they do not expressly cover the return of the child to State care in cases such as that described in your letter.

As you are well aware, the Legislature has very carefully safeguarded the children of this State at every stage of proceedings concerning their welfare and, in so far as taking such children into custody is concerned, has surrounded them with safeguards far in excess of those protecting the ordinary adult.

In view of these facts it would be my suggestion that perhaps legislation is needed to cover this particular phase of the juvenile procedure and that, pending passage of such legislation, the problem should be worked out in each locality in a manner consistent with the views of the local courts.

PUBLIC WELFARE—Children in custody; use of child’s money by local board. F-231 (103) October 23, 1952.

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

As a result of numerous questions which have arisen recently and after several conferences with members of my staff, you have requested my opinion as to whether a county or city department of public welfare has the authority to receive and use money for children who have been committed to such departments. You state that most common source of such funds is old age and survivors insurance benefits paid by the social security administration.

On January 16, 1952, in a letter addressed to you, I stated that I knew of no such authority possessed by the State Board. I have been unable to find
any provision of law conferring such authority upon a local board, and I am, therefore, of the opinion that they have no such authority.

You also inquire whether funds held by a local department of public welfare for a child committed to the department should be paid to the child upon release from custody or turned over to the legally appointed guardian or parent of the child. In my opinion, if the child has reached his majority upon release, it would be proper to turn such funds over to him, otherwise, it is my opinion that such funds should be turned over to the person or persons having legal custody over the property of such child.

PUBLIC WELFARE—Decisions of state board are final. F-231 (40)

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

I have your letter of July 23 with reference to the case of Colean Harper. It seems that this case was appealed to the State Board of Welfare and Institutions, which Board decided that this applicant for aid as a permanently and totally disabled person is a resident of Franklin County and, therefore, that it is a Franklin County case. You state that the Franklin County Board of Public Welfare wishes to appeal from the State Board’s decision to “a court of competent jurisdiction”. You desire my opinion as to whether an appeal to a court lies in this case and, if so, the proper court.

Section 63-134 of the Code (in the Chapter dealing with old age assistance) provides that the decision of the State Board in the case of an appeal shall be final and binding “and shall not be subject to further review or appeal, except that the State Board may at any time thereafter reopen and review the matter involved.” Section 63-216 of the Code makes this provision as to the finality of the decision of the State Board applicable to cases of the permanently and totally disabled.

In view of the applicable statutes to which I have referred, I conclude that the decision of the State Board in this case is final and is not subject to further review or appeal except in so far as the Board itself desires to reconsider the case.

PUBLIC WELFARE—Funds; of local boards should be handled by treasurers. F-231 (75)

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.

I have your letter of September 9, in which you ask if monies received by local Boards of Public Welfare, as a consequence of the duties which they are performing under the provisions of Section 63-73 of the Code, should be handled by a County or City Treasurer or other officer vested with responsibility for the receipt, custody and disbursement of public funds in a special fund and disbursed by him only on order of the local Welfare Board.

Section 63-73 of the Code as amended, to which you refer, reads as follows:

“Any local 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 local 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."

In an opinion given to Honorable Richard W. Copeland, Director, Department of Welfare and Institutions, under date of May 5, 1952, in considering the status of funds received by local Boards of Public Welfare pursuant to this section, I said:

"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."

I have considered the pertinent sections of the Code dealing with local Treasurers and it is my opinion that the monies in question, constituting public funds, should be received by these officers from the local Boards of Public Welfare and disbursed by them on order of these Boards. While there is no statute dealing specifically with the question, I am clearly of the opinion that not only from the general tenor of the sections of the Code applicable to the duties and responsibilities of local Treasurers, but also from the standpoint of sound public policy, these funds should be handled as I have indicated.

As to procedures for handling an accounting of the funds paid under the authority of the section, I suggest that these details be worked out by you, the Treasurers and the Welfare authorities.
REPORT OF THE ATTORNEY GENERAL

public assistance, made by the local boards of public welfare to their local governing bodies pursuant to sections 63-67.1 and 63-67.2 of the Code, should not be spread upon the official records of such governing bodies but should be filed in special books provided therefor. Section 63-67.3 also provided that such special books should not be opened to public inspection and made it a misdemeanor for any person to willfully disclose any information contained therein for purposes other than those directly connected with the administration of the Virginia Public Welfare and Assistance Law.

Your specific question is whether the repeal of section 63-67.3 means that the information which must be furnished monthly by the local boards of welfare to the governing bodies of the counties and cities must no longer be kept confidential by such governing bodies.

The Virginia Public Welfare and Assistance Law, found as Chapters 5 to 9 of Title 63 of the Code, makes it a misdemeanor for any person to willfully disclose information concerning applicants and recipients for purposes other than those directly connected with the administration of old age assistance (section 63-140), aid to dependent children (section 63-161), aid to the blind (section 63-204) and general relief (section 63-220). The practical effect of these sections was to make confidential all information concerning applicants and recipients of assistance, and since they were not amended or repealed by the Acts of Assembly of 1952 they are, of course, still in full force and effect unless they are found to be in conflict with Chapter 287 of the Acts of Assembly of 1952, which, as pointed out, amended and reenacted section 63-68 of the Code. This amendment reads as follows:

"Notwithstanding any other provision of law or rule or regulation in conflict herewith any citizen shall be afforded access, at the offices of the local departments of welfare, during office hours, to records of the disbursement of any funds or payments made or approved by the local board or department or division of public welfare in any county or city upon signing a request therefor with applicants' address. It shall be unlawful for any person, firm, corporation or association to use any list or names obtained directly or indirectly through access to such records for commercial or political purposes, or to publish the name of any child receiving assistance under the provisions of section 63-73 of the Code of Virginia, and any person violating these provisions shall be guilty of a misdemeanor and punished accordingly."

It may be seen from the above quoted language that a citizen, upon signing a written request and giving his address, shall be afforded access to the records of the disbursement of any funds or payments made or approved by a local board or department of public welfare at the offices of the local departments during regular office hours. It is further noted that the amendment which opens the relief rolls to public inspection does not permit the disclosure of lists of applicants for assistance but only disclosure of disbursement of funds, etc.

Therefore, notwithstanding the repeal of section 63-67.3, it is clear that there is no conflict between the amendment to section 63-68 and sections 63-140, 63-161, 63-204 and 63-220, mentioned above, in so far as the prohibition against the disclosure of information as to applicants for assistance is concerned, and that any wilful disclosure of this nature for purposes other than those directly connected with the administration of assistance is still a misdemeanor.

Furthermore, I am of the opinion that wilful disclosure of any information concerning the disbursements of funds for assistance for purposes other than those directly connected with the administration of the Virginia Public Welfare and Assistance Law remains a misdemeanor unless the terms and conditions set forth in the amendment to section 63-68 are strictly followed. For example, information concerning the disbursement of funds or payments made or approved
by local boards of public welfare may be obtained only at the offices of the local
departments and any person who wilfully discloses such information at any other
place would be subject to the penalties provided in sections 63-140, 63-161, 63-204
and 63-220.

To summarize, it is my opinion that, even though there no longer remains a
specific penalty for the wilful disclosure of information contained in the monthly
reports made by the local boards of public welfare to the governing bodies of
counties and cities, by reason of the repeal of section 63-67.3, sections 63-140, 63-161,
63-204 and 63-220 of the Code remain in full force and effect, subject, of course,
to the exception contained in the 1952 amendment to section 63-68, which exception,
as already pointed out, does not apply to the monthly reports to governing bodies.
Therefore, as a practical matter, in order to avoid any unlawful disclosure of in-
formation concerning applicants and recipients of assistance, it would be my
suggestion that the clerks of the various governing bodies, even though there is
no longer any express provision therefor, continue to keep such information in a
special book and refuse to allow public inspection thereof.

PUBLIC WELFARE—Local boards; city and county combining under one
board. F-231 (206)

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

March 5, 1953.

I am in receipt of your letter of February 25, in which you present the
following question on which you desire my opinion:

"I should like your opinion as to whether the governing bodies of a
county and a city may enter into an agreement by which the county board of
public welfare may operate, in accordance with the terms of such agreement,
the public welfare program in the city in lieu of the establishment of a
separate board of public welfare for the city or a combination board of
public welfare for county and city in accordance with Section 63-51 of the
Code, as amended. If so, shall the annual and biennial budget estimates
provided for in Sections 63-69 through 63-69.3 of the Code be prepared and
submitted separately for the county and city, or is it sufficient for the
budget of the county to include expenditures for the city in accordance with
the terms of the agreement?"

Section 63-51 of the Code as amended by Chapter 409 of the Acts of 1952
reads as follows:

"There shall be a local board in each county and city of the State, but
any combination of counties and cities may have one local board for all
if the governing body of the participating county or city so elects. The
provisions of §§ 63-52, 63-53 and 63-53.1 notwithstanding, if the local board
represents two or more counties and/or cities, there shall be two members
of the local board from each county or city; provided, if a participating
county or city has a population of thirty thousand or more it shall be repre-
sented by three members on the board, and one additional member for each
fifteen thousand in excess of thirty thousand. Administrative costs of a
local board representing more than one county or city shall be borne by the
participating counties or cities as they may agree. The term 'local board'
as used in this title shall mean a local board representing one or more
counties or cities."
The 1952 amendment added all of the section following the word "State" in the first sentence. Generally speaking, the amended section authorizes the joint operation of the public welfare program by a single "local board" in any combination of counties and cities, subject to the provisions of the section. Formerly the pertinent statutes contemplated that the program should be operated by separate local boards of public welfare in each county and city. See Sections 63-50, 63-51 (before the 1952 amendment), 63-52 and 63-53 of the Code. I know of no authority for the governing bodies of a county and city to operate their public welfare programs in accordance with the terms of an agreement that may be entered into between them. In other words, it is my opinion that, if a joint operation is desired, it must be pursuant to Section 63-51 of the Code as amended in 1952. If this section is not invoked, then the program must be operated by separate local boards for each county and city.

PUBLIC WELFARE—Maintenance of children; per diem payments.
F-13 (137) December 3, 1952.

HONORABLE CECIL W. TAYLOR,
Member House of Delegates.

I refer to our recent conversation in which you stated that the following suggestion had been made to you:

"Section 63-293 of the Code was amended in Chapter 644, Page 1099, of the 1952 Acts to provide for an increase in the rate of the per diem allowance for board of children placed by the State Board. Section 63-293 provides for the payment of per diem allowances for board to be paid from the appropriation for criminal expenses; in the 1952 Appropriation Act this is Item 46. The suggestion is that this Item of the Appropriation Act also specify that the allowances for the board of children be paid from the appropriation for criminal expenses."

You desire my opinion on the question of whether or not it is essential that Item 46 of the Appropriation Act be amended so as to specifically include the per diem allowance for the maintenance of children detained or placed by the State Board of Public Welfare pursuant to Section 63-293 of the Code.

Item 46 of the Appropriation Act of 1952 is the appropriation for criminal charges. It is an open appropriation, that is to say, "a sum sufficient" is appropriated. Section 63-293 stipulates that the per diem allowance for maintenance of children detained or placed by the State Board of Public Welfare "shall be paid by the State out of the appropriation for criminal expenses." Thus the General Assembly has classified this per diem allowance as a criminal charge and by Item 46 of the Appropriation Act has made an appropriation of a sum sufficient to pay criminal charges.

It is my opinion, therefore, that the State Comptroller is fully authorized by statute to pay out of the appropriation for criminal charges the per diem for maintenance of these children. I am advised by the State Comptroller that there is no doubt in his mind as to his authority to make these payments under existing law, even though there is no specific reference to Section 63-293 in Item 46 of the Appropriation Act. I might add that there is nothing unusual in this legislative procedure. There are a number of statutes, and have been over the years, providing that certain expenses shall be paid out of the appropriation for criminal charges, even though these expenses are not specifically spelled out under the Item making the appropriation. So far as I know, no question has ever been raised as to the validity of this procedure.
PUBLIC WELFARE—Non-support payments; not to be paid to local board except under court order. F-231 (239a)

April 3, 1953.

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

This is in reply to your letter of March 23, 1953, from which I quote as follows:

"A substantial proportion of the children for whom application is made for the aid to dependent children have been deserted by their fathers. Under State Board regulation it is required that non-support action be instituted in such cases under the provisions of Section 20-61 of the Code prior to the granting of assistance by the local department. In some instances the support payment ordered by the court is not sufficient to meet the minimum requirements of the wife and children and even that which is ordered is not always paid regularly.

"Is it permissible under the Virginia statutes for non-support payments paid to local departments of public welfare by the court, or by the defendant on court order, to be used as a refund to assistance granted the person or family in whose behalf they are paid, assuming that a regulation covering this matter is adopted by the State Board? It has been suggested that this would be a logical method by which a regular income can be provided the dependent relatives in those cases in which the stipulated support payments are not made regularly by the defendants."

I have considered this matter very carefully and I can readily appreciate the reasons underlying the desire to adopt this new procedure. In my opinion the desired procedure might be followed under proper regulations by the State Board in those cases in which the court, by proper order, requires non-support payments to be made to the local department of public welfare for use in this manner. In the absence of such order by the court, I am unable to see how the local department would be able to recover payments made or how it would have authority to use money paid to reimburse itself for past payments.

Therefore, I believe the procedure must be restricted to cases in which such orders have been entered by the court.

PUBLIC WELFARE—Old age assistance; no statute of limitation on recovery from estate of recipient. F-216 (214)

March 9, 1953.

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

This is in reply to your letter of March 2, 1952 in which you ask if there is any statute of limitations on the right or remedy of the Welfare Department to enforce its lien on the estate of the recipient of Old Age Assistance. Section 63-127 of the Code of Virginia provides as follows:

"On the death of any recipient of assistance, the total amount paid as such assistance under this chapter shall be allowed as a claim against the estate of such recipient, prior to all other claims except prior liens and except funeral expenses not in excess of one hundred dollars, and except hospital bills, doctors' bills and medical expenses not in excess of one hundred and fifty dollars."
"The local board may require the superintendent of public welfare to execute and acknowledge, as deeds are required to be acknowledged, a notice of such claim showing the total amount paid as such assistance, which notice may be filed within one year after the death of the deceased recipient, with the clerk of the court authorized to record deeds in the county or city where the real estate of such recipient subject to such claim is situated, and when so filed the clerk shall record it in the current deed book and index it in the names both of the local board and the deceased recipient. No fees shall be charged or collected by the clerk for filing, recording or indexing any such notice. After the expiration of the period of one year, such notice, when filed, recorded and indexed as aforesaid, shall have, as to purchasers, the same effect as though a creditors' suit had been instituted and a memorandum of lis pendens duly filed and recorded."

It is my opinion that failure to file the claim within one year after the death of the recipient does not bar the claim. Reference to section 8-35 of the Code reveals that "no statute of limitations which shall not in express terms apply to the Commonwealth shall be deemed a bar to any proceedings by or on behalf of the same * * *". I know of no statute of limitations which in express terms bars any such claim of the Commonwealth. Section 63-127 includes no such statute of limitations. This section expressly provides that the Commonwealth shall have a claim against the estate, and that such claim shall be prior to all other claims except prior liens, funeral expenses up to one hundred dollars and doctors' bills and medical expenses up to one hundred and fifty dollars. The statute then goes on to provide a means of filing the claim and provides for the protection of the claim against bona fide purchasers, if it is so filed.

While I am of the opinion that such claims should be filed within one year to gain protection against intervening innocent third party purchasers, I see no reason why the claim may not be enforced if there is not such a purchaser.

PUBLIC WELFARE—Relief rolls open only to "any citizen" of this State. F-231 (20)

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

July 18, 1952.

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

"You will recall that House Bill 37, Chapter 287 of the Acts of Assembly of 1952, amended § 63-68 of the Code by adding a new paragraph which permits opening relief rolls to public inspection. The bill provides that 'any citizen' may be afforded access to lists of recipients of aid.

"The question has been raised whether the phrase 'any citizen' means a resident of Virginia or any citizen of the United States."

The pertinent part of the amendment to § 63-68 reads:

"Notwithstanding any other provision of law or rule or regulation in conflict herewith any citizen shall be afforded access, at the offices of the local departments of welfare, during office hours, to records of the disbursement of any funds or payments made or approved by the local board or department or division of public welfare in any county or city upon signing a request therefor with applicant's address. * * *" (Italics supplied)
I am of the opinion that it must be assumed when the General Assembly of Virginia enacts legislation and uses therein the words "any citizen" that it has reference to citizens of this State unless a contrary intent is clearly indicated.

The debates in the General Assembly on this legislation indicated that the underlying reason for opening the relief rolls of this State was that its citizens are entitled to know how public funds are being disbursed. Citizens of other States, of course, are not concerned with the public funds of this State. Furthermore, the Bill as originally drafted and introduced contained the words "the public" instead of the words "any citizen" and I am advised by the chief patron who actually drafted the Bill that this substitution was made advisedly in order to make it clear that the relief rolls were to be open only for inspection by citizens of this State.

The legislative intent to limit the inspection of relief rolls to citizens of this State is thus clearly shown, and the context of § 63-68 and other related statutes does not indicate a contrary intent. Therefore, there can be no doubt, in my opinion, that the words "any citizen" as used in § 63-68 of the Code as amended refer only to citizens of the Commonwealth of Virginia.

PURCHASE AND PRINTING—Competitive bids do not have to be secured when purchase for locality. F-227 (245)

April 10, 1953.

MR. R. C. EATON, Director,
Division of Purchase and Printing.

This is in reply to your letter of April 9, in which you stated the following problem:

"The Industrial Department of the State Penitentiary manufactures quite a number of uniforms for the personnel of various political subdivisions of the State. In each case, we are told that the political subdivision states the type of cloth required and designates it by certain manufacturer's numbers. The penitentiary in turn sends us a requisition requesting us to purchase this particular material under manufacturer's numbers, which eliminates competition."

You ask if the purchase of this material is included within the provisions of section 2-251 of the Code of Virginia which requires that competitive bids be secured.

It is my opinion that this material may be purchased without being made through competitive bidding. Section 2-262 of the Code provides:

"The boards of supervisors, or other governing bodies, of the several counties and the councils of the several cities and towns, and the officers of counties and towns who are empowered to purchase material, equipment and supplies of any and all kinds for local public use, may, in their discretion, seek the aid and cooperation of the Comptroller in purchasing such material, equipment and supplies, to the end that, by central purchasing, cheaper prices may be obtained. ** *"

In effect, you are purchasing this material by direction of the localities and not the State. Therefore, section 2-251 of the Code is not applicable to these purchases. Section 2-249 is as follows:

"Except as hereinafter provided, every department, division, institution, officer and agency of the State, hereinafter called the using agency, shall purchase through the Comptroller all materials, equipment and supplies
of very description, the whole or a part of the costs whereof is to be paid out of the State treasury; it shall be the duty of the Comptroller to make such purchases in conformity with this chapter."

I am of the opinion that no part of the cost of these purchases is paid out of the State treasury. The entire cost is ultimately paid by the county, city or town ordering the uniforms.

RECOGNIZANCES—Forfeiture; when default recorded and execution issued. F-171 (281)

May 29, 1953.

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

This is with reference to your letter of May 25, 1953, a portion of which I quote:

"On May 15, 1953 an order was entered in my Court in a criminal case showing the failure of a defendant to appear in accordance with his recognizance and ordering his forfeiture herein to be recorded and a scire facias to be issued by the Clerk against the defendant and his surety on his bond returnable to the 1st day of the next term of our Court, which is July 13, 1953, and I have docketed a judgment against the defendant in the criminal case and the surety on his bond for the amount of the bond on the Judgment Lien Docket of my office, but have not issued an execution thereon and do not plan to do so until after process has been served on the defendant and the Court has so ordered."

