

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

From July 1, 1953, to June 30, 1954

COMMONWEALTH OF VIRGINIA
Division of Purchase and Printing
Richmond
1954

Letter of Transmittal

August 11, 1954

HONORABLE THOMAS B. STANLEY,
Governor of Virginia,
Richmond, Virginia.

My dear Governor Stanley:

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)

Name	County	Official Title
J. Lindsay Almond, Jr.	Roanoke City	Attorney General
G. Stanley Clarke	Henrico	Assistant
D. Gardiner Tyler	Charles City	Assistant
C. Champion Bowles	Goochland	Assistant
Frederick T. Gray	Chesterfield	Assistant
Thomas M. Miller	Richmond City	Assistant
H. Coleman McGehee, Jr.	Richmond City	Assistant
Francis C. Lee	Hanover	Assistant
Clarence F. Hicks	Caroline	Assistant
Nerhea S. Evans	Charlotte	Secretary
Louise W. Poore	Richmond City	Secretary
Eleanor W. Tilley	Smyth	Secretary
Mabel G. Hurt	Tazewell	Secretary
Madge V. Howell	Richmond City	Secretary
Anne Pitt Paul	Richmond City	Receptionist

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.

CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES

1. *American Railway Express Agency, Inc. v. Commonwealth of Virginia*. From State Corporation Commission. Application for refund of annual license tax. Upheld by Supreme Court of Appeals of Virginia. Taxing statute declared invalid.
2. *Cavalier Vending Machine Co. v. State Board of Pharmacy*. From Circuit Court City of Richmond. Bill for injunction to prevent enforcement of statute prohibiting sale of prophylactic devices in vending machines. Injunction denied below, upheld by Supreme Court of Appeals of Virginia. Certiorari denied.
3. *County Board of Arlington County v. State Milk Commission*. From Supreme Court of Appeals of Virginia. Question of price-fixing of milk alleged to be moving in Interstate Commerce. Dismissed for want of jurisdiction.
4. *Davis, Dorothy E., et als. v. County School Board of Prince Edward County*. From U. S. District Court for the Eastern District of Virginia. School segregation statutes declared invalid.
5. *Drummond v. Commonwealth of Virginia*. Habeas Corpus. Certiorari denied.
6. *Harris, H. J., et al. v. John S. Battle, Governor, etc.* From Circuit Court City of Richmond. Constitutionality of Public Utility Seizure Act. Petition for writ of error pending.

CASES DECIDED IN THE SUPREME COURT OF APPEALS OF VIRGINIA

1. *Anderson, Robert v. Commonwealth*. From Circuit Court of Lunenburg County. Unlawful manufacture of alcoholic beverages. Affirmed.
2. *Badalson, Frank v. C. H. Lamb, Commissioner, etc.* From Hustings Court City of Richmond, Part II. Suspension of operation privileges. Affirmed.
3. *Baggett Transportation Company, Inc. v. Commonwealth*. From the State Corporation Commission. Gross receipts tax. Affirmed.
4. *Boone, John D. v. Commonwealth*. From Circuit Court of Nansemond County. Murder. Affirmed.
5. *Braxton, Waddy Willard v. Commonwealth*. From Circuit Court of Hanover County. Murder. Reversed and remanded.
6. *Cavalier Vending Corporation and Eric Reisfeld v. The State Board of Pharmacy*. From Circuit Court City of Richmond. Illegal sale of drugs. Affirmed.
7. *Coffee, George D., Jr. v. Commonwealth*. From State Corporation Commission. Revocation of insurance agent's license. Reversed.
8. *Commonwealth, ex rel. C. H. Lamb, Commissioner, etc. v. Guy Stokeley Hill, Jr.* From Corporation Court City of Norfolk. Revocation of driving license. Reversed and final judgment.
9. *Commonwealth v. Wytheville Knitting Mills Employees Welfare Asso.* From Circuit Court of Wythe County. Retail merchant's license tax. Affirmed.
10. *Cross, Robert O. v. Commonwealth*. From Circuit Court of Norfolk County. Statutory rape. Reversed.
11. *Dan River Mills, Inc. v. Unemployment Compensation Commission*. (Re: Claim of Carolyn P. Jones) From Corporation Court City of Danville. Decided in favor of Commission.
12. *Equitable Fire and Marine Insurance Co., a Rhode Island Corporation, v. Commonwealth of Virginia, at the relation of State Corporation Commission*. From State Corporation Commission. Deposit of securities with Treasurer of Virginia or revocation of its license to transact an insurance business in this State. Affirmed.
13. *Eriksen, Erik J. and Louise Close Eriksen v. James A. Anderson, State High-*

- way Commissioner. Original jurisdiction. Damage to property of petitioners resulting from operation of a stone quarry. Mandamus denied.
14. *Evans, Russell v. C. F. Joyner, Jr., Commissioner, etc.* From Circuit Court City of Richmond. Disposition of funds deposited under the Safety Responsibility Act. Affirmed.
 15. *Farquhar, Norman, et als. v. Board of Supervisors of Fairfax County, et als.* From Circuit Court of Fairfax County. Validity of Virginia Water and Sewer Authorities Act. Decision of lower court upholding the Act affirmed.
 16. *Gardner, James E. v. Commonwealth.* From Circuit Court of Chesterfield County. Operation of motor vehicle while under the influence of alcohol. Reversed.
 17. *Green, John Locke v. State Board of Elections.* Petition for Writ of Preemptory Mandamus involving validity of Congressional Redistricting Act of 1952. Mandamus refused.
 18. *Hall, Walter Lee, et al. v. John S. Battle, Governor, etc.* From Circuit Court City of Richmond. Suit for damages allegedly suffered by employees because of State seizure of bus line. Petition denied.
 19. *Harlow, Earle v. Commonwealth.* From Corporation Court City of Bristol. Robbery. Affirmed.
 20. *Harris, H. J., et al. v. John S. Battle, Governor, etc.* From Circuit Court City of Richmond. Constitutionality of the Public Seizure Act. Petition denied.
 21. *Henry, Joe v. Commonwealth.* From Circuit Court of Washington County. Murder. Affirmed.
 22. *Jones, Lawrence James v. Commonwealth.* From Corporation Court City of Norfolk. Second degree murder. Reversed and remanded.
 23. *Ladd, Robert Anderson, III v. C. H. Lamb, Commissioner, etc.* From Hustings Court City of Richmond, Part II. Suspension of operation privileges. Affirmed.
 24. *Lamb, C. H., Commissioner v. Joseph Minetree Lanzarone, Sr.* From Hustings Court City of Richmond, Part II. Suspension of operation privileges. Reversed.
 25. *Lamb, C. H., Commissioner, etc. v. Carl Glenn Lowe.* From Hustings Court City of Richmond, Part II. Suspension of operation privileges. Reversed.
 26. *Lamb, C. H., Commissioner, etc. v. William Arthur Parsons.* From Corporation Court City of Alexandria. Suspension of operation privileges. Reversed.
 27. *Lamb, C. H., Commissioner, etc. v. Oscar F. Smith, III.* From Law and Chancery Court City of Norfolk. Suspension of operation privileges. Reversed.
 28. *Leah, Noah Thomas v. Commonwealth.* From Circuit Court of Rockingham County. Statutory rape. Affirmed.
 29. *Martin, William Moses v. Commonwealth.* From Corporation Court City of Danville. Pandering. Affirmed.
 30. *Morris, Samuel T. v. Commonwealth.* From Circuit Court of Middlesex County. Unlawful manufacture of alcoholic beverages. Confessed error.
 31. *Moxley, John Ray v. Commonwealth.* From Circuit Court of Carroll County. Second degree murder. Reversed and remanded.
 32. *Nelson, Edward Louis v. C. H. Lamb, Commissioner, etc.* From Circuit Court City of Norfolk. Suspension of operation privileges. Affirmed.
 33. *Norfolk and Western Railway Co. v. Commonwealth.* From State Corporation Commission. Petition for a change of schedule. Dismissed by Norfolk and Western without prejudice.
 34. *Pennsylvania Railroad Company v. Commonwealth, ex rel State Corporation Commission.* From State Corporation Commission. Abandonment of Railroad Station. Affirmed.
 35. *Pet Dairy Products v. State Milk Commission and Southern Maid, Inc. v. State Milk Commission.* From Circuit Court City of Richmond. Fixing of milk prices. Reversed.

36. *Plymale, Robert A. v. Commonwealth.* From Circuit Court of Alleghany County. Murder. Reversed.
37. *Royster, M. L., Superintendent, Virginia State Farm, v. John Lewis Smith.* From Circuit Court of Goochland County. Habeas Corpus. Writ dismissed.
38. *Simons, Percy v. Commonwealth.* From Corporation Court City of Norfolk. Statutory burglary and grand larceny. Confessed error.
39. *Skipper, Bernard v. Commonwealth.* From Corporation Court City of Lynchburg. Rape. Reversed.
40. *Smith, John Lewis v. Commonwealth.* From Circuit Court of Page County. Burglary. Reversed.
41. *Smyth, W. Frank, Jr., Superintendent, Virginia State Penitentiary, v. Frank White.* From Circuit Court of Stafford County. Armed robbery. Reversed.
42. *Southern Dairies v. State Milk Commission.* Dismissed agreed.
43. *Spradling, Roy and Frank Jackson v. Commonwealth.* From Hustings Court City of Roanoke. Assault and battery. Affirmed.
44. *Sterling Insurance Company v. Commonwealth.* From State Corporation Commission. Revocation of license to do business in Virginia. Reversed.
45. *Tate, Clay Vincent v. C. H. Lamb, Commissioner, etc.* From Hustings Court City of Richmond, Part II. Suspension of operation privileges. Affirmed.
46. *Universal C. I. T. Corporation v. Commonwealth.* From Corporation Court City of Norfolk. Forfeiture of automobile account of illegal transportation of ardent spirits. Reversed and final judgment.
47. *Vaughan, Elvin N. and Kenneth A. v. State Board of Embalmers and Funeral Directors.* From Circuit Court City of Richmond. Engaged in business without license. Reversed and remanded.
48. *Weston, Ross Allen v. Commonwealth.* From Circuit Court of Arlington County. Contempt of court. Reversed.
49. *Wright, Aubrey G. v. Commonwealth.* From Corporation Court City of Lynchburg. Grand larceny. Affirmed.

CASES PENDING IN THE SUPREME COURT OF APPEALS OF VIRGINIA

1. *American Railway Express Company, Inc. v. Commonwealth.* From State Corporation Commission. Application for refund of annual license tax. Case now pending on question of statute of limitations.
2. *Banovitch, Joseph E. v. Commonwealth.* From Circuit Court of Lunenburg County. Unlawful wounding.
3. *Castle, Ralph v. Commonwealth.* From Circuit Court of Scott County. Grand larceny.
4. *Commonwealth v. Bettie Watkins Morris.* From Circuit Court City of Richmond. Alleged erroneous assessment of inheritance tax.
5. *Knight, Arthur J. v. Commonwealth.* From Corporation Court City of Norfolk. Burglary.
6. *Lamb, C. H., Commissioner, etc. v. James Lloyd Dixon.* From Hustings Court City of Richmond, Part II. Suspension of operation privileges.
7. *Lamb, C. H., Commissioner, etc. v. Lawrence I. Driver, Jr.* From Hustings Court City of Richmond, Part II. Suspension of operation privileges.
8. *Lamb, C. H., Commissioner, etc. v. George L. Jones.* From Hustings Court City of Richmond, Part II. Suspension of operation privileges.
9. *Lamb, C. H., Commissioner, etc. v. Joseph James Joseph.* From Hustings Court City of Richmond, Part II. Suspension of operation privileges.
10. *Lamb, C. H., Commissioner, etc. v. James Elson Searce, Jr.* From Hustings Court City of Richmond, Part II. Suspension of operation privileges.
11. *New York, Philadelphia and Norfolk Railroad Ferry Company and The Pennsylvania Railroad v. Commonwealth, ex rel. Counties of Northampton and Accomack.* From Circuit Court of Northampton County. Contempt of court.

12. *Opanowich, Viola v. Commonwealth*. From Circuit Court of Arlington County. Murder.
13. *Schwartz, Sam et als. v. E. T. White, County Clerk*. From Court of Law and Chancery City of Norfolk. Petition for refund of recordation taxes. (Note: Major M. Hillard substituted as defendant after death of E. T. White).
14. *Western State Hospital v. Heirs of F. S. Glassett*. From Circuit Court of Montgomery County. Contest of will.

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

1. *Green, John Locke v. Charles L. Fenwick*. Mandamus proceeding involving validity of certain Primary Election Laws. Mandamus refused.

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

1. *Bailey, Jodie v. W. Frank Smyth, Jr., Superintendent, Virginia State Penitentiary*. Habeas Corpus.
2. *Booker, Lyndola, et als. v. School Board City of Hampton, Virginia*. Segregation in schools. Being handled by City authorities. File closed.
3. *Martin, Maceo Conrad v. Department of Conservation and Development*. Segregation in State Parks. Dismissed without prejudice.
4. *Tate, Lavinia G. v. Department of Conservation and Development*. Segregation in State Parks. Pending.

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

1. *Williams, Agra B. v. Virginia Military Institute*. Contesting right of V. M. I. to tax under a will.

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

1. *American Oil Company, et als. v. Commonwealth*. Chancery Court City of Richmond. Income tax. Pending.
2. *Anderson, J. A., State Highway Commissioner v. Northern Virginia Power Company*. Circuit Court of Warren County. Declaratory Judgment. Pending.
3. *Anderson, J. A., State Highway Commissioner v. Abel Oney*. Circuit Court of Russell County. Chancery suit. Pending.
4. *Anderson, J. A., State Highway Commissioner v. Stuarts Draft Water Company, Inc.* Circuit Court of Warren County. Declaratory Judgment. Pending.
5. *Bibb, E. L., et al. v. Commonwealth*. Circuit Court City of Richmond. Judgment for damages for breach of contract.
6. *Blair, John D., Jr., etc. v. C. W. Woodson, Jr., etc.* Circuit Court City of Richmond. Permanent injunction granted.
7. *Bryant, Jimmie Thomas, etc. v. Texas Mutual Insurance Co. et al.* Circuit Court City of Richmond. Agent's claim against deposit bond.
8. *Bush-Glover Housing Company v. Commonwealth*. Circuit Court City of Norfolk. Petition for correction of Contractor's license tax. Petition abandoned after Answer filed by Commonwealth.

9. *Commonwealth v. Bank of Waverly, Inc., etc.* Circuit Court of Sussex County. Suit involving escheat property. Pending.
10. *Commonwealth v. Charles Hill Carter.* Circuit Court City of Richmond. Inheritance and gift taxes. Pending.
11. *Commonwealth, ex rel Virginia State Apple Commission v. Mrs. Jacob Gardner and Mrs. George A. Bowers, Adm.* Circuit Court City of Richmond. Suit for apple excise tax. Pending.
12. *Commonwealth, ex rel H. G. Gilmer, Comptroller v. Blue Ridge Asphalt Paving Company, Inc.* Circuit Court of Frederick County. Motion for judgment. Pending.
13. *Commonwealth v. Mrs. Jean Hunt.* Circuit Court of Pulaski County. Bill for injunction. Violation of fire laws. Granted.
14. *Commonwealth v. Local Union No. 10, etc. et als.* Law and Equity Court City of Richmond. Injunction under Right to Work Act. Dismissed without prejudice after Stipulation of Compliance filed by defendants.
15. *Commonwealth v. Mrs. Annie Tamer.* Circuit Court of Wise County. Bill for injunction. Violation of fire laws. Pending.
16. *Cosby, Clifton B. v. Medical College of Virginia.* Circuit Court City of Richmond. Petition for recovery of salary. Demurrer sustained. Petition amended. Pending.
17. *Dillard, B. O., Adm. Estate of Willie Fink v. Commonwealth.* Court of Law and Chancery City of Roanoke. Protesting lien for inheritance taxes. Pending.
18. *Farquhar, Norman, et als. v. Board of Supervisors of Fairfax County, et als.* Circuit Court of Fairfax County. Validity of Virginia Water and Sewer Authorities Act. Constitutionality upheld.
19. *Hall, Walter Lee, et al. v. John S. Battle, Governor, etc.* Circuit Court City of Richmond. Suit for damages allegedly suffered by employees because of State seizure of bus line. Demurrer of the Governor sustained. Suit dismissed.
20. *Harris, H. J. et al. v. John S. Battle, Governor.* Circuit Court City of Richmond. Constitutionality of Public Utility Seizure Act. Act held constitutional.
21. *Hudson, Margaret W. v. Commonwealth.* Hustings Court City of Richmond, Part II. Petition for correction of assessment of income taxes. Pending.
22. *McBride, A. M. v. Preferred Accident Insurance Co. of New York.* Circuit Court City of Richmond. Decree of Court entered. Appeal to Supreme Court now pending.
23. *Martin, J. G. v. J. A. Anderson, State Highway Commissioner, and J. F. Royall.* Circuit Court of York County. Declaratory judgment. Pending.
24. *Meta, Helen, Estate of, and Tyson Janney.* Corporation Court City of Alexandria. Pending.
25. *Morris, Bettie Watkins v. Commonwealth.* Circuit Court City of Richmond. Petition for correction of assessment of inheritance tax. Granted. Appealed to Supreme Court.
26. *Nichols, t/a Onley Grain Company v. Commonwealth.* Circuit Court of Accomack County. Petition for correction of assessment of wholesale merchant's license. Petition denied and dismissed.
27. *Oliver, Marion Carter, Estate of v. Commonwealth.* Circuit Court City of Richmond. Petition for refund of inheritance taxes. Pending.
28. *Overnight Transportation Co. v. H. G. Gilmer, Comptroller.* Circuit Court City of Richmond. Petition for refund of gross receipts road taxes. Pending.
29. *Prentice, Grady J., t/a Prentice Poultry Co. v. Commonwealth.* Hustings Court City of Richmond, Part II. Protesting assessment of wholesale merchant's license. Dismissed agreed.
30. *Robinson, Herbert, Adm. v. Commonwealth.* Circuit Court of Page County. Petition for refund of inheritance tax. Dismissed.

31. *Safeway Stores, Inc. v. Virginia Milk Commission*. Circuit Court City of Richmond. Suit involving order of Milk Commission establishing certain prices. Judgment for Commonwealth. Appeal noted to Supreme Court of Appeals of Virginia.
32. *Snead, S. C., Lumber Co. v. Commonwealth*. Circuit Court of Roanoke County. Petition for correction of wholesale merchant's license. Petition denied.
33. *Southside Co-Operative Milk Producing Association v. State Milk Commission*. Circuit Court City of Richmond. Suit involving order of Milk Commission establishing certain prices. Pending.
34. *Stephens, J. P., Co. v. C. H. Lamb, Commissioner, etc.* Circuit Court City of Richmond. Petition for refund of fuel tax. Pending.
35. *Sydnor, Charles W. v. Commonwealth*. Hustings Court City of Richmond, Part II. Petition for correction of assessment of income taxes. Pending.
36. *Terjean, Henry v. Commonwealth*. Circuit Court City of Norfolk. Petition for correction of assessment of gift tax. Pending.
37. *The Texas Company, In the Matter of*. Hustings Court City of Richmond, Part II. Wholesale merchant's license. Dismissed without prejudice.
38. *Thompson, Blanche B. v. Commonwealth*. Circuit Court of Tazewell County. Petition on appeal from tax assessment. Pending.
39. *Twin City Market, Inc. v. Lynn-Kaylor Company, Inc. et als.* Corporation Court City of Bristol. Violation of fire regulations. Pending.
40. *Wilson, Willie Woodrow v. Commonwealth*. Circuit Court for Henrico County. Alleged erroneous assessment of income taxes. Pending.

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

1. *Allen, Woodrow Dennette v. C. H. Lamb, Commissioner, etc.* Law & Chancery Court of the City of Roanoke. Appeal from Commissioner's action in revoking operator's license. Judgment for the Commissioner.
2. *Allerton, John Stephen v. C. H. Lamb, Acting Commissioner, etc.* Hustings Court City of Richmond, Part II. Suit to enjoin Commissioner from revoking operator's license. Commissioner's action affirmed.
3. *Alward, Harry Everett v. C. H. Lamb, Acting Commissioner, etc.* Circuit Court of Fairfax County. Bill for injunction. Order of revocation withdrawn. Relief granted.
4. *Anderson, Bernard Eugene v. Chester H. Lamb, Acting Commissioner, etc.* Hustings Court City of Richmond, Part II. Appeal from Commissioner's action in revoking operator's license. Judgment for the petitioner.
5. *Armstrong, Howard Ellsworth v. C. H. Lamb, Acting Commissioner, etc.* Law & Equity Court, Part II, City of Richmond. Appeal from Commissioner's action in revoking operator's license and registration. Appeal withdrawn.
6. *Baggett Transportation Co., Inc. v. C. F. Joyner, et als.* Circuit Court City of Richmond. License tax. Pending.
7. *Bell, Ellis Walter v. C. H. Lamb, Acting Commissioner, etc.* Corporation Court City of Alexandria. Appeal from Commissioner's action in revoking operator's license. Commissioner's action affirmed.
8. *Benson, Sidney v. C. H. Lamb, Acting Commissioner, etc.* Hustings Court City of Richmond. Appeal from Commissioner's action in revoking operator's license. Judgment for complainant.
9. *Black, Julian Warren v. C. H. Lamb, Acting Commissioner, etc.* Hustings Court City of Richmond, Part II. Bill for injunction. Judgment for the Commissioner.

10. *Bly, Roland Allison v. C. H. Lamb, Acting Commissioner, etc., et als.* Circuit Court of Arlington County. Appeal from Commissioner's action in revoking operator's license and registration under Section 46-436. Relief granted.
11. *Boles, Ivan Burgess v. C. H. Lamb, Acting Commissioner, etc.* Circuit Court of Roanoke County. Appeal from Commissioner's action in revoking driver's license. Judgment for the Commissioner.
12. *Bova, Earl Rudy v. Commonwealth of Virginia.* Hustings Court City of Roanoke. Appeal from Commissioner's action in revoking operator's license. Commissioner's action modified and affirmed.
13. *Bryan, Alice W. v. Chester H. Lamb, Acting Commissioner, etc.* Hustings Court City of Richmond, Part II. Suit to enjoin Commissioner from revoking operator's license. Commissioner's action affirmed.
14. *Butler, James Harris v. C. H. Lamb, Acting Commissioner, etc.* Hustings Court City of Richmond, Part II. Suit to enjoin Commissioner from revoking operator's license. Pending.
15. *Campbell, George Wendall v. C. H. Lamb, Commissioner, etc.* Law & Chancery Court City of Norfolk. Suit to enjoin Commissioner from revoking operator's license. Pending.
16. *Cobaugh, Leon Rodney v. C. H. Lamb, Acting Commissioner, etc.* Circuit Court of Hanover County. Bill for injunction. Suit dismissed. Commissioner's action affirmed.
17. *Cohron, William Sarles v. C. H. Lamb, Acting Commissioner, etc.* Circuit Court of Botetourt County. Appeal from Commissioner's action in revoking operator's license under 46-418. Relief granted.
18. *Coleman, Alonzo v. C. H. Lamb, Acting Commissioner, etc.* Hustings Court City of Roanoke. Bill for injunction. Judgment for the Commissioner.
19. *Commonwealth of Virginia, ex rel, C. H. Lamb, Acting Commissioner, etc. v. George H. Ellis.* Circuit Court City of Richmond. Petition for order restraining defendant from operating a motor vehicle and directing him to surrender operator's license. Pending.
20. *Commonwealth of Virginia v. Justin Henry Litton.* Circuit Court of Dickenson County. Motion to quash execution to avoid payment of penalty for exceeding load limit. Pending.
21. *Cook, C. H. v. C. H. Lamb, Acting Commissioner, etc.* Hustings Court, City of Richmond, Part II. Suit to enjoin Commissioner from revoking operator's license. Commissioner's action affirmed.
22. *Cooley, Richard Calvin v. C. H. Lamb, Acting Commissioner, etc.* Hustings Court City of Roanoke. Bill for injunction to restrain Commissioner from revoking driver's license. Relief granted.
23. *Dewault, Nathaniel v. C. H. Lamb, Acting Commissioner, etc.* Corporation Court City of Alexandria. Bill for injunction to restrain Commissioner from revoking driver's license. Relief denied.
24. *Doyle, Rawleigh Lee v. Commissioner of Motor Vehicles.* Circuit Court of Roanoke County. Appeal from action of Commissioner revoking driver's license. Relief denied.
25. *Eanes, Hiawatha Wayne v. Commonwealth.* Circuit Court of Floyd County. Suspension of operating privileges. Pending.
26. *Frank, Sidney B. v. C. H. Lamb, Commissioner, etc.* Circuit Court City of Warwick. Suit to restrain Commissioner from revoking operator's license. Appeal withdrawn. Commissioner's action affirmed.
27. *Fuller, William Wallace v. C. H. Lamb, Commissioner, etc.* Circuit Court of the County of James City and the City of Williamsburg. Appeal from Commissioner's action in revoking operator's license. Pending.
28. *Gaines, Percy Edward v. C. H. Lamb, Acting Commissioner, etc.* Hustings Court City of Richmond, Part II. Suit to enjoin Commissioner from revoking operator's license. Judgment for the petitioner.