Section 19-113 of the Code of Virginia, 1950, provides:

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

It is noted that this section provides for recording of the default and that the "**process on any such forfeited recognizance shall be issued from the court before which the appearance was to be, and wherein such forfeiture was recorded or entered. **" It appears that it is the duty of the clerk to docket the forfeiture of the recognizance at the time the default is declared. Process must then be issued out against the principal and his surety to provide them an opportunity to show cause why execution should not be had on such recognizance. As stated in the case of Lewis v. Commonwealth, 106 Va. 20, "a condition precedent to its issuance (scire facias) is that the recognizance shall be declared to have been
forfeited by reason of the non-fulfillment of its condition on the part of the person bound by it”.

I, therefore, agree that you should have docketed the forfeiture of recognizance against the defendant and his surety at the time of default, but that no execution should be issued against such recognizance until final judgment has been entered on the scire facias.

RECORDATION—Clerks; when acknowledgment should be admitted to record. F-116 (266)

May 14, 1953.

MR. ROBERT M. OLDHAM, Deputy Clerk,
Circuit Court of Accomack County.

This is with reference to your letter of May 9, 1953, in which you make inquiries as to recordation of certain instruments and ask that certain sections of the Code of Virginia be clarified.

It is noted that all sections to which you have referred are embodied in Article 4 of Title 55 of the Code of Virginia of 1950 which is entitled “Validating Certain Acts, Deeds and Acknowledgements”. The sections of the Code which relate to when documents should be admitted to record are set forth in Article 1 of Title 55. As to what constitutes a proper acknowledgement is set forth in Articles 2 and 3 of Title 55. From an examination of the foregoing sections it will be concluded that the clerk of the appropriate court “* * shall admit to record any such writing as to any person whose name is signed thereto, when it shall have been acknowledged by him, * *”.

Therefore, if the requirements as to acknowledgements are substantially complied with, I feel that any signed writing should be admitted to record, irrespective of the validity of the instrument itself. Of course, you understand that no instrument should be admitted to record when the recordation of such instrument is expressly prohibited by statute.

RECORDATION—Conditional sales contract; what copy to be presented.
F-34 (273)

May 22, 1953.

HONORABLE LLOYD E. CURRIN, Clerk,
Circuit Court of Smyth County.

This is in reply to your letter of May 15, 1953 in which you state the following question:

“We have recently had submitted to this office, for recording, a copy of a conditional sales contract marked ‘recording copy’ which was duly signed by both the vendor and vendee. The vendor explained that the original copy was required for rediscount purposes.

“I would appreciate your advising me your opinion as to whether or not it is proper to insist on the original of such documents for recordation purposes.”
Section 55-88 of the Code of Virginia provides:

"Every sale or contract for the sale of goods and chattels, wherein the title thereto or a lien thereon is reserved until the same be paid for, in whole or in part, or the transfer of title is made to depend on any condition, when possession is delivered to the vendee, shall, in respect to such reservation and condition, be void as to creditors of the vendee who acquire a lien upon the goods and as to purchasers from the vendee, for value, without notice, unless such sale or contract be evidenced by writing, signed by the vendor and the vendee, setting forth the date thereof, the amount due, when and how payable, a brief description of the goods and chattels, and the terms of the reservation or condition; and unless such writing is filed for docketing with the clerk by whom deeds are admitted to record, as provided by law, of the county or corporation in which such goods and chattels may be; provided, that if such filing for docketing be done within five days from the delivery of the goods and chattels to the vendee, it shall be as valid as to creditors and purchasers as if such filing for docketing had been done on the day of such delivery of the goods and chattels.

"Such clerk shall endorse on every such contract the words 'filed and docketed', together with the day and hour of such filing and shall affix his signature thereto."

It is my opinion that any conditional sales contract which fulfills the listed requirements in § 55-88 of the Code must be accepted for recordation. I can find nothing in the Code or in the court decisions of this State which would require the "original copy" to be submitted for recordation. If it is a copy of the contract, signed by both the vendor and vendee, it is for recordation purposes the same as the original copy.

REFERENDA—County; statutory provisions for. F-83 (51)

August 15, 1952.

HONORABLE WILLIAM J. HASSAN,
Attorney for the Commonwealth, Arlington.

This is in reply to your inquiry concerning the various methods of referenda, enacted during the recent session of the General Assembly, which apply to Arlington County. I quote as follows from your letter:

"A question has arisen as to whether the dates for filing petitions and the number of signatures provided in the enabling legislation are a method for presentation to the voters of these matters of referenda in addition to the provisions of Title 15, Section 360.1 of the Code of Virginia, and also, whether the provisions of 15-360.1 are an additional method to those methods set forth in previous enabling legislation for matters of referenda in this County.

* * * * * * * * * * * *

"Please advise me whether Section 15-360.1 is in addition to the methods presented in the various referenda sections passed by the last legislature."

The first sentence of section 15.360.1 reads:

"If on or before the fifteenth day of July of any year in which such referendum is provided for by law a petition signed by two hundred or more
qualified voters of the county be filed with the circuit court or judge thereof in vacation of any county having the form of government provided for in Article 3 of this chapter, asking that a referendum be held on any question upon which a referendum is provided for by any applicable statute, then such court or judge shall on or before the first day of August of such year issue and enter of record an order requiring the county election officials to open the polls at the regular election to be held in November of such year on the question stated in such statute. * *” (Italics Supplied)

While section 15-360.1 is found in Article 4 of Chapter 12 of Title 15 of the Code and immediately follows the sections dealing with a referendum on the form of county government, it is my opinion that the language italicized above makes it clear that section 15-360.1 is a statute of general application and may be used as an additional method of obtaining a referendum.

For example, if a referendum is desired on the question of establishing a department of real estate assessment the voters may follow the applicable provisions of section 15-354.1 or, as an alternative, follow the method provided by section 15-360.1. Likewise, on the question concerning membership on the county board the voters may proceed either under section 15-351, as amended, or under section 15-360.1. However, the referenda on the creation of the office of county attorney (section 15-352.3) and on the appointment of the county manager and the heads of departments (section 15-355.2) must be conducted in accordance with section 15-360.1 since sections 15-352.3 and 15-355.2 expressly so provide.

RELEASE OF DEBT—Assignment of paid note for purpose of.

JAILS AND PRISONERS—Confinement; non-payment of costs.

F-245a (152)

December 16, 1952.

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

I am in receipt of your letter of December 11, which I quote below:

“In many instances after banks collect notes secured by deed of trust and mark the note paid with the bank stamp, they then endorse that note to someone else for the purpose of release. If the person to whom they have assigned this note attempts to release the same, in your opinion, is it a valid release? I have read one of your opinions dealing with a similar question and I am under the impression that when the bank is paid it has no interest to assign.

“In criminal cases in which the defendant is either convicted of a misdemeanor or a felony and is not given a fine, but only a jail or penitentiary sentence, can the defendant be held to serve time in the jail for the cost upon which a judgment is docketed against him?”

In answer to your first question, I call your attention to Section 55-66.3 of the Code, providing for the marginal release of a debt secured by a deed of trust by the creditor or his duly authorized agent, attorney, or attorney-in-fact. While I do not have before me the assignment given by the bank for the purpose of entering the marginal release, is not the effect of it to designate the assignee as the agent, attorney, or attorney-in-fact for the bank for the purpose of entering
the release? If this is the case, then I am of the opinion that the person so designated may enter the release.

In reply to your second question, I am of opinion that the person you describe may be held in jail for the non-payment of the costs for a period of not exceeding the limitation of such confinement prescribed by law. See Section 19-303 et seq. of the Code. However, I am further of the opinion that the order of the court imposing the sentence should direct such confinement and that in the absence of such direction the defendant should not be further confined for non-payment of costs.

RETIREMENT SYSTEM—City of Richmond converting to social security. F-243a (104)

October 23, 1952.

Mr. Charles H. Smith, Director, Virginia Supplemental Retirement System.

This is in reply to your letter of October 3, 1952, in which you request my opinion as to whether the proposed ordinance for the repeal of the City of Richmond's retirement system complies with § 5(7) of Chapter 2 of the Acts of the Assembly of 1952. I have just received a copy of the proposed ordinance.

Section 5(7) of Chapter 2 of the Acts of Assembly of 1952 requires that whenever any political subdivision of the State submits a plan for the purpose of securing social security coverage, such plan shall not be approved unless its contains evidence of repeal of any retirement system which the political subdivision has in effect. Such repeal must make adequate provision for the safeguard of all vested rights which have arisen under the system.

In a letter addressed to you on October 2, 1952, the Honorable J. E. Drinard, City Attorney for the City of Richmond, has pointed out that the City Council undoubtedly has the authority to amend or repeal the retirement system of the City of Richmond. Section 19 of the ordinance creating the retirement system makes adequate provision for its repeal or amendment and, as Mr. Drinard points out, the new charter of the City of Richmond, effective in September, 1948, also provided for the right of the Council to amend or repeal the retirement system.

I have reviewed the repeal legislation which is contained in the proposed ordinance No. 52-189. The City has followed rather closely the procedure used by the State of Virginia in terminating its retirement system. It has made provision for those already entitled to benefits and for those who are eligible for benefits on the repeal date but who will not have made application for benefits at that time. The repeal ordinance also protects the members' interest in their accumulated contributions, and in this respect a procedure is prescribed which is identical with that used by the State in safeguarding members' contributions.

In the light of these facts, it is my opinion that the repeal ordinance complies with the 1952 Act referred to above, and that the vested rights of the members are protected.
SANITARY DISTRICTS—Revenue bonds; conditions for exceeding 1890 debt limitations. F-213a (282)

May 29, 1953.

HONORABLE EDMUND W. HENING, JR.,
Commonwealth's Attorney for Henrico County.

This is in reply to your letter of May 20, 1953 in which you request my opinion on the following problem:

"I am frank to say that I have had some difficulty in interpreting the provisions of the Code relating to this matter, particularly Section 21-122 of the Code of Virginia of 1950, as to which clarification seems to be needed. Therefore, I request your opinion as to the interpretation of this Section, and your view as to what circumstances the issuance of bonds limited to eighteen percentum of the assessed value of all real estate in the district subject to local taxation applies."

Section 21-122 of the Code is as follows:

"The governing body of any county in which a sanitary district has been or may hereafter be created by general or special law shall have power, subject to the conditions and limitations of this article, to issue bonds of such sanitary district to an amount in the aggregate of not exceeding eighteen per centum of the assessed value of all real estate in the district subject to local taxation, for the purpose of raising the necessary funds to carry into effect the purposes for which such sanitary district is formed, provided, however, that such limitation of eighteen per centum shall not apply if the petition required by § 21-123 states the maximum amount of bonds to be issued and that such bonds are to be issued for a specific undertaking from which the sanitary district may derive revenue, but from and after a period to be determined by the governing body of the county, not exceeding five years from the date of the election authorized in § 21-123, whenever and for so long as such undertaking fails to produce sufficient revenue to pay for cost of operation and administration (including interest on bonds issued therefor), and the cost of insurance against loss by injury to persons or property, and an annual amount to be covered into a sinking fund sufficient to pay, at or before maturity, all bonds issued on account of such undertaking, all such bonds outstanding shall be included in determining such limitation."

It is my opinion that this section provides that a referendum shall be held on the bond issue and that such issue is limited to eighteen per centum of the assessed value of the real estate situated within the proposed sanitary district, unless the petition, to the circuit court of the county asking that said referendum be held, states that said bond issue is to be a revenue bond issue.

The petition, in the event this is to be a revenue bond issue, should state (1) the maximum amount of the bond to be issued; (2) that the bonds are to be issued for a specific purpose from which the district may derive revenue; (3) that at a definite time in the future (not to exceed five years from the date of the referendum) a determination shall be made to see if the bonds are self-liquidating. If they are not self-liquidating, then all of those bonds outstanding shall be included in determining the debt limitation for this district in the event of any future bond issues.

It is my opinion that the eighteen per centum debt limitation would apply to any bond issues of a sanitary district which does not comply strictly with the provisions set out in the paragraph above, which provisions provide for an issuance of revenue bonds.
SCHOOL BOARD—Authority to borrow; replace obsolete school buses.  
F-201 (215)  
March 9, 1953.  

MR. HAROLD W. RAMSEY, Superintendent,  
Franklin County Public Schools.  

This is in reply to your letter of March 4 which I quote as follows:  

"In the past, the Franklin County School Board has contracted for the furnishing and operation of eight school buses within the county. All of the remaining school buses are owned and operated by the County School Board. These eight school buses have become obsolete and cannot meet the state requirements.  

"The County School Board is contemplating by virtue of authority invested in it by Section 22-120 of the Code of 1950 to borrow a sum sufficient to buy eight buses to replace the private contractors' buses and to repay the same in five equal installments. Of course, this cannot be done without the express authorization of the Board of Supervisors.  

"I wish that you would advise me as to whether or not this procedure would be permissible inasmuch as the buses to be replaced were not owned by the County School Board, but were owned and operated by private contractors."  

Section 22-120 of the Code provides, among other things, that school boards "may borrow such sums as are needed to purchase new school buses to replace obsolete or worn out equipment". (Italics supplied). The word, equipment, in my opinion, must be construed to mean equipment owned by the school board, and it is clear that the eight buses to which you refer are not owned by the school board. Therefore, it must be concluded that the money would be borrowed to purchase additional buses. This cannot be done. Report of the Attorney General, 1945-46, p. 125.  

I have reached my conclusion reluctantly since I am aware that it could be argued that the eight obsolete buses are a part of the school transportation system that must be replaced. However, in view of grave results that would follow the borrowing of money without legal authority, I feel it is my duty to resolve any doubt as to the proper interpretation of section 22-120 against the school board.  

SCHOOL BOARD—Budget; approval of Board of Supervisors for transfer of funds among items.  
F-206 (124)  
November 17, 1952.  

HONORABLE BRANTLEY B. GRIFFITH,  
Commonwealth's Attorney for Russell County.  

This is in reply to your letter of November 3, which I quote below in full:  

"On March 5, 1952, Dowell J. Howard, Superintendent of Public Instruction, asked of you the following question: '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?'  

"Your reply, on March 17, 1952, was: '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.

"Further, in a letter of April 10, 1952, you clarified your reply of March 17th, in part, as follows: '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.'

"After having considered your opinion, from which the above excerpts were taken, the Russell County School Board has submitted to the Board of Supervisors for Russell County the following resolution: 'BE IT RESOLVED, that the Russell County School Board request the County Board of Supervisors to grant to the School Board the blanket authority to transfer funds from one item of the School Budget to another item, so long as said transfers do not result in expenditures greater than those provided for in the budget approved by the County Board of Supervisors, including any surplus brought forward at the beginning of the school year.'

"I would greatly appreciate your advising me whether or not the Russell County Board of Supervisors has the authority to grant blanket permission to the School Board to transfer funds from one item of the budget to another item without further action or approval on the part of the Board of Supervisors."

Section 22-122 of the Code makes it the duty of the Division Superintendent of Schools, with the advice of the School Board, to submit to the Board of Supervisors a budget of the amount of money necessary for school purposes, the budget to show all necessary details in order that the Board of Supervisors and the taxpayers of the County may be well informed.

Section 22-72 of the Code authorizes the School Board to incur costs and expenses, but only costs and expenses of such items as are provided for in its budget, without the consent of the tax-levying body.

These two sections clearly contemplate that the Board of Supervisors shall to the extent indicated have the power and duty of supervising school expenses, but the Board unquestionably has the power to authorize the transfer of funds from one item in the school budget to another item. I seriously doubt whether the pertinent statutes intended that the Board of Supervisors should give blanket authority in advance to the School Board to make transfers of funds from one item to another, but, if the Board desires to adopt such a resolution as you set out in your letter (certainly it does not have to adopt it), I cannot say that such action would be invalid. My predecessor, the late Justice Abram P. Staples, in a letter to the Superintendent of Public Instruction under date of March 26, 1935, reached a similar conclusion on principle.

SCHOOL BOARD—Condemnation; no power to in another county.
F-203 (92)

Mr. James H. Simmonds,
Attorney for the County School Board of Arlington County.

I am in receipt of your letter of October 7 from which I quote below:

"I represent the County School Board of Arlington County, Virginia in connection with the acquisition of certain parcels of land for school pur-
poses. It is proposed to erect two of the schools near the boundary with
Fairfax County and in one instance the school will be located within Arлин-
ton and part of the land for the grounds will be in Fairfax County, and in
the other instance, almost all of the land and the buildings will be located
in Fairfax County. It will probably be necessary to condemn one parcel of
land for the latter school, all of which parcel will be located in Fairfax
County."

You then inquire as to the power of Arlington County to acquire real estate
in Fairfax County by purchase or condemnation.

As to the power of the county to acquire property in Fairfax County by pur-
chase, I do not think there can be any question but that the county has this power.

The power of a county school board to condemn in another county for school
purposes is in my opinion exceedingly doubtful. The general rule is that a political
subdivision may not condemn land outside its own corporate limits unless the
power has been delegated by the Legislature. See McQuillin Municipal Corpora-
tions, Second Edition, Revised Volume 4, Section 1619. Section 22-149 of the
Code gives to the school board of a county the power to condemn land for school
purposes but does not say that such land may be condemned in another county.
Unquestionably the General Assembly could have given the counties authority to
condemn land for school purposes beyond their territorial limits but I have not
been able to find any statute which can reasonably be construed to grant this
power. In the absence of such a delegation of power I am inclined to be of the
opinion that it does not exist. I am somewhat strengthened in this view by the fact
that there are many statutes, especially charters of cities, which delegate power
to condemn property for municipal purposes, both within and without the territorial
limits of the municipalities, but I can find no similar statute giving this power to
the school board of a county.

SCHOOL BOARD—May pay premiums for liability insurance covering
their employees. F-200 (19)

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

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

"A number of school boards have considered a blanket insurance policy
covering school board employees who are responsible for the safe conduct
of pupils on school sponsored activities. I am enclosing herewith a letter
which has been received from the City of Norfolk in which they have
described, somewhat briefly, a proposed policy.

"I shall appreciate it very much if you will give us your opinion on the
following questions:

"1. Is there any liability on the part of the school board em-
ployees in connection with the injury of pupils who participate in
school activities, either during school hours or after school hours?

"2. Is it legal for the school board to pay the premiums for
such blanket insurance policy if there is no legal liability on the
board?"

The answer to your first question would depend upon the circumstances sur-
rounding an injury to a pupil. For example, if such injury was caused by a
negligent act of an employee of the school board, the employee, of course, would
be personally liable.
This office has previously ruled that State agencies have the authority to pay premiums for liability insurance covering their employees on the theory that such insurance is in the interest of the public. I am of the opinion that such ruling is applicable to local school boards and, therefore, the answer to your second question is in the affirmative.

I do not think that this office should comment on the type of insurance to be obtained. This is a matter of policy to be determined by the local school board.

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SCHOOL BOARD—Members; effect upon when town of residence becomes city.  F-203 (233)

March 31, 1953.

HONORABLE R. B. STEPHENSON, JR.,
Commonwealth's Attorney for Alleghany County.

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

"The following question has been presented to me regarding whether or not two members of the School Board of Alleghany County are legally members of said Board:

"On the 20th day of December, 1952, the Town of Covington became a City of the second class. Prior to this date, the two members in question had been duly appointed and qualified as prescribed by law. Both of these members resided in the Town of Covington and had established homes therein. They represented two of the magisterial districts of Alleghany County.

"Section 22-68 of the Code states that when a School Board member ceases to be a resident of the district he represents, 'his position on the County School Board shall be deemed vacant.'

"Section 15-94.1 states that 'any county officer or county trial justice of the county who resides in the town, and has an established home therein, which town has undergone transition to a city of the second class since such officer's election or appointment, shall not vacate his office by reason of his residence in such city, but shall continue to hold such office so long as he shall be successively elected or appointed to the office held by him at the time of such transition.'"

I do not think that there can be any question but that a member of a County School Board is a county officer. He has a definite term of office, is required to qualify and to take an oath of office, and his duties are prescribed by statute. Indeed, the County School Board is provided for by Section 133 of the Constitution.

Section 15-94.1 of the Code of 1950, as amended, is in part as quoted by you. In view of this statutory provision and since the members of the County School Board to whom you refer are county officers, it is my view that their offices are not vacated by reason of the transition of the Town of Covington to a City of the second class. I am frank to say that a rather unusual situation is presented when two members of a County School Board are residents of a City within the County, but, in view of the plain language of the statute, I cannot see that any other conclusion can be reached. It is entirely true that Section 22-68 contains the provision to which you refer, but this section, in my opinion, must yield to the specific provision in Section 15-94.1 dealing with the precise case presented.
REPORT OF THE ATTORNEY GENERAL

SCHOOL BOARD—Property may be disposed of at private sale. F-203 (151)

Honorable Robert R. Gwathmey, III,
Commonwealth's Attorney for Hanover County.

This is in reply to your letter of December 10 inquiring if a county school board could sell a piece of real property to the county board of supervisors at a private sale without the necessity of advertising same and for any compensation which might be approved by the circuit court.

Authority for the sale or exchange of real property by a county school board is contained in the following provisions of § 22-161 of the Code of Virginia, as amended, which section incorporates § 15-692 also:

"§ 22-161. Sale or exchange of property.—The school board shall have the same power to sell or exchange and convey the real and personal school property of the county as the governing body of the county has with reference to the power of sale, exchange and conveyance of other county property under § 15-692, provided that personal property not exceeding five hundred dollars in value may be sold or exchanged by the school board in such manner and upon such terms as it deems proper."

"§ 15-692. Purchase, sale or exchange of property; how sale made.—The board of supervisors shall have power to sell, at public or private sale, or exchange and convey the corporate property of the county; to purchase any such real estate as may be necessary for the erection of all necessary county buildings; to provide a suitable farm as a place of general reception for the poor of the county, and to make such orders as they deem expedient concerning such corporate property as now exists or as may hereafter be acquired; provided, that no sale or exchange of such property shall be made without the approval and ratification of such sale and exchange by an order of the circuit court of the county or by the judge thereof in vacation, entered of record. But this section shall not be construed to deprive the judge of the right to control the use of the courthouse of the county during the term of his court therein."

In accordance with the above legislation it appears that a county school board, and in like manner a board of supervisors, is empowered to sell such real property at a private sale in the usual manner for the transaction of private sales, provided that no sale of such real property shall be made without the approval and ratification of such sale by an order of the circuit court of such county, entered of record.

SCHOOL BOARD—School construction fund; approval of application for by Board of Supervisors. F-197 (190)

Honorable Stirling M. Harrison,
Commonwealth's Attorney for Loudoun County.

I am in receipt of your letter of February 11, in which you state that the Board of Supervisors of your County has requested you to secure my opinion on the following question:

"Mr. Emerick presented an application for State school construction fund money in the amount of $96,527.00 which is to be used toward construction of a new comprehensive high school to replace the four present white schools."
"The Board took no action on this matter at this time but requested the Commonwealth's Attorney to get a ruling from the Attorney General as to whether it is necessary for the Board of Supervisors to approve this application made by the School Board. * * *"

You refer, of course, to an application for funds made available by Chapter 14 of the Acts of 1950 and Item 484 of the Appropriation Act of 1952 to provide for State aid to counties and cities in the construction of public school buildings. The said Chapter 14 of the Acts of 1950, which is also applicable to the 1952 appropriation, provides the terms and conditions for the expenditure of the funds appropriated. The Act does not prescribe in detail how the funds shall be applied for by the localities, but it does provide that "the State Board of Education, with the approval of the Governor first obtained, shall prescribe the procedure governing the application for and the actual payment of any funds appropriated by this Act to the locality * * *."

My information is that the State Board of Education, pursuant to the above quoted provision, has prescribed, among other things, that an application for funds made by a county shall be approved by the Board of Supervisors. It is my opinion that this requirement is within the discretion of the State Board of Education and that it should be complied with.

SCHOOL BOARD—Short term investment of surplus funds. F-197 (143)

December 10, 1952.

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

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

"The School Board of Norfolk County, by authority granted them by special election held September, 1950, whereby they were authorized to issue bonds not exceeding four million dollars, are exercising their authority and are having issued two million dollars of these bonds which will be sold on January 15, 1953.

"According to their building program, approximately one million dollars of these funds will not be needed for a period of one year or more after the sale.

"It is our desire to so invest these surplus funds as to produce the maximum income therefrom and in this connection, we would like to have your opinion on the following questions:

"(1) May the Treasurer, acting for the School Board, place on time deposit, subject to withdrawal on 30, 60 or 90 days notice, these funds?

"(2) May the Treasurer, acting for the School Board, deposit with Building and Loan Associations these funds to the extent of F. D. I. C. coverage or greater amounts where the association places in escrow acceptable collateral?

"(3) May these funds be invested by the Treasurer, acting for the School Board, in government securities maturing within the time the funds are not needed by the School Board?"

In answer to your first question, I call your attention to Section 58-943 of the Code, which provides that the County Finance Board has authority to withdraw its approval of any depository if such action is necessary to protect the deposit and, if the approval of the Board is withdrawn, the Treasurer shall forthwith withdraw from such depository all money on deposit therewith. In view of this section, I question the authority to condition the withdrawal of funds from a
depository upon giving notice for a specified period, for, if this condition were attached to the deposit, the money would not be subject to withdrawal until the specified period had expired, and so the Finance Board would not be able to exercise the powers given it relating to the protection of the deposit. I suggest, however, that an agreement might be made between the County Finance Board and the depository to the effect that, if the approval of the Board should be withdrawn, the deposit would immediately become a demand deposit. Unquestionably, in the discretion of the County Finance Board, a depository may be required to pay interest.

I question the authority to deposit county funds with a building and loan association. Section 58-939 of the Code contemplates that county funds shall be deposited in a bank approved by the County Finance Board as a depository. Since a building and loan association is not a bank, it may not be selected and approved as a depository.

As to your third question, I call your attention to Section 15-22 of the Code, which reads as follows:

"So long as a state of war exists between the United States and any foreign power the board of supervisors of any county or the council of any city or town may by resolution or ordinance direct the treasurer of such county, town or city, or the custodian or manager of any sinking fund, to purchase out of any moneys available in the general fund, or in any sinking fund, or any special fund of such county, city or town, bonds or other evidences of debt of the United States of America, or of the State or any political subdivision or institution thereof, the amount of such purchases to be prescribed in the resolution or ordinance directing the purchase of same. Any such treasurer or custodian of such funds shall comply with any such ordinance or resolution. Any bonds or other evidences of debt purchased under the provisions of this section shall be held by the treasurer or other proper custodian thereof, until such time as the board of supervisors or council, by resolution or ordinance, directs the sale or other disposition thereof. No county treasurer, town treasurer, city treasurer or other custodian or manager of such funds shall be held liable for any loss of public money which may occur as a result of depreciation in the value of securities purchased pursuant to the provisions of this section.

"Nothing in this section shall be deemed to repeal any provision of any city or town charter prohibiting the investment of any sinking fund in the securities, investment in which is otherwise hereby authorized."

This office has expressed the view that a state of war still exists and I am, therefore, of opinion that the quoted section is applicable and that the funds you mention may be invested in the securities described. You will observe that the Board of Supervisors is given the authority to direct the investment and it is my opinion, therefore, that the proper procedure to be followed would be for the School Board to request the Board of Supervisors to authorize the Treasurer to make the investment.

SCHOOL BOARD—Use of school for election precinct; has control over.
F-252 (289)

HONORABLE J. J. FRAY, Division Superintendent,
Campbell County School Board.

June 9, 1953.

This is with reference to your letter of June 4, 1953, in which you state that a request has been made for the use of the Brookville High School for the
establishment of an election precinct. You further state that the School Board has felt that there would be considerable danger to the safety of the children during the school term if such a precinct is established.

I draw your attention to section 22-164, Code of Virginia, 1950, which provides as follows:

"The school board or the division superintendent, subject to the approval of the board, may provide for, or permit, the use of school building and grounds out of school hours during the school term, or in vacation, for any legal assembly, or may permit the same to be used as voting places in any primary, regular or special election. The board shall adopt rules and regulations necessary to protect school property when used for such purposes."

I also draw your attention to sections 22-164.1 and 22-164.2, which sections provide that certain portions of the school property may be used for such purposes as will not impair the efficiency of the schools.

Inasmuch as the conditions upon which a school building may be used have been left to the discretion of the school board and the division superintendent, I am of the opinion that the matter about which you inquire is one of policy which must be determined by the school board or the division superintendent, subject to the approval of the board, in the light of the surrounding facts and circumstances, and it is not, therefore, a question which I should attempt to resolve.

SCHOOL CONSTRUCTION FUNDS—Board of Supervisors; rescinding application for. F-203 (126)

November 19, 1952.

DR. DOWELL J. HOWARD,
Superintendent of Public Instruction.

This will acknowledge receipt of your letter concerning the payment of State School Construction Funds on application of the School Board of Scott County. I quote from your letter as follows:

"The General Assembly at its 1950 session appropriated $45,000,000 as State-aid to counties and cities in the construction of public school buildings. The General Assembly at its 1952 session reappropriated such unexpended balances as may have been to the credit of this fund on June 30, 1952 and appropriated an additional $15,000,000 for each year of the 1952-54 biennium. The original Act (Chapter 14 Acts of General Assembly 1950) reads in part as follows:

"The State Board of Education, with the approval of the Governor first obtained shall prescribe the procedure governing the application for and the actual payment of any funds appropriated by this Act to the locality and shall require that such funds are used only for the purposes of this Act."

"The State Board of Education has adopted the enclosed form (SCF-1) for use by the local school boards when applying for the use of State School Construction Funds for a specific project. On page 2 you will note that a resolution of the Board of Supervisors or City Council is required before the State Board will approve the application for the use of such funds.

"On May 6, 1952 the School Board for Scott County applied for the use of State School Construction Funds in the amount of $577,500 for the Rye
Cove High School. The Board of Supervisors approved the application on May 6, 1952 and we are advised that the School Board, acting on the authority of this resolution, proceeded to engage the services of an architect to prepare plans and specifications for the project.

"No action has been taken by the State Board of Education on the application filed by the Scott County School Board because plans and specifications have not been completed, and therefore have not been submitted to our School Building Service for approval.

"On August 8, 1952 we received a copy of a resolution passed by the Board of Supervisors for Scott County which reads in part as follows:

"'Resolved that the resolution passed by this Board on May 6, 1952, approving an application of the School Board of Scott County to the State Board of Education of Virginia for the purpose of securing State School Construction Funds in the amount of $600,000 for the construction of a new school at Rye Cove, Clinchport, Virginia, Route #1, is hereby rescinded and is null, void, and of no effect.'

"The Scott County School Board has not withdrawn the application, and we now find ourselves in the position of passing on an application properly executed in accordance with the Rules and Regulations of the State Board of Education and subsequent withdrawal of approval by the Board of Supervisors three months after the date on which the local governing body originally approved the application.

"The Scott County School Board has asked the State Board of Education to advise them as to the status of their application and they want to know if State School Construction Funds can be used on this particular project. * *"

I am advised that the architect employed by the School Board of Scott County has not only completed the temporary plans for the contemplated school project but has also completed the permanent plans which are now before the State Board of Education for its approval. It is also my understanding that the consideration of the contract with the architect is in the amount of $27,375.00 and that the School Board will have no funds available with which to pay the architect's fees if its application is denied.

The Commonwealth's Attorney of Scott County has expressed the opinion to me that this contract entered into by the School Board with the architect for the plans is binding upon the School Board and that the School Board would be liable in damages for any breach thereof. I agree.

It is my opinion that the application of the School Board of Scott County for State School Construction Funds meets the requirements of the Appropriation Act and has been properly executed in accordance with the regulations of the State Board of Education. Therefore upon consideration of all the facts involved in this particular case I feel that the State Board of Education, when considering the application of the School Board of Scott County, would be fully justified in refusing to consider the resolution passed by the Board of Supervisors of Scott County on August 8, 1952 rescinding its resolution of May 6.
August 11, 1952.

HONORABLE FRANCIS B. GOULDMAN,
Member of the House of Delegates.

I have your letter of August 9, in which you ask the following question:

"Must two magisterial districts of a county, each of which votes sub-
stantially against a proposed school bond issue, be bound by a county wide
bond referendum in which a third, more populous, magisterial district votes
in favor of said bond issue and causes by its vote said bond issue to be
passed?"

You do not state under what statutory provision the election was held, but
I assume, of course, that it was a county-wide election and that the bond issue
was approved by a majority of the voters of the county. Under these circum-
stances there can be no doubt but that your inquiry must be answered in the
affirmative.

You also ask:

"Is there any provision in the law whereby one or more magisterial
districts in a county may form its or their own school district, separate
and distinct from the third magisterial district in the county?"

This question must be answered in the negative. Section 22-42 of the Code
provides that for the purposes of representation each magisterial district shall
constitute a separate school district, "but for all other school purposes, taxation,
management, control and operation, the county shall be the unit, and the school
affairs of such county managed as if the county constituted but one school district;
* * *"). Provision is made under certain circumstances for some towns to be
operated as separate school districts, but this is not the case with magisterial
districts.

August 11, 1952.

HONORABLE MARK D. WOODWARD,
Commonwealth's Attorney for Page County.

This is in reply to your inquiry involving the question of submitting the school
budget to the Board of Supervisors for its approval. I quote as follows from your
letter:

"Section 22-121 of the Code of Virginia, 1950, Michie, requires that
the Board of Supervisors of the County include in the County budget the
budget for the schools.

"A school budget for the current fiscal year was presented to the Board
of Supervisors of Page County and was not approved. The Board of
Supervisors set the school levy at an amount less than that used in the
budget presented and requested the Superintendent of Schools to re-work
the school budget to conform to the school levy as set by the Board of
Supervisors."
REPORT OF THE ATTORNEY GENERAL

"To date, a budget prepared in accordance with the school levy set by the Board of Supervisors for the current fiscal year has not been presented to and approved by the Board of Supervisors of Page County."

"As you have held in your opinion dated April 10, 1952, to Dr. Dowell J. Howard, Superintendent of Instruction, Richmond, that changes in the individual items of a school budget must be approved by the Board of Supervisors, it is my opinion that of necessity the school budget itself must have the formal approval of the Board of Supervisors."

It is my opinion that the Board of Supervisors approved the amount of the total school budget when it set the school levy, which amount was less than the amount requested by the Division Superintendent of Schools. Therefore, the only question to be decided is whether the original school budget should be re-worked to conform to the school levy and filed with the Board of Supervisors.

The Division Superintendent is required to submit to the State Board of Education, on forms prescribed by the State Board, a school budget that balances with the approved budget. The forms of the State Board set up such classifications as administrative expenses, expense of instruction, transportation and housing expenses, fixed charge, etc. Thus, it may be seen that the school budget of Page County must be re-worked. In the case of Board of Supervisors of Chesterfield County v. County School Board, 182 Va. 266, the Court in the last paragraph of its opinions said:

"* * * 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."

While I have been unable to find a specific statute which requires the Division Superintendent of Schools to file the reworked school budget with the Board of Supervisors under the circumstances described in your letter, it is my opinion that the language quoted above clearly indicates that this must be done; otherwise the Board of Supervisors would not be able to ascertain whether the school board stayed "within the limits set up in the budget".

SCHOOLS—Buses; speed limits and warning devices in effect any time transporting school children. F-201 (225)

March 18, 1953.

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

This is in reply to your letter of March 5, 1953 and has reference to the questions raised by your letter of February 9, 1953, from which letter I quote as follows:

"My office has been requested by the Augusta County school authorities to get an opinion from you as to the operation of the speed limits affecting school buses."

"The law seems to be clear under 46-212 of the 1952 Code Supplement under (3) where school buses are operated solely for the purpose of carrying children to and from school, namely, thirty-five miles an hour, but it appears that these same buses have been used under authority of the Augusta County School Board, as well as other counties, for the purpose of transporting children, coaches, managers, etc., from one city to another.
during school hours and after school hours, for the purpose of athletic
events, school academic contests, etc., and, in a majority of the cases, I would
say to a school for the above purposes, but not for the routine academic
work for which a child attends his regular school.

"Under Section 22-280.1, Chapter 13, of the 1952 Supplement, it provides
that warning lights, identification, etc., shall be covered when a school bus
is being operated on a public highway for the purpose of transporting per-
sons or commodities other than school personnel or school children unless
the lettering, identification, etc., are blacked out or covered.

"What the authorities wish to know is whether or not the school buses
operated for the purposes as set out in Paragraph two of this letter are
compelled to abide by the thirty-five mile speed limit for such school buses,
or whether it is necessary for the lettering, signals, identifications, etc., to
be covered and when so done the school bus comes within the category of the
speed limit of any other passenger carrying bus."

I have very carefully considered the question presented by your letter with the
realization that we are dealing with criminal statutes and that, therefore, we are
faced with a rule of statutory construction requiring strict interpretation. It might
well be argued that a school bus being used for the purposes referred to in your
letter is not being used to carry "school children to or from school." However,
the obvious purpose of the General Assembly in enacting this legislation and the
legislation with respect to the marking of such school buses was to surround the
children of the Commonwealth with greater safeguards than those provided for
other members of our population. Unquestionably, the Legislature in adopting
such legislation was motivated by an understanding of the characteristics of young
children and a deep feeling of responsibility for their welfare. Despite the fact
that it may be argued that transporting children from one city to another for the
purpose of athletic events or academic contests is not, in a strict sense, transport-
inging them to and from school, the same hazards exist as in the normal day to
day transportation of children from their homes to the classrooms. It may further
be said that athletic contests and academic contests have become so closely
associated as a part of a well-round academic program, that in a very real sense,
these children are being transported for school purposes. Therefore, while I do
not feel that I can give a dogmatic answer to the questions presented, and while
I understand that various courts of the Commonwealth might reach an opposite
conclusion, it is my opinion that when the purpose of the General Assembly is kept
in mind and proper regard is given to the precious nature of the cargo involved,
the speed limits set forth in § 46-212 should be observed when children are being
transported in school buses for the purposes discussed in your letter, and that the
bus operators should not be required to cover the identification and warning lights
on the vehicles.

SCHOOLS—Funds; transfer of general funds to meet temporary deficit.
F-203 (84)

HONORABLE WILLIAM J. HASSAN,
Commonwealth’s Attorney for Arlington County.

I have your letter of September 29, with reference to the problem of available
funds to meet the custodial and teacher payrolls of your schools which are due
tomorrow. It appears that there is not a sufficient amount in the county school
fund to meet these obligations and that, due to a question which has been raised
as to the eligibility of certain members of the local School Board to hold that
office, the School Board has been unable to negotiate a temporary loan, pursuant to Section 22-120 of the Code, from the banks. It further appears that there is now an ample amount in the general county fund to meet the existing emergency. It also appears that the school levy, when collected, will yield an amount sufficient to meet all of the school obligations including those due tomorrow.

To meet the existing situation, it is my opinion that the Board of Supervisors of the County has the authority to adopt a resolution directing the Treasurer of the County to transfer from the general county fund to the school fund an amount sufficient to meet the custodial and teacher payrolls due tomorrow. I think the transfer should be made a conditional one, the Treasurer being directed that, when there is a sufficient amount in the school fund to reimburse the general county fund, he shall transfer from the school fund to the general county fund a sufficient amount to reimburse the latter fund.

On account of the fact that your inquiry was received only this morning and you desire an immediate reply, I do not have an opportunity to discuss the question in detail. However, I can see no valid objection to the procedure I suggest. The County is obligated to meet these payrolls and it has ample funds to do so, and certainly everything possible should be done to the end that these employees be paid the compensation which the County has contracted to pay. From the facts that I have presented to me there is no question but that in the immediate future there will be a sufficient amount in the school fund to meet all of its obligations, so that as a practical matter the procedure that I have suggested merely represents a book-keeping transaction.

SCHOOLS—Retirement system; certain Richmond city employees not entitled to coverage by State. F-161a (61)


Honorale J. Elliott Drinard,
City Attorney, Richmond.