29. *Gee, John William v. Commissioner of the Division of Motor Vehicles.* Circuit Court of Nottoway County. Appeal from action of Commissioner revoking driver's license. Appeal abandoned. Revocation order enforced.
30. *Gee, Robert C. and John v. Commissioner of Division of Motor Vehicles.* Circuit Court of Lunenburg County. Appeal from action of Commissioner in revoking dealer's license. Revocation order modified.
31. *Glasgow & Davis Company v. H. G. Gilmer, Comptroller.* Circuit Court City of Richmond. Action to recover penalty under overloading statutes. Pending.
32. *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. Judgment for the Commissioner.
33. *Gulley, Jack Marshall v. C. H. Lamb, Acting Commissioner, etc.* Hastings Court City of Richmond, Part II. Suit to enjoin Commissioner from revoking operator's license. Commissioner's action affirmed.
34. *Hagner, Alexander Burton v. C. H. Lamb, Commissioner, etc.* Law & Equity Court of the City of Richmond, Part 2. Appeal from Commissioner's action in revoking operator's license. Pending.
35. *Hardaway, Flaccus Horace, Jr. v. C. H. Lamb, Acting Commissioner, etc.* Hastings Court City of Richmond, Part 2. Suit to enjoin Commissioner from revoking operator's license. Judgment for the petitioner.
36. *Hartman, Bruce Reiff v. C. H. Lamb, Acting Commissioner, etc.* Circuit Court of Arlington County. Suit to enjoin Commissioner from revoking operator's license. Judgment for the Commissioner.
37. *Hawks, John Lester v. C. H. Lamb, Acting Commissioner, etc.* Hastings Court, Part II, City of Richmond. Bill for injunction to restrain Commissioner from revoking operator's license. Judgment for the Commissioner.
38. *Hensley, Ray Ellsworth v. C. H. Lamb, Acting Commissioner, etc.* Corporation Court City of Alexandria. Suit to enjoin Commissioner from revoking operator's license. Judgment for the Commissioner.
39. *Johnston, George W. v. C. H. Lamb, Acting Commissioner, etc.* Hastings Court City of Richmond, Part II. Bill for injunction to restrain Commissioner from revoking driver's license. Appeal abandoned. Revocation order enforced.
40. *Kingery, James Henry v. C. H. Lamb, Commissioner, etc.* Circuit Court of the City of Roanoke. Appeal from Commissioner's action in revoking operator's license. Pending.
41. *Kirby, Roy Marshall v. Chester H. Lamb, Acting Commissioner, etc.* Hastings Court City of Richmond, Part II. Suit to enjoin Commissioner from revoking operator's license under Section 46-436. Suit abandoned. Order of suspension enforced.
42. *Kouri, Albert v. C. H. Lamb, Acting Commissioner, etc.* Circuit Court of Princess Anne County. Suit to enjoin Commissioner from revoking operator's license. Judgment for the Commissioner.
43. *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. Relief granted.
44. *Long, Inez Zimmerman v. Commissioner of Division of Motor Vehicles.* Circuit Court of Stafford County. Appeal to avoid filing security under provisions of Section 46-436. Relief granted.
45. *Marlowe, Eugene Gerald v. C. H. Lamb, Acting Commissioner, etc.* Circuit Court of Fairfax County. Suit to enjoin Commissioner from revoking operator's license. Judgment for the Commissioner.
46. *McConnell, Everett Beverly v. C. H. Lamb, Acting Commissioner, etc.* Corporation Court City of Alexandria. Suit to enjoin Commissioner from revoking operator's license. Judgment for the Commissioner.

47. *Medley, Ben Tillman v. C. H. Lamb, Commissioner, etc.* Court of Law & Chancery, City of Norfolk. Suit to enjoin Commissioner from revoking operator's license. Commissioner's action affirmed.
48. *Metzler, Cuvier A., Jr. v. C. H. Lamb, Acting Commissioner, etc.* Circuit Court of Arlington County. Suit to enjoin Commissioner from revoking operator's license. Judgment for the Commissioner.
49. *Midgett, George Franklin v. C. H. Lamb, Acting Commissioner, etc.* Circuit Court City of Richmond. Petition for mandamus to enjoin Commissioner from revoking operator's license. Petition dismissed.
50. *Miller, Kenneth Fortune v. C. H. Lamb, Acting Commissioner, etc.* Hustings Court City of Richmond, Part II. Suit to enjoin Commissioner from revoking operator's license. Judgment for the petitioner.
51. *Mingle, James D. v. C. H. Lamb, Acting Commissioner, etc.* Corporation Court of City of Bristol. Bill for injunction to restrain Commissioner from revoking operator's license. Judgment for the Commissioner.
52. *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. Relief granted.
53. *Montague, James Edward v. Chester H. Lamb, Acting Commissioner, etc.* Hustings Court City of Richmond, Part II. Suit to enjoin Commissioner from revoking operator's license. Judgment for the petitioner.
54. *Moore, Lowenburg H. v. C. H. Lamb, Commissioner, etc.* Circuit Court of Westmoreland County. Appeal from Commissioner's action in revoking operator's license. Relief granted.
55. *Neff, Bill Vermont v. C. H. Lamb, Acting Commissioner, etc.* Circuit Court of Rockingham County. Appeal from Commissioner's action in revoking driver's license. Commissioner's action affirmed.
56. *Owen, Floyd Thomas v. C. H. Lamb, Acting Commissioner, etc.* Hustings Court City of Richmond, Part II. Suit to enjoin Commissioner from revoking operator's license. Judgment for the petitioner.
57. *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. Commissioner's action affirmed.
58. *Patterson, Rubye Halstead v. Commissioner of the Division of Motor Vehicles.* Corporation Court City of Norfolk. Appeal from Commissioner's action in revoking operator's license under Section 46-424. Pending.
59. *Pinion, Thomas P., Jr. v. Commonwealth of Virginia, etc.* Circuit Court of Loudoun County. Appeal from Commissioner's action in revoking operator's license. Judgment for Pinion.
60. *Rankin, John Benjamin v. C. H. Lamb, Acting Commissioner, etc.* Law & Chancery Court City of Norfolk. Appeal from Commissioner's action in revoking operator's license. Commissioner's action affirmed.
61. *Robbins, Meredith M. v. Chester H. Lamb, etc., et als.* Circuit Court of Lancaster County. Suit to enjoin Commissioner's action in revoking operator's license and registration. Suit dismissed.
62. *Roch, William Elmhirst v. Commissioner of Division of Motor Vehicles.* Circuit Court of Roanoke County. Appeal from action of Commissioner in revoking driver's license. Commissioner's action affirmed.
63. *Rush, Claude v. C. H. Lamb, Acting Commissioner, etc.* Corporation Court of the City of Alexandria. Appeal from Commissioner's action in revoking operator's license. Relief denied.
64. *Satterfield, Julian Yancey, Jr. v. Commissioner of the Division of Motor Vehicles of Virginia.* Circuit Court City of Richmond. Appeal from Commissioner's action in revoking operator's license. Pending.
65. *Shiflett, Ashton Eugene v. Commissioner of Division of Motor Vehicles.* Circuit Court of Fairfax County. Appeal from order of Commissioner revoking driver's license. Commissioner's action affirmed.

66. *Showalter, Marvin Olen v. C. H. Lamb, Commissioner, etc.* Hustings Court of the City of Richmond, Part 2. Appeal from Commissioner's action in revoking operator's license. Relief denied.
67. *Smith, Roy Douglas v. C. H. Lamb, Acting Commissioner, etc.* Hustings Court City of Roanoke. Bill for injunction to restrain Commissioner from revoking driver's license. Commissioner's action affirmed.
68. *Smith, T. Oscar v. C. H. Lamb, Acting Commissioner, etc.* Circuit Court of Arlington County. Suit to enjoin Commissioner's action in revoking operator's license. Relief denied.
69. *Snyder, Wayne Allen v. C. H. Lamb, Acting Commissioner, etc.* Circuit Court of Fairfax County. Appeal from Commissioner's action revoking operator's license. Relief denied.
70. *Stanley, Thomas Henry v. Commonwealth of Virginia.* Circuit Court of Culpeper County. Appeal from Commissioner's action in revoking operator's license. Commissioner's action modified and affirmed.
71. *Sternheimer, Lewis v. Commissioner of Division of Motor Vehicles.* Circuit Court City of Richmond. Appeal from action of Commissioner in revoking driver's license. Pending.
72. *Tabakin, Burnley Milton v. Commissioner of Division of Motor Vehicles.* Circuit Court City of Norfolk. Bill to enjoin Commissioner in revoking driver's license. Commissioner's action affirmed.
73. *Tester, Paul Edward v. Commonwealth of Virginia.* Corporation Court of City of Bristol. Appeal from Commissioner's action in revoking operator's license. Relief denied.
74. *Thorn, Clayton Thomas v. Commissioner of Division of Motor Vehicles.* Circuit Court City of Alexandria. Appeal from action of the Commissioner in refusing dealer's license. Pending.
75. *Weatherington, Thomas Nelson v. C. H. Lamb, Acting Commissioner, etc.* Hustings Court City of Richmond, Part II. Appeal from Commissioner's action in revoking operator's license. Commissioner's action affirmed.
76. *Weingart, Hyman Max v. Chester H. Lamb, Acting Commissioner, etc.* Hustings Court City of Richmond, Part II. Appeal from Commissioner's action in revoking operator's license. Judgment for the petitioner.
77. *Werth, Samuel v. C. H. Lamb, Acting Commissioner, etc.* Law & Chancery Court City of Norfolk. Appeal from Commissioner's action in revoking operator's license. Judgment for the Commissioner.
78. *Wertheim, Kurt v. C. H. Lamb, Acting Commissioner, etc.* Circuit Court of Arlington County. Bill for injunction to restrain Commissioner from revoking driver's license. Commissioner's action affirmed.
79. *Wetmore, Don Oscar v. C. H. Lamb, Acting Commissioner, etc.* Hustings Court City of Richmond, Part II. Appeal from Commissioner's action in revoking operator's license. Relief denied.
80. *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.

CASES TRIED OR PENDING IN THE CIRCUIT, HUSTINGS, LAW AND
EQUITY, CHANCERY AND CORPORATION COURTS OF THE
STATE IN WHICH THE UNEMPLOYMENT COMPENSA-
TION COMMISSION WAS INVOLVED

1. *Dan River Mills, Inc. v. Unemployment Compensation Commission of Virginia* (Re Claim of Nellie L. Belton) Corporation Court City of Danville. Pending.
2. *Malvern Manor Corporation, Nathan S. Gumenick, et al. v. Unemployment Compensation Commission.* Chancery Court City of Richmond. Pending.

3. *Martin, Everett J. v. Unemployment Compensation Commission, and William S. Newbill Roofing Company.* Hustings Court City of Portsmouth. Pending.
4. *Milliner, Mary C. v. Unemployment Compensation Commission, and American Viscose Corporation, et al.* Hustings Court City of Roanoke. Pending.
5. *Turpin, Ethel Hall v. Unemployment Compensation Commission, et al.* Corporation Court City of Danville. Pending.
6. *Unemployment Compensation Commission of Virginia v. W. H. Abel and 73 other similar suits.* Circuit Court City of Richmond.
7. *Unemployment Compensation Commission of Virginia v. Earl Johnson.* Circuit Court City of Richmond. Decided in favor of Commission.

CASES DECIDED BY STATE CORPORATION COMMISSION

1. *Adley Express Company v. Commonwealth.* Petition for refund of gross receipts tax. Denied.
2. *Commonwealth v. Charles T. Crowder.* Show cause order for failure to pay gross receipts tax. Fine ordered unless tax paid.
3. *Commonwealth v. George T. Ellis.* Show cause order for failure to pay gross receipts tax. Fine ordered unless tax paid.

HABEAS CORPUS CASES

1. *Adams, Henry V. v. W. Frank Smyth, Jr., Superintendent, Virginia State Penitentiary.* Circuit Court of Hanover County. Petitioner released. Appeal noted.
2. *Allen, Fred v. W. Frank Smyth, Jr., Superintendent, etc.* Circuit Court of the U. S. for the Fourth Circuit. Affirmed. District Court's denial of petition.
3. *Atkins, Herman v. Frank Cavedo, Sergeant of the city of Richmond.* Hustings Court, City of Richmond, Part II. Petition denied and dismissed. Petition for appeal denied by the Supreme Court of Appeals.
4. *Barrett, Paul v. W. Frank Smyth, Jr., Superintendent, etc.* Hustings Court, City of Richmond, Part II. Petitioner released.
5. *Conroy, William S. v. W. Frank Smyth, Jr., Superintendent, etc.* Circuit Court of Bedford County. Petition denied and dismissed.
6. *Hanson, Jerome Silva v. W. Frank Smyth, Jr., Superintendent, etc.* Circuit Court of Lunenburg County. Petition denied and dismissed.
7. *Harris, Walter B. v. W. Frank Smyth, Jr., Superintendent, etc.* Hustings Court, City of Richmond, Part II. Petition for release denied.
8. *Hill, Arthur v. W. Frank Smyth, Jr., Superintendent, etc.* Hustings Court, City of Richmond, Part II. Petitioner released.
9. *Hines, Raymond v. W. Frank Smyth, Jr., Superintendent, etc.* Hustings Court, City of Richmond, Part II. Petition for release denied.
10. *Isom, Willard v. W. Frank Smyth, Jr., Superintendent, etc.* Hustings Court, City of Richmond, Part II. Petition for release denied.
11. *Lilly, Leon v. W. Frank Smyth, Jr., Superintendent, etc.* Hustings Court, City of Richmond, Part II. Petition for release denied.
12. *Otley, Frank Howard v. W. Frank Smyth, Jr., Superintendent, etc.* Hustings Court, City of Richmond, Part II. Petition denied and dismissed.
13. *Powell, Earnest v. W. Frank Smyth, Jr., Superintendent, etc.* Hustings Court, City of Richmond, Part II. Petition for release denied.
14. *Rainey, Arthur v. W. Frank Smyth, Jr., Superintendent, etc.* Hustings Court, City of Richmond, Part II. Petition denied and dismissed. Petition for appeal denied by the Supreme Court of Appeals.
15. *Robey, Joe, Jr. v. W. Frank Smyth, Jr., Superintendent, etc.* Circuit Court of Middlesex County. Petition for release denied.

16. *Tinder, Roy W. v. W. Frank Smyth, Jr., Superintendent, etc.* Hustings Court, City of Richmond, Part II. Pending.
17. *Via, Lounders Wilson v. W. Frank Smyth, Jr., Superintendent, etc.* Circuit Court of Hanover County. Petitioner released.
18. *Williams, Charles v. W. Frank Smyth, Jr., Superintendent, etc.* Hustings Court of the City of Portsmouth. Pending.

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

1953

July 10	Floyd W. Wynes, Jr.
July 13	James E. McVea
July 20	Neal Galloway
July 27	Howard Arnold Carson (Carlson)
July 28	Robert R. Stigall
July 29	Andrew John Patla
Sept. 14	James H. Franck
Sept. 28	Richard A. Spangler
Sept. 29	Troy Linwood Graves
Oct. 5	Joe Nathan Gibson
Oct. 8	Woodrow Ledbetter
Oct. 9	Joseph C. Hines
Oct. 16	C. V. Cooley
Nov. 30	James P. Lewis
Dec. 15	Earl Clifford Chenault
Dec. 16	E. W. Haslup
Dec. 17	Fred Stevens
Dec. 28	Cecil Foley
Dec. 30	David I. Livingston
Dec. 31	John W. Croston

1954

Feb. 5	William O. Sigmon
Feb. 11	Janie Taylor
Mch. 15	Ralph B. Fadeley
April 2	Arthur Chaney
April 15	Margaret Hendricks Lombard
May 25	Arthur Lee Richards
June 4	Freddie Wade

OPINIONS

AGRICULTURE—Virginia Truck Experiment Station; leasing or selling property. F-268k (136)

December 29, 1953.

MR. WILLIAM H. BRITTINGHAM, *Director*,
Virginia Truck Experiment Station.

This is in reply to your letter of December 11, 1953, in which you state that you have been approached by the Thompson Mahogany Company with a request that it be allowed to use about 2.8 acres of land owned by the Virginia Truck Experiment Station, most of which is an artificial lake. You state that the Truck Station has no objection to the temporary use of such lake by the Thompson Mahogany Company for the purpose of storing timber, in that the property is not being utilized by the Truck Station.

There is no legal objection to the Truck Station granting a revocable permit to the Thompson Mahogany Company with the understanding that the land in question will be vacated by such company immediately upon request.

You also ask to be advised as to the proper procedure involved in disposing of the land in question inasmuch as the Truck Station has no further need of the same. In the absence of legislative authority a State Agency or institution has no authority to dispose of real property. I suggest that the Truck Station give consideration to seeking legislative authority to dispose of this property at the next session of the General Assembly.

APPROPRIATION ACT—Transfer of funds; from Item 122 to 123; Supplemental Retirement System. F-13 (109)

December 3, 1953.

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

This is in reply to your letter of November 30, 1953 which reads, in part, as follows:

"This office has received a request from the Director of the Virginia Supplemental Retirement System for authority to transfer \$204,286.78 from the appropriation made by Item 122 of the general Appropriation Act for this biennium to the appropriation made by Item 123."

Items 122 and 123 of the Appropriations Act provide, respectively, for the employer's social security payment on behalf of State employees and reimbursement to the local school boards of the actual employer's social security payments made by them on behalf of teachers. The question presented is whether a portion of the appropriation for the former purpose may be transferred to the latter purpose. Section 48 of the Appropriation Act provides, among other things, that the governing board of any State department, institution or other agency may transfer any such appropriation from the object

for which specifically appropriated to some other object definitely and closely related to the object for which the appropriation was made if an appropriation is also made to the said related object and, 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 the appropriation.

Items 122 and 123 both contain appropriations pursuant to Chapter 2 of the Acts of Assembly of 1952. Both of the appropriations were made in furtherance of the express desire of the legislature to obtain social security coverage for the employees of the State and school teachers. It is my opinion that we would be justified in saying that Item 123 is definitely and closely related to Item 122 and that the transfer can be authorized.

**BAIL AND RECOGNIZANCE—Disposition of cash bail upon conviction;
fine to come out. F-173 (317)**

June 10, 1954.

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

I have your letter of June 1, from which I quote as follows:

"A question has arisen concerning the interpretation of Section 19-108 of the Code of Virginia, 1950.

"A defendant charged with a misdemeanor and cash bond is posted for his appearance in the Trial Justice Court by a third party. The defendant appears in court on the day of trial and there is no default on the recognizance. The defendant is tried and found guilty and fined. The defendant desires to serve a sentence in jail in lieu of payment of the fine and costs imposed. Is the Trial Justice required to apply the cash bond to the payment of fine and costs, or does the provision of said section only apply where the defendant is tried in his absence and found guilty as aforesaid? I would also like to know if the fine and costs should be paid out of the cash recognizance when same is posted by the defendant."

Section 19-108 of the Code insofar as it is pertinent to your inquiry reads as follows:

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

Construing the above language, I think it is reasonably plain that the Trial Justice trying the case, if the defendant is found guilty, shall apply the money to the payment of the fine and costs, whether the defendant is tried in his absence or not. It also seems to me plain that this is true, whether or not the money is put up by the defendant or by someone for him. From a reading of the section I do not see how any other conclusion can be reached.

BAIL AND RECOGNIZANCE—Docketing lien against surety; duty of clerk. F-181 (65)

September 28, 1953.

HONORABLE ROBERT D. STONER, *Clerk*,
Circuit Court of Botetourt County

This is in reply to your letter of September 22, 1953, a portion of which is quoted:

"An automobile is attached by the State, and a court order is later entered allowing the owner to repossess it upon giving bond in a definite amount. The owner offers as security on such bond a non-resident of the county, who owns land in a neighboring city.

"If you do not feel that the recognizance should be docketed in the judgment lieu docket before it is forfeited (as suggested by Mr. Staples in the opinions of the Attorney General 1940-1941 page 129), what other steps, if any, can I take to keep the property of the surety from being disposed of? Can I require a deed of trust and have this recorded, or would that violate the constitutional rights of a person of whom bond is required?

"Does the liability of the clerk cease when he has taken a bond that is good at the time it is taken?"

The obligation of a surety on a recognizance bond is a personal one which does not mature until there has been a default by his principal. Under our statutes there is no lien against the surety's property until judgment has been rendered following forfeiture on the bond. Therefore, no action may be taken to evidence any lien against the surety's property until such judgment has been rendered.

I am of the opinion that the extent of the clerk's responsibility is to assure himself of the soundness of the surety at the time the bond is taken.

BAIL AND RECOGNIZANCE—Forfeiture; non-appearance, but lawyer present. F-27 (184)

February 19, 1954.

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

This will acknowledge receipt of your letter of February 16, in which you present the following questions:

"An accused is charged with a misdemeanor before the Trial Justice of Frederick County, Virginia and is released on a property bond furnished by another and after several continuances fails to appear at the trial except by counsel. He offers no evidence and is found guilty and sentenced to jail and to pay a fine and costs. He cannot be found thereafter.

"1. Is his appearance at trial, by counsel, sufficient to prevent the forfeiture of the bond for his appearance?

"2. Is the bond liable for fine and costs?

"3. Is the same rule applicable to cash bond given either by the accused or by another?"

Dealing with your first question, I assume that the condition of the recognizance is that the person charged with the offence will appear before the Trial Justice at such time or times as may be prescribed by the Court or officer taking the recognizance. The accused does not so appear and in this situation, in my opinion, appropriate steps may be taken for the forfeiture of the recognizance. I do not think that mere appearance by counsel is sufficient to prevent the forfeiture.

Replying to your second question, I beg to advise that in the case of an ordinary recognizance it is my opinion that there is no liability on the surety for the fine and costs that may be assessed against the accused.

As to question number three, relating to a cash bond, I direct your attention to Section 19-108 of the Code dealing with the disposition of the money deposited. This section will, I think, answer your inquiry, but, if it does not, I will be glad if you will write me further.

BAIL AND RECOGNIZANCE—Liability of surety; for fine and cost of accused. F-27 (215)

March 22, 1954.

HONORABLE J. WILTON HOPE,
Commonwealth's Attorney for City of Hampton.

In your letter dated March 19, 1954, you request my opinion on the following:

"In several instances, in the former Trial Justice Court of Elizabeth City County, Virginia, which was also the Police Court of the City of Hampton, Virginia, a bond with sufficient surety was entered into for a defendant's appearance. On the date of his appearance, he was fined and given additional time to pay the fine. No forfeiture was indicated on the warrant at any time and a commitment was finally issued and usually the commitment indicated that the person could not be found. The question arises, is the surety on the bond still liable under these circumstances, as the case has never been finally disposed of, as the defendant has failed to pay his fine in the time allowed by the Court. Could a forfeiture on the bond be requested at this time and a Scire Facias issued against the surety even though the commitment for the fine has been issued?"

Since your question concerns the liability of a surety on an appearance bond and the principal made his appearance and fine was imposed against him, I construe your question to be is the surety liable for the fine and cost which have not been paid.

This office, on February 19, 1954, in an opinion to the Honorable Joseph A. Massie, Jr., Attorney for the Commonwealth of Frederick County, answered this question in the negative. The opinion, in this respect, reads as follows:

"Replying to your second question, I beg to advise that in the case of an ordinary recognizance it is my opinion that there is no liability on the surety for the fine and costs that may be assessed against the accused."

**BAIL AND RECOGNIZANCE—Person may leave state while under.
F-27 (169)**

February 3, 1954.

HONORABLE P. J. MARSHALL, *Clerk*,
Corporation Court, Winchester.

This is in reply to your letter of February 2, 1954 in which you request my opinion as to whether defendants in criminal cases who are admitted to bail and give recognizance under § 19-104 may leave the State so long as they return on the appearance date set in the recognizance.

It is my opinion that there is no condition of recognizance prescribed by § 19-104 which would prohibit a person from leaving the State so long as he returns and appears before the court at such time prescribed for his appearance in the recognizance.

BAIL AND RECOGNIZANCE—Surety not bound after accused tried and convicted. F-27 (31)

August 7, 1953.

HONORABLE HENRY D. GARNETT,
Attorney for the Commonwealth, Warwick.

This is with reference to your letter of July 24, 1953, a portion of which I quote:

"I am enclosing herewith a blank Commonwealth Warrant, on the back of which is printed an Appearance Bond, the conditions of which have brought rise to a question that I am now submitting to your office for an opinion.

"Quite often in our Municipal Court when an accused is fined for an offense, he is given time in which to answer his judgment, that is to say, to pay his fine and costs where no jail sentence is imposed. More often than not the Surety is not present in Court.

"The question is, should the accused fail to appear on the date specified on which he is to pay his fine and or costs, could the Commonwealth move the Court for a *scire facias* on the bond under the terms thereof?"

The conditions of an appearance bond are in the nature of a guarantee that an accused will appear to answer the charge contained in the warrant of arrest. This guarantee continues until the charge is finally disposed of, even through the stages of appeal. However, when the accused has appeared as ordered, is tried and convicted, I am of the opinion that the conditions of the bond are no longer in effect. If, after conviction, the accused is allowed a period within which to satisfy the judgment rendered against him, the court could protect itself against his non-appearance by requiring an additional bond.

In view of the foregoing I am of the opinion that the Commonwealth could not proceed on a *scire facias* on the original bond which was posted for the appearance of the accused.

BAIL AND RECOGNIZANCE—Witnesses; non-resident may be required to give. F-293 (15)

July 16, 1953.

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

I acknowledge receipt of your letter dated July 15, 1953, and quote the same as follows:

"I would like to have the benefit of your opinion as to the proper procedure for the State Police to follow in criminal cases where a witness to an offence is a non-resident of Virginia. It is my understanding that a witness should be bonded for appearance. If they cannot put up bond can they be jailed pending bond? If they are jailed, what charge is made against them?"

If a person is deemed by the court to be a material witness in a criminal case, whether a resident or non-resident of Virginia, the court may require a recognizance with or without surety for his appearance at the trial. If recognizance is not given by such material witness as required by the court, such person may be committed to jail. Section 19-111 of the Code provides:

"A person not giving, and for whom no other person gives, a recognizance required shall be committed to jail. He shall be discharged therefrom when such recognizance is given before the court or a conservator of the peace; or, if it be to appear and give evidence, when such evidence is given; or, if it be to keep the peace and be of good behavior, when the period for which it was required has elapsed; or, in any case, when the discharge of such person is directed by the court in whose jail he is."

In view of the plain language of this statute, I am of the opinion if a material witness cannot give bond as required by the court, he can be committed to jail until such bond is furnished or the evidence of the witness is given.

If a material witness were committed to jail, it would be on the charge of failing to give recognizance required by the court.

BANKS—Branches in counties not adjacent to city of parent bank. F-28 (178)

February 15, 1954.

HONORABLE JOHN B. BOATWRIGHT,
Member House of Delegates.

This is in reply to your letter of February 9, 1954, which reads in part as follows:

"I should like to have your opinion with respect to the proper construction of Section 6-27 of the Code of Virginia as it affects the following question:

"May a state bank located in a city which lies wholly within the territorial boundaries of a county take over by merger a state bank located in a county adjoining the county within the boundaries of which is located the city in which the first mentioned bank is located and

establish a branch of the city bank at the location of the merged state bank?"