This is in reply to your letter of August 4, 1952, which reads as follows:

“As of June 1st of this year there were 468 Richmond School Board employees who were not members of the Virginia Retirement System and are not members of the Virginia Supplemental Retirement System for the reason that they are not professional or clerical employees of the Board.

“These employees are members of what is known as the classified service of the City or School Board under Section 9.08 of the City's charter; that is, their jobs have been classified by the City's Personnel Administration according to the authority, duties and responsibilities of the positions they hold. Their salaries are fixed according to a pay plan adopted by the City Council prescribing rates of pay for members of the classified service. The money to pay the salaries comes from City and probably State appropriations made to the School Board.

“These employees are members of the Richmond Retirement System and make periodic contributions to the system through payroll deductions as any City employee, in the full sense of the word, does, and, of course, they are entitled to the full retirement benefits afforded by the City's system. The City also appropriates funds to the Richmond system for pensions for these employees at retirement. They were not provided coverage for State employees under the old age and survivors insurance provisions of the Social Security Act because they were not members of the Virginia Retirement System.
"The City is now engaged in making the necessary investigations preliminary to a decision whether the City will seek coverage through the State for its employees under the Social Security Act. That decision must be made before the beginning of the year, and it is necessary to know whether these employees can be included in the Social Security coverage by arrangement with the State and dissolution of the City's retirement system. I shall greatly appreciate your advice."

In addition to the information contained in your letter I am advised by Mr. Gray, of this office, with whom you conferred regarding the problem, that the following conditions also exist:

1. Legal title to the schools is in the City and not the School Board.
2. The School Board in engaging in the services of the personnel under consideration must select persons from a list supplied by the City's Personnel Department.
3. When the School Board discharges any such person he is placed on the list of those eligible for employment by the City's Personnel Department.
4. Retirement benefits are based on rate of pay which rate of pay is established by the City Council.
5. All of the money used in paying salaries of such personnel is from the City. The State Department of Education advises that no State funds are used for such purpose in Richmond.

It is my opinion, under the facts stated, that the employees in question are and have been in the past treated as City employees rather than School Board employees for retirement purposes. The City has assumed complete responsibility for the retirement program for such employees and has certainly to that extent, at least, made them its employees.

It would further appear that there is a very real possibility that these employees are employees of the City in every sense of the word. The services which they perform are concerned with the care and maintenance of City property, not School Board property. It is true, of course, that the School Board has supervisory control over the employees, but in the final analysis, and upon considering all of the facts, it appears that the City is undertaking to furnish to the School Board the physical facilities for the operation of a school system, complete with janitorial and maintenance services.

I am convinced that as to retirement the employees should be considered employees of the City and, therefore, a part of the City's coverage group should the City elect to avail itself of Social Security. It is also my belief that these employees are in other respects City employees as distinguished from School Board employees, but as to this latter question there is room for disagreement.

Before final determination is made by the City it would be advisable to obtain from the Federal Security Administration a ruling as to the status of such employees, as our opinion would in nowise be binding upon them.

SCHOOLS—Tuition charges; not to charge children of servicemen residing in locality. F-256 (244)

Honorable Howard W. Smith, Jr., Attorney for the Commonwealth, Alexandria.

I have your letter of April 8, in which you state that there are residing in Alexandria many persons who are members of one of the armed services, such
persons being stationed in Alexandria by reason of military or naval orders. These persons are retaining their original domiciles in other States, but are actually living in Alexandria. They invoke the exemption from certain State and local taxes afforded them under the Soldiers and Sailors Civil Relief Act, 50 App. U. S. C. A. Sec. 574. You desire my opinion on the question of whether or not the School Board may charge tuition for the attendance of the children of these persons upon the public schools of Alexandria.

Section 22-218 of the Code provides in part:

"The public schools, except as otherwise provided, shall be free to all persons between the ages of seven and twenty years residing within the county, or city, including the children of persons residing on any Federal military or naval reservation located, wholly or partially, within the geographical boundaries of such county or city. * * *"

These parents and their children are actually residing in Alexandria for an indefinite period, although they may not be residing in the city permanently. I do not think that the "residing" as used in the portion of Section 22-218 which I have quoted is used in the sense of having a technical legal domicile in the city or county. It is my view that the word "residing" means actually physically living in the county or city, which apparently the persons you describe are doing. It follows that the public schools of Alexandria "shall be free" to children of these persons. It would indeed be an anomalous situation for the children of persons residing on a military or naval reservation located in a county or city to be allowed to attend the public schools of the county or city without charge and the children of members of one of the armed services actually residing in the county or city to be required to pay tuition to attend the public schools.

I am aware of the provision in Section 22-220 of the Code authorizing the charging of tuition for attendance upon the public school of children "who are not residents of the State of Virginia, but who may be living temporarily with relatives or others within such county or city," but I do not think this section is applicable to the situation you present; nor do I think that the amount of State or local taxes paid by the parents of these children is to be considered in construing the word "residing" as it is used in Section 22-218.

SCHOOLS—Tuition charges; residence not domicile determining factor.

F-256 (227)

March 20, 1953.

HONORABLE HOWARD W. SMITH, JR.,
Attorney for the Commonwealth, Alexandria.

I have your letter of March 17, in which you present the following question:

"As you are no doubt aware, there are many persons residing in the City of Alexandria who have come here from other parts of the United States in connection with their employment by the Federal government. Many of these persons claim their place of origin or place of last residence as their domicile and pay a larger portion of their taxes in such places. Our local school system is heavily burdened with the children of such persons, who do not contribute financially to the support of the schools by reason of the foregoing facts.

"There has recently been appointed in Alexandria a Citizens Tax Advisory Committee, which has requested me to seek your opinion concerning whether or not a tuition or other fees can be charged such students, whether they be enrolled in the elementary grades or in high school."
I take it that these children are living with their parents in Alexandria during the entire year and that one or both of the parents are regularly employed in Washington. Under these circumstances, I must advise that I know of no authority for charging these children tuition for attending the public schools of Alexandria, even though the parents are retaining their original domiciles in another State. It is my view that the children are residing in Alexandria within the meaning of Section 22-218 of the Code. It is true that Section 22-220 of the Code authorizes the School Board of any county or city to charge tuition for children attending its schools "who are not residents of the State of Virginia, but who may be living temporarily with relatives or others within such county or city * * *"); but I think it reasonably plain that this section is not applicable to the situation you present.

In connection with the taxes which the parents are required to pay, we are, of course, cognizant of the fact that they are liable to the Virginia State income tax and to city taxes on their tangible personal property and real estate in Alexandria and to applicable State and local license taxes.

SEARCH AND SEIZURES—Entering private home; seeking escaped ward of State. F-231 (94)

October 16, 1952.

HONORABLE AMBROSE A. RUCKER,
Commonwealth's Attorney for Bedford County.

Your letter of September 30, 1952, addressed to Mr. J. Luther Glass, Consultant of the Department of Welfare and Institutions, has been forwarded to this office for reply.

The problem set forth in your letter involves an interpretation of subsection 5 of § 16-172.60. In short, that section provides that when a child has been committed to the State Board or some other agency and escapes from the custody of the agency to which he was committed, an officer who has knowledge of such fact may take the child into immediate custody without obtaining any legal process. You have raised the question of whether the authority contained in that section is sufficient authorization for an officer to go into the home of such child's parents and search for the child without having a legal process authorizing such search.

In view of our constitutional guarantees against unreasonable searches and seizures, it is my opinion that the language of the Legislature should not be construed to authorize a search such as that described in your letter without the proper warrant.

SOCIAL SECURITY—Appropriations; payment and reimbursement; date for. F-161a (172)

January 16, 1953.

HONORABLE CHARLES H. SMITH, Director,
Virginia Supplemental Retirement System.

This is in reply to your letter of December 17, 1952, which was the subject of a conference held in this office last week.

The first problem presented by your letter is as follows:

"Chapter 15 of the Acts of Assembly, 1952, appropriated from the general fund sums sufficient for the State employers social security payment
for the period January 1, 1951 through June 30, 1952. Section 7 of the Chapter also provided, 'On June 30, 1952, the Comptroller shall transfer to the general fund, from each special fund in the State treasury out of which, during the period beginning January 1, 1951, through June 30, 1952, inclusive, any sums are payable to the retirement allowance account or to the Contribution Fund established by the General Assembly of 1952, such amounts as shall have accrued on account of salary and wage payments to employees from such special funds.'

"It was not administratively possible to ascertain on June 30, 1952, the amounts that had accrued on account of salary and wage payments to employees from special funds for the period January 1, 1951, through June 30, 1952, due to the quarterly social security reports not being available at that time. The transfer from special funds will be completed subsequent to June 30, 1952; therefore, your opinion is respectfully requested as to the proper procedure to follow in the handling of this credit."

While I do not think it would be advisable for this office to attempt to instruct you as to the proper procedure of accounting to be used, it is my opinion that the transfer from the special funds to the general fund subsequent to June 30, 1952, is proper because it must be assumed that the General Assembly recognized the administrative impossibility of making the actual transfer on June 30, 1952.

You next ask my opinion as to the time limit on the use of the funds appropriated in Section 3 of Chapter 15 of the Acts of Assembly of 1952. These funds were appropriated for reimbursement to each county and city of the prorata share of the actual employers' social security payments made by it for the period January 1, 1951, through June 30, 1952, on behalf of local special employees to the Contribution Fund established by the General Assembly of 1952.

You state in your letter that a few of the political subdivisions who did not take action to be excluded from the Federal-State Agreement on or before April 1, 1952, and were thus automatically required to provide such coverage, did not actually come under the Agreement until after June 30, 1952, which is the last date mentioned in the Act. The question arises, therefore, whether the money appropriated by Section 3 of the Act is available for reimbursement to those localities at this time. In my opinion the appropriation is operative for the full constitutional period of time, but that only the employers' costs for social security payments on behalf of the special employees within the period January 1, 1951, through June 30, 1952, may be paid out of the appropriation. In other words, I believe the dates established by the Legislature were intended as the dates fixing the period for which reimbursement would be made rather than fixing the period during which reimbursement would be made.

SOCIAL SECURITY—Coverage for employees of new political subdivisions.
F-161a (45)

HONORABLE CHARLES H. SMITH, Director,
Virginia Supplemental Retirement System.

August 8, 1952.

This is in reply to your letter of August 1, 1952, from which I quote as follows:

"The employees of the School Boards of the City of Hampton, the Counties of Elizabeth City and Warwick and the Town of Phoebus were included under the Federal-State Social Security Agreement with the effective date of coverage January 1, 1951. The employees of the City of Hampton and the Counties of Elizabeth City and Warwick were also included
with the effective date January 1, 1951. The Town of Phoebus signed the State Plan of Agreement June 5, 1952, with the effective date January 1, 1951; however, the agreement was not received until July 1, 1952. The Town of Phoebus is not, therefore, included under the Federal-State Social Security Agreement.

"With the County of Warwick becoming the City of Warwick July 16, 1952, the County of Elizabeth City, City of Hampton and the Town of Phoebus becoming the City of Hampton July 1, 1952, and school boards being also similarly affected, two questions are raised.

"1. Do the employees of the political subdivisions accepted by the Federal-Security Agency continue to be covered under the Federal-State Social Security Agreement?

"2. May we now include the employees of the Town of Phoebus under the Federal-State Social Security Agreement with the effective date January 1, 1951?"

In endeavoring to reply to your inquiry, I shall treat the two newly created cities separately and give my opinion as to the situation with respect to each, rather than attempt to give a general answer covering both cases.

I shall deal first with the City of Warwick. This city was created from the former County of Warwick. Its boundaries coincide and are coextensive "with the boundaries of the County of Warwick as they exist(ed) immediately preceding the effective date of" the charter of the city. In other words, all that has happened is that a political subdivision has changed its form and become another type of political subdivision made up of the same inhabitants and the same territory that comprised the original.

In bringing about this transition the Legislature has provided that the assets and liabilities of the old subdivision shall carry over to the new subdivision. This is provided in Chapter 706, Acts of Assembly of 1952 which contains the charter of the City of Warwick. Section 15.01 of that Act reads as follows:

"On and after the date that the county of Warwick is incorporated and becomes effective as the city of Warwick, the said city of Warwick shall become and be liable for the bonded indebtedness and current debts and obligations of the said county and of any sanitary or other district of the said county, and shall become liable for the obligations and other liabilities of said county and districts, both in law and equity, arising out of any act of said county or districts for which said county or districts would have been liable, and said city shall faithfully observe, keep and perform every such liability, and the said city of Warwick may sue in its corporate name on all bonds, notes, accounts or contracts payable to the said city, the said districts, or the county of Warwick. The title to all the property, all rights and privileges, things of value and other assets of the said county and the said districts, and their rights and privileges under any contract, including any and all moneys belonging to said county or districts, and their books, records, papers, and other things of value, shall vest in and become the property of the city of Warwick. In the same manner and to the same extent as provided above, all property, rights and privileges, things of value, and other assets, and all bonded and other debts, obligations and other liabilities of the school board of the county of Warwick, at the time said county is incorporated and becomes a city, shall vest in the school board of the city of Warwick."

I call your particular attention to the fact that it is expressly provided that the "rights and privileges under any contract of the county shall vest in and become the property of the city" and, further, all obligations do not terminate but merely carry over to the city. You will note that exactly the same is true of the rights and obligations of the county school boards, they carry over to the city
school board. In my opinion there can be no doubt that the agreements entered into by the county and the county school board are now the agreements of the city and that there has been no hiatus. I would suggest that, for the purpose of keeping records, a supplemental agreement by the city might be executed and a modification in the Federal-State Agreement made in order to show the correct name of the subdivision and in order to eliminate any doubt as to any new employees of the city who were not employed by the county. But I am satisfied that, from a legal standpoint, there has been no break in the coverage under the existing agreements.

With respect to the new City of Hampton, the situation as affecting the old City of Hampton and County of Elizabeth City is exactly the same as that with regard to the City of Warwick and no further consideration need be given them.

Turning next to a consideration of the Town of Phoebus, the facts as I understand them are these. On June 5, 1952, the Town of Phoebus signed a plan of agreement which provided for an effective date of January 1, 1951. This agreement was not received by the State until July 1, 1952, on which day the town became a part of the new City of Hampton. The question, therefore, arises whether it is still possible to cover the employees of the town from January 1, 1951, or whether the town, as such, is excluded and those persons who were employees of the town unable to obtain coverage from January 1, 1951, and placed in the position of having available coverage from July 1, 1952, only.

In my opinion the difficulty in this problem is resolved by a clause in Chapter 2 of the Acts of Assembly, 1952. It is provided in §§ 3 and 5 of that Act that, unless a political subdivision takes action by April 1, 1952 to have itself excluded, its employees shall be included, and unless by such date the subdivision has taken action to have itself excluded or has submitted a plan of agreement, the State agency shall make and adopt a plan for such subdivision.

It appears, therefore, that on April 1, 1952, the Town of Phoebus, having failed to take action to exclude itself, became legally bound to provide social security coverage for its employees. The State agency, rather than force an agreement on the subdivision, waited for the subdivision to submit a plan. This was done on June 5, 1952. That plan provides for retroactive coverage from January 1, 1951.

In my opinion, since the Town of Phoebus became obligated to provide social security coverage on April 1, 1952, that obligation carries over to the city and becomes its obligation. As a result of the obligation of the town, the State agency gained the right to make and adopt for the town employees a plan of agreement. That right likewise carries over against the city. On the other hand, the town enjoyed the privilege of requesting and providing for retroactive coverage. That privilege now vests in the city. I am advised that the City of Hampton has already, by formal action, signified its ratification and approval of the plan of agreement submitted by the town. The city has clearly expressed its desire to exercise the privilege of retroactive coverage on behalf of the town employees which right has now vested in the city. In my opinion an agreement may properly be entered into providing retroactive coverage for the employees of the Town of Phoebus executed by the proper officials of the City of Hampton.

Anyone familiar with the 1952 session of the General Assembly and the Acts passed by that body with reference to social security is also familiar with the intent of the Legislature to provide social security coverage for State and local employees "on the basis now permitted under applicable federal law." This intent is expressly set forth in § 1 of Chapter 2 of the Acts of Assembly of 1952. In order to achieve the desired results drastic steps were taken, and it is significant to note the words quoted above "permitted under applicable federal law." An important aspect of that which is permitted is backdating. The State provided for backdating coverage of its employees. It is obvious that the Legislature intended every subdivision to have that privilege. The Acts which created two new subdivisions discussed in this letter were passed at the same session. There is no doubt in my mind but
that the Legislature intended the employees of any subdivision, which was
terminated by the creation of a new subdivision, to have the same rights and benefits
under social security as do employees of other subdivisions. For that further reason,
I believe the right to provide retroactive coverage for the employees of Phoebus
has vested in the City of Hampton under the provisions of § 14.01 of the charter
of the City of Hampton, which contains provisions similar in effect to the pro-
visions of the charter of the City of Warwick set forth above.

SOCIAL SECURITY—Coverage for employees of Roanoke City.
F-161a (159)

December 29, 1952.

Mr. Charles H. Smith, Director,
Virginia Supplemental Retirement System.

This is in reply to your letter of November 20, 1952, regarding coverage under
social security of the City Sergeant of the City of Roanoke and his employees.

Section 12 of the City of Roanoke Ordinance, No. 8558, which created the
system, provides for amendment thereof and, in my opinion, the council possesses
the right to exclude the City Sergeant and his employees from coverage under the
City system. I believe that the proposed procedure for exclusion, since it has the
full consent of every member affected, protects all vested rights, but I would
prefer the letter of resignation to contain a statement releasing all vested rights
in consideration for return of contributions plus interest. I believe such a written
waiver would completely obviate any difficulties.

I suggest an amendment to the proposed resolution requesting social security
coverage. In the paragraph numbered 1 it is stated:

"Council desires Old Age and Survivor's Insurance coverage only for
the Sergeant of the City of Roanoke and all deputies and employees of his
constitutional office."

I do not believe the Federal Agency will accept this resolution. As I under-
stood the proposed changes in Roanoke, their retirement system will now cover
all employees who would be eligible for social security if not barred by the re-
fusal of the City to accept it and by the existence of the retirement system. The
Federal Act contemplates and demands that when a political subdivision seeks
social security coverage it must do so for all its employees as defined in the
Federal Act. Therefore, it is my opinion that Roanoke should apply for coverage
of all its employees. We know, of course, that § 218(d) of the Social Security
Act provides:

"No agreement with any State may be made applicable (either in the
original agreement or by any modification thereof) to any service performed
by employees as members of any coverage group in positions covered by a
retirement system on the date such agreement is made applicable to such
coverage group."

Therefore, even though application is made for coverage of all employees of
the City, those positions included in the retirement system on the day the agree-
ment is signed would not and could not in the future be covered by social security.

If, as I understand they do, the City provides a retirement system for all its
employees and will exclude only the City Sergeant and his employees, then the
suggested change will reach the same result. In this connection two things should
be clearly understood:
1. The agreement will bring under social security coverage all employees of the City as defined in the Federal Act unless they are covered by the retirement system.

2. By this action the City is barring from coverage under social security every position covered by a retirement system on the day the agreement is signed. This bar affects not only the present incumbent of the positions but attaches to the position for all future time unless and until the Federal Act is amended.

With the suggested changes, I believe Roanoke can reach the desired result. However, one phase of this matter gives me some concern. It appears that unless very careful attention is given to the timing involved, the City Sergeant and his employees will be totally unprotected between the day the City system is amended and the day the agreement is reached. I would think the amendment might be worded so as to become effective as to those persons on a date which would be left blank in the proposed ordinance and, when this matter is cleared in Washington, a day for signing the agreement could be determined and the ordinance could be then passed so as to become effective as to those persons on the day prior to signing the federal agreement. This latter suggestion may not be of concern to Roanoke, but I feel I should point it out so that you can advise them of the manner in which the State met the problem and help them with the timing.

SOCIAL SECURITY—Coverage; State Milk Commission not included in agreement. F-23 (171)

January 15, 1953.

HONORABLE CHARLES H. SMITH, Director,
Virginia Supplemental Retirement System.

This is in reply to your inquiry as to whether or not the members of the State Milk Commission qualify for coverage under the Federal-State Social Security Agreement as embodied in Section 51-111.1 through 51-111.8 of the Code of Virginia.

Under Section 3-347 of the Code, the membership of the Milk Commission, a fact-finding and rule-making body, consists of three members who are appointed by and hold indefinite terms at the pleasure of the Governor. The actions of the Commission are not subject to supervision or review by the appointing authority or the State except through the judicial processes as prescribed. Pursuant to Section 3-348 the members are paid each the sum of ten dollars per day plus actual and necessary expenses for each day actually spent in the performance of their duties. There is no fixed period or number of days required to be spent in the performance of such duties.

In construing the said Agreement the common law principles as to what constitutes an "employee" are to be considered in ascertaining if the members of the Commission, constituted as described above, qualify as "State employees", which by Section 51-111.2 (e) are defined: "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 or any department, institution or agency thereof, and shall include trial justices, the Auditor of Public Accounts, the Director of the Division of Statutory Research and Drafting, the Clerk of the House of Delegates, and the Clerk of the Senate, but not (1) any officer elected by popular vote, and (2) a county or city treasurer, commissioner of the revenue, Commonwealth's Attorney, Clerk of court, Sheriff, sergeant or constable, and a deputy or employee of any such officer."

Upon consideration of the foregoing, it is my view that the members of the State Milk Commission do not qualify for inclusion within the present Federal-
State Social Security Agreement. In addition, there are certain material common law incidents of the employer-employee relationship, such as power of supervision and control, a regular term and conditions of employment, and a somewhat definite overall compensation, that are not present in the relationship here under consideration. Moreover, the absence in the said Agreement of specific inclusion of such members, coupled with the express inclusion of the holders of certain offices, further indicates that the Legislature did not intend to include the members of this or similar bodies under the Social Security Agreement. I am further advised that the membership of the State Milk Commission has not been classed at any previous time under any State Retirement program.

SOCIAL SECURITY—Justices of the peace; eligibility for coverage. F-161a (132)

MR. CHARLES H. SMITH, Director, Virginia Supplemental Retirement System.

November 25, 1952.

This is in reply to your letter of November 12, 1952, in which you request my opinion as to whether a justice of the peace should be reported under the social security agreement as an employee of a political subdivision. We have discussed this matter informally on previous occasions and reached the tentative conclusion that a justice of the peace does not stand in the relation of employee to a political subdivision. Upon examining the statutes, cases and prior opinions of this office, I find that, on April 26, 1932, the late Honorable John R. Saunders, then Attorney General, held that a justice of the peace is a State officer. Mr. Saunders based his opinion upon the case of Burch v. Hardwicke, 30 Gratt. (71 Va.), 34. I concur in the opinion of the former Attorney General that a justice of the peace is a State officer.

You are, of course, familiar with the fact that Chapter 2 of the Acts of Assembly of 1952 provides that the term "state employee" shall not include any officer elected by popular vote. Justices of the peace are elected officials in counties and, for that reason, are not eligible for social security coverage under Chapter 2 of the Acts of Assembly of 1952, which is, of course, the Act providing coverage for officers and employees of the State and political subdivisions thereof. I am advised, however, that in certain cities—for example, the City of Richmond—the charter provides for the appointment of justices of the peace by some designated official and for their payment by salary rather than by fee. In view of the fact that the arrangement in various political subdivisions may vary, it is impossible for me to lay down a blanket ruling which would cover all political subdivisions, and I believe it will be necessary to ascertain from the various political subdivisions the manner in which the justices of the peace are selected and paid and other pertinent facts with respect to their office. However, wherever the justices of the peace are elected by the people they are ineligible for the reasons stated above. I might add that provision is made in the Code for the selection of additional justices by appointment by the judge of the circuit court. Such additional justice serves under appointment only until the next succeeding general election for district offices and would thereafter be elected by the people. It is my opinion that such a justice of the peace would also come within the prohibition referred to above, and would not be eligible for social security coverage.

We do not have available copies of the charters of all the various political subdivisions, and it would be my suggestion that the various city attorneys be contacted to ascertain the method of selection of justices of the peace, the mode of payment and other information necessary for a determination of their status.
HONORABLE E. R. Combs,
Clerk of the Senate.

This will acknowledge receipt of your letter of October 10, 1952, from which I quote as follows:

"From an examination of the Senate Journal for the regular session of 1952, we find that the Lieutenant-Governor had not signed, prior to the time of his death, the proceedings as recorded in the Journal for twelve days of the session.

"The purpose of this letter, therefore, is to request an opinion of you as to the procedure which we should follow with reference to having some member of the Senate sign in lieu of the signature of the Lieutenant-Governor.

"As you know, Honorable Robert C. Vaden is President pro tempore of the Senate and since the untimely death of Lieutenant-Governor Collins, Senator Vaden has performed the duties usually discharged by the Lieutenant-Governor such as appointing members of the Senate to the various commissions created at the last regular session of the General Assembly."

You desire my opinion as to whether or not Senator Vaden should sign the Journal as President pro tempore, and also whether it will be necessary for the Senate to take official action authorizing and approving the signature of Senator Vaden for the twelve days which Lieutenant-Governor Collins did not sign.

Section 79 of the Constitution provides that the Lieutenant-Governor shall be President of the Senate. Section 3, Article 1, Rules of the Senate, among other things, imposes upon the President and the Clerk the duty of signing the Journal. Section 24-152 of the Code of Virginia provides that, when a vacancy occurs in the office of Lieutenant-Governor, the duties of that office shall be discharged by the President pro tempore of the Senate.

It seems clear, therefore, that since the President pro tempore succeeds to the duties of the office of Lieutenant-Governor during a vacancy, and the signing of the Journal being one of the duties of that office which the Lieutenant-Governor exercises in his capacity as President of the Senate, it would devolve upon the President pro tempore as one of the duties incumbent upon him by virtue of the provisions of Section 24-152.

For the foregoing reasons it is my opinion that it is not necessary for the Senate to take official action authorizing and approving the signature of Senator Vaden for the twelve days of the 1952 session.

SUPPORT ACT—Interpretation of. F-383 (154)

HONORABLE VALENTINE W. SOUTHALL,
Commonwealth's Attorney for Amelia County.

This is in reply to your letter of December 16, 1952, in which you request my opinion as to three questions arising under the Uniform Reciprocal Enforcement of Support Act, contained in §§ 20-88.12 through 20-88.31 of the Code of Virginia.

Your first question is whether the Juvenile and Domestic Relations Court has jurisdiction over a case where a petition has been filed in a foreign state and for-
warded to such court in this State. In my opinion the answer to your question is clearly in the affirmative, as the definition of the term "court", contained in § 20-88.13, includes a juvenile and domestic relations court of this State. Your second question is whether it is necessary that the respondent named in the petition be served with a copy of the petition, or whether he may properly be brought before the court by a nonsupport summons. It is my opinion that the Juvenile and Domestic Relations Court may obtain proper jurisdiction over the respondent by means of a summons without the necessity of serving a copy of the petition upon him.

Your final question involves, as I see it, the very intent and purpose of the Uniform Act. You inquire how the case is to be proven inasmuch as the complainant and her witnesses are not available to testify in the court in this State, unless brought here at considerable expense. It is obvious that such procedure would make the filing of the petition in the foreign state a completely futile act, for, if the petitioner must appear in this State at all, there appears no reason why the action should not have been instituted in this State in the beginning. In my opinion, the purpose of the Uniform Act is to permit the petition and the supporting testimony, sworn to before the court in another state, to be read as evidence by the court in this State. The very purpose of this Act is to allow a court in the state in which the respondent is residing and employed to render a binding judgment against him in order that it will not become necessary to extradite him to the State in which the petitioner is residing, which would result, in many instances, in loss of employment by the respondent with a resulting hardship upon him and those to whom he owes a duty of support. I believe a fair reading of the entire Act will support my opinion that the petition and supporting papers may be read as evidence by the court in this State.

SUPPORT ACT—No retroactive effect. F-383 (240)

HONORABLE MARK D. WOODWARD,
Commonwealth's Attorney for Page County.

This is in reply to your letter of March 18, 1953 in which you request my opinion as to whether the Uniform Reciprocal Enforcement of Support Act which went into effect as of June 28, 1952 is retroactive in operation to such an extent that this Act could be used to enforce payment of alimony decreed in a divorce suit and which has not been paid and was due and owing prior to the effective date of the Act.

While, as you know, there have been no cases decided by our Court of Appeals under the Act, I am of the opinion that it has no such retroactive effect, the better rule being that retrospective construction is not given to a statute in the absence of definite indication of legislative intent to that effect.

SUPPORT ACT—Reciprocal enforcement of; petition of out of State complainant. F-383 (96)

HONORABLE JAMES W. HARMAN, JR.,
Commonwealth's Attorney for Tazewell County.

This is in reply to your letter of October 7, 1952, in which you ask several questions with respect to the new Uniform Reciprocal Enforcement of Support Act.
The first question set forth in your letter may, I believe, be disposed of by a discussion of the apparent purpose of this legislation. At a recent meeting of a committee designated to study this legislation it was seemingly the unanimous view of those present that the petition filed by an out-of-state complainant for the purpose of enforcing support payments in this State must be accepted as evidence if the Act is to have any meaning whatsoever. By the situation set forth in your letter it is obvious that the whole purpose of the Act could be evaded in every case by a mere denial of liability on the part of the defendant. In my opinion the machinery set forth in the Act for the filing of the petition provides safeguards specifically designed to entitle the petition to the dignity of being received as evidence in this State.

You also inquire as to the propriety of using the machinery set forth in this Act to enforce support payments ordered in a divorce proceeding by a court of this State. As I understand your letter, this matter is now pending in the Juvenile and Domestic Relations Court of your county and I, therefore, feel that I must adhere to the strict policy of this office to refrain from rendering official opinions on matters pending before the courts of the Commonwealth. Of course, on questions of this kind, I would not hesitate to render any assistance requested by the court but, from the tenor of your letter it appears that this matter is in issue and I do not feel that it would be proper for me to render an opinion to you under these conditions.

TAXATION—Architect's license; when license required. F-195 (246)

April 14, 1953.

HONORABLE TURNER N. BURTON, Director, Department of Professional and Occupational Registration.

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

"It is requested that you advise this office whether or not a person who has been granted a certificate as an architect by the Virginia State Board for the Examination and Certification of Architects, Professional Engineers, and Land Surveyors is required to pay the revenue license tax of $25.00 provided for in Section 58-370, Code of Virginia, 1950, when he is employed as a draftsman or a junior architect by an architectural firm, and is strictly on a salary basis and is not a member of the firm, nor does he participate in the profits of the firm by which he is employed."

It is my opinion that Section 58-370 of the Code is not to be construed as imposing a revenue license on every architect merely because he holds a certificate issued by the Virginia State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors. The test is whether or not the Certificate holder is actually practicing his profession, and this question must be determined by the facts existing in each particular case. The fact that an architect is being compensated by a salary rather than sharing in the profits of a firm does not necessarily mean that he is not practicing his profession. I imagine there are many instances where an architect is actually practicing his profession and is being compensated for his work by means of a salary.

You direct my attention to paragraph (5) of Section 54-37 of the Code, providing that the following persons shall be exempt from the provisions of Chapter 3 of Title 54 of the Code, dealing with architects, engineers and surveyors:

"(5) Engaging in professional engineering, architecture or land surveying as an employee under a certified professional engineer, a certified architect or a certified land surveyor; provided, that such practice may not include responsible charge of design or supervision."

F-195 (246)
Persons coming within this exemption do not need a certificate from the Board and would not, in my opinion, be subject to the revenue license as an architect, but whether or not any particular individual is included in the exemption is again dependent upon the facts in each particular case.

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TAXATION—Assessments; appointment and qualifications of Board of Equalization. F-242 (29)

July 28, 1952.

HONORABLE J. E. DRUMHELLER,
Commissioner of the Revenue, Waynesboro.

This is in reply to your letter of July 16, 1952, from which I quote as follows:

"Reference to the provisions of Section 58-776.1 the governing bodies of any City having a population not in excess of 30,000 may, in lieu of the quadrennial reassessment provided by general law, by ordinance provide for the annual assessment and reassessment and equalization of assessments of real estate and shall prescribe the duties and terms of office of the assessors. If a City should proceed to have its assessment under the provisions of Section 58-776.1 et seq. we should like to have your opinion as to the following question:"

"(1) Who should appoint the board of equalization?"

"(2) Would it be proper to have the same persons who are appointed as assessors by the Council be appointed as the board of equalization?"

In answer to your first question, section 58-895 of the Code provides that in cities containing more than 12,000 population the Corporation Court shall appoint a board of equalization of real estate assessments. I am aware of no statutory change in this provision and unless it is altered by the charter of the city of Waynesboro it is my opinion that the provisions of this section should be followed in appointing the board of equalization there.

With reference to your second question, on December 16, 1948, in an opinion to the Honorable W. Howard Ellifrits, Clerk of the Circuit Court of Shenandoah County, this office held that members of the board of equalization might be the same persons who served as real estate appraisers.

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TAXATION—Board of Supervisors; notice required for proposed increase in tax levy. F-270 (219)

March 16, 1953.

HONORABLE FRANK L. MCKINNEY,
Commonwealth's Attorney for Halifax County.

I have your letter of March 11, with enclosures, in which you present the following question:

"The Board of Supervisors of this county (Halifax) lately published the annual budget, as you will note from pages 4, 5 and 6 of a local newspaper dated February 12, 1953, and later a synopsis of the budget, appearing March 3rd and 5th. This budget and synopsis reflect an increase of the general county levy from 25 cents to 50 cents, or rather it shows a proposed
levy of 50 cents and makes no reference to an increase other than the figure by which the tax yield is calculated.

"I had some doubt whether these publications constituted a sufficient compliance with the requirements of Section 15-582 of the Code as to notice of the proposed increase in local levy and the purpose of such proposed increase.

"The Board will meet on March 21st for action on the increase and I would like to be able to advise them whether the notice of proposed increase is a sufficient compliance with the above section of the Code, and I should greatly appreciate knowing your view of this, if I can have it within the next few days."

The proposed budget as published in the newspaper in its issue of February 12, 1953, in so far as the amount of the general county levy is concerned, shows it to be 25 cents on the hundred dollars. On March 3rd and 5th there was published in the newspaper a brief synopsis of a proposed county budget showing a general county levy of 50 cents on the hundred dollars. This last synopsis of the budget as printed does not indicate that it supersedes the proposed budget which was published on February 12th. However, I understand that the levy of 50 cents on the hundred dollars, as shown in the synopsis printed on March 3rd and 5th, represents an increase of 25 cents on the hundred dollars, although this synopsis does not state that the 50 cents levy represents an increase, nor does it state the purpose of such increase other than as may be ascertained by a careful examination of the synopsis and observing that there is an increase in most of the proposed expenditures for the year ending June 30, 1953.

Section 15-582 of the Code requires that before any tax levy shall be increased "the amount and purpose of such proposed increase shall be published in a newspaper having general circulation in the locality affected at least thirty days before the increased levy or assessment is made and citizens of the locality shall be given an opportunity to appear before, or be heard by, the local governing body on the subject of such increase." The purpose of the quoted provision is too obvious to require comment. I must confess that it is difficult for me to see how the average taxpayer can be said to have been put on notice by the printing of these two proposed budgets as to "the amount and purpose" of the proposed increase in the general county levy. He could only get any real information on the subject, as I have said, by a careful examination and analysis of the two proposed budgets which were printed. I do not believe that Section 15-582 contemplates that a taxpayer should have to make the study necessary to inform himself concerning what and why the local governing body is proposing relative to the general county levy. When the purpose of the section is considered, it is my conclusion that these publications do not constitute a compliance with either the spirit or the letter thereof.

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TAXATION—Collection of; action by Board of Supervisors; suits instituted by attorney. F-268 (283)

June 2, 1953.

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

I am in receipt of your letter of May 28, from which I quote as follows:

"Section 58-1016 [of the Code] provides that the additional proceedings available under Section 58-1014 * * * shall be instituted and conducted at the direction of the Board of Supervisors or other governing body of the
REPORT OF THE ATTORNEY GENERAL

County or Council of the City or Town, by such attorney or attorneys as such Board, Council or other governing body may employ for the purpose.

"When a case of this kind arises it is frequently a matter that needs immediate attention, and would therefore be impractical to await the next meeting of the governing body to obtain authority to proceed. Also the amounts involved frequently do not justify the employment of an attorney.

"It will be appreciated if you will render an opinion upon the following:

"1. May the Board of Supervisors or other governing body authorize the Treasurer, or other tax collector, generally to determine when to proceed under Section 58-1014; or is it necessary to obtain such authority in each individual case?

"2. May the warrant be obtained by the Treasurer and judgment rendered thereon, without the intervention of an attorney, if the matter is not contested by the defendant?"

Section 58-1014 et seq. of the Code provides for additional proceedings for the collection of taxes. Section 58-1016 stipulates that such proceedings shall be instituted at the direction of the Board of Supervisors or other governing body of the County "by such attorney or attorneys as such Board * * * may employ for the purpose."

Answering your first question, I do not think it is reasonable to construe the pertinent sections to mean that the Board of Supervisors must pass a resolution in each particular case directing the attorney to institute the appropriate proceedings. Once the attorney has been selected by the Board, I think the Board would clearly have the authority to authorize the Treasurer to refer to the attorney for collection such taxes as are still in that officer's hands for collection; in other words, I do not think a resolution in each particular case is necessary.

Answering your second question, Section 58-1016 provides that such proceedings shall be instituted by such attorney or attorneys as the Board may employ for the purpose. I, therefore, conclude that, if the proceedings are brought under Section 58-1014 et seq., they must be instituted by the attorney employed by the Board for the purpose and that the Treasurer, although he has certain other powers in connection with the collection of taxes, has no authority to institute the proceedings contemplated by these sections by warrant or otherwise.

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TAXATION—Collection of delinquent taxes; deputy treasurer, who is an attorney, may institute suits. F-262 (193)

February 19, 1953.

HONORABLE WILLIAM J. HASSAN,
Commonwealth's Attorney for Arlington County.

This is in reply to your letter of February 11, 1953 concerning the legality of a proposed designation by the county board of supervisors of an attorney, who is the county deputy treasurer, as the attorney to act, without additional compensation, in the institution of suits for the collection of delinquent local taxes. You also inquire if the office of the county treasurer would have authority to institute suits for the collection of delinquent taxes or control the collection of delinquent taxes where suit is filed by an attorney as designated by the board to institute such proceedings.

As pointed out by your letter, pursuant to § 58-989, Code of Virginia, the "treasurer shall continue to collect the taxes" on the delinquent lists for one year following June 30th of the year as of which the lists speak and pursuant to § 58-990 the board may require the treasurer to continue to collect those taxes after that time; or pursuant to § 58-991, instead of requiring the treasurer to continue to
collect after that time, the board may place such collections in the hands of other officers or employ a local delinquent tax collector. In this connection, I am in accord with your view that when a collector is so appointed and such lists and levies are turned over to him, then the treasurer is entitled to credit for all delinquent levies so turned over for collections pursuant to orders given by such board, and no part thereof shall thereafter be returned to the treasurer for collection.

I likewise concur in your opinion that it is not within the intent of the applicable statutes that the treasurer have authority to institute suits, in his official capacity, for the collection of delinquent local taxes or retain authority to supervise the collection of any such taxes turned over for collection to some party designated by the board.

However, this office is still of the view as previously expressed by former Attorney General, Abram P. Staples, by opinion under date of September 13, 1939 to the Honorable G. M. Weems, that, although such procedure would be unusual, there appears to be no legal objection to the employment in the statutory manner of an attorney, even though he is the county treasurer, to act without additional compensation in the institution of suits for the collection of delinquent local taxes. The foregoing would likewise appear to apply to an attorney who may be the county deputy treasurer.