Section 6-26 and 6-27 of the Code provide, in part, as follows:

"No bank or trust company heretofore or hereafter incorporated under the laws of this State shall be authorized to engage in business in more than one place, except that the State Corporation Commission, when satisfied that public convenience and necessity will thereby be served, may authorize banks having paid-up and unimpaired capital and surplus of fifty thousand dollars or over to establish branches within the limits of the city, town, or county in which the parent bank is located.

* * * * *

"The provisions of the preceding section shall not be construed to prohibit the merger of banks in the same or adjoining counties or banks located within a distance of twenty-five miles of a parent bank and the operation by the merged company of such banks * * *. The term 'adjoining counties', where more than two are involved, shall be construed to mean counties each of which shall adjoin the county in which the parent bank is located."

It is my opinion that these two sections prohibit the merger of a bank located in a city with a bank located outside of the city unless the two banks are located within a distance of twenty-five miles of each other. I am of the opinion that a bank located in a city is not located in the county which surrounds the city. Our Supreme Court of Appeals said in *Murray v. Roanoke*, 192 Va. 321, at 324:

"In Virginia, counties and cities are separate and distinct legal entities. Each is a subordinate agency of the State government, and each is invested by the legislature with subordinate powers of legislation and administration relative to local affairs within a prescribed area."

The construction placed on the phrase "banks in the same or adjoining counties" in § 6-27 would also have to be applicable to the phrase "to establish branches within the limits of the city, town, or county." To construe § 6-27 to mean that a bank located in a city is also located in the county surrounding the city would, under § 6-26, permit a city bank to establish branches in the surrounding county. This is not in accordance with the present practice of the State Corporation Commission, nor is it in my opinion in accordance with the intent of the General Assembly when they enacted and later amended these two sections of the Code.

It is my opinion, therefore, that a state bank located in a city which is wholly surrounded by a county may not take over by merger and operate as a branch a state bank located in a county adjoining the county which wholly surrounds the city in which the first mentioned bank is located.

BOARD OF ACCOUNTANCY—Cannot promulgate more stringent regulations against accountants certified from another state. F-52 (168)

February 3, 1954.

MR. TURNER N. BURTON, *Director*,
Department of Professional and Occupational Registration.

This is in reply to your letter of February 2, 1954, which I quote:

"The Board of Accountancy, at its meeting in May, 1953, passed the following resolution:

"BE IT RESOLVED: That effective May 1, 1953, it shall be the policy of the Virginia State Board of Accountancy that no office shall be opened for the purpose of practicing public accountancy in the State of Virginia, unless said offices are to be operated on a full time basis, and that such offices shall at all times be under the direction and supervision of either a partner or a manager who is the holder of a certificate as a Certified Public Accountant, and who resides in the community where the office is located."

"The above resolution only applies to certificates issued under Section 54-93, Code of Virginia, 1950.

"This resolution has been questioned, and the Board desires to know if this resolution is contrary to the provisions of Chapter V of Title 54, Code of Virginia, 1950."

The Board of Accountancy has authority to promulgate rules and regulations as provided in section 54-92 of the Code of Virginia, a portion of which is quoted:

"The Board may make all needful rules and regulations regarding the conduct and scope of the examination, the method and time of filing applications for examination and all other rules and regulations necessary to carry into effect the purpose of this chapter."

Although there is nothing in the resolution of May 1, 1953 expressly confining the provisions thereof to accountants certified by the Board under reciprocal agreement, you state in your letter that such is the purpose of the resolution.

Once the Board has issued a certificate of certified public accountant under the provisions of section 54-93 of the Code, such person is entitled to the rights and privileges enjoyed by those persons possessing a certificate issued after examination by the Board. Therefore, I am of the opinion that any resolution or regulation of the Board promulgated to restrain or regulate public accountants certified from another State to a greater extent than that exercised against Virginia residents is an unreasonable exercise of authority which has been vested in the Board, and therefore unenforceable.

BOARD OF ARCHITECTS, ENGINEERS, SURVEYORS—Members can serve for but two successive terms. F-195 (150)

January 14, 1954.

HONORABLE OMER L. HIRST,
Member House of Delegates.

This is in reply to your letter of January 7, 1954 in which you ask to be advised whether a member of the State Board of Architects, Engineers and

Surveyors, who has been appointed to finish a term of one of the members, may be appointed for two successive terms immediately thereafter.

Section 54-20 of the Code of Virginia, 1950, provides as follows:

"No person shall be eligible to serve for or during more than two successive terms, and incumbency during the term current on June twenty-fourth, nineteen hundred and forty-four constitutes the first of the two successive terms with respect to eligibility for appointment."

In view of the prohibition against a person serving during more than two successive terms, I am of the opinion that your inquiry must be answered in the negative.

BOARD OF NURSE EXAMINERS—Refusal to examine applicant.
F-294 (141)

January 4, 1954.

MISS MABEL E. MONTGOMERY, R. N., *Secretary-Treasurer*,
State Board of Nurse Examiners.

This is in reply to your letter of December 29, 1953 in which you ask to be advised whether the State Board of Nurse Examiners has the right to refuse to admit an applicant to examination to be licensed as a registered practical nurse on the basis of evidence of misconduct, involving moral turpitude, which misconduct occurred in 1951.

By virtue of chapter 13, Article 1 of Title 54 of the Code of Virginia, 1950, the State Board of Nurse Examiners is vested with the authority to determine by examination the fitness of any applicant to practice nursing of the sick in the particular field of practice designated by such applicant. Section 54-348 provides as follows:

"An applicant who desires to be licensed as a registered practical nurse shall furnish satisfactory evidence that she is at least eighteen years of age, is of good moral character, is in good physical and mental health, has completed at least the elementary grades in school or the equivalent thereof, and has successfully completed a period of not less than nine months of training for practical nursing under a program approved by the State Board of Examiners of Nurses."

In view of the foregoing statute I am of the opinion that the State Board of Nurse Examiners has the authority to withhold a license as a registered practical nurse from any applicant who fails to furnish satisfactory evidence that she is of good moral character. Of course, such applicant must be given a formal hearing by the Board in order that she be given an opportunity to explain, justify or refute the evidence which has been presented against her. After such hearing the Board must then determine whether or not the evidence so presented constitutes ground for refusal to admit such person to practice in this State.

BOARD OF SUPERVISORS—Authority to adopt ordinance prohibiting sale of produce on court house grounds. F-33 (326)

June 24, 1954.

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

This is in reply to your letter of June 23, from which I quote below:

"A part of the Court House grounds of this County has, since the earliest recollection of men, been used for parking purposes for the general public. For many years a part of the said grounds, which is so used for parking, has from time to time been also used by farmers who bring in farm produce which they have raised and park their vehicles and sell the produce from the trucks. Within the last year or so numerous parties who have obtained license to buy and sell farm products have been parking their vehicles on a part of the space used generally for parking purposes and sell their wares. Under these circumstances the Board of Supervisors of Louisa County desires an opinion from your office as to whether the said Board can legally:

"(1) Pass an ordinance prohibiting the sale of any and all farm produce and merchandise on said grounds.

"(2) Pass an ordinance prohibiting the sale on said grounds of farm produce or other merchandise purchased and offered for resale."

The Board of Supervisors of a County has the care of the County property and may "make such orders as they deem expedient concerning such corporate property." See Sections 15-9 and 15-692 of the Code. In view of the authority given by these sections, if your Board of Supervisors deems it expedient to adopt either of the ordinances suggested by you, it is my opinion that it may do so.

BOARD OF SUPERVISORS—Authority to compensate radio dispatcher as special police. F-136e (206)

March 11, 1954.

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

This is in reply to your letter of March 8, 1954, which I quote.

"We have a Special Policeman appointed by our Court now serving as Radio Dispatcher in our Sheriff's Office. He is not compensated by the County as Special Policeman, but his employment as Dispatcher contemplates that he will be compensated as such Dispatcher by the County.

"Would you advise me whether the Board of Supervisors would be authorized, notwithstanding Sec. 15-504, to pay this individual as Dispatcher?"

Any arrangement whereby the governing body of the county agrees to compensate a person for services rendered would necessarily be a contract even though the relationship be one of employer and ministerial employee. See 35 Am. Jur. 450. While it may appear an unusually strict interpretation of Section 15-504 of the Code of Virginia to make such employment contracts subject to the restrictions therein, I cannot escape the conclusion that it was the intention of the Legislature that such be the case. This is borne out by

the provisions set forth in that Section as well as Section 15-504.1 of the Code making the prohibitions in Section 15-504 inapplicable to employment contracts between certain officers and the county in specified instances. Inasmuch as no exception is made for the special policeman, I am of the opinion that such officers cannot accept compensation from the county for services rendered in some other contractual arrangement.

BOARD OF SUPERVISORS—Authority to condemn land for public road for private convenience. F-177 (17)

July 17, 1953.

HONORABLE LYON G. TYLER,
Commonwealth's Attorney for Charles City County.

Receipt is acknowledged of your letter dated July 15, 1953, which I quote as follows:

"I have considered your opinion of June 27, 1953, relative to the condemnation of land by the Board of Supervisors of Charles City County for a public road, which road is primarily necessary to serve private convenience.

"I call your attention to Section 33-152, which provides that if the proprietor is dissatisfied with the decision of the Board of Supervisors he may of right appeal, but only on the question of damages and to Section 33-153 which provides that if it appears to the Board that opening or establishing the public road will be for mere private convenience then the Board may order the same upon condition the applicant pay, in whole or in part, the costs of the proceedings and damages to the proprietor.

"Assuming that the report of the viewers shows that the proposed road will serve mere private convenience, but the board of supervisors decides that the public road is necessary and orders the roadway condemned, please give me your opinion as to whether the Circuit Court may review the action of the Board of Supervisors and determine that the road is or is not necessary for a public use.

"I apologize for ineptly stating the question in my previous letter. This opinion is sought not to influence the decision of the Board of Supervisors in determining the necessity for the road but to advise them as to the consequences of their action."

Section 33-153 of the Code to which you refer provides, insofar as material to your inquiry, as follows:

"But when it shall appear to the board of supervisors or other governing body that the opening and establishing or altering of such road will be for mere private convenience then the board of supervisors or other governing body may order the same upon condition that such applicant pay, in whole or in part, the compensation and damages to the proprietor or tenant and the costs of the proceedings and keep the road in order. * * *

Assuming that the report of the viewers under the provisions of Section 33-144 of the Code shows that the proposed road will be for mere private convenience, you inquire if the Board of Supervisors could condemn property for such road and if the Circuit Court could review the action of the Board of Supervisors and determine that the road is or is not necessary for a public use.

As pointed out in my letter to you of June 26, 1953, the term "public use" is a legislative question and is not subject to judicial review. *Bailey v. Anderson*, 182 Va. 70, 27 S. E. 2d 914, 321 U. S. 799, 64 S. Ct. 940, 88 L. Ed. 1087.

It is further noted that Section 33-152 limits the court's authority on appeal to the amount of compensation and damages allowed.

In view of the foregoing, I am of the opinion that if the Board of Supervisors established a road although for mere private convenience, the Circuit Court would be without authority to determine the question of public necessity for such a road.

The other question presented by you has to do with the authority of the Board of Supervisors to condemn private property for a road when it is established for mere private convenience. This question is not free from doubt. However, it may be seen from the quoted portion of Section 33-153 it is clearly contemplated that the Board of Supervisors may establish such a road.

"A public road is a road or street of any description and however established over which any member of the public may lawfully pass.
* * *" (Nichols on Eminent Domain, Vol. 2, Section 7.512)

The same authority, Section 7.626, states:

"* * * In some of the states it was held that the private roads authorized by the statutes were private only in name; that, although they were laid out upon the petition of individual land-owners and were constructed at the expense of the parties at whose request they were established, they were open to use by the general public as completely as if they were highways, and they consequently formed a part of the general public road system of the state. Such roads, it was held, might be laid out over private land without the consent of the owner, and the decisions to this effect are clearly sound, since it is well established that a highway that is open to public use may be laid out by the exercise of eminent domain, even if it is specially advantageous to but few people, or leads to the residence of a single individual. * * *"

It does not seem that Virginia has passed upon this precise point, however, the foregoing quotation seems to be the weight of authority. If Virginia follows the weight of authority, I am of the opinion that the power of eminent domain may be exercised by a county to establish or alter a road for mere private convenience if such road when opened is available to and may be lawfully used by any member of the public.

BOARD OF SUPERVISORS—Authority to enter into agreement for water for area of county. F-33 (171)

February 4, 1954.

HONORABLE WILLIAM J. PHILLIPS,
Attorney for the Commonwealth for Warren County.

This is in reply to your letter of January 30, 1954 relative to the situation which has developed with respect to the Mountain View Subdivision in Warren County which involves a water line serving both the Town of Front Royal and the County of Warren.

I have reviewed the copy of a proposal which you enclosed by which the Town of Front Royal and County of Warren would accept the present distribution system and accessory rights and then undertake as a joint venture the construction of a six inch water main from the corporate limits of the

Town of Front Royal to the subdivision, together with feed lines to the property line of the home owners as well as fire hydrants. The estimated cost of such an undertaking is \$18,000.00, which sum is to be repaid to the town and county on an amortization basis. It is noted that the county proposes to use for such purpose general county funds, and the project would serve approximately 2% of the population in the county.

You ask to be advised as to whether the County Board of Supervisors is empowered to enter into such an agreement with the Town of Front Royal in view of the statutory provisions for the creation of sanitary districts and water authorities within the counties.

I assume that the Board has assured itself of the availability of the required \$9,000.00, and hence the question does not arise as to whether the Board is empowered to bind future Boards for the payment of such a project. Your attention is particularly drawn to the inhibition in section 115a of the Constitution of Virginia against the creation of debts by a county, except as otherwise provided therein.

The proposed expenditure of general county funds is to be repaid to the county by the users of the facility constructed with such funds. It, therefore, appears that the county funds are not a general county outlay to serve a small percentage of the population at the expense of the entire population, but an advance from the county treasury for the health and welfare of its citizens which is to be repaid to the county by the users of the facility. Under such circumstances I am of the opinion that the Board of Supervisors is empowered to enter into the proposed agreement.

BOARD OF SUPERVISORS—Authority to install street lights, charge residents of street. F-33 (133)

December 22, 1953.

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

This is in reply to your letter of December 18, 1953, which I quote:

"The Board of Supervisors of Nansemond County has an agreement with Virginia Electric & Power Company, whereby the Power Company furnishes us light service at a special rate. Does the Board of Supervisors have the power to have lights installed on streets in the suburban sections of the County, upon the request of the people living on those streets, and have the Power Company bill the Board for the light service, and in turn permit the people living on the streets where these lights are installed to reimburse the Board of Supervisors?"

Section 15-778 of the Code of Virginia of 1950, as amended, provides as follows:

"The boards of supervisors of counties may, in their discretion, install and maintain suitable lights on the streets and highways in the villages and built-up portions of such counties, respectively, and pay the costs of such installation and maintenance out of the county fund."

With the authority vested in the Board of Supervisors as provided above to install and maintain street lights, I feel that it is contemplated that the Board may enter into an agreement with public service companies for supplying power for such lights. Inasmuch as this is a proprietary function of the

county by which it undertakes to furnish a service it has no obligation to supply, I am of the opinion that a charge may be made for such service to the persons requesting the same.

**BOARD OF SUPERVISORS—Authority to limit use of county dump.
F-83 (67)**

October 5, 1953.

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

This is in reply to your letter of September 30, 1953 in which you request my opinion on the following question:

"The County of Stafford maintains and operates a County dump within the county. Does the county have authority to limit the use of the dump to county residents, and if so would the county have power to enact an ordinance prohibiting its use by other than county residents?"

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

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

* * * * *

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

It is my opinion that the county has authority under this section to limit the use of the dump if its limitation is a reasonable one. Several questions might possibly arise if use is limited to county residents. Does this mean that a transient or person in the county temporarily cannot use the dump? Can a resident of the county dispose of trash from a business establishment he owns in another county at the county dump? A more practical limitation might be that only trash or waste material originating within the boundaries of the county may be disposed of at the county dump.

**BOARD OF SUPERVISORS—Authority to pay bounty on foxes.
F-33 (100)**

November 25, 1953.

HONORABLE ROBERT D. STONER, *Clerk*,
Circuit Court of Botetourt County

I have your letter of November 18, in which you ask if the Board of Supervisors may adopt an ordinance placing a bounty on foxes, and whether or not such ordinance would be effective at all times of the year including such time as there may be a closed season on foxes.

Section 15-20 of the Code provides among other things that the Board of Supervisors of a County shall have the power to award a premium to be paid

for the scalp of red foxes and gray foxes. Under the authority of this section, to which I refer you, I am of the opinion that your question must be answered in the affirmative. However, I think that the ordinance should be made applicable only to cases where the foxes are lawfully killed in compliance with Section 29-138 of the Code. I think it would be contrary to public policy for the ordinance to provide for a bounty for the scalp of a fox unlawfully killed.

**BOARD OF SUPERVISORS—Authority to pay rental on fire hydrant.
F-33 (193)**

March 1, 1954.

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

This is in reply to your letter of February 19, 1954 in which you ask to be advised as to the authority of the Board of Supervisors to pay a yearly rental on a fire hydrant outside the corporate limits of the Town of Smithfield which was installed by the Smithfield Water Company at the request of a lumber concern for use by the Smithfield Volunteer Fire Company in the event of a fire. For the fifteen years following the installation of such fire hydrant the rental has been paid by business interests located in the area. However, due to the development of the area by businesses and residences there has been a request that the Board of Supervisors assume the responsibility for the yearly rental on the hydrant.

While this appears to be a facility constructed initially for the benefit of a private concern to be utilized by the Smithfield Volunteer Fire Company, it now appears to be a facility which is of service to the general public in the county. While I entertain doubts as to the authority of the Board of Supervisors of the county to assume the responsibility of paying rental for the use of the fire hydrant without regard as to how or where the water therefrom is to be used, I do feel that it is possible for the board to enter into an agreement with the town to accomplish the purposes desired. This office has previously expressed the view that a county could enter into an agreement with a town rendering aid in fire protection in the county by virtue of section 27-2 of the Code of Virginia. The payment of such rental could be made a term of such agreement.

Another possible method by which this problem could be approached may be pursuant to section 15-16.1 of the Code of Virginia whereby a contribution would be made to the volunteer fire department, which department in turn would pay the rental of the fire hydrant.

**BOARD OF SUPERVISORS—Authority to purchase school bonds.
F-33 (261)**

May 5, 1954.

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

I am in receipt of your letter of May 4, in which you ask the following question:

"The County School Board of Tazewell County has \$100,000 in school bonds of the Maiden Spring Magisterial District of the County

for sale. The Board of Supervisors of the County has \$100,000 of surplus funds in the general fund and would like to buy these bonds, provided it is permissible for the Supervisors to do so.

"The Board of Supervisors desires to have an opinion from you as to whether or not it would be legal for the Board of Supervisors to buy these District School Bonds."

I refer you to Section 15-22 of the Code authorizing, so long as a state of war exists between the United States and any foreign power, the board of supervisors of any county to direct the treasurer of such county to purchase out of any monies available in the general fund bonds of the United States of America or of the State or any political subdivision thereof.

This office has heretofore held that a state of war does exist between the United States and a foreign power and I am, therefore, of the opinion that the Board of Supervisors may direct the Treasurer to invest the \$100,000 of surplus funds in the general fund in school bonds of the Maiden Spring Magisterial District.

BOARD OF SUPERVISORS—Changing designation of building funds to the general fund. F-77 (61)

September 21, 1953.

HONORABLE STIRLING M. HARRISON,
Commonwealth's Attorney for Loudoun County.

This is in reply to your letter of September 14, 1953, in which you make several inquiries with regard to the action of the Board of Supervisors of Loudoun County relative to appropriations from bond investment for building purposes. A portion of your letter is herein quoted:

"The same fund is involved in each of the said resolutions. You will note that in the first resolution the fund was earmarked as a building fund, in the second as a fund for the erection of a new office building and for the erection of a new jail building and in the third was reissued in the name of the General County Fund. This fund was never included nor mentioned in the County budget.

"The questions upon which the Board of Supervisors wishes your advice are:

"1. Can the fund having once been set aside and earmarked for a specific purpose be withdrawn from the purpose specified and be applied elsewhere as was attempted in the last of the three resolutions shown above where they reissued the bonds to be held in the General County Fund.

"2. The budget being the basis upon which the County arrives at its tax levy for the ensuing year, is it not necessary that the funds in the General Fund of the County be included and set out therein?

"3. If it is legal to return funds once earmarked for a specific purpose to the General Fund can the Board expend said fund, being a fund not out of the current revenue and not included in the budget, for a purpose not included in the budget."

The funds involved were derived from the general levy in Loudoun County. The effect of the resolutions was first to authorize the investing of surplus funds in government bonds and earmarked as a building fund, secondly, to appropriate the value of the bonds for the erection of certain buildings

and, thirdly, to change the payee of the bonds from Howard E. Cole, Treasurer, to the General County Fund of Loudoun County.

So long as there is no special levy for a specific purpose the Board of Supervisors has the power to reallocate or reapportion any funds which it may have at its disposal. The mere fact that a certain sum has been earmarked for a specific purpose does not prohibit the withdrawal from the purpose specified in order to be applied in other authorized expenditures.

There is no legal obligation upon the Board of Supervisors to include in its budget the surplus of the preceding years' tax receipts. This is not to say, however, that such is not good practice. You are, of course, aware of section 188 of the Constitution of Virginia which prohibits the making of a greater tax levy than may be required for the necessary expenses of the government.

In answer to your third inquiry I am of the opinion that there would be no legal prohibition against the expenditure of a fund derived from the general county tax levy even though such fund is not included in the budget and such fund was formerly earmarked for another purpose.

BOARD OF SUPERVISORS—May not purchase automobile from firm which employs a supervisor. F-33 (329)

June 30, 1954.

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

I am in receipt of your letter of June 28, in which you present the following question:

"The Board of Supervisors of Alleghany County is considering purchasing new automobiles to be used by the Sheriff's Department. With this in mind, said board asked for bids from various automobile dealers in this vicinity. It has developed that the low bid was submitted by a firm which employs one of the Supervisors of Alleghany County.

"The supervisor in question is employed by said automobile firm in the capacity of salesman. He does not have a proprietary interest in said business, and he will not personally gain in any monetary way should said firm's bid be accepted by the Board of Supervisors. In other words, his relationship with the business is purely one of an employee working for salary and commissions.

"Inasmuch as there is a possibility of conflicting interests, the Board of Supervisors desires an opinion as to whether or not it would be legal and proper for them to deal with the automobile firm which employed one of its members. * * *

You are, of course, familiar with 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."

The salary of the supervisor to whom you refer is dependent upon the earnings of the business by which he is employed. I can see no escape from the conclusion, therefore, that this supervisor is "interested, directly or indirectly," in the contract which the Board of Supervisors makes for the purchase of the automobiles to be used by the Sheriff's office, and so it is my opinion that the Board should not purchase the automobiles from the firm by whom the Board member is employed.

BOARD OF SUPERVISORS—No authority to adopt ordinance for closing hour of restaurants. F-60a (90)

November 10, 1953.

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

I refer to our recent correspondence in which you state that you have been having quite a bit of difficulty in your County on account of the disorderly conduct which takes place in some restaurants late at night or early in the morning, that is, after midnight. You further state that there is good reason to believe that whiskey is sold and consumed at these places and that, as a matter of fact, raids made on some of them showed this to be true. It appears that at the last session of your Grand Jury in order to meet this situation it was recommended that a local County Ordinance be passed requiring all restaurants in the County to be closed at midnight. You seek my opinion as to whether or not such an ordinance would be valid.

If the Board of Supervisors has the power to adopt such an ordinance, it is by virtue of that part of Section 15-8 of the Code which empowers the Board "to adopt such measures as they may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of their respective counties not inconsistent with the general laws of this State."

Your inquiry is not an easy one to answer categorically. The general rule seems to be that regulations by political subdivisions of the hours during which specified businesses may be conducted have been upheld where there is a patent relationship between the regulations and the protection of the public health, safety, morals, or general welfare as where the business is of such a character that the public safety or general welfare is likely to be endangered if it is carried on during the late hours of the night. I should not think that normally the nature of the business of a restaurant is such that the general welfare of the inhabitants of a county is likely to be endangered if it is carried on after midnight and, unless there is a very strong showing that the conditions prevailing throughout the county are such as to justify an ordinance closing the restaurants at midnight, I feel that such an ordinance would be of doubtful validity. I am somewhat strengthened in this view by the fact that the Alcoholic Beverage Control Act (Sections 4-81 and 4-82 of the Code) affords a solution to the problem which confronts you.

I am aware of the opinion of this office dated January 23, 1950, given to the Honorable Cary J. Randolph, Commonwealth's Attorney for Henry County, a copy of which I enclose. Upon reflection, I am inclined to believe that the fourth paragraph of this opinion probably goes too far. In any

event, the opinion may be distinguished from the situation presented in your letter in that no facts are disclosed justifying the proposed ordinance regulating the closing hours of the businesses mentioned.

BOARD OF SUPERVISORS—No authority to give monetary credit in lieu of taxes for planting trees. F-33 (134)

December 23, 1953.

MR. GEORGE W. DEAN,
State Forester, Charlottesville.

This is in reply to your letter of December 19, 1953 in which you ask if the board of supervisors or commissioner of revenue of any county has the authority to give a monetary credit in lieu of taxes to a land owner who plants tree seedlings on property owned in that county.

It is my opinion that this could not be done by a board of supervisors or a commissioner of revenue without expressed statutory authority, and I can find no section of the Code of Virginia which grants such expressed authority to these officials.

BOARD OF SUPERVISORS—No authority to make donations to private landowners for planting trees. F-220 (160)

January 26, 1954.

MR. GEORGE W. DEAN, *State Forester*,
Department of Conservation and Development, Charlottesville.

This is in reply to your letter of January 22, 1954, which I quote:

"We are searching for ways and means of encouraging reforestation of idle and abandoned acres.

"It has been suggested that certain County Boards of Supervisors might wish to appropriate certain annual sums, say \$500, from which they could pay a landowner \$3.00 for each thousand of seedlings planted. This, in effect, would be a subsidy for reforestation.