In the event that the board should make such designation, the suggestions in regard to the contents of the ordinance made in the above-cited opinion should be followed.

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TAXATION—Delinquent taxes; separate school district entitled to penalty and interest. F-262 (287)

June 5, 1953.

HONORABLE VOLNEY H. CAMPBELL,
Commonwealth's Attorney for Washington County.

I am in receipt of your letter of June 1, from which I quote below:

"I have been requested by Mrs. Anne H. Miller, Treasurer of Washington County, to secure an opinion from you regarding the following situation.

"The Town of Abingdon is now, and has been for many years, a separate school district, for operational purposes, and each month the Treasurer of Washington County pays over to the Treasurer of the Town of Abingdon the school tax portion of the tax levied in the Town of Abingdon. The proportionate part of the penalty collected on delinquent taxes is also paid over to the Treasurer of the Town of Abingdon. Heretofore, however, all interest collected on delinquent taxes, either by the County Treasurer or the Clerk of the Circuit Court, has been credited to the general county fund and the proportionate part of this interest on delinquent taxes has not been paid to the Town Treasurer. I might also point out that it has been the practice for many years to credit all interest collected on delinquent taxes to the general county fund rather than distribute it to the various funds according to the different district rates.

"The Town Manager of the Town of Abingdon has raised the question as to whether or not the town should receive the interest collected on the school tax portion of delinquent taxes levied in the Town.

"Specifically we shall appreciate your opinion on the following questions:

"Shall the Treasurer of Washington County pay to the Treasurer of the Town of Abingdon interest on the school tax portion of delinquent taxes collected by the County Treasurer or the Clerk of the Circuit Court on property assessed within the Town of Abingdon?"
"Shall the Treasurer of Washington County distribute to the various county funds the tax, penalty and interest, or just the tax and penalty collected on delinquent taxes on property assessed throughout the county?

"If it is your opinion that this interest on delinquent taxes should be distributed to the Town of Abingdon and to the various county funds, should it begin with the new fiscal year, July 1, 1953, or should the Treasurer go back and make retroactive payments?"

Section 22-141 of the Code provides in part that when the town is operated as a separate school district the county treasurer shall pay over to the town treasurer "from the amount derived from the county levy * * * for school purposes a sum equal to the prorata amount from such levy * * * derived from the town. It has always been my understanding that interest and penalties imposed on delinquent taxes become a part of the taxes themselves. I know of no statutory authority for treating interest and penalties on taxes as a source of revenue separate and apart from the taxes on which the interest and penalties are imposed. Under this view, it is my opinion that your first question must be answered in the affirmative.

In connection with your second question, I am not entirely clear as to just what county funds you have in mind, but, if the taxes are allocated to such funds by statute or ordinance, it is my opinion that the same principle would apply.

As to your third question, if I am correct in my answer to your first question, I am of opinion that the Town of Abingdon is entitled to its prorata share of the interest for prior years. However, I suggest that what should be done as to prior years is a matter which had best be settled between the proper authorities of the County and the Town.

TAXATION—Exemptions from of Federal Reserve Bank; license and gasoline tax. F-149 (139)

TAXATION—Exemptions from of Federal Reserve Bank; license and gasoline tax. F-149 (139)

December 5, 1952.

Mr. C. F. Joyner, Jr., Commissioner,
Division of Motor Vehicles.

This is to acknowledge receipt of your letter of November 26 in which you inquire as to whether the Federal Reserve Bank of Richmond is immune from the payment of license fees imposed under the provisions of Article 9, Chapter 3, Title 46 of the Code of Virginia; and whether the said bank is immune from the payment of the gasoline tax imposed under the provisions of Section 58-711 of the Code of 1950. I shall discuss each question separately.

(1) Is the bank exempt from the payment of automobile license fees?

The Federal Reserve Bank of Richmond is a body corporate existing under the provisions of the Federal Reserve Act, 12 USCA, 226 et seq., and it is expressly exempted from Federal, State and local taxation, except taxes on real estate, under the provisions of Section 531, Title 12 USCA, which said section reads as follows:

"Federal Reserve Banks including the capital, stock and surplus therein, and the income derived therefrom, shall be exempt from Federal, State and local taxation, except taxes upon real estate."

Although it has been held by the Court of Appeals of Virginia that the motor vehicle registration act of 1926 (quite similar to Article 2, Chapter 3, Title 46 of the Code of Virginia) was not primarily a revenue raising measure, and further that the same was essentially a police regulation, the court was, at that time,
considering the provisions of the act dealing with the registration and the titling
of motor vehicles and not the provisions of the statute imposing license fees. Vast
sums are collected therefrom which are used for the maintenance and construction
of the highway system. The conclusion is inescapable that the sections of the
statute imposing license fees are primarily revenue measures and that the license
fees are taxes paid for the privilege of operating motor vehicles on the highways
of Virginia.

In the case of Federal Land Bank v. State Highway Department, 172 SC 174,
173 SE 284, (1934) the question was raised as to whether the bank was liable for
the payment of automobile license fees. South Carolina statute provided that if
the car was driven without the required tags, the driver would be arrested and
operation of the car would be prevented. This is very similar to the Virginia law
on the subject. It was contended by the bank that it was immune from this license
fee or tax by virtue of the expressed provision of Section 931, Title 12, c 7, of
the USCA, which provides in part:

"Every Federal Land Bank and every national farm loan association,
including the capital and reserve or surplus therein, and the income derived
therefrom, shall be exempt from Federal, State, municipal and local taxation,
except taxes upon real estate held, purchased or taken by said bank or
association under the provisions of Section 731 and 781 of this chapter **.*"
(Italics supplied)

The Supreme Court of South Carolina said on page 288:

"This language is so explicit that it would scarcely need to be interpreted,
but it has undergone judicial interpretation in numerous cases".

Again the court said on page 289:

"It is clear that the State may not tax the instrumentalities of the
general Government, but it is urged by the Highway Department that the
license fee for automobiles is not a tax, but a valid exercise of the police
power of the State. If the force of that argument be admitted, that does not
save the situation. It still would be a burden imposed by the state upon the
instrumentality of the general Government".

The decision of the court in the South Carolina case is sound and I do not
find where it has been reversed or modified in any fashion. Besides the expressed
provision in the Federal statute which gives immunity to the Federal Reserve Bank,
the bank as an instrumentality of the Federal Government, from a constitutional
standpoint, is immune from the payment of the tax. The United States Supreme
Court in the case of McCullock v. Maryland, 4 Wheat 316, 4 L. Ed. 579, 17 US 316,
in holding a state statute unconstitutional and void which sought to impose a tax
on a branch of the Bank of United States stated:

"The court has bestowed on the subject its most deliberate consideration.
The result is a conviction that the states have no power, by taxation or
otherwise, to retard, impede, burden, or in any manner control the operation
of the constitutional laws enacted, by Congress to carry into execution the
powers vested in the general Government."

The principles laid down in that case are as sound today as they were when
they were enunciated in 1819. Whether the Federal Reserve Bank identifies its
motor vehicles in the manner usually done by the other Federal agencies or in-
strumentalities, or does not identify them at all is a matter for the bank and not
one of which the State of Virginia is concerned. I am, therefore, of the opinion
that the Federal Reserve Bank of Richmond is not liable for the automobile license
fees provided for in Article 9, Chapter 3, Title 46 of the Code of Virginia, 1950.
(2) Is the Federal Reserve Bank of Richmond exempt from the payment of the tax on motor fuel imposed by Section 58-711 of the Code of Virginia, 1950?

The tax provided for by Chapter 13, Title 58, Code of Virginia, commonly known as the Motor Fuel Tax Act, is imposed on the dealer. The dealer must be licensed before he can lawfully sell; he must make monthly reports to the Division of Motor Vehicles showing his sales, and he is required to pay the tax on the sales each month. The dealer is liable for penalties if he fails to do so. The tax in question has never been anything but a tax upon the dealer. There has never been any attempt on the part of the State to compel the consumer to pay any part of the tax.

Section 58-690 provides:

"Dealers and all other persons selling motor fuel shall add the amount of the tax to the price of the motor fuel sold by them and may state the amount of the tax separately from the price of the motor fuel on all price display signs, sale or delivery slips, bills and statements which advertise or indicate the price of motor fuel." (Italics supplied)

It is argued by the bank that the language "shall add the amount of the tax to the price of the motor fuel" has the effect of placing the tax on the consumer. It may be that the economic burden eventually falls upon the consumer who buys the gasoline, however, the payment or nonpayment by the consumer for the gasoline he purchases does not affect the collection of the tax from the dealer or his surety, who are liable therefor.

In the case of United States v. Lee, 13 SE2d 919, (1943) (Fla.), it was contended by the United States that the State of Florida had no authority to collect the tax on gasoline sold to the Federal Government, its departments, agencies and instrumentalities. The Florida statute is similar to the Virginia statute in many particulars, providing, among other things, that the tax should be paid monthly by the dealer who must be licensed, and who must furnish bond. In the section of the statute imposing the tax (208.04 Fla. Statutes Anno.), it is recited that "this levy of tax is upon the consumer but shall be paid upon the first sale * * * by a distributor or dealer * * * and the amount of the tax may be stated separately from the price of the produce on all price display signs * * *. (Note the similarity of the last portion of this statute to the Virginia law, Section 58-690, Supra). The Supreme Court of Florida on page 921 said:

"A tax is determined by its practical operation and effect and not upon the name applied to it by the legislature. Measured by this test, the tax in question has never been anything but a tax upon the dealer in gasoline who is not immunized from payment of tax on sales to the United States.* * *."

And again on page 922:

"It is strictly a dealer tax and even though the economic burden of it may be placed on the United States, that will not make it a consumer tax."

I cannot find where this case (United States v. Lee, Supra) has been reversed or modified. It was decided in 1943 and my understanding is that no appeal was sought by the United States. I call your attention to Section 58-712.1 of the Code of Virginia, 1950, which was enacted in 1948. That statute provides that a dealer of gasoline or like products shall be exempt from the payment of tax imposed by Section 58-711, Code of 1950, upon gasoline sold by such dealer to the United States, its departments, agencies, and instrumentalities when same is sold in bulk lots of 500 or more gallons on each delivery. This act (58-712.1) leaves no doubt that it was the intent of the legislature that Section 58-711 imposes a tax on a dealer in gasoline and not upon the consumer.
I am, therefore, of the opinion that Section 58-711 of the Code of 1950 imposes a tax on the dealer and although the United States, its departments, agencies or instrumentalities may bear the economic burden of the tax when they have purchased the same, are not immunized from the payment of said tax.

TAXATION—License upon trailer camps; validity of ordinance. F-60a (156)

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

I have your letter of December 16, in which you ask if the Board of Supervisors of Montgomery County may pass a valid ordinance under the provisions of Chapter 592 of the Act of 1952 (Sections 35-64.1 to 35-64.6 of the Code of 1950 as amended). This Act authorizes the governing body of any political subdivision in the State to levy a license tax upon the operation of trailer camps, trailer parks and the parking of trailers. Your inquiry is prompted by the recent decision of our Court of Appeals in Fairfax County et al. v. The American Trailer Company, 193 Va. 72. The effect of your letter is to raise the question of the constitutionality of the Act of 1952.

The ordinance held invalid in the Fairfax County case was adopted pursuant to the provisions of Chapters 256 and 443 of the Acts of 1942. It was held invalid because in so far as Chapter 256 was concerned only authority to enact a regulatory ordinance was granted, whereas the one adopted was a general revenue measure and the amount of the tax bore no relation to the cost of regulation. And in so far as Chapter 443 of the Acts of 1942 was concerned, this Chapter was condemned as being a special or local law prohibited by Section 55 of the Constitution of Virginia. Neither of these objections appears applicable to Chapter 592 of the Acts of 1952, as this is clearly a general law and appears to authorize the levy of a license tax for revenue purposes. With the information before me certainly I cannot say that the Act in question is unconstitutional and I am, therefore, of opinion that a valid ordinance may be enacted pursuant to the authority granted therein.

TAXATION—Local capitation tax; may not exceed $1.00. F-270 (205)

HONORABLE E. B. PENDLETON, JR., Treasurer of Louisa County.

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

"We are faced with a problem in this County of obtaining additional funds for our school costs. No doubt we are similar to many other counties throughout the Commonwealth in that there is a large segment of our residents paying little or no tax, yet providing the bulk of the school population. Our problem is to legally spread the burden of additional costs over our entire population rather than to further increase the load on present taxpayers, which would be the case in the event of an increase in the tax levy.

"My question, Sir, would it be legal for the Board of Supervisors or governing body of this County, without a special Act by the General Assembly, to levy a tax upon every individual residing in the County over
two years of age and in an amount sufficient to absorb the additional costs necessary for the operation of our schools? If this be legal, would the Board of Supervisors be within its rights to aid in the collection of this tax by requiring the receipted bill be shown before entering a child in school or before the purchase of any license, or enjoy the rights and privileges of a citizen in good standing?"

While I am not entirely clear as to the precise character of the tax which you have in mind, I presume that it is in the nature of a capitation tax. I, therefore, direct your attention to Section 173 of the Constitution, under which section the General Assembly may authorize counties, cities and towns to levy a local capitation tax not exceeding one dollar per annum on every resident. I do not know whether your County levies a capitation tax or not, but, even if such a tax is imposed, it may not exceed, in view of the constitutional provision, one dollar per annum, and I doubt whether this will accomplish the purpose which you have in mind.

TAXATION—Local on automobiles; locality entitled to. F-266 (135)

HONORABLE E. GLENN JORDAN,
Commissioner of the Revenue, Richmond.

I am in receipt of your letter of December 1, in which you present two cases, quoted below, and desire my opinion as to the situs for taxation of the automobiles described:

"The Atlantic and Pacific Tea Company, located at 1010 N. Meadow Street, Richmond, Virginia, owns a fleet of automobiles assessed by this office at a value of $21,275.00 for tangible personal property in 1952. Two of the automobiles in this fleet are used by supervisors of the company who reside in Henrico County and the automobiles are owned by the company, registered and titled in the company's name at its business address. City automobile license plates have been purchased voluntarily by the owner. The company permits the supervisors to use the cars to go back and forth from the office as a convenience. It is my understanding that they are not to be used for their own private use. They are parked in front of their homes over night when they are in this vicinity. Henrico County claims that they should be taxed by the county as their situs for assessment purposes is in the county due to the fact that they are parked in front of the homes of those who use them as a convenience granted by the company. This office claims that they are properly assessed by the Richmond office for reasons stated above. They have no financial interest whatsoever in the automobile.

"The Phoenix Assurance Co. Ltd., 706 American Building, owns several automobiles registered and titled in the company's name, giving its business location in Richmond have purchased city automobile license plates voluntarily as required by city ordinance. The company states that their employees who use the automobiles travel the State of Virginia, District of Columbia and Maryland and one of them lives at 5913 Richmond Avenue, Henrico County. They state further that the car is not garaged there as the operator does not have a garage, but he is permitted to park this car in front of his house when he is home on week-ends. He is not permitted to use the car for family use. Under these circumstances we feel that the automobile has been properly assessed by our Richmond office. It has also been assessed
by Henrico County, who claims that the owner of the car has no tax liability for tangible personal property to the city of Richmond, but that it should be taxed by the county."

It is my opinion that the automobiles mentioned in both cases are properly assessable by the City of Richmond. The automobiles in both cases are registered and titled in the names of the owners at their places of business in Richmond. Their headquarters and permanent locations are in Richmond, and it is my view that this results in their situs for taxation being in Richmond. The fact that the automobiles are from time to time temporarily kept or parked outside of Richmond does not, as a matter of law, change the situation. Conversely, an automobile owned by a resident of Henrico, the permanent location of which is at the home or place of business of such resident in Henrico would be properly taxable as tangible personal property by Henrico County, even though such automobile was temporarily parked or kept in Richmond each day being used by the Henrico resident in going to and from his place of business in Richmond.

TAXATION—Motor fuel; exemption of Elizabeth River tunnel district. 
F-150 (102) 

October 22, 1952.

MR. CHARLES B. BORLAND, General Manager, 
Hampton Roads Sanitation District Commission, Norfolk.

This is to acknowledge receipt of your letter of October 13 in which you ask whether the Elizabeth River Tunnel District is exempted from the payment of gasoline tax.

I find that this Commission was created by Chapter 130 of the 1942 Acts of the General Assembly. Section 16 thereof reads as follows:

"Governmental Function.—It is hereby found, determined and declared that the creation of the District and the carrying out of its corporate purposes is in all respects for the benefit of the people of this State and is a public purpose and that the District and the commission will be performing an essential governmental function in the exercise of the powers conferred by this act, and the State covenants with the holders of the bonds issued under the provisions of this act that the District shall not be required to pay any taxes or assessments upon any of the property acquired by it or under its jurisdiction, control, possession or supervision or upon its activities in the operation and maintenance of the project or upon any revenue therefrom and the project and the bonds issued in connection therewith and the income derived therefrom shall be exempt from all Federal, State, municipal and local taxation."

This section is constitutional and, therefore, exempts this Commission from paying not only property taxes but all license taxes and taxes on motor fuel. The action taken by the General Assembly is within the purview of Section 183 of the Constitution of Virginia. Furthermore, the limitations in Section 168 do not prevent the General Assembly from granting tax immunity to this Commission. I am, therefore, of the opinion that the Commission is exempt from the payment of taxes on gasoline used by it in the operation and maintenance of the Elizabeth River Tunnel District.

Chapter 13 of Title 58, Code of Virginia, commonly known as the Motor Fuel Tax Act, imposes a tax on gasoline sold and delivered or used in this State, the taxes paid by the oil company selling or delivering the gasoline within the State,
and the retail purchaser buys the gasoline, paying the tax thereon. Hence, although the Commission is exempt from paying this tax through expediency, it must purchase gasoline like any other purchaser and then make an application for a refund to the Division of Motor Vehicles. I suggest, therefore, that you get in touch with the Division of Motor Vehicles and arrange with that department the procedure to be followed in order to effect the refunds.

TAXATION—Motor fuel; exemption of sanitation districts. F-150 (117)

Mr. Charles B. Borland, General Manager,
Hampton Roads Sanitation District Commission, Norfolk.

This is to acknowledge receipt of your letter of October 31, in which you ask whether the Hampton Roads Sanitation District Commission is exempt from the payment of gasoline taxes.

I find that the General Assembly, by Chapter 380, Acts of 1942, amended Chapter 335, Acts of the General Assembly, 1938, which said Act provided for the establishment of sanitation districts. Paragraph (a) of Section 4 of Chapter 380, Acts of 1942, contains the following language:

"Each district heretofore or hereafter created pursuant to this act or pursuant to a special act of the General Assembly, and the inhabitants of its territory as the same has been or may be established and from time to time altered pursuant to law, is hereby created as a body corporate and politic under the name and style of, and to be known by, the name of the district with the word "commission" appended. Each such commission, constituting a corporation as aforesaid, is hereby invested with the rights, powers and authority and charged with the duties set forth in this act as amended, and shall constitute a political subdivision of the Commonwealth of Virginia established as a governmental instrumentality to provide for the public health and welfare, and the bonds of such district or commission, and the property owned or operated by such district or commission shall be exempt from all taxation, and the interest on the said bonds shall take the same status under tax laws as the interest on bonds or other political subdivisions of the State." (Italics supplied)

This section is constitutional and, therefore, exempts this Commission from paying not only property taxes but all license taxes and taxes on motor fuel. The action taken by the General Assembly is within the purview of Section 183 of the Constitution of Virginia. Furthermore, the limitations in Section 168 do not prevent the General Assembly from granting tax immunity to this Commission. I am, therefore, of the opinion that the Commission is exempt from the payment of taxes on gasoline used by it in the operation and maintenance of the Hampton Roads Sanitation District Commission.