"Does a Board of Supervisors have the legal right to appropriate from its general fund money for the above purpose?"

On prior occasions this office has expressed the view that the County Boards of Supervisors do not have the power to appropriate public funds for donations to individuals or organizations unless such donations be authorized by the General Assembly. However worthy may be the purpose, I am aware of no legislative enactment which would authorize an appropriation to be spent in the manner proposed in your letter.

BOARD OF SUPERVISORS—No authority to withhold Deputy Sheriff's salary. F-136 (64)

September 25, 1953.

MR. D. K. HALL, *Sheriff*,
Pittsylvania County.

This is in reply to your letter of September 18, 1953, which I quote:

"A, a deputy sheriff operating his own motor vehicle on official duty, collides with another vehicle in an intersection. A is painfully injured as a result of the wreck and is unable to perform his duties for about two weeks. However, there is no permanent disability and he is now functioning fully. Some people concerned maintain that A was at fault in the collision. That he may have been guilty of Civil Negligence, failure to yield right of way or even reckless driving as defined in § 46-209 (8).

"Assuming the latter to be true may the Board of Supervisors refuse to pay A for the month he was disabled?

"It is my view that a deputy sheriff is a state officer whose salary is set by the State Compensation Board. The locality pays only one-third of his compensation. As long as he holds the office he is entitled to its emoluments including salary and this cannot be denied him because of a temporary incapacity not involving moral turpitude."

By virtue of section 15-485 of the Code of Virginia the sheriff of a county is empowered to employ deputies, such deputies to take the oath as provided for county officers. Section 14-86 of the Code of Virginia provides the manner in which the Compensation Board shall fix the salary for such deputies. The County Board of Supervisors has no authority to employ, discharge or fix the salary of any deputy sheriff of the county. Therefore, I am of the opinion that the Board of Supervisors is without authority to withhold the salary of such deputy so long as he continues in office.

BOARD OF SUPERVISORS—Parliamentary procedure for meetings. F-33 (95)

November 17, 1953.

HONORABLE H. B. CHERMSIDE,
Clerk of Charlotte County.

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

"At a meeting of our Board of Supervisors held on Monday last a motion was made for an additional appropriation to our Hospitalization Fund for Indigents, and it was stated by two members of the Board that it was not necessary for the motion to be seconded, as you had ruled that motions before the Board didn't need to be seconded. I am no parliamentarian at all, but always thought that parliamentary procedure was part of the Common Law and a motion should receive a second. I always try to read all your opinions about Boards of Supervisors, but have never seen this opinion, if rendered, and would appreciate a copy of same or to have you advise me of the law."

I do not recall an opinion of this office dealing with the question raised by you.

The Board of Supervisors is a legislative body and, except where the Board has adopted its own rules of procedure or where there are statutory provisions to the contrary, I should think that recognized parliamentary procedure should be followed at meetings of the Board. However, it seems to be well established that an ordinance otherwise valid and adopted by the necessary vote of such a legislative body will not be set aside on account of the failure to observe technical rules of parliamentary law. See 2 McQuillin, *Municipal Corporations* (2d Ed.) Section 636.

BOARD OF SUPERVISORS—Public welfare; appropriations made, budget not approved; Treasurer to disburse funds. F-130 (19)

July 21, 1953.

HONORABLE C. T. COMBS,
Treasurer of Lee County.

I have your letter of July 16, from which I quote as follows:

"This past spring the Local Superintendent of Public Welfare in Lee County, Virginia, died, creating a vacancy in this position. On March 12, 1953, the Board of Supervisors advertised a proposed Budget for Lee County to be considered on the 1st day of April, 1953. This budget, including \$123,800 for Public Welfare, a copy of which I am enclosing, was advertised in a local county paper. This budget was later approved by the Board of Supervisors, but I am not sure of the date. After this a conflict arose between the Board of Supervisors and the Local Welfare Board over the appointment of the Local Superintendent of Public Welfare. As I understand it the appointment is not satisfactory with the Board of Supervisors; therefore, when the Board of Public Welfare presented their budget to the Board of Supervisors on June 6th they refused to approve it. And to this date this budget has not been approved.

"Under these facts, I submit the following question to you: Where an appropriation has been made by the Board of Supervisors for Public Welfare, but the Budget of the Department of Public Welfare has not been approved by the Board of Supervisors, am I authorized to disburse County Funds at the request of the Local Department of Public Welfare? These checks have been submitted for my signature and I refused to sign them until the situation cleared up. * * *

Section 63-69 of the Code as amended requires the Local Boards of Public Welfare to submit to the Boards of Supervisors a Welfare Budget. The section does not require that the Board of Supervisors approve this Budget. However, Section 63-105 of the Code requires the Board of Supervisors of each County to appropriate such sums of money as shall be sufficient to provide for the payment of Public Assistance, including the cost of administration.

As I understand the facts, the Welfare Budget for your County was submitted to the Board of Supervisors and also to the Commissioner of Public Welfare, and by the latter officer approved with minor changes. Your Board of Supervisors in turn has made an appropriation for the payment of Public Assistance, including the cost of administration. Under these circumstances, it is my opinion that you are fully authorized to honor the properly executed warrants of the Local Board of Public Welfare so long as there is an outstanding appropriation for Public Welfare; indeed, I think it is your duty to do so.

BOARD OF SUPERVISORS—Publication of expenses of county officers; no newspaper published in county. F-118 (47)

August 28, 1953.

HONORABLE J. H. BINNS, *Clerk*,
Circuit Court of Charles City County.

This is in reply to your letter of August 24, 1953, which I quote:

"Va.-Code, Section 14-158 requires the Board of Supervisors to publish a statement of expenses of certain offices and officers furnished by the State Compensation Board in a newspaper having a general circulation published in the county. There is no newspaper published in Charles City County.

"I would like your opinion as to whether this section requires publication in a newspaper having general circulation in, but not published in, the county."

Section 14-158 of the Code of Virginia provides as follows:

"The State Compensation Board shall as soon as practicable annually furnish the board of supervisors or other governing body of each county with a statement showing receipts and expenses of office and of officers making report under this article, which statement shall be published once a week for two weeks in a newspaper having a general circulation, to be selected by the board of supervisors or other governing body, published in the county, and in like manner shall furnish such a statement to the auditor or comptroller of each city to be published in one or more daily newspapers having a general circulation in the city, in the discretion of such auditor or comptroller. The expense of these publications shall be borne by the locality."

It is to be noted that the above quoted section requires that the statement be published in a newspaper having a general circulation in the county but also requires that such paper be published in the county. In view of this language I am of the opinion that the circulation contemplated in this statute is through a newspaper published in the county.

Inasmuch as there is no newspaper published in the county of Charles City I am of the opinion that the provisions of section 14-158 of the Code cannot be complied with in this instance.

BOARD OF SUPERVISORS—Purchase of insurance; may from State Legislator; may not from members of Electoral and School Trustee Electoral boards. F-33 (313)

June 9, 1954.

HONORABLE D. CARLETON MAYES,
Commonwealth's Attorney for Dinwiddie County.

I am in receipt of your letter of June 7, in which you ask the following questions:

"The Board of Supervisors is planning to divide the County insurance business between several agents. Included among the agents are the following:

- "1. A member of the State Legislature.
- "2. A member of the County Electoral Board.
- "3. A member of the School Trustee Electoral Board.

"Are the above by virtue of their office prevented from doing business with the County?"

I direct your attention to Section 15-504 of the Code, which provides in effect that no paid officer of a 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, * * *."

Applying the prohibitions in this section, it would appear that they do not apply to a member of the State Legislature, inasmuch as he is not one of the named officers, nor is he a paid officer of the county. A member of the County Electoral Board is a paid officer of the county. See Section 24-37 of the Code. So, also, is a member of the School Trustee Electoral Board a paid officer of the county. See Section 22-60 of the Code. It follows that a member of the County Electoral Board and a member of the School Trustee Electoral Board may not participate in commissions on insurance policies contracted for by the Board of Supervisors.

BUILDING CODES—Authority to enact; Norfolk County has. F-44 (81)

October 26, 1953.

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

This is in reply to your letter of October 15, 1953 in which you ask if, in my opinion, § 15-10 of the Code of Virginia gives Norfolk County the authority to enact an ordinance setting up a building code similar to building codes adopted by cities in the State.

Section 15-10 of the Code of Virginia reads as follows:

"The boards of supervisors of counties:

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

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

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

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

"Are hereby vested with the same powers and authority as the councils of cities and towns by virtue of the Constitution of the State of Virginia or the acts of the General Assembly passed in pursuance thereof; provided, however, that with the exception of such ordinances as are expressly authorized under §§ 46-200 to 46-206 and 46-212 no ordinance shall be enacted under authority of this section regulating the equipment, operation, lighting, or speed of motor propelled vehicles operated on the public highways of such county, unless the same be uniform with general laws of this State regulating such equipment, operation, lighting or speed and with the regulations of the State Highway Commission adopted pursuant to such general laws, and provided further that nothing in this section shall be construed to give such boards of supervisors any power to control or exercise supervision over

signs, signals, markings and traffic lights on any roads constructed and maintained by the State Highway Department or to give the boards of supervisors power to levy license taxes.

"No law shall be enacted by the boards of supervisors under authority of this section until after descriptive notice of intention to propose the same for passage shall have been published once a week for two successive weeks in some newspaper having general circulation in the county."

This section clearly gives the County of Norfolk authority to enact any ordinance that a city can enact except certain motor vehicle and highway regulations. It is my opinion, therefore, that the County of Norfolk can enact a building code similar to those adopted by the cities of the State.

CHECKS—Made payable to Commonwealth of Virginia for town fine; cannot be cashed by town. F-54 (237)

April 14, 1954.

HONORABLE ARTHUR C. STICKLEY, II,
Trial Justice for the Town of Haymarket.

This is in reply to your letter of April 9, 1954 pertaining to the problem with which you are faced arising from the payment of collateral by checks from motorists arrested within the town of Haymarket, such checks being made payable to the Commonwealth of Virginia rather than to the town of Haymarket. You specifically inquire as to whether such checks may be accepted and endorsed "Commonwealth of Virginia, Town of Haymarket".

Inasmuch as the payee on such checks has been specified as the Commonwealth of Virginia, I am of the opinion that any endorsement other than that of the payee would be ineffectual to negotiate such checks. Therefore, the town may not accept payment by negotiable instrument for collateral arising from violations of town ordinances when such town is not named as payee on such instrument.

CHILDREN—Committed to local Board of Welfare; Veterans Administration benefits may be expended for. F-231 (8)

July 8, 1953.

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

I have your letter of June 25 with enclosures. The question presented by the correspondence concerns the right of a guardian who receives Veterans Administration benefits for his ward to use these funds to pay for the care and maintenance of such ward when he has been committed by a court to a local Board of Public Welfare. It appears that some members of the legal staff of the Veterans Administration have gained the impression that this office has ruled that funds representing these benefits in the hands of a guardian may not be used for the care and maintenance of a ward duly committed to a local Board of Public Welfare. At no time have I ever expressed any such opinion in writing, nor have I or any member of my staff, so far as I can ascertain, expressed any such opinion orally.

Section 16-172.50 of the Code of Virginia of 1950 expressly provides that "if a child or minor has an estate in the hands of a guardian or trustee, the guardian or trustee may be required to pay for his education and maintenance so long as there may be funds for that purpose." This provision has reference to a child or minor committed under the authority of Section 16-172.44 of the Code of Virginia of 1950. It is my conclusion, therefore, that a court committing a child or minor to a local Board of Public Welfare may under the authority of Section 16-172.50 of the Code direct a guardian having funds in his hands representing Veterans Administration benefits for his ward to use such funds for the education and maintenance of the ward so committed, provided there is nothing in the Federal law to the contrary, and my information is that there is no such prohibition in the Federal law. I might add that I entirely concur in the view expressed by Mr. W. L. Painter, Director of the Division of General Welfare of your Department, in his letter dated April 21, 1953, to Miss Junia E. Graves, Superintendent, Department of Public Welfare of Rockbridge County, Lexington, Virginia.

CIRCUIT COURT—Juvenile cases; publicity of. F-239a (122)

December 14, 1953.

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

This is in reply to your letter of December 9, 1953 in which you ask whether the hearings and orders of a case involving a juvenile offender which has been transferred to the Circuit Court under the provisions of § 16-172.43 of the Code should be private and withheld from the public.

Section 16-172.43 provides:

"If the court deems that any child or minor before it who is fourteen years of age or over cannot be adequately controlled or induced to lead a correct life by use of the various disciplinary and corrective measures available, to the court, then the court may, in such cases, in lieu of trial of such child or minor under this law send or transfer such juvenile to the appropriate court having jurisdiction for trial by the court as if he were an adult.

"In the hearing and disposition of cases properly before a court having general criminal jurisdiction the court may sentence or commit the juvenile offender in accordance with the criminal laws of this State or may in its discretion deal with the juvenile in the manner prescribed in this law for the hearing and disposition of cases in the juvenile court."

In view of this section of the Code, it is my opinion that the Circuit Court may at its own discretion conduct its hearings in private and provide that the orders are to be confidential, or it may conduct the hearing as a public trial and have the orders recorded just as it would in a case involving an adult. I feel that the answer to the question as to which procedure should be followed is entirely within the discretion of the Circuit Court.

CIVIL DEFENSE—Local councils; organization of mandatory. F-225b (84)

October 29, 1953.

HONORABLE J. H. WYSE, *Coordinator*,
Office of Civil Defense, Richmond.

This will acknowledge receipt of your letter of October 1, in which you request my opinion as to whether it is mandatory on local governing bodies to organize a local Civil Defense Council under section 44-145 of the Code of Virginia.

Section 44-145 subsection (a) provides as follows:

"There shall be a local council of defense, as hereinafter defined, in each county, city, and town with one thousand population or more, in the State; provided, however, that in the discretion of the Governor one local council may be established for a county and any city or town, or cities and towns, located within the territorial boundaries of such county. The Governor may order a local council of defense for any town with a population of less than one thousand."

This section, when read in conjunction with the sections immediately following, leaves no doubt in my mind that it was the intention of the General Assembly to make mandatory the organization of local Civil Defense Councils.

CIVIL AND POLICE COURTS—Records; destruction of, after micro-filming. F-43 (49)

September 3, 1953.

HONORABLE JAMES R. DUNCAN,
Civil and Police Justice, Alexandria, Virginia.

This is in reply to your letter of August 26, 1953 inquiring as to the legality of a proposed destruction of original records of the Civil and Police Court of Alexandria once such records which include both City and State records have been microfilmed by the city of Alexandria, Virginia.

As has been pointed out, in accordance with section 15-5.1 of the Code of Virginia "The governing body of any city or town is authorized to provide for the * * microphotographing, * * of all or any part of papers, records, documents or other material kept by or in charge of any *department, agency or institution* of such city or town". However, it is to be noted that this legislation is contained under Title 15 pertaining to Counties, Cities and Towns rather than under portions of the Code pertaining to civil and police courts and such courts are not included within the enumerations underscored above.

Moreover, sections 16-123.3 and 16-123.4 specifically provide for the destruction of papers in civil justice or police courts in cities of certain populations.

In accordance with the foregoing the proposed destruction of records after microfilming in the Civil and Police Court of Alexandria, Virginia, under the provisions of section 15-51 of the Code of Virginia, would appear to be of doubtful legality.

**CLERKS—Closing of office; on July 5 when July 4 falls on Sunday.
F-116 (327)**

June 24, 1954.

HONORABLE J. SWANSON SMITH, *Clerk*,
Circuit Court of Carroll County, Hillsville.

I have your letter of June 22, in which you ask the following question:

"May I have your opinion as to whether or not it would be legal for me to close the Clerk's Office of Carroll County on July 5, 1954. We have always kept the Clerk's Office closed on July 4th heretofore; but this year the Fourth of July is on Sunday."

Section 17-41 of the Code as amended provides that:

"The clerk's office of every court shall be kept open on every day except * * * the fourth of July * * * during convenient hours, for the transaction of business; * * *."

There are certain exceptions prescribed, but none of them is applicable to your inquiry. It was obviously the intention of the General Assembly to make the fourth of July a holiday, and it is generally recognized that where a holiday falls on a Sunday the Monday next following is observed as the holiday. See Section 2-19 of the Code. My information is that for years it has been the practice of the clerks of the various courts of the State, where the fourth of July falls on Sunday, to close their offices on the Monday following. This administrative construction of the section is entitled to great weight and it is my opinion, therefore, that the clerks' offices may be closed on Monday when the fourth of July falls on Sunday.

While I am satisfied that the view I am expressing herein is the better one, yet, in consideration of the possible serious consequences to the public and to the clerks should I be in error, I suggest that you confer with your Judge.

CLERKS—Fees; certifying copies of recorded instruments. F-116 (125)

December 15, 1953.

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

This is in reply to your letter of December 9, 1953 in which you asked the following question:

"The Clerk is only allowed by law 25¢ for the docketing of a crop lien and \$1.00 for docketing an agricultural lien. When the Southside Virginia Production Credit Association presents one of these instruments to the Clerk's Office it not only presents the original for the Clerk's certificate, but in addition thereto presents three copies, which means that the Clerk has to fill out four certificates for each instrument. You can readily see that for the small fee involved, this entails a great deal of work. Is it the duty of the Clerk to stamp the three copies of the instrument that are presented with the original without cost, or is he entitled to a fee for his certificate on each of the copies?"

I am of the opinion that the Clerk is not required to certify copies of instruments recorded in his office without being entitled to a fee, and that he is entitled to a fee for putting his certificate on each of the copies.

CLERKS—Maximum compensation; Princess Anne County. F-83 (217)

March 23, 1954.

HONORABLE JOHN V. FENTRESS,
Clerk of Princess Anne County.

Receipt is acknowledged of your letter dated March 20, 1954, which I quote as follows:

"I wish to have the opinion of your office as to the maximum which the Board of Supervisors of Princess Anne County may pay its County Clerk.

"It appears to me that there is no maximum and verbally I have been so advised by The Compensation Board. However, I wish your opinion for the record."

The Report of the Secretary of the Commonwealth shows the population of Princess Anne County to be 42,277 according to the 1950 United States Census.

The minimum and maximum allowances to county clerks are set forth in Section 14-163.1 of the 1950 Code of Virginia, as amended. The pertinent portion reads as follows:

"The governing body of every county is empowered to determine what annual allowances, payable out of the county treasury, shall be made to the county clerk of such county so that, * * * in counties having forty, but not more than fifty, thousand, not less than one thousand, nor more than fifteen hundred, dollars; * * * provided that the minimum and maximum amounts of the annual allowances to the clerks in the following named counties shall be the amounts in dollars immediately following the names of the counties, to wit: * * * Princess Anne: minimum eight hundred; * * *."

The proviso in the statute changes the minimum allowance to the Clerk of Princess Anne County from one thousand dollars to eight hundred dollars, but does not change the maximum. In view of this, I am of the opinion that the maximum allowance which may be fixed by the County for your office is as stated in the foregoing quoted section.

CLERKS—Recordation of veterans' discharges; Korean war. F-116 (177)

February 12, 1954.

HONORABLE W. E. SPENCER, *Clerk*,
Circuit Court of Floyd County.

This is in reply to your letter of February 10, 1954 in which you ask if Article 4 of chapter 2 of Title 17 of the Code of Virginia, relating to recordation in connection with War Service Men, is applicable to those veterans who have been inducted since the termination of World War II and those returning from the conflict in Korea.

Although the provisions pertaining to World War II Induction and Discharge Records are not broad enough to provide for the recordation of the inductions and discharges since the termination of that war, I am of the opinion that section 17-92 of the Code provides for the recordation of the

discharge certificates of any veteran of the Korean conflict. This section provides as follows:

"The clerk of every circuit or corporation court, or other court in which deeds are required to be recorded, shall, upon presentation, record, free of charge, the discharge certificate of any veteran of any war in which the United States has been engaged."

You also inquire as to whether it would be proper to record "Separation Certificates" rather than a "Discharge" when such be the only document provided for such veterans in the event of reserve status after such separation from active duty.

For the purpose of recordation of veterans' records, I am of the opinion that a Separation certificate will suffice as evidence of the fact that such veteran has been discharged from active service.

**CLERKS OF COURTS—Records; duty to issue negative certificates.
F-116 (55)**

September 11, 1953.

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

This is in reply to your letter of September 10, 1953, which I quote:

"As Clerk I am frequently requested to furnish a negative certificate certifying that a certain marriage license has not been issued or that there has not been instituted a divorce proceeding or that a certain person has no criminal record. All of these inquiries, are of course, requesting the negative certificate from me as Clerk of the Corporation Court, Corporation Court, Part Two, and the Court of Law and Chancery.

"I conceive it to be the duty of the Clerk to furnish copies of all records in his office and not his duty to furnish a negative certificate."

The duties of the clerk of court with respect to records are governed in general by statute. Section 17-43 of the Code of Virginia provides, in part, 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."

I am aware of no statute which imposes upon a clerk of court the duty to issue certificates certifying that certain facts do not exist or that the court records contain no evidence of facts or circumstances.

COLLEGES AND UNIVERSITIES—State; authority to sell timber off land. F-268 (207)

March 11, 1954.

HONORABLE A. D. CHANDLER,
President College of William and Mary.

This is in reply to your letter of February 17, 1954 concerning the cutting of some timber by the College of William and Mary for the purpose of preserving and improving certain timberlands owned by the College. It is my opinion that the College has the authority to cut this timber as a conservation measure to protect the timberlands, without obtaining authority from the General Assembly of Virginia.

If, after cutting the timber, the College should find that it has some cut timber of commercial value which it, the College, has no use for, then the cut timber should be disposed of as surplus supplies, as provided for in § 2-265 of the Code of Virginia.

The College does not, in my opinion, have the authority to make a commercial sale by blocks of this standing timber without the consent of the General Assembly, as this standing timber would be considered real estate.

COLLEGES AND UNIVERSITIES—State; public inspection of minutes of Board of Visitors. F-268f (270)

May 5, 1954.

HONORABLE BARRON F. BLACK,
Rector, University of Virginia.

I am in receipt of your recent communication asking to what extent the minutes of the Board of Visitors of the University of Virginia are open to public inspection.

The University of Virginia is a public institution wholly owned by the State and governed and controlled by the State. Its governing body is styled "The Rector and Visitors of the University of Virginia" and this body is at all times subject to the control of the General Assembly. The minutes of the governing body of this corporation represent its official actions and I, therefore, do not think there could be serious doubt but that these minutes constitute a public record.

In an opinion of this office dated January 29, 1940, given to Honorable Preston Moses, then a member of the House of Delegates, relative to the right of the public to inspect the records of the School Boards and Boards of Supervisors, including the minutes of the meetings of those Boards, this was said:

"The records of these bodies, including the minutes of their meetings, are public documents and, so far as they are of direct interest to an individual, or of public concern, I am of the opinion that any person, individually interested, has a right to inspect the records directly concerning him, and, that, where it is a matter of serious public concern, a taxpayer and citizen, although not himself personally interested, has a right to access to such of the records as may reasonably include the subject of public interest about which he desires information.

"The right to access of public records is one spoken of as an absolute right, but the courts have held that there must be a sufficiency of purpose for which the applicant for the records desires the inspection. Not only must there be sufficient purpose, but the custodian of the

records may impose such reasonable restrictions and regulations as are necessary for the safety of the records, and the inspection must be had in such manner and at such times as not to interfere with the business of his office.

"In this connection see 23 R. C. L. pages 160-164, *Gleaves v. Terry*, 93 Va. 491, and *Keller v. Stone*, 96 Va. 667."

After careful consideration, I am of opinion that the principles stated in the above quoted language are applicable to the minutes of the Board of Visitors of the University of Virginia. While there may be exceptions, I would not think that, generally speaking, these minutes contain matters of such serious public concern that every taxpayer and citizen has a right to inspect them, even though not individually interested or involved. Certainly it does not appear to me that the gratification of mere curiosity, or motives merely speculative, or the creation of scandal constitutes such a legitimate interest as would entitle a person to inspect the records. Then, too, I do not think that such inspection should be allowed where it would be detrimental to the public welfare or interest.

COLLEGES AND UNIVERSITIES—State; public liability; military vehicles operated by ROTC personnel. F-268g (68)

October 8, 1953.

MR. S. K. CASSELL, *Business Manager*,
Virginia Polytechnic Institute.

This is in reply to your letter of October 7, 1953, which is quoted:

"The question has recently been raised regarding the College's liability in the case of an accident involving a government owned vehicle assigned to the College for use in connection with the Air Force and Army ROTC programs. Attached is a copy of a letter from Colonel Jones, Professor of Air Sciences and Tactics, regarding this matter.

"We have always been of the opinion that since these vehicles were owned by the Federal Government and are used exclusively by the Army personnel, who are employed by the Federal Government for the Army and Air Force programs, that there would be no liability on the part of the College should these vehicles be involved in an accident. It is true that they are assigned here to the Property Custodian, who assigns them to the Army personnel and has no supervision or control over the use of these vehicles under such assignment.

"Before taking any further steps in connection with this matter, I thought it well to refer it to you for advice. No doubt you have had similar questions raised by other state institutions of higher learning having reserve officers' training programs. If you need any further information, please let us know and I shall be glad to furnish it."

The Commonwealth of Virginia is immune from suit arising from acts of negligence of its employees. Many of the agencies and institutions of the State carry public liability insurance policies. These policies are for the protection of the individual employees and the general public rather than the State itself. Generally speaking, the coverage under such policies extends only to employees and vehicles under the control of the agency or institution. The reason for such limitation is obvious.

It appears from the contents of your letter that the army personnel operating the vehicles owned by the army which are assigned to the training program at Virginia Polytechnic Institute are not under the control or supervision of the college. I am, therefore, of the opinion that the college rightly excludes such personnel and vehicles from its insurance coverage.

COLLEGES AND UNIVERSITIES—State student loan fund; rate of interest to be charged. F-264 (74)

October 20, 1953.

HONORABLE EDGAR E. WOODWARD, *Bursar*,
Mary Washington College.

This is in reply to your letter of October 13, 1953 with reference to the interest rate to be applied to loans made from the State Student Loan Fund. Your letter is herein quoted:

"It has just been called to my attention that there was a change in the appropriation Act passed by the General Assembly in 1952 changing the rate of interest charged students awarded loans from the State Student Loan Fund from 3% interest to 2% interest so long as the student is in residence and 4% after she leaves school or graduates.