Chapter 13 of Title 58, Code of Virginia, commonly known as the Motor Fuel Tax Act, imposes a tax on gasoline sold and delivered or used in this State, the taxes paid by the oil company selling or delivering the gasoline within the State, and the retail purchaser buys the gasoline, paying the tax thereon. Hence, although the Commission is exempt from paying this tax, through expediency, it must purchase gasoline like any other purchaser and then make an application for a refund to the Division of Motor Vehicles. I suggest, therefore, that you get in touch with the Division of Motor Vehicles and arrange with that department the procedure to be followed in order to effect the refunds.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Personal property; automobiles of servicemen domiciled elsewhere not subject to. F-149 (251)

Honorable Cecil C. Frost,
Commissioner of the Revenue for Elizabeth City County.

This letter is written in response to our telephone conversation of a few days ago, in which you referred to the very recent opinion of the Supreme Court of the United States in the case of Dameron v. Brodhead, decided April 6, 1953.

Your inquiry relates to the liability to the local personal property tax of an automobile owned by a serviceman domiciled in another State, but using his automobile in Virginia and voluntarily registering his car here and securing Virginia license tags. It has been heretofore held that in this situation the automobile would be subject to the local tangible personal property tax. This holding involved the construction of a section of the Soldiers’ and Sailors’ Civil Relief Act (50 USCA App. 574) which is quoted below:

“(1) For 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 of 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: Provided, That nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942.

“(2) When used in this section, (a) the term ‘personal property’ shall include tangible and intangible property (including motor vehicles), and (b) the term ‘taxation’ shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: Provided, That the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid.”

The particular portion of the section now to be considered is the second paragraph thereof and especially the proviso. After giving the matter considerable study, it is my opinion that the proviso is only applicable to licenses, fees, or excises imposed on automobiles of servicemen. In other words, if a serviceman domiciled in some other State than Virginia has purchased his license tags for his automobile in the State of his domicile, he is not required to purchase license tags in Virginia, even though his car may be operated in Virginia; but insofar
as the property tax is concerned the exemption given by the section includes the automobile of the serviceman who is domiciled in another State and is in Virginia by reason of military orders, whether or not he has registered his car in Virginia and purchased license tags here.

While the decision in the Dameron Case does not deal specifically with the question in which you are interested, the opinion does emphasize the exemption given to servicemen by the Soldiers' and Sailors' Civil Relief Act, and it is my view that, if the precise question were presented to the Supreme Court of the United States, it would hold in accordance with the views I am now expressing.

I might add that the former holding as expressed in a letter to you was in accordance with the position taken by the Department of the Navy as expressed in Navy Department Bulletin NAVEXOS P-1, 15 September 1948. This position has recently been changed by the Navy Department.

Summarizing, it is my opinion that, pursuant to the quoted section of the Soldiers' and Sailors' Civil Relief Act, the automobile of a serviceman stationed in Virginia by reason of military orders, but retaining his domicile of origin in another State, is not subject to the local personal property tax in Virginia, even though such serviceman may have voluntarily registered his automobile in Virginia and purchased Virginia license tags therefor.

TAXATION—Professional license tax; localities may enact when based on gross income. F-152 (256)

April 30, 1953.

HONORABLE GEORGE M. COCHRAN,
Member House of Delegates.

This is in reply to your letter of April 28, in which you ask for my opinion on the following question:

"Would a license tax, levied by a City of the first class, payable in respect to the privilege of engaging in or carrying on a particular business or vocation, the amount of the tax payable by person so engaged being determined or measured by the net income derived from business or vocation be valid under the statutes and Constitution of the Commonwealth of Virginia? Net income, for this purpose, being defined as gross receipts during the period used as base less all deductions allowed in determining net income under State income tax law, except salaries, bonuses or other compensation paid any person, firm or corporation which is owner, partner, or stockholder in or of the business or vocation."

I assume that your question is asked in view of the following provision of Section 58-80 of the Code: "Incomes having been segregated for State taxation only, no county, city, town or other political subdivision of this State shall impose any tax or levy upon incomes."

The effect of the above prohibition was recently considered by our Supreme Court of Appeals in Langston v. Danville, 189 Va. 603. There was involved the validity of a license tax imposed by the City of Danville upon certain professions, businesses and occupations measured by a percentage of the taxpayers' gross receipts for the preceding calendar year. One of the contentions of those challenging the ordinance imposing the tax was that it was forbidden by the section of the Code which I have quoted above in that the tax was upon income imposed by a political subdivision. The Court answered this contention by saying:

"That this type of ordinance does not impose a 'tax or levy upon incomes,' in contravention of this section of the Tax Code, is well settled.
It imposes a license tax exacted for the privilege of conducting a business or practicing a profession, and such tax, although measured by the taxpayer’s gross receipts, is not a tax on the income derived from such business or profession.” (189 Va. at page 606)

The opinion goes on to cite with approval the following from Commonwealth v. Werth, 116 Va. 604:

“License and occupation taxes, which are payable in respect to the privilege of engaging in or carrying on a particular business or vocation, are not income taxes, notwithstanding the fact that the amount of tax payable by an individual may be measured by the amount of business which he transacts or his earnings therefrom. * * * ”

In view of the decisions of our highest Court, my conclusion is that your question must be answered in the affirmative.

Since I do not have before me the taxing ordinance which you have in mind and so am not familiar with its terms, please understand that I am not attempting to pass on the validity of any particular ordinance, but am simply expressing the opinion that a local license tax, the amount of the tax being measured by income, may be imposed for the privilege of engaging in a business or profession.

TAXATION—Property located on federal reservations; when taxable. F-163 (230)

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

This is in reply to your recent letter in which you ask for my opinion upon a question which may be thus stated:

Where the United States, through the Department of the Army, pursuant to Act of August 8, 1949 (10 USC 1270) and Title VIII of the National Housing Act (12 USC 1748-1748i), leases a part of one of its military reservations in this State for purposes of military housing as in said statute contemplated, may the land and improvements thereon be subjected to ad valorem taxes? Your inquiry is made in connection with a lease dated November 7, 1950, between the Secretary of the Army and Lewis Heights, Incorporated, covering a certain tract or parcel of land on Fort Belvoir Military Reservation “located in Mount Vernon Magisterial District, Fairfax County, Virginia.”

The construction of the buildings by the lessee and the financing thereof through the Federal Housing Administration will be in accordance with the provisions of the Wherry Act, Title 12 USC, Subchapter VIII, Section 1748 et seq.: the security for the money advanced to be a mortgage upon the leasehold interest of the lessee. The function of the lessee will be to maintain and manage the project during the term of the lease. The income of the lessee will be limited by the rental allowances of the military personnel. From the information furnished me and from a consideration of the instrument involved the United States and not the lessee will hold the title to the land, but, as will be noted later, title to the improvements constructed thereon will be in the lessee.

States and localities are without power under the Constitution of the United States, as construed by the courts, to impose property taxes upon Federally owned property except in those instances in which congressional consent has been given.
The question is, therefore, whether Congress had permitted the taxation by the State and its political subdivisions of the land or the buildings concerned. Since in Virginia there is no State tax on real estate or tangible personal property, we need only deal with the right of Fairfax County to impose a tax.

As to the land, title to which is in the United States, from my examination of the Federal statutes I can find no specific authorization for its taxation. Section 1748f of Title 12 USC provides that "nothing in this subchapter shall be construed to exempt any real property acquired and held by the Commissioner under this title from taxation by any state or political subdivision thereof, to the same extent according to its value as other real property is taxed." But this section refers to the time the property is taken over and held by the Commissioner of the Housing Administration upon the forfeiture of the lease by the lessee; it is not applicable, I think, during the time the property is held and managed by the lessee. My conclusion is that the land is not subject to taxation by Fairfax County.

Coming to the taxation of the improvements, the title to these improvements is in the lessee, as is provided in numbered paragraph 11 of the lease, reading as follows:

"That title to all improvements constructed upon the leased premises by the Lessee, in accordance with the terms of this Lease, shall during the term of this Lease remain in the Lessee. Upon the expiration of this Lease, or earlier termination, unless the Lessee shall elect to remove the improvements and restore the premises, all improvements made upon the leased premises shall become the property of the Government without compensation."

And Section 1270d of 10 USC provides that "the lessee's interest, made or created pursuant to the provisions of Sections 1270-1270d of this Title, shall be made subject to State or local taxation." In view of the quoted provisions of the lease and of the statute, I must conclude that the improvements may be taxed to the lessee by Fairfax County.

TAXATION—Real estate; veteran's administration subject to. F-273 (148)

HONORABLE ROBERT D. BAUSERMAN, Commonwealth's Attorney for Shenandoah County.

December 15, 1952.

I have your letter of December 10, in which you present the following question:

"The local Commissioner of Revenue Mr. Michael H. Tussing, Jr., has asked me to pass upon the question following:

"The Veterans Administration of the United States guaranteed a Veteran's loan made by the Massanutten Bank of Strasburg, Strasburg, Virginia, and thereafter the loan became in default, as a result of which the Trustees named in the deed of trust sold the property and the Massanutten Bank purchased the same because it did not bring the amount of the loan. Thereafter, in keeping with the original guarantee the Veteran's Administration paid off the loan and had the land conveyed to them according to their right of subrogation. The question now proposed is this, 'Is the Veterans Administration liable for real estate taxes in Shenandoah County for the year 1953 providing the real estate is in the name of the Veterans Administration on January 1, 1953?'"

I presume you refer to loans made under the World War Two Service Men's Readjustment Benefits Act. See 38 USC A, Sections 694 to 694-m. Section
694-j provides that the acquisition of property by the Administrator shall not deprive a State or political subdivision of the power to tax such property. Therefore, where a loan is in default and the Administrator, pursuant to the Act, acquires real estate as a result of such default, it is my opinion that such real estate is taxable by the locality in which it is situated.

TAXATION—Recordation; deeds creating joint tenancy, when subject to. F-90a (98)

October 21, 1952.

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

This is in reply to your letter of October 18 from which I quote below:

"I will appreciate it very much if you will let me have the benefit of your opinion in respect to the question hereinafter set out.

"By a certain deed, dated May 22, 1951, the grantor therein and his wife conveyed to one Phillips a tract or parcel of farm land situate in Northampton County; and on the same date the said Phillips and his wife conveyed said tract or parcel of land to a trustee to secure unto one Newton, State Director for the Farmers Home Administration for the State of Virginia, the indebtedness therein described.

"It now appears that the Farmers Home Administration, which, I understand, is a United States Government lending agency, desires that the legal title to the aforesaid property be vested in the joint names of Phillips and his wife, with right of survivorship between them as at common law. In order to accomplish this Phillips and his wife have executed a deed conveying the property to one Atwell, as straw man; and Atwell, who is unmarried, has executed a deed conveying the property to Phillips and his wife, jointly, with right of survivorship as at common law.

"The two deeds last mentioned have been presented to the Clerk of the Circuit Court of Northampton County for recordation, with the request that no recordation tax be charged for recording either of these deeds and that no Federal tax stamps be affixed to either of them."

If there is any exemption from the recordation tax for these two deeds it must be found in section 58-61 of the Code as amended, which 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 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."

It will be observed that this section, among other things, exempts from the recordation tax a 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 **". This, of course, is a tax exemption provision and must be strictly construed. The two deeds which have been presented to the clerk do not meet the requirements for the exemption. In neither one of the deeds are the husband and wife grantors and grantees from themselves to themselves. It is, therefore, my opinion that the statutory tax should be imposed upon the recordation of the deeds.

As to requiring federal stamps to be affixed, this, of course, is a question of interpretation of a federal statute. My personal view would be that the stamp should be affixed. If I were the clerk, in the absence of a ruling from competent federal authority, I would require them.

**TAXATION—Recordation of deed; joint tenants convey to husband in fee.**

F-90a (110)  
October 31, 1952.

HONORABLE C. E. MORAN, Clerk,
Corporation Court City of Charlottesville.

I am in receipt of your letter of October 28, from which I quote as follows:

"We have had presented to us another deed where we would be glad to have your opinion as to the basis of taxation.

"The husband and wife own the land jointly with survivorship, they convey to the husband alone the fee simple title to the said property. Should the tax be based on the entire value of the property or should the wife's interest therein be subtracted before taxation, i. e., a one-half interest plus whatever difference there may be in their ages.

"Under date of January 25, 1950, your opinion given on that date was changed by the last Assembly, but, in reading the change, we are unable to decide whether the full tax should be charged as indicated by your opinion or whether there should be taken from the valuation the wife's interest therein."

Section 58-61 of the Code as amended by Chapter 461 of the Acts of 1952 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 jointly 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 recordation of the original deed; provided that, if the tax already paid is less than a proper tax based upon the full amount of 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 deed which you have before you is not a deed in which the husband and wife "are both grantors and grantees from themselves to themselves, the only change being one of tenancy," but is a deed conveying the fee simple title to the property to the husband alone. Therefore, the deed is not embraced within the foregoing section providing that no additional recordation tax shall be required in certain cases. Therefore, the tax to be charged upon the recordation of this deed is that prescribed by Section 58-54 of the Code, namely, fifteen cents on
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every hundred dollars or fraction thereof of the consideration of the deed or the actual value of the property conveyed, whichever is greater. If the consideration is less than the actual value of the land conveyed, it follows that the tax should be based upon such actual value of the land.

_TAXATION—Sale for delinquency; real estate and standing timber must be sold together. F-262 (9)_

_Honorable G. M. Weems,
Treasurer of Hanover County._

July 7, 1952.

This is in reply to your letter of July 1, from which I quote as follows:

"I have the question confronting me of selling the timber on certain land for taxes. A member of the Board of Supervisors is interested in this timber and is anxious for me to advertise it so that he can purchase it. The two questions involved are as follows:

1. Whether or not I can advertise for sale at auction the timber for all of the delinquent years, most of which are collectible by the clerk, from 1932 through 1951.
2. Whether or not the purchase of this timber by a member of the Board of Supervisors would be in violation of any law, particularly Section 15-504."

I assume that the land and the standing timber thereon are assessed as real estate against the same person, and I further assume that this real estate is being sold under the general statutes relating to the sale of real estate for delinquent taxes thereon. If my assumptions are correct, I know of no authority for the separating of standing timber from the land and selling the standing timber alone. In other words, it is my opinion that the real estate, including the standing timber, should be sold together.

My reply to your first question would seem to make it unnecessary to reply to your second.

_TAXATION—State income; legal resident for voting is legal resident for tax. F-274 (298)_

Mrs. Robertine H. Jordan,
Commissioner of the Revenue for Montgomery County.

June 22, 1953.

I have your letter of June 16, in which you ask for my opinion on the following question:

"We have a taxpayer in this County (Montgomery) who is a salesman for a chair concern. He owns a house in this county and rents it. He maintains a home in Ohio for his wife and children. In filing his 1952 State income return he filed on a Non-resident form, listing rent from the house as Virginia income and income from the chair concern as Ohio income. Although he claims that he is a non-resident in filing income, both he and his wife have retained their voting status in the State of Virginia. Will you
please let us know if he can file on this non-resident form or since they retain this State as their voting residence can we require him to file on his complete income as a Virginia resident?"

I must assume from your letter that the facts justify this taxpayer in retaining his legal domicile in Virginia. As a legal resident of Virginia he is subject to the State income tax upon his entire net income, both from within and without this State. Under certain circumstances a resident individual of this State paying income tax to another State as a non-resident is entitled to certain credits on his tax payable to this State. See Section 58-103 of the Code. I know of no tenable theory upon which a person may be a legal resident of this State for the purpose of voting and not be a legal resident for the purpose of liability to the State income tax.

TAXATION—State licenses; real estate brokers; amount when beginning in middle of year. F-273 (235)

April 2, 1953.

HONORABLE STUART B. CARTER,
Member House of Delegates.

I am in receipt of your letter of March 31, in which you ask the following question:

"Does a real estate agent in this State have to pay his license for the twelve month period of 1953 if he does not start doing business as such agent until April first of this year? In other words, does he have to pay for the full year or for the eight months in which he expects to operate?"

Section 58-398 of the Code imposes a State license tax on real estate brokers and such tax in a county is $25.00 for the period of one year. However, Section 58-248 of the Code authorizes the issuance of a license for less than a year except where otherwise expressly provided. Where the license is issued for less than a year the tax shall bear such proportion to the whole annual tax as the space of time between granting the same and 31st of December following bears to the whole year.

I am, therefore, of the opinion that a real estate broker commencing business on April 1 may be granted a license upon the payment of three-fourths of the annual tax.

TAXATION—Towns may apply to estate or debtor of deceased for payment of taxes. F-270 (16)

July 16, 1952.

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

I am in receipt of your letter of July 12, in which you ask if the provisions of Section 58-1010 of the Code may be invoked in the collection of town taxes.

The section provides in part that any person indebted to or having in his hands the estate of a person assessed with taxes or levies may be applied to by the officer for payment of the taxes out of such debt or estate. The section is plainly broad enough, in my opinion, to include town taxes.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Treasurers; poll tax list to be alphabetically by magisterial districts. F-100c (88)

HONORABLE CHARLES A. REID,
Treasurer for Greensville County.

This is in reply to your letter of October 6, in which you ask if the Treasurer's list of persons who have paid their State poll taxes, prepared pursuant to Section 24-120 et seq. of the Code, shall be arranged alphabetically by magisterial districts.

Section 24-120 does not require that the list be arranged by magisterial districts. The section simply provides that the list "shall state the white and colored persons separately." However, Section 38 of the Constitution, dealing with Treasurers' lists, stipulates that the "list shall be arranged alphabetically, by magisterial districts in the counties, and in such manner as the General Assembly may direct in the cities, shall state the white and colored persons separately, and shall be verified by the oath of the treasurer." It will immediately be seen that the requirements of Section 24-120 do not comply with the constitutional mandate. It is my opinion that the constitutional mandate is self-executing and that the Treasurer of a County in preparing the list should, therefore, arrange it alphabetically by magisterial districts. There is nothing in Section 24-120 to prohibit this method of preparation and, in view of the plain language of the constitutional provision, it is my view that in the counties the list should be prepared as the Constitution directs.

TOLL FACILITIES—Free passage for school children; when entitled to.

HONORABLE LLOYD C. BIRD, State Senator,
Richmond 5, Virginia.

I have your letter dated July 8, 1952, requesting an opinion on the following:

"Children, living in Charles City County, cross the Charles City-Hopewell Ferry, on their way to Red Water Lake in Chesterfield County, where they are taught swimming under the auspices of the Red Cross. They travel in a School bus. The question is: Will Section 22-277 or any other Section give these people exemption from paying the Ferry fee?"

Section 22-277 of the Code, as amended, to which you refer, reads in part, as follows:

"Any such pupil, student, or the parent or guardian of any such pupil or student may apply for and receive from the principal of any school, college, or other educational institution in this State, a card certifying that any child or person is a pupil or student using such facilities daily for regularly attending such school, college or other educational institution, * * *.

Upon reference to this section, it seems that two conditions must exist before free passage can be granted over toll facilities of the State. The statute requires, first, that the pupil or student must be in daily attendance at some educational institution, and, second, that a card must be obtained from the principal of such institution certifying that the pupil is in daily attendance at such institution.

In view of the foregoing requirements of the statute, I am of the opinion that the statute is not broad enough to include children attending a course in swimming
instruction given by the Red Cross. I am not advised of any other statute pertaining to exemption of school children on toll facilities owned by the Commonwealth.

I regret very much that I cannot give a favorable opinion on such a worthy cause as set forth in your letter.

TRIAL JUSTICES—Attachments; jurisdiction over up to $1,000.  
F-136a (274)  
May 22, 1953.

HONORABLE PIERCE C. KEGLEY,  
Trial Justice of Bland County.

This is in reply to your letter of May 20, 1953 in which you request my opinion as to the construction to be placed upon the apparently conflicting provisions of §§ 16-70, 8-521, 8-564, 8-567 and 8-568. Specifically, you inquire whether a trial justice has jurisdiction to try and decide attachments where the amount of the claim exceeds $20.00.