"The 1950 appropriation Act stated that the rate of interest charged students shall be fixed by the Governor at a uniform rate of not less than 2% nor more than 4% per annum. It is my understanding that the Governor established a rate of 3% under the terms of this Act. Up until the 1950 Act was passed we had been charging 4% since it is my understanding that previous appropriation Acts stated that the rate of interest charged said students on such loans shall not be less than 4% per annum. Subsequent to the 1950 Act we had been charging 3%.

"We have not applied the interest rates as set forth in the 1952 appropriation Act due to the fact that the college did not request an appropriation and was not awarded an appropriation in the 1952 Act. Since the terms and conditions of the Act refer to appropriations made in this Act we have assumed that these conditions applied only where appropriations were made in the 1952 Act. Also, we have not applied this new interest rate because we are holding notes signed by students and their endorsers at a lower rate of interest than the 3%, then the rate charged after leaving school or graduation. We have been under the impression that the 1952 appropriation Act was not intended to be retroactive to contractual agreements previously entered into with students and their endorsers.

"I will be grateful to you if you will furnish me your opinion regarding the two following subjects. First, should the interest rates shown in the 1952 appropriation Act be retroactive to loans made students prior to the effective date of this Act. Second, since the college received no appropriation in the 1952 appropriation Act should we not continue to charge the rate of interest as previously in effect. I will be very grateful to you for your advice in this regard."

As to your first inquiry I am of the opinion that the 1952 Appropriation Act establishing the rate of interest on student loans is not applicable to those loans made prior to the effective date of the 1952 Act.

Your second inquiry presents a problem which is not entirely free from doubt. To attempt to segregate the funds available for loans into categories

earmarked with an interest rate applicable at the time the appropriation was made would create an anomalous situation in the administration of such loans. Inasmuch as the appropriation does not revert to the general fund, but remains in the Loan Fund subject to relending, it would not be feasible to attempt to identify the funds on hand with the Appropriation Act which made such funds available. Therefore, I am of the opinion that the only logical manner in which the Loan Fund may be administered is to apply the interest rate of the current Appropriation Act whether or not any portion of the Loan Fund was obtained therefrom. I, therefore, suggest that any loan made subsequent to this time be made with the interest rate as prescribed in the 1952 Appropriation Act.

COLLEGES AND UNIVERSITIES—VMI; appropriation for restoration of Jackson's classroom. F-268h (52)

September 8, 1953.

MAJOR GENERAL WM. H. MILTON, JR., *Superintendent*,
Virginia Military Institute.

This is in reply to your letter of September 1, in which you present the following question:

"Item 621½ of Chapter 716, an Act approved April 8, 1952, reads as follows: 'For restoration of the classroom of General Thomas J. Jackson, at the Virginia Military Institute, at Lexington, as a public shrine \$10,000.'

"General Jackson's classroom was on the second floor of barracks. The rooms directly below it are identical. In order to utilize the second floor in the restoration, we would have to take over six cadet rooms, whereas if it were restored on the first floor, it would cause the loss of only three cadet rooms. It has been suggested for consideration that the room be restored on the first stoop, with a proper bronze plaque explaining that it is identical to the original classroom in so far as can possibly be made, excepting that it is on the first floor.

"We would like to have you inform us as to whether or not a restoration on the first stoop would come within the requirements of the Act. Inasmuch as the next Board meeting is called for 23 September, 1953, it would be greatly appreciated if we could have an opinion before that date."

The appropriation to which you refer is made in the language quoted by you. While I can appreciate the advantage, from the standpoint of conservation of space, of following the plan suggested by you, I do not think the words used in making the appropriation permit it. The appropriation is made for the restoration of the classroom of General Thomas J. Jackson and not for the construction of another classroom similar to that of General Jackson. The language of the statute, it seems to me, is plain and the appropriation, if spent, must be used for the restoration of General Jackson's classroom.

COMMISSIONERS OF REVENUE—Arlington County; effect of creation of Department of Real Estate Assessment. F-58 (191)

February 26, 1954.

HONORABLE GEORGE D. FISCHER,
Commissioner of Revenue, Arlington.

This is in reply to your letter of February 24, 1954 in which you ask to be advised as to whether any responsibility remains in you as Commissioner of Revenue with respect to the assessment of real estate in Arlington County for the tax year 1954 inasmuch as there is now a Department of Real Estate Assessments created in the county of Arlington by ordinance as authorized by chapter 611, Acts of Assembly of 1952.

Although there is no express language either in the ordinance setting up the Department of Real Estate Assessments or the enabling legislative act which removes the responsibility for such assessments from the office of the Commissioner of Revenue, I am of the opinion that such is the clear intention of chapter 611, now codified as section 15-354.1 of the Code of Virginia. This conclusion is borne out by the language which reads as follows:

“Upon the establishment of the department, the county manager shall select some person as the head thereof and provide for such employees and assistants as may be required. Such department shall be vested with the powers and duties conferred or imposed upon commissioners of the revenue by general law under article 4 of chapter 15 of Title 58 and sec. 58-772.1 of the Code of Virginia, in relation to the assessment of real estate.”

By vesting the Department with the powers and duties conferred or imposed upon Commissioners of the Revenue, with respect to this particular phase of taxation, it would appear that the Legislature intended that those powers should be exercised by the Department created for the particular purpose, and, upon the establishment of such a department, the Commissioners of Revenue would be released of such duties by implication.

COMMISSIONERS OF REVENUE—Treasurers; holidays for. F-111 (118)

December 14, 1953.

HONORABLE JOHN A. B. DAVIES,
Commissioner of the Revenue, Culpeper.

I am in receipt of your letter of December 7, in which you inquire as to the “holidays the Commissioner of Revenue and Treasurer are entitled to.”

It is my opinion that Section 2-19 of the Code, prescribing legal holidays in this State, is applicable to the offices of the Commissioner of the Revenue and the Treasurer. I know of no statute applicable to Treasurers and Commissioners of the Revenue such as Section 17-41 of the Code dealing with the days on which Court Clerks' offices are required to be kept open.

COMMONWEALTH'S ATTORNEYS—Allowable expenses; printing subpoena forms. F-57 (83)

October 27, 1953.

HONORABLE L. MCCARTHY DOWNS, *Chairman*,
Compensation Board.

This is in reply to your letter of October 22, 1953, in which you ask to be advised as to the allowability of the cost of printing subpoena forms by the office of the Attorney for the Commonwealth as an item of office expense.

I am advised that the general practice of the Attorneys for the Commonwealth when summoning witnesses is to use the form supplied by the clerk of the court. However, in view of the statutory authority for the issuance of subpoenas by the Attorneys for the Commonwealth, with no provision for such forms to be furnished by the court, I am of the opinion that the cost of printing such forms is such an expense of the office of the Attorney for the Commonwealth as the Compensation Board would be justified in allowing under section 14-77 of the Code of Virginia.

COMMONWEALTH'S ATTORNEYS—Duty on appeal; closing of road part of secondary system. F-69 (219)

March 24, 1954.

HONORABLE STIRLING M. HARRISON,
Attorney for the Commonwealth, Leesburg.

Receipt is acknowledged of your letter dated March 19, 1954, requesting my opinion on the following:

"I can foresee a number of proceedings under Section 33-76.8 of the Code which will require a substantial amount of time for the proper conduction thereof. My question is whether it is my duty, as Commonwealth's Attorney, to attend to such matters or whether it is a private matter for which I should be compensated."

You will observe from the provisions of Section 33-76.9 of the Code, as amended, that in the case of appeal to the circuit court the statute provides in part as follows:

" * * * Upon the filing of such petition, the clerk of the circuit court shall docket the appeal and if the appeal be by any of the landowners who filed a petition with the governing body for a public hearing shall have notice of such appeal served upon the Commonwealth's attorney and the Commissioner and if the appeal be by the Commissioner notice thereof shall be served upon the governing body of the county and landowners who filed petition with the governing body for a public hearing. * * * "

Since the notice of appeal is required to be served upon the Commonwealth's attorney, I am of the opinion that it is embraced within your official duties.

COMMONWEALTH'S ATTORNEYS—Duty on appeal; prosecute violators of city and town ordinances. F-69 (189)

February 24, 1954.

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

This is in reply to your letter of February 19, 1954, which I quote :

"As Commonwealth's Attorney for Rockingham County and the City of Harrisonburg, I would appreciate your opinion as to the following :

"(1) Whether it is the duty of such Commonwealth's Attorney to prosecute appeals in cases involving alleged violations of ordinances of the City of Harrisonburg.

"(2) Whether it is the duty of such Commonwealth's Attorney to prosecute appeals in cases involving alleged violations of ordinances of incorporated towns located within Rockingham County."

With reference to your first inquiry, this is to advise that this office has previously expressed the opinion that in the case of appeals from convictions in civil and police justice courts, in the absence of a charter provision of the city imposing the duty to prosecute such appeals on some other officer, this duty would fall upon the Commonwealth's Attorney when he is properly advised of the proceeding under the provisions of section 19-131 of the Code of Virginia, 1950. This is the opinion which was held by the former Attorney General Abram P. Staples, as expressed in his letter of December 27, 1937, to the Commonwealth's Attorney and City Attorney of Harrisonburg.

Referring to your second inquiry, it has been the expressed view of this office that it is not the duty of the Commonwealth's Attorney to prosecute in the Circuit Court appeals from convictions for violations of town ordinances.

COMMONWEALTH'S ATTORNEYS—Employment by Housing Authority; may accept. F-249 (111)

December 4, 1953.

HONORABLE JERRY G. BRAY, JR.,
Commonwealth's Attorney for City of South Norfolk.

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

"Pursuant to statute the Council of the City of South Norfolk has created a Redevelopment and Housing Authority and appointed members thereto. The Authority is planning to expand its activities in the near future upon acquisition of a housing project from the Veterans Administration. Considerable legal work will thereafter result and the Authority has made inquiry as to whether my legal services could be obtained, either on a retainer or fee basis.

"Section 36-14 of the Code of Virginia, as amended, permits an Authority to call upon the City Attorney of the City, or, in the case of an Authority created in the County, upon the Attorney for the Commonwealth for such legal services as it may require. In the alternative, the Authority may employ its own counsel and legal staff.

"Section 15-486 of the Code of Virginia, 1952, as amended, prohibits the Attorney for the Commonwealth from holding any other office, elective or appointive, at the same time except certain offices which are enumerated.

"The question is thus posed as to whether or not retention as counsel for the South Norfolk Redevelopment and Housing Authority constitutes the holding of an elective or appointive office.

"As Commonwealth's Attorney for the City of South Norfolk, I respectfully request your opinion as to whether I am permitted under the statute to accept employment and compensation as counsel for the South Norfolk Redevelopment and Housing Authority."

Section 36-14 of the Code, which is a part of the "Housing Authorities Law," provides as follows:

"For such legal services as it may require, an Authority may call upon the city attorney of the city or the attorney for the Commonwealth of the county or may employ its own counsel and legal staff."

It is plain, in my opinion, that the lawyer who is employed by a Housing Authority on a fee basis to render special service does not hold an elective or appointive office. It is my opinion that there is no statutory prohibition against your accepting employment as a practicing attorney from the South Norfolk Redevelopment and Housing Authority.

COMMONWEALTH'S ATTORNEYS—Fees; when allowed in criminal case. F-69 (104)

November 27, 1953.

HONORABLE VIRGIL H. GOODE,
Commonwealth's Attorney for Franklin County.

This is in response to your inquiry by letter of November 12, 1953 pertaining to the possibility of a conflict between the fourth paragraph of section 14-130, Code of Virginia, with section 14-99, both sections relating to the taxing of fees for prosecutions by the Commonwealth's Attorney. Section 14-99 provides:

"No costs or fees shall be taxed for, or in any way allowed to, an attorney for the Commonwealth of any city or county in any case, unless he in person, or by a duly authorized assistant, actually appears and prosecutes the proceedings before the court."

Section 14-130 states as follows:

"The fees of attorneys for the Commonwealth in all felony and misdemeanor cases in which there is a conviction and sentence not set aside on appeal or a judgment for costs against the prosecutor, and for expenditures made in the discharge of his duties shall be as follows:

"For each trial of a felony case in his circuit or corporation court, in which only one person is tried at a time, if the punishment prescribed may be death, twenty dollars; if the punishment prescribed is less than death, ten dollars; but where two or more persons are jointly indicted and jointly tried for a felony, in addition to the fees above provided, ten dollars for each person more than one so jointly tried. For each person prosecuted by him at a preliminary hearing upon a charge of felony before any court or justice of his county or city, five dollars.

"For each person tried for a misdemeanor in his circuit or corporation court, five dollars, and for each person prosecuted by him before any court or trial justice of his county or city for a misdemeanor, which he is required by law to prosecute, or upon an indictment found by a grand jury,

five dollars, except when such prosecution is before a trial justice appointed under the provisions of chapter 2 of Title 16, in which case such fee shall be two dollars and fifty cents; and in every misdemeanor case so prosecuted the court or trial justice shall tax in the costs and enter judgment for such misdemeanor fee.

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

In accordance with a basic principle of statutory construction, "statutes *in pari materia*, although in apparent conflict, are, so far as reasonably possible, construed to be in harmony with each other." Moreover, it is noted that section 14-99 pertains to the disallowance of fees unless the Commonwealth's Attorney prosecutes in person rather than pertaining to the levying of fees as provided for in section 14-130.

Therefore, in accordance with the foregoing sections, it appears that the two sections may be resolved and that section 14-130 disallowing fees for appearance by the Commonwealth's Attorney in misdemeanor cases "except in those particular violations of the law when he is expressly required to appear by statutory enactment" does not necessarily conflict with section 14-99, providing that no fee shall be taxed for an Attorney for the Commonwealth "unless he in person, or by a duly authorized assistant, actually appears and prosecutes the proceedings before the court". Moreover, it thus appears to me, under section 14-130, that the appropriate court "shall tax in the costs and enter judgment for such misdemeanor fee" in behalf of the Attorney for the Commonwealth in misdemeanor cases which he is required by law to prosecute.

COMMONWEALTH'S ATTORNEYS—Insurance contract with School Board; may not have interest in. F-200 (172)

February 8, 1954.

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

This is in reply to your letter of February 5, 1954, a portion of which is quoted:

"I write to ask your opinion as to whether or not the Commonwealth's Attorney who is agent for insurance companies writing fire insurance, would be allowed to write insurance policies for the School Board of the same county on their school property.

"I sought an opinion on this matter on October 2nd, 1946, and the Honorable Abram P. Staples who was Attorney General at that time, gave me his opinion in his letter dated October 4th, 1946, stating that Section 2707 (which is now Section 15-504), did not prohibit the attorney for the commonwealth to write insurance on School Board property. Evidently Section 15-504 which takes the place of Section 2707 has included attorneys for the commonwealth with reference to becoming interested directly or indirectly in any contract, etc., as set out in the first paragraph thereof."

Section 2707, present section 15-504, of the Code of Virginia was amended in 1948 to add several officers to the list who are prohibited from having an interest in the contracts made on behalf of certain county officers. That section as now constituted provides, in part, as follows:

"No supervisor, superintendent of the poor, special policeman, commissioner of the revenue, treasurer, attorney for the Commonwealth, clerk of the court, trial justice, sheriff or any paid officer of the county shall become interested, directly or indirectly, in any contract, or in the profits of any contracts, made by or with any officer, agent, commissioner, or person acting on behalf of the supervisors, the county school 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."

In view of the foregoing I am of the opinion that the Commonwealth's Attorney who is agent for an insurance company would be prohibited from writing insurance coverage on the property of the county school board.

CONSERVATION—Dogwood; prohibiting commercial sale of. F-21 (5)

July 1, 1953.

HONORABLE FRANK S. RICHESON,
State Senator, Richmond, Virginia.

This is in reply to your letter of June 24, 1953, in which you ask the following question:

"There has been much discussion among the Garden Club women relative to the commercial sale of dogwood in Virginia. I am, therefore, writing to ask, in your opinion, the Legislature could pass a law prohibiting the commercial sale of dogwood, and if such a law were passed, would it in your opinion be constitutional?"

A conference on this same subject was held with Governor Battle a short time ago. At that time the view generally accepted by all concerned was that there could be no blanket prohibition against the sale of dogwood. It was felt, however, that it might be possible to enact a statute to prohibit the cutting and sale of dogwood until the trunk reached a certain size for conservation purposes, the required size being a reasonable one. My opinion concurs with the view reached in that conference.

CONSERVATION AND DEVELOPMENT—Department may not award prize for catching an illegal fish. F-21 (312)

June 9, 1954.

HONORABLE RAYMOND V. LONG, *Director*,
Department of Conservation and Development.

This will acknowledge receipt of your letter of June 7 relative to the awarding of a trophy by your Department for the largest rock fish caught in Virginia waters during the fall of 1953.

You advise that the Department did not issue any rules concerning this offer, and it would appear that the contestants proceeded under the bona fide belief that the term "largest rock fish" meant just what it said. You further advise

that one of the contestants caught a rock fish weighing twenty-eight pounds, which was the largest fish caught, and normally this contestant would appear to be entitled to receive the trophy.

Section 28-45 of the Code of Virginia, among other things, makes it unlawful to take, catch or have in possession "any rock fish of less than twelve inches in length or more than twenty-five pounds in weight."

Assuming authority in the Department to offer the trophy in the first instance, the offer of necessity had to be within the confines of applicable law. No construction could legally be placed on the offer which would authorize the catching or taking of rock fish of a length and size proscribed by the statute. In other words, no State agency or department could offer a reward or trophy to any individual to violate the law.

It is my opinion, therefore, that a rock fish taken from the waters under the jurisdiction of Virginia less than twelve inches in length or more than twenty-five pounds in weight could not qualify the contestant for consideration in the awarding of the trophy. The offer of the trophy must be construed consistent with applicable law.

CONTRACTORS—When installation part of sale of manufactured equipment, not subject to Code provisions. F-34 (241)

April 19, 1954.

MR. E. L. KUSTERER, *Executive Secretary*,
State Registration Board for Contractors, Richmond.

This has reference to the question which has arisen in conjunction with the proposed addition to the library at Union Theological Seminary in Richmond, Virginia, regarding the eligibility of the contractors who have been invited to bid on the project.

The facts which you have presented indicate that the nature of the addition is the manufacture and installation of self-supporting metal book stack tiers. The library stack manufacturers appear to be rather few in number and customarily install their own stack work. In this particular project the cost of the factory fabricated stack work will consist of approximately fifty-five percent of the total stack contract including erection. Of the four manufacturers who have been invited to bid on this project none are registered Virginia contractors. You request that you be advised as to whether or not such a construction project comes within the purview of chapter 7 of Title 54 of the Code of Virginia.

The statutory definition for general contractor is set forth in section 54-113 of the Code as follows:

"(2) 'General Contractor' or 'subcontractor' shall mean any person, firm, association or corporation that for a fixed price, commission, fee or percentage, undertakes to bid upon, or to construct or superintend the construction of, any building, highway, bridge, railway, sewer, pipe line, grading, or any improvement, or structure or part thereof, when the cost of the undertaking or a subcontract thereunder is twenty thousand dollars or more; and any person, firm, association or corporation who shall bid upon or engage in constructing or superintending the construction of any structure or any undertaking or improvements or part thereof above mentioned in the State, costing twenty thousand dollars or more, shall be deemed to have engaged in the business of general contracting or subcontracting in this State."

Generally speaking, any construction for the improvement of any building comes within the above definition. However, in those instances in which the

project is primarily one of installation of a manufactured product, which installation is performed by the manufacturer, such installation may be considered as incidental to the sale of the manufactured equipment, the performance of which is not to be considered as the practice of contracting within the meaning of the law. In the instant case I am of the opinion that the highly specialized nature of the project leads to the conclusion that the installation of the book stack tiers is primarily an operation incidental to the sale of the product. For this reason the provisions of chapter 7, Title 54, do not appear to be applicable.

**COSTS—Criminal prosecution; convicted person to pay for dismissed juries.
F-85b (69)**

October 13, 1953.

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

This is in reply to your letter of October 10, 1953, which I quote as follows:

"A question has arisen here on the taxation of costs in a criminal case tried in the Circuit Court of Page County, Virginia, the facts being as follows:

"A certain defendant was indicted for a felony and on the day upon which the case was to have been tried, the trial of the case was postponed on motion of the Attorney for the Commonwealth, due to the absence in Court of the prosecuting witness. Upon the subsequent trial of the case the defendant was convicted and I have taken the position that the costs of the first felony jury which was present in Court on the day the trial was postponed and used for no other case on that date, should be taxed as a part of the costs of prosecution since, had it not been for the wrong-doing of the defendant the jury would have been unnecessary. On the other hand it is argued that the first jury was excused and the case not disposed of through no fault of the defendant.

"It has always been my understanding that all costs which the people have been forced to pay because of a person's wrong-doing should be charged to the convicted person.

"Will you please advise me."

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 * * shall as soon as may be, make up a statement of all the expenses incident to the prosecution", such expenses to be taxed against the accused. Our courts have consistently held that the purpose and intent of this statute is to exact from the wrongdoer full reimbursement of the expense to which he has put the State.

On previous occasions this office has expressed the view that the accused should be taxed with whatever expenses have been incurred in assembling and compensating jurors for the trial of his case, in the event such accused be convicted. If it becomes necessary to dismiss and reconvene a jury for the trial of an accused who is ultimately convicted, I am of the opinion that the expense incurred in assembling the jury on both occasions should be taxed against the accused. It would appear immaterial as to who brought about the necessity for postponing the trial.

COSTS—Investigation by court appointed attorney for indigent accused, not allowed. F-85b (185)

February 19, 1954.

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

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

"An accused is charged with a felony in the Circuit Court of Frederick County, Virginia. He is unable to employ counsel and the court appoints two attorneys, practicing before its bar, to represent the accused. The maximum sentence for the felony is a death penalty. The accused is a non-resident of the State of Virginia, and counsel desire to go to his home and obtain whatever information and evidence that they may find there concerning his defense.

"1. Is there any provision for the payment of costs to the defense attorneys, thus appointed to defend a defendant on a felony charge for costs that might be incurred on his behalf for his defense. Said costs to be borne by the Commonwealth?"

I know of no statute which places upon the Commonwealth any liability to pay the expense of such an investigation as you describe. Section 14-180 of the Code, relieving a person on account of his poverty from paying fees or costs, is applicable, in my opinion, only to such fees or costs as may be taxed as a part of the costs in any case. The expense of such an investigation as you describe to obtain information and evidence in behalf of the accused would not be taxable as a part of the costs.

COSTS—Jury in civil case; no authority for taxing as part of. F-116 (130)

December 18, 1953.

HONORABLE S. M. GIBSON, *Clerk*,
Circuit Court of Hampton.

This is in reply to your letter of December 10, 1953, which I quote:

"I should greatly appreciate it if you would give me your opinion as to whether there is any statutory authority for the Clerk of a Court of Record to tax as a part of the costs in criminal and civil cases the pay of jurors necessary for the trial of said cases.

"Section 19-296 would appear to give authority for taxing such an item in the costs in criminal cases, wherein it states: ' . . . Make up statement of all expenses incident to the prosecution, . . . '

"An opinion of the Attorney General under date of June 26, 1943, to the Honorable C. W. Eastman, Clerk of Court of Middlesex County, at page 55, in Opinions of the Attorney General for the year ending June 30, 1943, appears by inference to take the view that pay of jurors should be included in costs taxed in criminal cases.

"I do not seem to be able to find any reference to this question as to civil cases, hence the request for your opinion at your convenience."

I agree with the construction placed on section 19-296 which authorizes taxing expense of the jury to the defendant convicted in a criminal prosecution. However, there is no statute which authorizes the clerk to tax the cost of jury pay in a civil case. I am advised that the prevailing practice among the courts of the State is consistent with this opinion.

COUNTIES, CITIES, TOWNS—Annexation; petition for by residents after city loses suit. F-8 (301)

May 28, 1954.

HONORABLE V. ALFRED ETHERIDGE,
Oceana, Virginia.

I am in receipt of your recent communication, from which I quote as follows:

"The City of Virginia Beach proceeded against the County of Princess Anne, in an annexation suit for certain territory of the County, in 1952 and the final order was entered in the Circuit Court of Princess Anne in 1953, rejecting the City of Va. Beach's request. Can the residents in that same area, upon a petition of 51% of the qualified voters, join the City in 1954, or does this petition constitute an annexation proceedings, and is not permissive under § 15-152.25 of the Acts of 1952?"

Section 15-152.25 of the Code, to which you refer, reads, in part, as follows:

"No city or town, having instituted proceedings to annex territory of a county, shall again seek to annex territory of such county within the five years next succeeding the entry of the final order in any annexation proceedings under this article or previous acts except by mutual agreement of the governing bodies affected, in which case the city or town moving to dismiss the proceedings before a hearing on its merits may file a new petition five years after the filing of the petition in the prior suit."

The contemplated proceedings, to which you refer, will not be instituted by the City of Virginia Beach, but will be instituted as the result of a petition signed by 51% of the qualified voters of the territory adjacent to Virginia Beach sought to be annexed. In other words, the proceedings, as I understand from your letter, will be instituted not by the City pursuant to § 15-152.3 of the Code, but as a result of a petition of the qualified voters of the territory to be annexed pursuant to § 15-152.4 of the Code. Section 15-152.25 of the Code, from which I have quoted, is applicable only to unsuccessful proceedings which have been instituted by the city or town desiring to annex territory in the county, and I am, therefore, of the opinion that it is not applicable to proceedings which may result from the petition to which you refer.

COUNTIES, CITIES, TOWNS—Constitutionality of act permitting leasing of land for swimming pools. F-1 (242)

April 19, 1954.

HONORABLE CHARLES R. FENWICK,
State Senator, Arlington.

This is in reply to your letter of April 14, 1954, in which you ask to be advised as to the constitutionality of Senate Bill No. 167, which Bill was enacted by the recent General Assembly to authorize counties to lease certain unimproved land to non-profit organizations for the purpose of constructing swimming pools thereon. You draw my particular attention to section 125 of the Constitution of Virginia and sections 15-727 and 15-10 of the Code of Virginia.

Both section 125 of the Constitution of Virginia and section 15-727 of the Code of Virginia pertain to the method by which corporate property may be sold or leased or franchises granted relative thereto. Section 15-727 is one of the provisions enacted by the General Assembly to carry through the limitations set forth in section 125 of the Constitution. It is to be noted that section 125 of

the Constitution relates solely to the corporate property of cities and towns, such section being embodied in Article 8 of the Constitution. There is no similar provision relating to counties. While section 15-10 of the Code of Virginia confers upon certain counties the same powers and authority as have been vested in cities and towns by virtue of the Constitution of Virginia, or the Acts of the General Assembly passed in pursuance thereof, there is no provision which imposes the limitation upon such counties with respect to public property as has been imposed upon cities and towns.

It should be noted that the power conferred upon the counties by virtue of Senate Bill No. 167 is authority granted directly to the counties by the General Assembly and not such authority as may be exercised by certain counties by virtue of section 15-10 of the Code of Virginia. I am therefore of the opinion that section 125 of the Constitution of Virginia presents no barrier to the validity of Senate Bill No. 167.

COUNTIES, CITIES, AND TOWNS—Councilman; removal from ward elected from; effect of. F-60 (182)

February 17, 1954.

HONORABLE FELIX E. EDMUNDS,
Member House of Delegates.

This is in reply to your letter of February 12, 1954 which says in part:

"I would appreciate your opinion as to whether a councilman elected to office from a given ward in that city (Waynesboro) and who later moves to another ward is entitled to continue service on the council."

Section 8 of the charter of the City of Waynesboro provides that the council shall be composed of five members, voted for at large, but with one member to be from each of the four wards and the fifth member to be from the city at large. Section 15-401 of the Code of Virginia provides, in part, as follows:

"When any vacancy shall occur in the council of a city having one branch, * * * by death, resignation, *removal from the ward*, failure to qualify from any other cause, the council, * * * shall elect a qualified person to fill the vacancy for the unexpired term * * *." (Italics supplied)

It is my opinion that, under the preceding section of the Code, if one of the four members of the council of the City of Waynesboro who are elected from wards moves out of the ward elected from, he vacates his office of councilman and is no longer eligible to serve on the city council.

In construing § 15-401 of the Code, § 15-398 must also be considered. Section 15-398 provides, "The members of the council of each city * * * shall be residents of their respective wards and qualified voters therein * * *." Residence for the purpose of this section of the Code has been construed to mean domicile, not actual physical presence, by our Supreme Court of Appeals. *Williams v. Commonwealth*, 116 Va. 272. Therefore, it is my opinion that when § 15-401 refers to "removal from the ward" it means the removal of the domicile of the councilman from the ward.

COUNTIES, CITIES, TOWNS—Criminal jurisdiction of mayor and town policemen. F-60 (319)

June 10, 1954.

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

This is in reply to your letter of June 8, 1954, in which you request my opinion concerning the criminal jurisdiction of the mayor and policemen of incorporated towns.

Town officers have the authority to make arrest for violations of town ordinances within the corporate limits of the town. They have the authority to make arrest for violations of State laws occurring in the corporate limits and within one mile thereof.

The mayor of a town has the authority to try only violations of town ordinances and matters connected with the town revenue and tax ordinances. He has no jurisdiction to try violations of State laws. These must be tried in the trial justice or circuit court of the county. All fines resulting from the conviction of a state law are to be paid into the State Treasury, regardless of whether the offense occurred within the corporate limits of the town or not, and regardless of whether the arrest is made by a State, county or town officer.

Whereas, before the General Assembly amended § 19-73 of the Code of Virginia in 1950, a town policeman had no authority to make an arrest outside of one mile of the corporate limits of the town, the amendment extended his authority to make an arrest for a misdemeanor, committed within his presence and within his jurisdiction, throughout the adjoining county, city or town when he is in close pursuit of the person sought to be arrested. In my opinion, this amendment is controlling over the decision of the Supreme Court of Appeals of Virginia in the case of *Banks v. Bradley*, 192 Va. 598, as in that case the Court rendered its decision on an event which occurred in 1948 or prior to the amendment to § 19-73 which was enacted in 1950.

COUNTIES, CITIES, TOWNS—Definition of population for purposes of Acts of Assembly. F-136b (162)

January 27, 1954.

HONORABLE DELAMATER DAVIS,
House of Delegates.

I have before me your letter of January 25, and the letter of January 7 from Mr. L. P. Roper, Assistant City Attorney of Norfolk, to Honorable Walter A. Page. You are concerned relative to the continued applicability of section 14-135 of the Code as amended by Chapter 89, Acts 1952. Section 5 of the statute was then amended as follows: "or having a population between two hundred thousand and two hundred twenty thousand."

I am informed that there is pending an annexation suit which, when completed, will add approximately fifty thousand to the city's population. You desire my opinion as to whether or not the additional population will affect the applicability of the Act on the basis of the 1950 census.

Section 14-135, as amended, authorizes the justice of the peace in cities of the population bracket designated to charge \$1.00 for issuing warrants, this being an exception to the general law fixing the charge at 50 cents.

It is my opinion that the addition to the population of Norfolk as contemplated by the pending annexation proceedings will not change the status of the city within the contemplation of section 14-135. The authority granted by this section relative to the \$1.00 charge for issuing warrants, in the absence of further

legislation, would continue to subsist. This construction is in keeping with the meaning of the word "population" as defined in section 1-13.22.

You will recall that legislative action was taken relative to distribution of ABC funds to localities and relative to allocation of the Battle school funds. This legislative action as to the instances indicated bolsters my opinion in the construction of section 14-135.

Mr. Roper points out in his letter to Mr. Page that there may be other population sections which used the word "inhabitants" rather than "population". The word inhabitant is not specifically dealt with under Chapter 2 of the Code relating to rules of construction. However, it is my opinion that the words "inhabitants" and "population" are susceptible to the same meaning as that given to population in section 1-13.22. Webster defines, in substance, population as a whole number of people or inhabitants of an area, section or country. The same authority, in substance, defines inhabitant as one who dwells or resides permanently in a place as contradistinguished from a sojourner.

COUNTIES, CITIES, TOWNS—Magisterial districts; property conveyed to may be sold by county. F-33 (116)

December 14, 1953.

HONORABLE VOLNEY H. CAMPBELL,
Commonwealth's Attorney for Washington County.

This is in reply to your letter of December 9, 1953, which I quote:

"In 1926 one Charles C. Lee and wife conveyed a tract of land containing 0.6 acres to 'Goodson District, Washington County, Virginia'. This tract of land was purchased for a consideration of \$100, and it was, I am advised, used for many years as a quarry for rock to be used on roads in that district. The location has not been used for many years, and an offer has been made by the adjoining land owner to the Board of Supervisors of Washington County to purchase this tract of land. The Board is willing to sell it if it can legally do so.

"I shall appreciate your advising me whether, in your opinion, Washington County acquired a title to this land which it can now convey, in view of the above quoted words naming the grantee as the Goodson District. In other words, I do not feel that a magisterial district is a corporate entity under the law, but do feel that the effect of the deed would be to place the title in the county.

"Please advise me also if, assuming the sale can be effected under Section 15-692, the proceeds therefrom should go into the general county fund. It may be claimed that since the land was purchased originally in 1926 from Goodson District road funds that the district now has a claim on the said proceeds."

The magisterial districts of a county are created for political and administrative purposes and are subordinated divisions of limited character. They are possessed of no corporate personality. See *Moss v. County of Tazewell*, 112 Va. 878. I, therefore, concur in your view that title to the tract of land in question is vested in Washington County and not in Goodson District. In the event that a sale is effected pursuant to Section 15-692 of the Code, I am of the opinion that the proceeds thereof should be placed in the general county fund. Such proceeds should be considered as general county assets, even though the original purchase price was derived from one of the county magisterial districts.

COUNTIES, CITIES, TOWNS—May not borrow from bank when officer of town is officer of bank. F-28 (238)

April 19, 1954.

HONORABLE J. GORDON BENNETT, *Secretary*,
State Commission on Local Debt.

This is in reply to your letter of April 15, 1954 in which you ask to be advised as to whether certain banks in the Town of Strasburg may submit sealed bids with the Commission of Local Debt for the purchase of certain bonds proposed to be sold by the Town of Strasburg inasmuch as the mayor and a councilman of the town are Vice-President and member of a Board of Directors for the two banks.

Section 15-508 of the Code of Virginia, 1950, prohibits members of council or other officers of cities and towns from entering into contracts, or becoming interested in any contract, with the city or town. An exception to this limitation has been provided in the following quoted portion of section 15-508:

"The term 'contract' as used in this section shall not be held to include the depositing of city or town funds in, or the borrowing of funds from, local banks in which councilmen or other officer of the city or town may have a stock interest; nor shall it include the granting of franchises to or purchase of services from public service corporations."

In view of the foregoing provision it is my considered opinion that the General Assembly intended the exemption to apply only to those banks which an officer of the city or town may have a stock interest, and the section should not be construed to exempt those banks in which the directors and officials are also officials of the cities and towns.

COUNTIES, CITIES, TOWNS—Ordinances; legality, when punishment exceeds that in State statute. F-60a (70)

October 13, 1953.

HONORABLE SIDNEY D. WATSON,
Trial Justice, Albemarle County, Virginia.

This is in reply to your letter of October 8, 1953, which I quote:

"Please advise me on the validity of county ordinances as follows:

"Section 18-114 Code of Virginia 1950 enables counties and towns to adopt ordinances prohibiting and punishing drunkenness in public. Punishment under this code section is a fine of not less than \$1.00 nor more than \$10.00.

"The town ordinance which is in question, while worded in substantially the same manner, provides that, for second and subsequent offenses, a fine in excess of that provided by the State Code Section and a jail term not to exceed thirty days may be imposed.

"While the more stringent punishment under the town ordinance would be invoked rarely the validity of the punishments in excess of that provided by State Statute has been questioned."

This office has on a prior occasion had an opportunity to consider this question. See Opinions of the Attorney General, 1935-1936, page 43.

Although the Supreme Court of Appeals of Virginia has never had occasion to consider this question with reference to section 18-114 of the Code,

it did, in 1937, consider the question with reference to a city ordinance of Norfolk which paralleled a State statute pertaining to the operation of motor vehicles while intoxicated. The court there, in part, said:

"The general rule is that where a municipality has the power to legislate on the same subject with which the State has dealt by general law, in the absence of specific restrictions, the ordinance of the municipality will not be declared invalid merely because different penalties are prescribed in the ordinance from those prescribed by a general statute." *Shaw v. City of Norfolk*, 167 Va. 352.

In view of the general provision of section 18-114 of the Code I am of the opinion that the fact that the penalty provided by the ordinance is greater than that provided by the statute does not necessarily render the ordinance invalid.

COUNTIES, CITIES, TOWNS—Parking regulations; no authority over public roads. F-60a (18)

July 20, 1953.

HONORABLE W. M. MINTER,
State Senator.

This is in reply to your letter of July 16, 1953, a portion of which is quoted:

"Does a county (in this instance Mathews County) have the authority under Section 15-8 of the Code or any other applicable statute known to you to provide parking rules at the county seat which is not incorporated? By parking rules I mean the right to prescribe limitations on the time of parking as well as the location and manner of parking and to prohibit the same in certain areas.

"We face, along with most other counties in Virginia and elsewhere, a terrific problem in the matter of handling automobiles. The advice requested will be appreciated."

Section 15-8 of the Code of Virginia, relating to the general powers of the Board of Supervisors of the counties, provides, among other things, that the Board of Supervisors shall have the power to "* * (5) adopt such measures as they may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of their respective counties, not inconsistent with the general laws of this state. * * "

Section 46-204 of the Code, as amended, provides as follows:

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

"But nothing in this section shall apply to the authorities or the ordinances, rules and regulations adopted by the authorities of any county which adjoins a city within or without this State having a population of one hundred and twenty-five thousand or more, provided such county has a trial justice; provided that nothing in this section shall apply to the authorities or the ordinances, rules and regulations adopted by the governing body of any county which adjoins two cities

of the first class and within the boundaries of which said county is located any United States military camp, and provided, further, that the fines collected for the violation of such ordinances shall be paid to the State when the arrest is made by an officer of any division of the State government."

Inasmuch as the County of Mathews does not qualify as an excepted category as set forth in the above mentioned section, or as provided in section 46-259.1 of the Code, as amended, it necessarily follows that the Board of Supervisors does not have the authority to regulate parking on the public roads in the county. However, if the board deems it necessary to regulate parking on county property not embraced in a public road, either for promoting the safety and general welfare or in order to protect county property pursuant to section 15-9 of the Code, I am of the opinion that it is empowered to do so.

COUNTIES, CITIES, TOWNS—Schools; bond issue; may not be handled by a bank when officer of bank is city official. F-103 (280)

May 21, 1954.

HONORABLE J. GORDON BENNETT, *Secretary*,
State Commission on Local Debt.

This is in reply to your letter of May 21, 1954 in which you ask to be advised as to the applicability of section 15-508 of the Code of Virginia, 1950, under the following circumstances.

In a sale of \$400,000.00 of school building bonds for the City of Buena Vista the bid by the Peoples Bank of Buena Vista, Virginia, Incorporated, was informally rejected due to the fact that it was determined that the director and Vice-President of such bank is the Mayor of the City of Buena Vista and that the Chairman of the Board of Directors of such bank is a Councilman of the City of Buena Vista. The rejected bid was submitted solely in the name of the Peoples Bank of Buena Vista, Virginia, Incorporated, but actually the bid represented the joint bid of that institution as well as the First National Bank of Buena Vista, Peoples National Bank of Lexington and the First National Exchange Bank of Roanoke. In addition to the aforesaid officers of the Peoples Bank of Buena Vista being members of the governing body of the City of Buena Vista, it was determined that a director of the First National Bank of Buena Vista is the Vice-Mayor of the City of Buena Vista.

Please refer to my letter of April 19, 1954 addressed to you in which the prohibition of section 15-508, Code of Virginia, 1950, was discussed in connection with a similar situation arising in connection with the sale of bonds for the Town of Strasburg. I am of the opinion that the prohibition relative to the bid involving officials of that town is likewise applicable to the situation referred to in connection with the City of Buena Vista, Virginia.

COUNTIES, CITIES, AND TOWNS—Tort liability; machinery leased to private individuals. F-83 (152)

February 16, 1954.

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

This is in reply to your letter of February 13, 1954, a portion of which is quoted:

"If the county acquires and becomes the owners of a piece of road machine equipment for the purpose of hiring and renting the same out to private land owners so that the land owners may improve their road ways leading from public road into their private properties would or could there be any liability on the part of the county or the members of the Board of Supervisors if an accident resulted while a farmer or property owner had custody of the said piece of road machinery.

"The county expects to charge a small fee for each day a machine is kept by the land owner but, of course, the county and the Board of Supervisors would have no control over the manner of the operation or use of the machine when it was in the custody of the property owner."

Even if mere ownership of road equipment could impute liability to the owner thereof for damages arising from its operation, this office, pursuant to decisions of our Supreme Court of Appeals, has frequently expressed the opinion that a county is not liable for injury or damage sounding in tort. I am, therefore, of the opinion that the Board of Supervisors would not be responsible for the actions of the property owners renting the road equipment. We express no opinion as to the action of the Board of Supervisors in the acquisition of road machine equipment for the purpose herein stated.

COUNTIES, CITIES, TOWNS—Transition to second class city; election changes; county hunting and fishing licenses; appointment of notary public. F-60 (311)

June 9, 1954.

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

This is in reply to your letter of June 4, 1954 in which you request my opinion on several questions which have arisen with the transition of the town of Galax into a city of the second class. Your inquiries and my reply thereto will be set forth seriatim.

"Does the Registrar for the city have to file a report of the new voters registered in the city with the clerk of the Circuit Court?"

Sections 24-78 and 24-117 provide that the registrar of a precinct shall transmit the name of each person admitted to registration and the name of each person who is transferred to the precinct from another precinct to the clerk of his county or to the clerk of the corporation court of his city. Since Galax has no corporation court, it is my opinion that these names should be transferred to the Clerk of the Circuit Court of the County.

"Are the ballots from the city returned to the clerk's office of the Circuit Court?"

Section 24-265 provides that after canvassing the votes, the poll books and ballots are to be delivered to the clerk of the county or clerk of the corporation court of the city. Since there is no corporation court, again it is my opinion that they should be returned to the Clerk's Office of the Circuit Court.

"Since the voters of the city still vote for some county officers, how will the report of the result of the election be reported to the counties?"

In my opinion § 15-94 of the Code of Virginia answers this question. That section provides as follows:

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

For elections under this section, the county electoral board has jurisdiction over the precincts within the city. The returns shall be canvassed by the election commissioners of the county and the results ascertained and attested to as in the election of any other county official.

"Are the citizens of the city of Galax, who were on the Grayson side before the town became a city, entitled to county hunting license?"

It is my opinion that citizens of cities of the second class are still considered to be residing within the county for hunting and fishing license purposes.

"Should a Notary Public now be appointed, who lives in Galax for the City, or for the county?"

Under § 47-1 of the Code a notary public could be appointed for either the city or county and he would have authority to act as notary in the county or city contiguous thereto. However, since a notary has to give bond with the Circuit Court of the County since there is no corporation court, it is my opinion that the better procedure would be to appoint the notary for the county.

COUNTIES, CITIES, TOWNS—Water and sewer authorities; granting permission to competing facility. F-33 (214)

March 19, 1954.

HONORABLE VOLNEY H. CAMPBELL,
Commonwealth's Attorney for Washington County.

This is in reply to your letter of March 11, 1954 in which you ask to be advised as to whether the Board of Supervisors of Washington County may legally grant permission to the city of Bristol to lay mains and furnish water to the residents in the Goodson District of Washington County, which district lies within the area proposed to be served by the Goodson-Kinderhood Water Authority which has been granted a charter pursuant to chapter 22-1, Title 15,

Code of Virginia, 1950, as amended. You state that the Authority has been unsuccessful in its attempt to sell bonds to finance the cost of this project and the residents of the Goodson District are desirous of obtaining services from another source.

While there is no express prohibition against the board's taking any action which would permit the city of Bristol to extend its facilities into the area covered by the Authority, I feel such is the obvious intent of the Water and Sewer Authorities Act. Section 15-764.13 of the Code refers to competing Authorities but to construe that term so literally as to enable a governing body to permit another facility to compete with the operations of the Authority would be incongruous with the entire purpose of the Act. To authorize another governmental body to furnish similar services to those which have been authorized by the charter of the Authority would be to do indirectly that which could not be done directly.

In view of the foregoing I am of the opinion that the governing body of Washington County is precluded from granting authority to the city of Bristol to extend water services into the area for which the Goodson-Kinderhood Water Authority was incorporated to serve. This is not to say, however, that the governing body may not take steps to have the Authority dissolved or withdraw from the Authority as provided in section 15-764.10.

**CRIMINAL CASES—Evidence; blackjack in possession *prima facie*.
F-71 (140)**

December 31, 1953.

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

This is in reply to your letter of December 14, 1953 requesting my interpretation of § 18-147 of the Code of Virginia. That section reads as follows:

"If any person sell or barter, or exhibit for sale or for barter, or give or furnish, or cause to be sold, bartered, given or furnished, or has in his possession, or under his control, with the intent of selling, bartering, giving or furnishing, any blackjack, brass or metal knucks, or like weapons, such person shall be fined not less than twenty-five nor more than one hundred dollars. The having in one's possession of any such weapon shall be *prima facie* evidence, except in the case of a conservator of the peace, of his intent to sell, barter, give or furnish the same."

The above section provides that the having in possession of any such weapon shall be *prima facie* evidence of a person's intent to sell, barter, give or furnish the same. The definition of *prima facie* evidence is such evidence as, in the judgment of the law, is sufficient to establish a given fact, and which if not rebutted or contradicted will remain sufficient.

Therefore, it is my conclusion that, under § 18-147 of the Code, if the Commonwealth proves that such illegal weapons were in the possession of the accused and it is not rebutted by the accused, this is sufficient evidence to sustain a conviction of a violation of this section of the Code.

CRIMINAL CASES—Evidence; person may not be compelled to name driver of automobile if he would incriminate himself. F-353 (79)

October 23, 1953.

HONORABLE W. PAT JENNINGS, *Sheriff*,
County of Smyth.

This is in reply to your letter of October 21, 1953, which I quote:

"This office respectfully requests your opinion on the following issues, which have, and are, causing quite a lot of controversy, resulting in confusion and difference of opinion:

1. A man arrested on a charge of DRUNK DRIVING, or DRUNK, requests that he be given a blood test, and is promptly given same. ARE THE RESULTS OF THIS TEST HIS EVIDENCE, to be used if he so desires, or can the Court demand that he present this evidence after the question is asked him in open Court, 'did you ask for and receive a blood test?'
2. The arresting officer, bewildered as to the extent of drunkenness of an arrested driver, desires to give the accused a blood test, and no objection is raised by the accused. Can this evidence be used by the Officer in Court, over an objection by the Defense?
3. A RECKLESS DRIVER flees Officers in an automobile identified by the Officers as the property of a known individual. Suspected driver arrives at his home shortly before the Officers and not having been identified as the owner, and takes refuge in his home. Can Officers immediately, or within a reasonable time, armed with the proper warrant, enter this home and question the owner as to who the operator of this vehicle belonging to him was, or, later after the incident, may owner be summoned into Court, and be made to reveal who the operator of his machine was on a particular occasion, during which time a traffic violation occurred?"

Your first two inquiries present questions of admissibility of evidence in a criminal proceeding. Such questions must be answered by the court in the particular case. This office has consistently refrained from expressing its views on questions which are pending, or which must be answered, by the judiciary.

Your third inquiry presents the problem of obtaining information from a person who may very likely be incriminated by his answer. As to entering a house for the purpose of pursuing a person having committed a crime, there appears to be little question. However, the owner of the house is not compelled to advise the authorities as to the identity of the person who entered his house, nor must he reveal the identity of the driver of his automobile. Such person could be summoned into court as a defendant or witness and yet avail himself of the privilege of refusing to testify if it may tend to incriminate him.

CRIMINAL CASES—Expense allowable out of State funds; transportation of witness out of State to identify suspect. F-293 (332)

June 30, 1954.

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.

I am in receipt of your letter of June 28, in which you enclose a communication addressed to you from the Director of Finance of the City of Warwick, from which communication I quote as follows:

"Sometime ago there was a robbery in the city of Warwick involving the theft of over \$5,000.00. Information has come to our Police Department of the arrest of a suspect now being held in jail in Topeka, Kansas.

"The only means of identification is to have the person who suffered the loss flown to Kansas to personally look at the suspect. This person happens to be the chief clerk in charge of a large housing development and cannot spare the time of being away several days due to train or bus travel; which causes the necessity of traveling by plane. The Commonwealth's Attorney is willing to authorize this person to make such trip, but first wishes to ascertain whether or not the State will bear the expense."

It is my opinion that the expense of the trip of the person described may be paid by the Commonwealth under the authority of Section 19-291 of the Code. You are, of course, thoroughly familiar with this section, but the pertinent paragraph thereof reads as follows:

"A sheriff or other officer, for traveling out of his county or corporation but within the State to execute process in a criminal case and doing any act in the service thereof, for which no other compensation is provided, shall receive therefor, out of the State treasury, such compensation as the court from which the process issued may certify to be reasonable. When in a criminal case an officer or any person renders any other service in the State for which no specific compensation is provided, the court in which such case is may allow therefor what it deems reasonable and such allowance shall be paid out of the State treasury from the appropriation for criminal charges on the certificate of the court stating the nature of the service. This section shall not prevent any payment under § 2-199, which could have been made if this section had not been enacted."

**CRIMINAL CASES—Police court justice of town may not grant new trial.
F-136c (330)**

June 30, 1954.

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

This is in reply to your letter of June 24, 1954 in which you request my opinion as to the authority of the police court justice for the town of South Boston to grant a new trial to a person convicted by him for violation of a town ordinance against operating an automobile under the influence of intoxicants.

You are perhaps aware of section 16-27 of the Code of Virginia relating to the granting of a new trial by a trial justice. Although this statute does not specifically so state, it appears that the power to grant a new trial is confined to civil cases. This view is strengthened by the Supreme Court decisions in the cases of *Seay v. Commonwealth*, 155 Va. 1087, and *Malouf v. City of Roanoke*, 177 Va. 846, which cases you relied upon in opposing the granting of a new trial.

In view of the aforementioned decisions I concur in your view that the power of the police court justice is confined to granting of appeals following his verdict and, therefore, the person convicted and subsequently acquitted would not be entitled to a refund of the fine and cost imposed upon him in the original trial.

CRIMINAL CASES—Preliminary hearings; when arrested person entitled to. F-85 (11)

July 9, 1953.

HONORABLE LOUIS F. JORDAN, *Judge*,
Juvenile and Domestic Relations Court, Waynesboro.

This is in reply to your letter of July 18, 1953, a portion of which is quoted:

"Where an individual is arrested on a warrant charging a felony, is bonded to appear before me, and the defense lawyer requests a preliminary hearing, is it my duty to accede to this request and hold such a hearing within a reasonable time? *If it is proper* to accord a hearing, is there any specified time within which such a hearing should take place? And lastly, is it or not within the province of the Commonwealth's Attorney to determine when it might be suitable for him to have the hearing date set?"

Section 19-77 of the Code of Virginia of 1950 provides as follows:

"An officer arresting a person under a warrant for an offense shall bring such person before and return such warrant to a trial justice or justice of the peace of the county or corporation in which the warrant is issued, unless such person be let to bail as hereinafter mentioned, or it be otherwise provided."

Article II, Chapter 5, of Title 19 of the Code sets forth the procedure for preliminary examination. In the Virginia case of *Benson v. Commonwealth*, 190 Va. 744, the Court, relying on a former decision, *Jones v. Commonwealth*, 86 Va. 661, held that a person indicted in a court of record may be tried on the indictment without any preliminary hearing. These opinions were limited, of course, to those cases in which an indictment was pending against the accused. In the absence of such an indictment I am of the opinion that the statutes make it mandatory to accord a preliminary hearing to a person arrested on a warrant. The time for this hearing should be reasonably convenient for counsel representing the Commonwealth as well as the accused, but need not be at the direction of the Attorney for the Commonwealth.