Section 16-70 of the Code was adopted by the Legislature in 1942. All of the other sections were in force prior to that date. Section 16-70 expressly provides that a trial justice may issue, try and decide attachments when the amount of the plaintiff's claim does not exceed $1,000.00. It is my opinion that this section has the effect of amending the other sections by changing the jurisdictional amount from $20.00 to $1,000.00. Any other construction would give no meaning to the provisions of the 1942 Act.

TRIAL JUSTICES—Criminal appeals; allowance of withdrawal is discretionary.  F-85 (259)  
May 6, 1953.

HONORABLE EDW. H. RICHARDSON,  
Commonwealth's Attorney, Roanoke County.

This is in reply to your letter of May 2, 1953 in which you asked for an opinion on the meaning of § 16-82 of the Code of Virginia as amended in 1952. That section reads as follows:

"There shall be an appeal of right in criminal cases from the trial justice to the circuit court of the county or the corporation court of the city as provided for by the laws with reference to appeals from trial justices generally. There shall also be an appeal of right to the circuit court of the county or corporation court of the city from any order or judgment of a trial justice forfeiting any recognizance or revoking any suspension of sentence formerly entered by such trial justice. In any such case such trial justice shall have the power to permit any defendant to withdraw any such appeal within ten days after conviction."

Your question is:

"Will you please give me your opinion as to whether it is within the discretion of the Trial Justice to allow the appeal to be withdrawn or is it mandatory that he permit said appeal to be withdrawn?"
The last sentence of § 16-82 was added by the 1952 amendment. It is my opinion that this amendment is worded so as to show clearly that the appeal may be withdrawn at the discretion of the trial justice. It is not mandatory that such withdrawal be allowed. The words "shall have the power to permit" are not mandatory, they are words of discretion.

TRIAL JUSTICES—Interrogatory summons; issuance and place of return.
F-136a (62)


HONORABLE JOHN W. SNEAD,
Trial Justice for Chesterfield County.

This is in reply to your letter of August 20, from which I quote below:

"Code Section number 8-435, as amended by Acts of 1952, has to do with proceedings by interrogatories to ascertain the estate to which a judgment debtor is entitled. The question has arisen as to whether an interrogatory summons may be issued from this Court against a judgment debtor residing in this county requiring the judgment debtor to appear before a Commissioner in Chancery in the City of Richmond. To me this section is not clear and I have three or four questions on which I would like your opinion.

"Where the fieri facias has been issued by a Trial Justice appointed under provisions of Chapter 2 of Title 16 (which would make it apply to me) can the summons to answer interrogatories be made returnable within a county or city other than the county for which said Trial Justice was appointed? Section 8-435 reads in part as follows: 'such summons shall not be served out of the county or city in which such commissioner resides or maintains an office or for which such Trial Justice was appointed, or elected, or a county or city contiguous thereto.' Does this mean that the process may be made returnable in a contiguous county or city, or does the general law require that processes issued by the Trial Justice Court against persons residing within his county be made returnable within that county?

"My next question is this: If in your opinion the interrogatory summons may be made returnable in a contiguous county or city, can it be made returnable before a commissioner of a court of that contiguous county or city or must it be made returnable before a commissioner of the Circuit Court of the county for which the Trial Justice is elected or appointed, even though the commissioner's residence or office may not be within that county, but in a contiguous county or city?

"My last question is: Does the Clerk of the Trial Justice Court have authority to issue such interrogatory summons or is that authority vested only in the Trial Justice."

Section 16-71 of the Code is also pertinent in connection with your inquiry.

I have carefully considered Section 8-435 of the Code and have reached the conclusion that the better view is that, where a summons is issued by you pursuant to the section, it should be made returnable before a commissioner in chancery appointed by the Circuit Court of Chesterfield County and, if there is a commissioner appointed by that court whose residence or office is in a contiguous county or city, such summons may be made returnable before such commissioner. While the question is not altogether free from doubt, I suggest that this is the best procedure for you to follow.
Replying to your last question this office has heretofore expressed an opinion in a case similar on principle, the effect of which is to hold that the Clerk of a Trial Justice Court may issue a summons under Section 8-435 of the Code. See Section 16-61 of the Code.

TRIAL JUSTICES—Suspension of sentence; motor vehicle violations; revocation of operator's license. F-136a (90)

October 8, 1952.

HONORABLE WILLIAM M. McCLENNY, Commonwealth's Attorney for Amherst County.

This is in further reply to your letters of September 18 and 24, 1952, in which you inquire as to the power of a trial justice to suspend any sentence to be imposed under §§ 46-215.1 and 46-347.1 of the Code. Those section are as follows:

"When any person shall be convicted of violating any law of this State which designates the maximum speed limit for the operation of motor vehicles and the judge or jury shall find that such person exceeded the prescribed speed limit by more than five miles per hour, then in addition to any other penalties provided by law, the operator's permit of such person may be suspended for a period of ten days. For the second and each subsequent conviction within the period of one year, in addition to any other penalties provided by law, the operator's permit of such person shall be suspended for a period of sixty days. Nothing contained in this § 46-215.1 shall apply to speed violations which occur in cities and towns. Nor shall the provisions of this section apply in any case unless the applicable legal speed limit is forty-five miles per hour or more. In case of conviction the court or judge shall require the delivery of the operator's permit to the court, where it shall be held in accordance with § 46-195.1. The provisions of §§ 46-59 and 46-425 shall not apply to any person whose license is revoked under the provisions of this section."

"No person whose operator's or chauffeur's license has been suspended or revoked by any court or by the Commissioner shall thereafter drive any motor vehicle in this State unless and until such suspension or revocation shall have terminated. Any person violating the provisions of this section shall for the first offense be confined in jail not less than ten days nor more than six months, and for the second of any subsequent offense be confined in jail not less than two months nor more than one year; and may in addition be punished by a fine of not less than one hundred nor more than one thousand dollars."

In my opinion a trial justice may suspend any of the punishments imposed by these sections. However, the 60-day suspension of license provided in § 46-215.1 for a second conviction within a year is not a part of the punishment and, therefore, is not within the control of the trial justice. In Pritchard v. Battle, 178 Va. 455, 17 S. E. (2d) 393, the Supreme Court of Appeals said that revocation of a driver's license for conviction for violation of a criminal statute is not a part of the punishment and hence not subject to being pardoned by the Governor. I believe the reasoning of that opinion applies in this case.

With respect to your questions concerning the expenses of the trial justice's office, I am enclosing a copy of an opinion rendered on October 2, 1952, to the Honorable L. H. Shrader, Trial Justice of Amherst County, dealing with this question.
TRIAL JUSTICES—When substitute has authority to discharge duties.
F-136a (290)

Honorable J. B. Massie,
Trial Justice for Nelson County.

I have your letter of June 4, in which you ask the following question:

"Does the Substitute Trial Justice have the authority to issue warrants, take bail bonds, issue attachments or other papers, on Sunday or after the regular office hours of the Trial Justice, as a matter of convenience?"

Section 16-56 of the Code provides in part that:

"* * * In the event of the inability of the trial justice to perform the duties of his office, by reason of sickness, absence, vacation, interest, proceedings or parties before his court, or otherwise, such substitute trial justice shall perform the duties of the office during such inability * * * "

The section goes on to provide for the compensation of the substitute trial justice when he is performing the duties of the trial justice.

In view of the statutory provision which I have quoted, it is my opinion that the substitute trial justice does not have the authority to discharge the duties of the trial justice except under the circumstances specified in the section.

TRIALS—Drunk driving; admissibility of blood test and conclusions.
F-6 (168)

Honorable Edward McC. Williams,
Commonwealth's Attorney for Clarke County.

This is in reply to your letter of December 10, 1952, in which you ask:

"Whether or not it is proper for a report of the office of the Chief Medical Examiner as to the alcoholic content of a sample of blood furnished him by the State police and which, in addition to setting forth the percentage of alcoholic content of the sample states that 'in the opinion of the Chief Medical Examiner, a person whose blood had an alcoholic content equivalent to that stated in the report would be under the influence of intoxicants to a degree that would make it unlawful for him to operate a motor vehicle' to be submitted to a jury in the course of a trial of a person concerning whom the report is rendered for operating a motor vehicle while under the influence of intoxicants."

It is my opinion that the report of the Chief Medical Examiner would be of little worth without his opinion, referred to above, and, therefore, that his opinion is incorporated into and a part of his report. While there is some doubt concerning this, I feel that it should be submitted in evidence in the course of a trial and, in the event an objection is raised, the trial court will, of course, rule on the admissibility of this as evidence.
UNEMPLOYMENT COMPENSATION—Disposition of unclaimed or unpaid funds. F-161 (183)

January 28, 1953.

HONORABLE JESSE W. DILLON,
State Treasurer.

This is in reference to our conversation on Tuesday with Messrs. Rhodes and McGhee regarding the status of funds derived from cancelled checks issued by the Treasurer of Virginia for the payment of unemployment compensation benefits.

Section 2-158 of the Code of Virginia imposes the duty upon you, as State Treasurer, to cancel all checks at the end of the fiscal year which have not been presented for payment within one year from the date of issuance. In regard to outstanding checks issued by you for unemployment compensation benefits, it has been your practice to retain sufficient funds for the payment of such checks in a benefit surplus account. The United States Department of Labor, Bureau of Employment Security, has taken the position that these funds should be utilized for the payment of benefits after the expiration of the period for which they were requisitioned or returned to the Secretary of the Treasury of the United States by virtue of Section 60-92 of the Code of Virginia, any interpretation to the contrary being inconsistent with Section 303 (a) (5) of the Social Security Act and Section 1603 (a) (4) of the Internal Revenue Code.

In my opinion, Section 60-92 of the Code of Virginia prohibits the retention of such funds in a special surplus account and makes mandatory the duty of the Unemployment Compensation Commission to either deduct such amounts from estimates or benefits to be paid during succeeding periods or return such funds to the Secretary of the Treasury of the United States. You will note that Section 60-92 specifically refers to the disposition of "... any balance of moneys requisitioned from the unemployment trust fund which remains unclaimed or unpaid. ..." Section 60-92, having been enacted by the legislature subsequent to Section 2-158, supersedes and qualifies your duties with respect to disbursements of unemployment compensation funds.

VETERANS—Definition of; under various sections of the Code. F-356a (145)

December 12, 1952.

MR. HARRY F. CARPER, JR., Director,
Division of War Veterans Claims.

This is in reply to your letter of November 3, 1952, relative to the interpretation of numerous sections of the Code of Virginia having to do with veterans of the late wars of the United States. I am informed by Mr. Gray of this office that he has discussed with you the necessity for delaying consideration of your question until we could obtain certain information from the State Department with reference to the termination of World War II. We are now prepared to consider your questions and, in the following paragraphs, I shall attempt to interpret the sections referred to in your letter in the order in which they appear therein.

Sections 36-65 to 35-69, dealing with housing authorities for World War II Veterans.

The definition of "World War II Veterans," contained in § 36-65, restricts that class to one who was a member of the armed forces during the recent war with Germany and Japan. That Act was passed in 1946 at a time when the treaties required to formally end World War II had not been signed, but at which
time the hostilities had ceased. The use of the words "was" and "recent" conclusively demonstrate that the Legislature, for the purposes of these sections, was thinking of the War as being a past event and, in my opinion, in order to qualify as a veteran for the purpose of this Act, the veterans must have served in the armed forces at some time between December 7, 1941 and termination of hostilities with Japan.

Section 54-68, dealing with the granting of licenses to practice law to men who served in the armed forces.

This section of the Code continues in effect certain Acts of the Legislature authorizing the Supreme Court of Appeals to grant licenses to practice law to certain persons who served in the armed forces between "December 7th, 1942 and August 15th 1945." Inasmuch as this Act is specific as to the dates between which such services must have occurred, I can conceive of no difficulties which will arise in an interpretation thereof.

Section 2-27.1 regarding an exception as to public offices for employees engaging in war services.

This Act provides that no state, county or municipal officer or employee shall forfeit his title to office or position or vacate same by reason of engaging in the war services of the United States, whether such person voluntarily or otherwise enters such war service. For the purposes of this Act, it is my opinion that service in any branch of the armed forces of the United States at the present time constitutes war service. I believe that my conclusion in this regard is strengthened by the fact that this Act was adopted in 1950, at which time such legislation would have been currently uncalled for unless the Legislature was of the opinion that the Korean conflict was of such character as to constitute service in the armed forces as war service.

Section 2-29(3).

The purpose of this Act is to prevent any person who may be called by the United States into actual duty as an officer or soldier from vacating any office or post of trust in the Commonwealth of Virginia or a political subdivision thereof by reason of such service with the United States. The Supreme Court of Appeals of Virginia has said that the manifest purpose of this section is to disqualify as office holders members of the regular army of the United States who are permanently in service and to except from disqualification officers and soldiers of the State Militia or National Guard who may be called into service for a temporary period. See, Lynchburg v. Suttenfield, 177 Va. 212. In my opinion, this Act is effective currently.

Sections 17-84 and 17-92.

I am advised that your office is preparing a more detailed inquiry with respect to these sections and I shall, therefore, decline rendering any opinion as to the effect of these sections at this time and shall await receipt of further inquiry.

Section 51-66.

Section 51-66 of the Code was repealed by Chapter 1, Acts of Assembly of 1952.

Section 2-80 dealing with ratings on examinations for veterans.

This section was amended in 1952 so as to provide a specific credit for "a person who has served in the armed forces of the United States in World War I or subsequent to December 6, 1942, having a discharge not dishonorable." Inasmuch as this amendment deleted the words "World War II" and substituted there-
for the words "subsequent to December 6, 1942," there can be no doubt that the specific intention of the Legislature was to make the provision in this section applicable to persons serving in the armed forces after World War II has been terminated.

Sections 24-345.1 to 24-345.15, dealing with absent voting of members of the armed forces.

This Act by its terms was made effective from the date of passage until such time as the Governor by declaration finds that the members of the armed forces of the State do not require the same. See, § 24-345.14. The General Assembly appropriated money for the purpose of administering that Act during the current year, and I believe there can be no question but that it is applicable in all respects at the present time.

I trust that the information contained herein is sufficient for your purposes. I shall reply to your further inquiry with reference to §§ 17-84 and 17-92 as promptly as possible. In the event any answers I have given are in need of clarification, I shall be pleased to hear from you further.

VETERANS—Discharges to be recorded and certified copies furnished.

F-116 (173)

January 16, 1953.

MR. HARRY F. CARPER, JR., Director,
Division of War Veterans Claims.

This is in reply to your letter of December 23, 1952, from which I quote as follows:

"I shall greatly appreciate your further ruling on Sections 17-85 and 17-91 of the Code, in their application to the recording of discharges. A question has arisen in the Offices of the Clerks of the Courts as to whether or not discharges of Korean veterans should be recorded since this has been termed 'a police action', and further whether certified copies of discharges may be furnished free of charge, when necessary for use before the Veterans Administration.

"Secondly, clarification is also needed on whether the Code requires the Clerk of the Court to record only the discharge, which contains the veteran's name, branch of service, and date of discharge or, on the other hand, is the Clerk required to record the DD Form 214, Certificate of Separation, which contains all the necessary information regarding the veteran's service."

In my opinion, the discharges of "Korean veterans" should be recorded by the Clerk under the provisions of Section 17-92 of the Code of Virginia, which reads as follows:

"The clerk of every circuit or corporation court, or other court in which deeds are required to be recorded, shall, upon presentation, record, free of charge, the discharge certificate of any veteran of any war in which the United States has been engaged."

While it is true that there has been no declaration of war in connection with the Korean struggle, this office has on previous occasions held that that struggle is in a very real sense a war and, in my opinion, it is a war within the meaning and intention of the Legislature as that term is used in Section 17-92 of the Code.
With respect to your second question, I refer you to the provisions of Section 17-90 of the Code, where it is provided that the record book to be kept by the Clerk for the purpose of recording discharge records shall contain a space for the service record and the discharge, and that this space shall provide suitable headings for recording the information contained in "the discharge papers." It appears, therefore, that it was the intention of the Legislature that the information regarding the veteran's service should also be recorded.

In connection with the question of whether certified copies of discharges may be furnished free of charge for use before the Veterans Administration, Section 14-102 provides as follows:

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

In my opinion, the Clerk should furnish copies free of charge for use before the Veterans Administration when such use is for the purposes outlined in the statute.

VITAL STATISTICS—Births; various provisions concerning the recording of. F-141 (264)

MISS ESTELLE MARKS, State Registrar, Bureau of Vital Statistics.

May 12, 1953.

This is with reference to your letter of May 7, 1953 in which you make several inquiries with reference to birth certificates for illegitimate children prepared by local registrars and forwarded to the Bureau of Vital Statistics.

Sections 32-325 and 32-326 of the Code of Virginia clearly place the local registrars under the control of the State Registrars. These and other sections impose upon the local registrars the obligation of carrying out the provisions of the vital statistic laws pertaining to child births, as well as other policies of the State Registrar which may be pertinent.

Section 32-331 provides for uniform forms to be furnished by the State Registrar to the local registrars for the purpose of recording births. This section also prohibits the use of any other forms.

Section 32-335(c) prescribes the method local registrars must employ in copying birth certificates into the record furnished by the State Registrar. Inasmuch as this section provides that only certain portions of the certificate be copied in the
case of illegitimate children, I am of the opinion that a duplicate certificate or a photostatic copy of the same is prohibited by the statute.

Sections 32-337, 32-337.1, 32-337.2 and 37-337.3 provide for the dissemination of the information contained in birth certificates by the State Registrars. Inasmuch as the Legislature has specified when and how this information may be obtained, I am of the opinion that any other method of releasing such information is prohibited.

As you have requested that I comment upon the contents of Judge Kearney's letter to Dr. Robeson on April 18, 1949, I feel it only necessary to point out that at the time this letter was written the sections of the Code last above quoted had not been enacted by the General Assembly. Inasmuch as the objectives sought by Judge Kearney have clearly been obtained by the enactment of the sections of the Code above mentioned, I feel that the information desired should properly be released from the office of the State Registrar.

WAR ORPHAN EDUCATION FUND—Stepchild not eligible for. F-356a (249)

April 20, 1953.

DR. DOWELL J. HOWARD, Superintendent of Public Instruction.

This is in reply to your letter of April 10 in which you asked if a step-child who was not legally adopted can qualify for aid under the World War Orphan Education Fund Act. Section 23-7.1 of the Code of Virginia provides:

"(1) All sums appropriated by law for the purpose of carrying into effect the provisions of this section shall be used for the sole purpose of providing for matriculation fees, board and room rent and books and supplies for the use and benefit of the children not under sixteen and not over twenty-one years of age of those who entered the service of the United States from Virginia and were killed in action or died from other causes in World War I between April sixth, nineteen hundred seventeen, and July second, nineteen hundred twenty-one, or in World War II between December seventh, nineteen hundred forty-one, and the date fixed by the United States government as the date of termination of such war, while serving in the armed services of the United States, and of those who were, or are, or may hereafter become totally and permanently disabled due to service during such periods, whether the veteran be now living or dead; which children are attending or may attend a State educational or training institution of secondary or college grade."

It is my opinion that this act excludes all persons from qualifying for aid except legal children of the person killed in one of the World Wars. A step-child is not included and is not looked upon under the laws of this state as a legal child of its step-father. The statute was enacted for the purpose of providing assistance in the education of a child whose father would have been legally bound to support him. A step-child has no legal claim for support against its step-parent.
This is in reply to your letter of March 16 with regard to employees of your department appearing as witnesses in a civil suit and testifying concerning the contents of records made confidential by law.

Courts, of course, have the power to compel witnesses to testify. Whether or not a court would exercise such power must necessarily depend upon all of the facts surrounding a particular law suit. For example: If it appeared to the court that the contents of certain confidential records were not really material to a decision in the case, they would not be admitted. On the other hand, if such testimony was necessary to protect the rights of the litigants the court would be fully justified in compelling a witness to testify.

May I suggest that it would not be improper for a witness to call the court's attention to the fact that the testimony which he is called upon to produce is of a confidential nature.
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