CRIMINAL CASES—Prosecution; bar to as result of testifying. F-293 (117)

December 14, 1953.

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

This is in reply to your letter of December 10, 1953 in which you ask the following questions:

"I would like to know whether or not the fact that a person who is charged with crime is called or sent before a Grand Jury, which Grand Jury is investigating his crime along with a crime of other persons participating in the same incident, is thereby given any defense or bar to a prosecution, of such crime? (2) If a person charged with crime is called to testify on behalf of the Commonwealth, in a case against another person involved in and charged with a crime growing out of the same incident, is the person called to testify on behalf of the Commonwealth then afforded a defense, or is that fact a bar to that witness being prosecuted later on?"

Section 8 of the Constitution of Virginia provides, in part, as follows:

"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."

The Supreme Court of Appeals of Virginia has repeatedly held that before this constitutional privilege against self-incrimination can be taken away by the Legislature there must be absolute indemnity provided, and that nothing short of complete amnesty to the witness, so that he can no longer be prosecuted for the offense, will furnish that indemnity. The court has held that this applies to testimony before a grand jury as well as testimony in any other court proceedings.

A person who is charged with a crime and is called or sent before a grand jury can later be prosecuted for that crime unless the Code provides immunity for witnesses giving evidence concerning that particular crime. See §§ 4-94, 18-66, 18-242, 18-337, 19-240, 24-449 and 48-15. Once the witness is before the grand jury he may refuse to testify on the ground that he might tend to incriminate himself. If he refuses to testify on this ground, he cannot be made to testify, but he can be prosecuted for the crime. If he does not invoke his constitutional privilege and does testify, he may still be prosecuted for the crime.

The above would also be applicable if the person is called to testify on behalf of the Commonwealth at the trial.

CRIMINAL CASE—Second offender; mandatory jail sentence; first conviction can be before law enacted. F-75b (318)

June 10, 1954.

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

This is in reply to your letter of June 8, 1954 in which you request my opinion concerning the effect of an amendment to § 4-58 of the Code of Virginia by the 1952 session of the General Assembly. That amendment reads as follows:

"Provided, however, that in the event of a second or subsequent conviction under this section the jail sentence so imposed shall in no case be suspended."

Your question is as follows:

"Does this amendment mean that a conviction prior to the said amendment cannot be considered as a prior conviction, or must second or subsequent convictions be had under the amended statute in order to require the compulsory serving of the jail sentence imposed?"

In my opinion, if the first conviction occurred prior to the effective date of the amendment and the offense on which the second conviction was based occurred subsequent to the effective date of the amendment, the compulsory jail sentence is applicable. The mandatory jail sentence is not a new jeopardy or additional penalty for the earlier conviction. It is a stiffened penalty for the last conviction, which the General Assembly considers an aggravated offense because a repetitive one.

CRIMINAL CASES—Trespass and destruction of property constitutes misdemeanor. F-85 (226)

April 1, 1954.

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

This is in reply to your letter of March 23, 1954 in which you request my opinion as to "whether or not a person going upon or entering into the property of another and doing damage on, in or to such property of another or therein is guilty of any common law offense."

The General Court of Virginia held in *Henderson v. The Commonwealth*, 8 Gratt. (49 Va.) 708, at 710:

"It is abundantly clear that the mere breaking and entering the close of another, though in contemplation of law a trespass committed *vi et armis*, is only a civil injury to be redressed by action; and cannot be treated as a misdemeanor to be vindicated by indictment or public prosecution. But when it is attended by circumstances constituting a breach of the peace, such as entering the dwelling house with offensive weapons, in a manner to cause terror and alarm to the family and inmates of the house, the trespass is heightened into a public offense, and becomes the subject of a criminal prosecution. The case of *Rex v. Storr*, 3 Burr. R. 1698, and *Rex Bathurst*, which was cited in that case, establish and illustrate both of these principles. Three of the indictments in that case were quashed, because they amounted merely to trespass *vi et armis*. But as to the fourth indictment, which was for entering a dwelling house *vi et armis*, and with strong hand, the objection to that indictment was given up by the counsel for the defendant, and the prosecution for that offense was sustained, whilst the three first indictments were ordered by the Court to be quashed. * * * ."

In my opinion if a person goes on the property of another and wilfully destroys or damages the property of another, it would constitute a misdemeanor at common law.

DANGEROUS WEAPONS—Forfeiture to State; disposal of determined by court. F-71 (144)

January 6, 1954.

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

This is in reply to your letter of December 16, 1953 in which you ask for an interpretation of § 18-146 of the Code of Virginia. That section reads, in part, as follows:

"If any person carry about his person, hid from common observation, any pistol, dirk, bowie-knife, razor, slungshot, metal knucks or any weapon of like kind, he shall upon conviction thereof be fined not less than twenty dollars, nor more than one hundred dollars and, in the discretion of the court, trial justice, or jury trying the case, may, in addition thereto, be committed to jail for not more than six months, and such pistol, dirk, bowie-knife, razor, slungshot, metal knucks, or weapon of like kind, shall, by order of the court, or justice be forfeited to the Commonwealth and may be seized by any officer as forfeited, and such as may be needed for police officers and conservators of the peace shall be devoted to that purpose, and the remainder shall be destroyed by the officer having them in charge."

I concur with your interpretation of this section of the Code. It is my opinion that the court or justice by order shall cause the illegal weapon to be forfeited to the Commonwealth and that the court or justice should order the disposal of the weapon and declare whether it is to be destroyed or turned over to a local law enforcement agency. I agree with you that local officers do not have the authority to either retain or destroy weapons seized by them when they make an arrest without a proper order of the court or justice trying the case.

DOG FUND—Compensation for owner; poultry stampeded by dog; determination made by Supervisors. F-95 (164)

February 1, 1954.

HONORABLE A. LAURIE PITTS, JR.,
Commonwealth's Attorney for Buckingham County.

In response to your inquiry as to the responsibility of a County Board in a situation where a claim for total damages is made because a dog got into a chicken house, killed several chickens and caused about two hundred and fifty or three hundred chickens to stampede or rush into a corner of a house where they were smothered, reference is made to sections 29-202 and 29-209, Code of Virginia, as amended, and to a reported opinion of this office to the Honorable Joseph A. Poff dated October 13, 1950, relative to the authority of the governing body to determine the "reasonable value" of the poultry destroyed or injured.

While it would be my view that, in accordance with section 29-202, "any [owner of] 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," and under section 29-209 "if the remainder is sufficient, all damages to livestock or poultry" shall be paid out of the dog fund of the county; and that upon submission of such claim as prescribed by law, if evidence satisfactory were submitted that the direct cause of the killing or injury was due to the dog's action by biting, chasing, stampeding, that such claim would appear to be compensable. However, as mentioned in the opinion of October 13, 1950, in the final analysis, the governing body determines the "reasonable value" of the livestock; and this would appear to likewise apply in determining whether or not the dog's actions were the direct cause of the death or injury of the poultry.

DOG LAWS—Board of Supervisors may adopt resolution prohibiting running at large. F-95 (211)

March 17, 1954.

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

This is in reply to your letter dated March 15, 1954, requesting my opinion on the following:

"Pursuant to Code Section 29-194, our Board of Supervisors in the year 1940, adopted a resolution prohibiting the running of dogs at large in the County of King George for 12 months of the year. They simply placed the resolution upon the minutes without public notice and without a formal ordinance.

"Obviously, a twelve month restriction is unenforceable and impracticable. Our game warden only attempts to require confinement during the months of May, June and July which is the mating season.

"There is some doubt in my mind, whether this resolution for the county without public notice and a formal ordinance is legal. Your opinion on this question will be appreciated."

Section 29-194 of the Code of Virginia provides as follows:

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

This section is flexible in its terms in that it preserves an area for local choice in matters of local concern. The governing bodies of the counties are authorized, in their discretion, to prohibit the running at large of dogs during such months as they may designate. The terms of the statute do not become operative until the authority conferred upon the governing body of the county is exercised. When this authority is exercised, the violation thereof would be of a State statute and not of a county ordinance. I am of the opinion that a formal ordinance is unnecessary and that a resolution properly adopted and duly recorded would be sufficient to enable the governing body of the county to exercise the authority conferred by the foregoing section of the Code.

I am not aware of any section which requires the governing body to give public notice of resolutions adopted by it. They are, of course, a matter of public record in the clerk's office of the county as provided by Sections 15-236 and 15-237 of the Code of Virginia.

DOG LAWS—Compulsory vaccination; no liability on Board of Supervisors for possible injury to dog. F-95 (284)

May 24, 1954.

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

I have your letter of May 18, in which you ask the following question:

"Should the Board of Supervisors of the County see fit to pass an ordinance requiring all dog owners to have their dogs vaccinated and administered serum injections at their own expense against rabies, would the Board of Supervisors be responsible in any way, especially as to damage for the loss of a dog by death due to vaccination or injection of the serum given by the veterinarian who would be paid by the dog owner under the enforced or compulsory ordinance?"

I take it there is no question but that the Board of Supervisors has the authority to pass such an ordinance as you describe. Upon this assumption I can conceive of no tenable theory by which the Board of Supervisors would be responsible for the loss of a dog by death due to vaccine administered by a

veterinarian paid by the dog owner. In the case of any negligence in the treatment of the dog, this would be a matter between the dog owner and the veterinarian.

**DOG LAWS—Ordinance requiring destruction of strays; validity of.
F-95 (107)**

November 27, 1953.

HONORABLE BASIL C. BURKE, JR.
Commonwealth's Attorney for Madison County.

This is in response to your letter of November 15, 1953 inquiring if a county ordinance providing, in part, "An epidemic of rabies infected animals in the Counties of Fauquier, Rappahannock and Madison having resulted in a condition dangerous to the public health and safety of the residents of Madison County * * Any time that a wild, unlicensed, stray or lost dog or dogs shall come into the possession of the Game Warden of Madison County, it shall be impounded for a period of four days prior to being destroyed by the Game Warden", is valid when considered in view of pertinent sections of the Code of Virginia such as 29-194, 29-194.1, 29-195 and 29-196.

Section 29-194.1, pertaining to confinement for fifteen days and disposition of stray dogs without the required tag, provides:

"The governing body of any county may cause to be constructed and maintained a pound or enclosure and to require dogs found running at large without the tag required by section 29-191 to be confined therein. Such governing body may require that any dog which has been so confined for a period of fifteen days and has not been claimed by the owner thereof shall be destroyed or otherwise disposed of by the game warden of such county."

Section 29-195 provides, in part, as follows:

"Any trial justice, on proof that any dog is mad or has been bitten by a mad dog, shall order such dog to be killed. If it is believed that such dog has been bitten by a mad dog but the proof is not sufficient, the trial justice may order the owner to confine it for observation."

Section 29-196 provides, in part, for the adopting of county ordinances "or other measures as may reasonably be deemed necessary to prevent the spread within its boundaries of the disease of rabies. * *"

The ordinance in question, while dealing with a serious problem, appears to go rather far especially in that it authorizes the killing after four days' detention by the Game Warden of unlicensed or stray dogs. It could be stated that it would authorize, after four days' detention, the destruction of an unlicensed dog picked up on the owner's property but which dog may have lost its collar or not possessed of a current license, and likewise it could be stated that the same would apply to a licensed dog having merely strayed a short distance from the owner's premises. It would also appear that if the statute could provide for four days' detention it could just as well provide for one day's detention prior to disposition. In this connection it is noted that section 29-195 provides for the killing of dogs proved to be mad or bitten by a mad dog by order of any trial justice. The present ordinance would appear to be strengthened if it contained the fifteen days' confinement period in accordance with section 29-194.1.

Likewise, the present ordinance would be made stronger if it were limited only to wild dogs. Or, it could be strengthened if it provided for some criteria for establishing that a stray or unlicensed dog was believed to be rabid in some particular circumstances. Accordingly, while the legality of the ordinance at hand cannot be determined categorically, it would appear that in some respects and situations its validity would be questionable.

ELECTIONS—Absentee ballots; disposition of when voter dies before election. F-100a (82)

October 27, 1953.

HONORABLE J. HOGE ROBERTSON,
Secretary of Giles County Electoral Board.

This is in reply to your letter of October 23, 1953, which I quote in part:

“I have a voter who has voted by mail, and since I have received his ballot he has died. What is your ruling as to his vote, can it be counted or not at the Election? I think it my duty to give it to the Judges along with the other mail ballots and it is their business to dispose of it.”

Although provisions are made for the delivery of a vote to the registrar prior to election day, it is not deemed to be actually cast until the day of the election. Therefore, if a person cast his ballot by mail and dies prior to the date of the election it would be improper to count such a ballot on the day of the election. I, therefore, agree that such a ballot should be delivered to the Judges at the polls in order that they may make the proper disposition of the same.

ELECTIONS—Ballots; names may not be inserted with rubber stamp. F-100a (34)

August 11, 1953.

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

This is in reply to your letter of August 10, 1953 in which you request my opinion as to whether the names of candidates who did not qualify as provided by law in time to have their names inserted on the ballot may be placed on the ballot by means of a rubber stamp.

I assume that the procedure you suggest would be to provide rubber stamps which the voter himself might use in lieu of writing in the name of a particular candidate. In former years it has been held by this office that such procedure was legal. However, the General Assembly, in 1952, amended the law to make it plain that a ballot marked in such a manner in the future would be invalid. Chapter 581 of the Acts of 1952 (§ 24-252 of the Code) provides that it shall be lawful for a voter to place the name of any person on a ballot in his own handwriting and vote for such person by a check, cross, mark or line immediately preceding the name, but that any ballot with a name placed thereon in violation of this section shall not be counted for such person. Therefore, it is clear that the answer to your question must be in the negative.

ELECTIONS—Ballots; procedure where no candidate qualifies. F-100a (29)

August 4, 1953.

HONORABLE E. M. STARKEY,
Commissioner of the Revenue, Buena Vista.

This is in reply to your letter of August 1, 1953 in which you request my opinion concerning an election for city officials where no candidate qualified by the date prescribed by law. Section 24-161 of the Code of Virginia provides that the Commonwealth attorney, city treasurer, commissioner of revenue and city sergeant shall be elected by the qualified voters of the city on the Tuesday after the first Monday in November, nineteen hundred and forty-nine, and every four years thereafter. Therefore, it is my opinion that an election shall be held, even though no candidates have filed for the purpose of having their names printed on the ballot as required by § 24-131 of the Code. Section 24-132 provides that no person not announcing his candidacy, as required by § 24-131, shall have his name printed on the ballot.

The proper procedure to be followed where no one has qualified is to have blank ballots printed, namely, ballots with the list of offices with space beneath each office for the voters to write in names, as provided for in § 24-252 of the Code of Virginia.

ELECTIONS—Ballots; writing name on bottom does not void it. F-100a (1)

July 1, 1953.

HONORABLE VERNON B. TATE, *Secretary*,
Wise County Electoral Board.

This is in reply to your letter of June 26, 1953, which I quote:

"In the Town Election of Big Stone Gap I understand that there was a ballot cast similar to the one enclosed and the question is on whether the ballot is void, whether it could be counted for either the Mayor or in the Council Race.

"In other words can it be ascertained if the name Virginia Smith which was written, was done with the intention of signing the ballot or just adding another candidate for Council.

"You will see that the write-in was not voted for, just merely the name written.

"QUESTION: Does the write in void the entire ballot for Mayor and Council, or can it be counted for both, and 2nd: Could it be ascertained our law if the intention of the party who wrote the name in meant to sign the ballot or just write in a new candidate. The name written in is a voter in the Town and was qualified to vote on that date."

I am aware of no statute prohibiting the mutilation of a ballot or defining what constitutes a defacement of a ballot. In the absence of any statute declaring void a mutilated or defaced ballot, it becomes pertinent to inquire whether the ballot marked as the sample you enclosed in your letter is in violation of section 27 of the Constitution, providing that "so far as consistent with the provisions of this Constitution, the absolute secrecy of the ballot shall be maintained". Unless it can be clearly ascertained on the face of the ballot that the elector intended the write-in to constitute his signature I am of the opinion that such write-in does not affect the validity of the ballot.

In this case the elector has voted for six candidates listed on the ballot, the full number for which he was entitled to vote. No check mark was made

preceding the name which was written in the space designated for write-in candidates.

Bearing in mind the fundamental principle that a citizen is not to be disfranchised except by a clear expression of legislative intent, my conclusion is that a ballot marked in the manner as the sample is valid.

**ELECTIONS—Candidates; filing deadline for town and city councils.
F-100b (174)**

February 9, 1954.

HONORABLE P. W. ACKISS,
Commonwealth's Attorney for Princess Anne County.

This is in reply to your letter of February 5, 1954, which I quote:

"I have recently been requested by several persons who desire to become candidates for Mayor and Councilmen to the City of Virginia Beach, which election is to be held on June 8, 1954, to advise them the latest date they might file in order to comply with Section 24-345.3 of the Code of Virginia.

"It appears to me that any such candidate shall file his Notice of Candidacy and Petition within ten days after the first Tuesday in April. I would appreciate it if you will advise me if this is your construction of this section since no primary is to be held to nominate candidates for the June election."

Section 24-345.3 of the Code of Virginia, as amended, provides, in part, as follows:

" * * * During the effective period of this chapter, 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 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).

It is to be noted that the nominations for the office of mayor and members of councils in cities must be completed on or before the first Tuesday in April next preceding the election and the proper authorities of each political party must certify the names of such candidates to the Board not later than ten days after the first Tuesday. All candidates for such offices other than party nominees must file notice of candidacy with the Board within ten days after the first Tuesday in April.

In view of the fact that no primary is to be held to nominate candidates for the election to be held on June 8, I am of the opinion that the final day for which a candidate for mayor or councilman may file his notice with the Board is April 16, 1954.

ELECTIONS—Candidates; filing notice for town elections; when special election before may abolish office. F-100b (222)

March 29, 1954.

JOHN Y. HUTCHESON, ESQ.,
Secretary of Electoral Board, Boydton.

This is in reply to your letter of March 24, 1954 in which you ask for suggestions for the manner in which prospective candidates for town offices may file notice of candidacy inasmuch as there is to be held a special election prior to the General Election in order to ascertain whether the form of government for the town of Boydton should be changed.

Section 24-131 of the Code of Virginia, 1950, requires that notice of candidacy for town offices be filed at least sixty days prior to the date of General Election and there is no exception to this rule to provide for notice in those instances in which the form of government may be changed as may be the case with the town of Boydton. Therefore, it will be necessary for prospective candidates to file such notice regardless of the outcome of the special election.

Inasmuch as the office for which a candidate may file may be abolished prior to the General Election, I see no objection to such candidates filing notice of candidacy for such office, with a provision attached to such notice that in the event the form of government is changed such notice will be deemed to be notice of candidacy for such office to which such candidate may aspire under the new form of government. Thus, in the event the form of government for the town remains as it is at the present time, the conditional notice need not be withdrawn inasmuch as it would have no basis to become effective.

ELECTIONS—Candidates; may purchase radio and television time during campaign. F-100b (310)

June 8, 1954.

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

This is in reply to your letter of June 4, 1954 in which you enclosed a letter from Mr. Henry E. Howell, Jr., of Norfolk, Virginia requesting an interpretation of § 24-440 of the Code of Virginia. Specifically, you desire my opinion as to whether § 24-440 of the Code prohibits a candidate in a general election in Virginia from becoming liable or permitting any of his friends or

adherents to become liable for any expense for the purchase of radio or television time for the purpose of making known to the public the candidate's views on public questions and his qualifications for office.

Section 24-440 of the Code of Virginia has not been amended since its inclusion in the Code of 1919 as § 251. As you know, at that time radio and television were not available for such use, and it is my opinion that there was and is no intention on the part of the Legislature to prohibit expenditures for such purposes. If such an interpretation were placed upon the section, I believe that grave doubts as to its constitutional validity would thereby be created, since legislation to that effect would certainly affect the candidate's freedom of speech. It is also doubtful that the Legislature could constitutionally distinguish between the dissemination of information by newspaper, magazine or other periodical which the statute permits and the dissemination of such information by radio or television which it would prohibit under the suggested interpretation.

It is, therefore, my view that a candidate in a general election may legally purchase radio or television time for the purpose of making known to the public his views on public questions and his qualifications for office.

ELECTIONS—Candidates; may use nickname on ballot. F-100b (2)

July 2, 1953.

HONORABLE L. WAVERLEY HUDGINS,
Chairman, Electoral Board, Portsmouth.

This is in reply to your letter of July 1, 1953, which I quote:

"A candidate has filed to run in the Primary Election, using his initials, and parenthetically, his nickname, as 'W. L. (Bill) Smith'. The ballots have been printed in this manner, and another candidate has raised the following questions:

"1. Is the Declaration of Candidacy, which was made out and signed in this manner, legal?

"2. May the candidate's name legally appear in this manner on the ballot?

"There are other candidates in the election who would have perhaps been better served by the use of a nickname, and therefore this point has been raised."

I am aware of no legal prohibition against a candidate for office using his nickname on the ballot in conjunction with his initials or given name.

ELECTIONS—Candidates; must be eligible to vote in the election; failure to pay poll tax. F-100b (257)

May 3, 1954.

MR. WILLIAM F. CARTER,
Member House of Delegates, Martinsville.

This is in reply to your letter of April 30, 1954 in which you ask to be advised as to the eligibility of a person to run for the City Council of the City of Martinsville in the election to be held on June 8, 1954 inasmuch as such

candidate failed to pay the poll tax assessed against him for the year 1953 until December 19, 1953.

This office has previously expressed the opinion that in order to be a candidate on an election ballot such person must be a qualified voter in the election for which he offers himself as a candidate. Inasmuch as the deadline for the payment of poll taxes to be eligible to vote in the June eighth election was December 8, 1953, it follows that the payment of such tax on December 19, 1953 comes too late to qualify one to vote in that election. Therefore, such person's name could not be printed on the ballot as a candidate for the office of councilman in the election to be held in the City of Martinsville on June 8, 1954.

**ELECTIONS—Changing districts; when town becomes second class city.
F-60 (223)**

March 30, 1954.

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

This is in reply to your letter of March 23, 1954 in which you request my opinion concerning revisions to be made in the County of Wise and City of Norton for election purposes.

You state that Norton, which has just become a City of the second class, has three precincts within the City and that at present two of these precincts extend beyond the corporate limits of the City. Under the new city charter of Norton and the Code of Virginia, residents of the City will elect their own Treasurer and Commissioner of Revenue, but will participate in the county elections so far as the offices of Sheriff, Commonwealth's Attorney and Clerk are concerned.

I would suggest that the following steps be taken so as to produce the smoothest and simplest system of elections in the affected area. The Board of Supervisors of Wise County should petition the Circuit Court of Wise County to alter the boundaries of the two precincts of the County which are partially within the new City, so as to remove them completely from the City. The procedure for this altering of the boundaries of the precincts is prescribed in Chapter 5 of Title 24 of the Code of Virginia.

The City Council of Norton should establish as many election districts as it may deem necessary for the City, and a voting place in each district. This is prescribed for by § 24-45 of the Code.

The City Electoral Board shall have complete responsibility for all elections within the City for city, district, State and national offices.

Section 15-94 of the Code provides:

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

In my opinion, this section places in the County Electoral Board complete responsibility for the election of the Sheriff, Commonwealth's Attorney and Clerk of the Circuit Court within the corporate limits of the City as well as in the County. These officers are still considered to be county officers.

**ELECTIONS—Compensation of local judges, clerks, and commissioners.
F-100d (94)**

November 13, 1953.

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

This is in connection with the recent discussion between your office and this office regarding the matter of compensation to which judges, clerks and commissioners of elections are entitled under sections 24-207 and 24-200 of the Code of Virginia in a situation where a judge also is appointed and acts as a commissioner and in such offices renders services, not otherwise compensated for, on several different days. This situation is to be distinguished from a situation discussed in an opinion to the Honorable Martin M. Folks, Highland County Circuit Clerk, on November 16, 1950, wherein the question and answer dealt with the performance of services on the same day by a person acting as both a judge and a commissioner.

Section 24-207 provides as follows:

"The judges, clerks and commissioners of any election shall receive as compensation for their services the sum of seven dollars and fifty cents for *each day's service rendered*. The governing body of any city, town or county may supplement the compensation herein prescribed for judges, clerks, and commissioners of election or for any one or more of them. (Code 1919, section 200; 1920, p. 387; 1926, p. 872; 1928, p. 770; 1932, p. 4; 1934, p. 547; 1938, p. 246; 1944, p. 151; 1946, p. 464; 1948, p. 857; 1950, p. 245.)" (*Italics supplied*).

Section 24-200, providing that five judges will also act as commissioners, reads as follows:

"The electoral board of each county and city shall, at the time they appoint judges and clerks of election, designate five of the judges so appointed to act as commissioners, who, or any three of whom, shall constitute a board of which the county clerk or the clerk of the corporation court, as the case may be, shall, ex-officio, be clerk."

It is the view of this office that the foregoing legislation intends to provide the compensation of seven dollars and fifty cents for "each day's service rendered", and this amount would apply for each separate day's service rendered while performing services as a judge or commissioner. For example: A person acting as a judge of an election on one day would be entitled to seven dollars and fifty cents for services rendered on that day and, acting as a commissioner on a second or later day after an election, would likewise be entitled to an additional seven dollars and fifty cents for his services rendered on this separate day. Section 24-208 allows a flat five dollars fee for carrying the returns and records to the county clerk's office and such payment for this particular service is separate and distinct from compensation for services rendered as a judge of an election. I am further advised that the views expressed herein are in conformity with the generally prevailing practices in this matter.

ELECTIONS—Electoral board; members continue to discharge duties until successors qualify. F-100g (283)

May 24, 1954.

HONORABLE WILLIAM C. CARTER,
Commonwealth's Attorney for Cumberland County.

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

"All the terms of office of the three members of the Cumberland County Electoral Board have expired, one of which expired in February, 1952, the second expired in February, 1953, and the third and last expired in February of 1954.

"A referendum with regard to the sale of alcoholic beverages was held in Cumberland County on May 14, 1954, and in view of the fact that all of the terms of office of the legally appointed members of the Electoral Board had expired, would this referendum be a legal election?

"Section 31 of the Constitution of Virginia sets forth in part as follows:

" * * * The present members of such boards continue in office until the expiration of their respective terms; and thereafter their successors shall be appointed for the term of three years. Any vacancy occurring in any board shall be filled by the same authority for the unexpired term."

"Section 33 of the Constitution of Virginia sets forth as follows:

"Unless otherwise prescribed by law, the terms of all officers elected under this Constitution shall begin on the first day of February next succeeding their election, unless otherwise provided in this Constitution. All officers elected or appointed shall continue to discharge the duties of their offices after their terms of service have expired until their successors have qualified."

"Will Section 33 apply in this particular case, or does it mean that the electoral officers appointed shall continue to discharge their duties until their successors have qualified, or until their successors have been appointed?"

First, let me say that I do not think it would be proper for this office to attempt to pass on the validity of the referendum to which you refer. The referendum has been held and its validity can only now be determined by legal proceedings.

As to the power of the members of the Electoral Board whose terms have expired to continue to discharge their duties under the circumstances stated by you, I am of the opinion that Section 33 of the Constitution, which you quote, plainly controls, and especially that portion of the section reading as follows: "All officers elected or appointed shall continue to discharge the duties of their offices after their terms of service have expired until their successors have qualified." In other words, in the absence of their successors having qualified, it is my opinion that the members of the Electoral Board continue to discharge the duties of their office.

ELECTIONS—Electoral board; members should be appointed with staggering terms. F-100g (266)

May 17, 1954.

HONORABLE WILLIAM C. CARTER,
Commonwealth's Attorney, Cumberland County.

This is in reply to your letter of May 11, 1954 in which you state that the terms of office of all the members of the Cumberland County Electoral Board have expired due to the fact that the matter was not brought to the attention of the Judge of the Circuit Court. You request my opinion as to whether the Judge can appoint three new members to the Electoral Board this year in order to correct this error. Also, for what terms shall each member be appointed?

Section 24-29 of the Code of Virginia provides in part as follows:

“ * * * During the month of February in each year, as the terms of the members of the board respectively expire, their successors shall be appointed for a term of three years. * * * .”

If the terms of all three members of the board have expired the Judge of the Circuit Court, in my opinion, should appoint three new members to the board this year. Although the statute prescribes terms of three years for each member, it also contemplates that the term of office of one member will expire each year. Although there is nothing in the statute which would definitely require the judge of a circuit court to stagger their terms of office so that one will expire each year as contemplated by § 24-29 of the Code, I feel that this would be the better practice.

ELECTIONS—Judge of; registrar and draft board member eligible. F-100d (37)

August 19, 1953.

MR. A. P. COLEMAN, SR., *Secretary*,
Campbell County Electoral Board.

I am in receipt of your letter of August 17, in which you ask the following questions:

- “1. Is it permissible for a Registrar to serve as a Judge of Elections?
- “2. Can a member of a Draft Board serve as a Judge or Clerk of Elections?”

In answer to your first question, I beg to advise that a Registrar may serve as a Precinct Judge of Elections. See Section 24-52 of the Code.

Replying to your second question, I will state that Chapter 21 of the Acts of the Extra Session of the General Assembly of 1952 provides that

“No person shall be ineligible to hold any State, county or municipal office or position by reason of being engaged in service in Virginia in the Selective Service System of the United States.”

In view of this Act, I am of opinion that a member of a Draft Board may serve as a Judge or Clerk of Elections.

ELECTIONS—Poll books; inspection by political party leader. F-100 (59)

September 18, 1953.

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

This is in reply to your letter of September 17, 1953 inquiring if the Chairman of the Committee of a political party is authorized to examine the poll book records of the judges from a previous election for the purpose of learning which voters registered in a county actually cast a vote.

Section 24-267 of the Code of Virginia provides as follows:

"After canvassing the votes in the manner aforesaid, the judges, before they adjourn, shall put under cover the poll books, seal the same, and direct them to the county clerk of the county or clerk of the corporation court of the city (as the case may be) in which the election is held; and the poll books thus sealed and directed (together with the ballots strung as aforesaid enclosed and sealed) shall be conveyed by one of the judges, to be determined by lot, if they cannot otherwise agree, to the clerk to whom they are directed on the day following the election, there to remain for the use of the persons who may be lawfully entitled to inspect the same."

In accordance with the foregoing legislation placing such poll book records under seal except for the use of persons entitled to inspect the same by law, this office concurs in your opinion that a court order would be required in order for the Chairman of a committee to be entitled to inspect the sealed poll books.

ELECTIONS—Poll taxes; deadline for payment to participate in town elections; newly annexed territory. F-100c (221)

March 24, 1954.

HONORABLE BRANTLEY B. GRIFFITH,
Attorney for the Commonwealth, Lebanon.

This is in reply to your letter of March 23, 1954, which I quote:

"Under Section 15-152.24 and other applicable statutes of the Code of Virginia, I wish you would please advise me as to your opinion, based upon the following statement of facts.

"Effective December 31, 1953, certain territory lying outside of the Town of Lebanon, Virginia, through annexation proceedings, became a part of said town.

"There are certain individuals residing in said annexed territory who, although they are properly registered, have failed to pay their capitation tax prior to December 7, 1953 (six months prior to the forthcoming Town Election), but who have and will have paid said capitation tax prior to May 1, 1954 (this being six months prior to the forthcoming General Election).

"I wish you would please advise me whether or not the above referred to parties will be entitled to vote in the Town Election to be held on the 8th day of June, 1954."

Section 15-152.24 of the Code of Virginia, 1950, as amended, entitles persons residing in the territory annexed by a city or town to be transferred to the proper poll books in the city or town without again registering. Such

section also entitles such persons to be registered if they would have been entitled to vote at the next succeeding election in the county. However, this section does not authorize such persons to vote in the city or town unless such persons have complied with all conditions for voting, in addition to the requirements of registration.

The conditions for voting as prescribed by section 21 of the Constitution of Virginia are as follows:

"A person registered under the general registration of voters during the years nineteen hundred and two and nineteen hundred and three, or under the last section, shall have the right to vote for all officers elective by the people, subject to the following conditions:

"That unless exempted by section twenty-two, he shall, as a prerequisite to the right to vote, personally pay, at least six months prior to the election, all State poll taxes assessed or assessable against him, under this Constitution, during the three years next preceding that in which he offers to vote.

"If he shall have registered after the first day of January, nineteen hundred and four, he shall, unless physically unable, prepare and deposit his ballot without aid, on such printed form as the law may prescribe; but any voter registered prior to that date may be aided in the preparation of his ballot by such officer of election as he himself may designate."

I am, therefore, led to the conclusion that any person offering to vote in the election to be held on June 8, 1954 must have paid all the required poll taxes at least six months prior thereto.

ELECTIONS—Poll taxes; member of reserves not on active duty not exempted. F-100c (71)

October 19, 1953.

MRS. LUCILE H. TALLEY,
General Registrar, Danville.

This is in reply to your letter of October 17, 1953 in which you request my opinion as to whether a former member of the armed forces, now in the active reserves, classification 0-2, is exempt from the payment of poll taxes as a prerequisite to voting.

Sections 24-23.1 and 24-23.2 of the Code provide that a person who is in active service as a member of the armed forces or who has been discharged from active service as a member of the armed forces on or after the first day of the calendar year preceding the year in which the election occurs may vote without the payment of any poll tax. Therefore, if the person in question was discharged from active service on or since January 1, 1952, he may vote in the general election next month without the payment of poll tax.

A person in the active reserves as contrasted with the inactive reserves, is not exempted from the payment of the poll tax. The Code and Constitution of Virginia specify that a person must be on active service as a member of the armed forces. A member of the reserves, regardless of classification, does not come within these exemptions unless he is on active duty or service at the present, or has been discharged from active service since January 1, 1952.

ELECTIONS—Poll taxes; new resident moving into state; payment of. F-100c (204)

March 10, 1954.

HONORABLE H. A. WOODHOUSE, *Chairman*,
Electoral Board for Princess Anne County.

This is in reply to your letter of March 8, 1954, which I quote:

"Please advise me at your earliest convenience whether or not a person who moved to this County as resident from the State of North Carolina on January 5, 1953, is required to pay any poll taxes as a prerequisite to vote in the primary and general elections to be held in the year 1954. This question has raised considerable controversy here and your opinion is urgently requested."

Section 21 of the Constitution of Virginia provides in part that, in order to be eligible to vote, a person must have paid at least six months prior to the election all State poll taxes assessed or assessable against him during the three years next preceding that in which he offers to vote.

Section 58-4 of the Code of Virginia provides as follows:

"Except when otherwise specifically provided, the tax year shall begin on the first day of January of each year and shall end on the thirty-first day of December of each year and all assessments shall be made as of the first day of January of each year."

Inasmuch as the person in question was not a resident of Virginia on the first day of January, 1953, such person was not assessable for the State poll tax in that year. It is not necessary that a person pay the poll tax assessed against him on January 1, 1954, in order to be eligible to participate in this year's elections, inasmuch as the Constitution specified that such tax must be paid only for the years in which a person was assessable next preceding the election year. In view of the foregoing, the person mentioned in your letter is not required to pay any poll tax as a prerequisite to vote in the primary and general elections to be held in the year 1954.

ELECTIONS—Poll taxes; when assessable against person coming of age. F-100c (220)

March 29, 1954.

HONORABLE GEORGE W. PALMER,
State Senator, Green Bay.

This is in reply to your letter of March 26, 1954 in which you ask to be advised whether a person who became twenty-one years of age in 1953, who registers in March or April of 1954, at which time such person pays his 1954 poll tax, will be disqualified from participation in the regular town election due to the failure to pay the 1954 poll tax at least six months prior to June 8, 1954.

The requirement of the Constitution of Virginia as well as the Code of Virginia for the payment of poll taxes as a condition to voting in the year 1954 does not apply to those persons who became assessable for such tax for the first time as of January 1, 1954, inasmuch as the requirement is based on the years *next preceding* the year in which a person offers to vote. Thus, persons who

became twenty-one years of age after January 1, 1953 were not assessable for any poll tax until January 1, 1954, and therefore are not required to pay any such tax as a condition for voting in the election to be held on June 8, 1954.

ELECTIONS—Primaries; participants obligated to support all nominees of party in general election. F-100 (4)

July 3, 1953.

HONORABLE VICTOR P. WILSON,
State Senator, Hampton.

This is in reply to your letter of July 2, 1953 which was received in the absence of the Attorney General who is at this time convalescing from minor surgery. In view of the imminence of the primary election, I have felt it necessary to give prompt attention to your inquiry.

I quote from your letter the question presented:

"Can I vote in the Democratic Primary on Tuesday, July 14, 1953, only for candidates for municipal offices and candidates for the General Assembly and refrain from casting any ballot for one of the Gubernatorial Democratic candidates, and then vote for the Honorable Ted Dalton in the general election on November 3rd, without impairing my status as a good Democrat and member of the Democratic Party of Virginia?"

While I do not find that this office has previously expressed an opinion upon the precise point raised in your question, I have found three opinions which I believe answer the question on principle. The first of these was addressed to the Honorable B. S. Utz, Treasurer of Madison County, on October 2, 1939, and was rendered by the former Attorney General, the Honorable Abram P. Staples. Judge Staples said, in part, "While * * * in the absence of a resolution by the committee, it is not necessary for voters in the primary to subscribe and take the above pledge, nevertheless, it is generally understood that all persons offering to vote shall support and vote for *all of the nominees* of the party in the next ensuing general election." (Italics added). The second opinion was rendered on October 30, 1939 to Mr. W. W. Finley. In that opinion Judge Staples ruled that, by participating in a primary, a person is morally obligated to support all of the nominees of the party, even though some of the nominees may have had no opposition and even though their names did not appear on the ballot. As an attorney you will, of course, appreciate the strong analogy between the situation there presented and the question raised by your letter, for Judge Staples has, in effect, ruled that regardless of whether you vote for a particular candidate in the primary you are nevertheless morally obligated to support him should he become the nominee of the party. Finally, in an opinion rendered to the Honorable E. L. Johnson, Mayor of Bedford, Virginia, on October 5, 1951, Judge Almond, in answer to a question as to whether there is any legal obligation which requires a person who voted in the primary to vote for the nominee of the party in the general election said "By this act of participation as a voter he represents to the judges of his election precinct, and to all who participate with him in that primary, voters and candidates alike, that he will support *all of the nominees* of that party at the next ensuing general election. * * * The fact that the voter is not challenged does not alter the fact that, through his participation, he has represented himself to be qualified to vote in the primary and that he will support all of the nominees. While the obligation thus assumed is not one which can be legally enforced, yet in ethics, good conscience and

honor, it far transcends legal considerations. The obligation is one of honor and morality which cannot be discharged by resort to narrow legislative concepts."

I feel confident that reference to the enclosed opinions will convince you that the answer to the question presented by your letter must be in the negative.

ELECTIONS—Registrars; appointing general for Arlington County.
F-100d (212)

March 19, 1954.

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

This is in reply to your letter of March 12, 1954 in which you request my views relative to the applicability to Arlington County of Chapter 228, Acts of Assembly, 1952.

Since 1943 the County of Arlington has been operating under a system of appointing a general registrar in addition to local registrars, pursuant to authority granted by the General Assembly in Chapter 291, Acts of Assembly, 1942, as amended by Chapter 410, Acts of Assembly, 1948, which provides that any county having a density of population of two thousand or more per square mile may adopt such a procedure. This authority is not unlike that granted by the General Assembly in prior and subsequent legislation affecting other counties. Even though it may be that Arlington is the only county which could bring itself within the classification which requires a density of population of not less than two thousand per square mile, the Act is general in nature. See *Bray v. County Board*, 195 Va. 31. In the 1952 session of the General Assembly several Acts were passed authorizing certain changes in the office of registrars in the counties. Such Acts were permissive, as were former Acts of like nature, and were not effective until the county affected thereby adopted the appropriate resolutions. One such Act was Chapter 542 which authorized certain counties to create the office of general registrar in addition to local registrars of such counties. Another Act, namely, Chapter 228, granted authority to *any* county to create the office of general registrar, and also provided that the creation of such office would automatically abolish the office of local registrars. This Act also made provision for the counties choosing to adopt the provisions thereof to abolish the office of general registrar and revert to the system of appointing registrars as was provided by law.

The primary effect of chapter 228, Acts of Assembly, 1952, was to grant the same permission to any county as had been previously extended to only a certain number of counties. The Acts applicable only to certain counties were not repealed by the passage of chapter 228 so it is, therefore, necessary to construe such Act together with other Acts relating to the same subject. It is obvious that the General Assembly was aware that certain counties had authority to appoint general registrars prior to the enactment of chapter 228. Therefore, in the absence of a clear intent to rescind the authority already granted, it must be concluded that the General Assembly intended that such authority be continued in effect. This is borne out by the fact that chapter 542 of the Acts of Assembly of 1952 which placed certain other counties in the same position as the county of Arlington was passed subsequent to the passage of chapter 228. When construing all statutes *in pari materia* relative to registrars it appears that any county may appoint a general registrar, which appointment will automatically abolish the office of local registrars unless the county making such appointment be one of such a population density as to come within additional legislative enactments which authorize the appointment of a general registrar in addition to local registrars.

Accordingly I concur in your opinion that the county of Arlington is bound by the terms of chapter 291, Acts of Assembly, 1942, as amended by chapter 410, Acts of Assembly, 1948, and cannot now appoint a general registrar under the terms of chapter 228, Acts of Assembly, 1952.

ELECTIONS—Registrars, general; may not also serve as land assessor or any other office. F-249 (155)

January 19, 1954.

HONORABLE F. N. WATKINS,
Commonwealth's Attorney for Prince Edward County.

This is in reply to your letter of January 9, 1954, which I quote:

"The Board of Supervisors of my County has requested that I secure your opinion as to the following questions:

"1. May 'X', who holds the office of General Registrar of Prince Edward County, appointed under Section 24-118.5 of the Code of Virginia, be appointed as a land assessor, as provided under Section 58-787, Code of Virginia, while holding the office of Registrar?

"2. If it is permissible for the Judge to appoint the General Registrar as assessor, does by such appointment, the office of General Registrar become vacant?

"3. May the Clerk of the Trial Justice Court of this County be appointed assistant registrar?

"4. If the Clerk may be appointed Assistant Registrar, does this vacate the office of the clerk of the Trial Justice Court?"

Although sections 24-118.5 through 24-118.8 do not, by express terms, prohibit the holding of other offices by general registrars and their assistants, I am of the opinion that such is the implied intent of the Legislature. It is to be noted that the duties and qualifications of general registrars and their assistants are, with slight exception, identical to those of registrars for magisterial districts as provided in section 24-52 of the Code. One such qualification is that such registrars shall not hold any other office, by election or appointment, during their term, except that of precinct judge of election. This provision has been in the law relating to registrars for a great number of years, and I am confident that the Legislature had no intent to remove such a requirement by the enactment of the statute providing for general registrars in the counties.

There appears little doubt that land assessors are public officials. (See 51 American Jurisprudence (Taxation, section 662) and 42 American Jurisprudence, page 889).

In view of the foregoing I am of the opinion that a general registrar may not be appointed as a land assessor under section 58-787 of the Code.

Your next inquiry is whether the Clerk of the Trial Justice Court may be appointed as an assistant registrar. Section 24-118.8 of the Code provides that all statutes applicable to registrars and general registrars shall apply *mutatis mutandis* to assistant registrars. As a registrar would be prohibited from serving as Clerk of the Trial Justice Court, the same holds true as to the assistant registrar.

Your inquiries as to which offices become vacated in the event that the general registrar and the Clerk of the Trial Justice Court are appointed as land assessor and assistant registrar, respectively, may be answered by the provisions of section 24-53 of the Code, which I quote:

"The registrar shall hold office for two years from the first day of July following his appointment, and until his successor is duly appointed

and qualified. 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. The electoral board shall fill any vacancies that may occur in the office of registrar."

ELECTIONS—Registration; applicant must be able to read and write.
F-100d (110)

December 4, 1953.

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

This is in reply to your letter of November 30, 1953 which reads, in part, as follows:

"The General Registrar of Fairfax County, Virginia, has submitted the following query to this office for reply:

"Is it necessary for an individual to be able to make his application to register in his own handwriting when his disability is due to lack of formal education thereby rendering such individual incapable of signing his name?"

As you point out, § 20 of the Constitution of Virginia provides, among other things, that a person shall be entitled to register provided "That, unless physically unable he make application to register in his own handwriting, without aid, suggestion, or memorandum, in the presence of the registration officer, stating therein his name, age, date and place of birth, residence and occupation at the time and for the one year next preceding, and whether he has previously voted, and, if so, the state, county and precinct in which he voted last." In my opinion it is clear from the language of this section that the person must be able to make this application in his own handwriting without aid, suggestion or memorandum. The words "unless physically unable" are, as I understand them, inserted for the purpose of protecting those who are unable to meet the requirements due to some physical impediment. I do not believe that these words should be construed to mean that a person who lacks sufficient formal education to read and write shall be deemed physically unable, for such construction would result in this requirement meaning virtually nothing. I believe that this opinion is supported by the decision in the case of *Davis v. Allen*, reported in 157 Va. page 84.

ELECTIONS—Registration; former convict whose civil rights have been restored, eligible. F-100d (165)

February 1, 1954.

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

I am in receipt of your letter of January 28, 1954, requesting the opinion of this office on a question submitted to the State Board of Elections by Mr. Malcolm M. Christian, the general registrar of Albemarle County.

I quote from Mr. Christian's letter as follows:

"A man has applied to me for registration. The man is a former inmate of the State penitentiary, * * *. However, the man has had his

civil rights restored * * *. It appears to us from our interpretation of Section 24-18 of the Virginia Code that after a man's civil rights are restored he may be privileged to register to vote.

"I would appreciate if you would inform me as to whether that is the correct interpretation. If he is permitted to register, how long must he remain in the precinct before he is eligible to vote?"

Mr. Christian's interpretation is correct. After a person who has been convicted of any of the crimes specified in § 23 of the Constitution has had his disabilities removed, he may register and vote, provided he qualifies under the other requirements of the Constitution and Code of Virginia. It is my opinion that the other qualifications for such a person are the same as those for any other citizen of the State. In order to register and vote he must be a *resident* of the State one year, of the County six months, and of the precinct thirty days. These times should be computed from the time that he actually established his residence in the State, county and precinct.

ELECTIONS—Registration; new voters; preparing poll tax lists; town capitation taxes not a prerequisite. F-100d (235)

April 12, 1954.

HONORABLE R. PAGE MORTON,
Commonwealth's Attorney for Charlotte County.

This is in reply to your letter of April 7, 1954 in which you make several inquiries pertaining to the election laws of Virginia. Several of these inquiries relate to the interpretation to be placed upon section 24-56 of the Code, which provides as follows:

"The electoral board of the county within which such town or the greater part thereof is situated, shall, not less than fifteen days before any town election therein, appoint one registrar and three judges of election for each voting precinct, which judges shall also act as commissioners of election. The registrars shall, before any election in the town, register all voters who are residents of the respective precincts of such town, and who shall have previously registered as voters in the county, or either of them in which the town is situated, and none others. The registrars shall be governed as to their qualifications and powers, and in the performance of their duties, by the general laws of this Commonwealth, so far as the same may be applicable."

The pertinent provisions of the Code relating to the registration for new voters in the counties, cities and towns are embodied in subsequent sections of chapter 6, Title 24, of the Code. Section 24-74 provides that each registrar in the counties, cities and towns shall complete the registration of voters thirty days before the election. Section 24-82 provides that no additional persons shall be registered after the day fixed by section 24-74 until following the election. Section 24-85 makes provision for the persons who have registered in one election district in the same county or city to transfer their registration in the event they change their place of residence from one election district to another. Such persons must be furnished a certificate by the registrar with whom they registered which they may present to the registrar in the election district to which they have removed. The names of such persons must be entered on the registration books by the registrar in the election district to which the electors have removed at any time except in specified instances.

Section 24-56 has nothing to do with the registration of new voters. It merely deals with the preparation of the special list of voters for the purpose of town elections and includes only those persons previously registered as voters in the county. Such voters, of course, must have registered in the county before the books were closed for that purpose. However, if they have been so registered they may be transferred to the town registration book at any time before the town election. Such persons must present themselves to the registrar with the necessary proof of prior registration in the county.

Your next inquiry pertains to the provisions of section 24-127 of the Code of Virginia. This section requires the county treasurer to furnish a list of residents of any incorporated town to the clerk of the circuit court who have paid the State poll tax as provided by law. The requirement for the payment of such poll tax at least six months prior to the general election is found in section 21 of the Virginia Constitution which provides, in part, as follows:

"A person registered under the general registration of voters during the years nineteen hundred and two and nineteen hundred and three, or under the last section, shall have the right to vote for all officers elective by the people, subject to the following conditions:

"That unless exempted by section twenty-two, he shall, as a prerequisite to the right to vote, personally pay, at least six months prior to the election, all State poll taxes assessed or assessable against him, under this Constitution, during the three years next preceding that in which he offers to vote."

You also inquire if a voter is required to pay his town capitation tax in order to vote in a town election. Section 24-23 of the Code provides that the electors of a town shall be actual residents thereof and qualified to vote for members of the General Assembly. Section 18 of the Virginia Constitution provides, in part, 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 preceding the election in which he offers to vote, has been registered, and has paid his State poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly, and all officers elective by the people; * * *."

It is to be noted that in both sections 18 and 21 of the Constitution the requirement for the payment of poll taxes relates to *State poll tax* only. I am, therefore, of the opinion that payment of municipal capitation taxes cannot be required as a condition to voting in town elections.

ELECTIONS—Registration; procedure for loose leaf system; segregation of poll tax list. F-100d (285)

May 24, 1954.

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

This is in reply to your letter of May 12, 1954 in which you request my opinion on the following questions:

"We are considering adopting the loose leaf system for registration in Rockingham County and desire to know if we can put the white voters

together, regardless of sex, using a different color for the colored voters, but all (white and colored) in one book. Is this permissible?

"If this be done is there any reason why the treasurers' capitation list cannot show the same alphabetical arrangement without regard to color and sex?"

Section 24-118 of the Code of Virginia, in my opinion, answers your first question. That section provides in part as follows:

"In the discretion of the electoral board of any city or any county, in lieu of registering voters in permanent books, the electoral board may provide for the registration of voters (1) on serially numbered cards, or (2) in loose leaf binders locked with an approved key locking device with white sheets for recording the names of white voters and buff sheets for recording the names of colored voters, * * *."

This section permits and contemplates the placing of the white and buff sheets in the same book.

Section 24-120 of the Code provides, in part, as follows:

"The treasurer of each county and city shall, * * * file with the clerk of the circuit court * * * a list of all persons in his county or city who have paid * * * the State poll taxes * * * which list shall state the white and colored persons separately, and shall be verified by the oath of the treasurer."

In the light of this section, I feel that the treasurer must continue to file separate lists after a county adopts the loose leaf system of registration.

ELECTIONS—Special; closing registration books; voters eligible. F-100 (96)

November 19, 1953.

MR. SAMUEL T. BINNS, JR., *Secretary*,
Henrico County Electoral Board.

I have your letter of November 16, in which you ask several questions in connection with the special election to be held in Henrico on December 8 next.

First, you ask when the registration books should be closed for the purpose of registering and transferring voters for this election.

Section 24-83.1 of the Code provides in part that: "For the purpose of registering and transferring voters all registration books shall be closed for a period of six days next preceding and including the day of any special election or of any election upon a referendum." Construing the language of the quoted provision, I am of the opinion that the registration books should be closed on and after December 2 and including the day of election.

You also ask as to the persons qualified to vote in this special election.

Section 24-22 of the Code, dealing with the qualifications of voters at special elections, provides in part as follows:

"The qualifications of voters at any special election shall be such as are hereinbefore prescribed for voters at general elections, but at any such special election, held before the second Tuesday in June in any year, any person shall be qualified to vote who was so qualified at the last preceding regular November election, or who is otherwise qualified to vote, and has personally paid, at least six months prior to the second Tuesday in June of that year, all State poll taxes assessed or assessable against him during the three years next preceding that in which such special election is held,

and at any such special election, held on or after the second Tuesday in June in any year, any person shall be qualified to vote who is or was qualified to vote at the regular election held on the Tuesday after the first Monday in November of that year. * * *

Construing this section, this office has on a number of occasions held that at a special election taking place in December of any year all persons who are qualified to vote at the regular November election in that year will be qualified to vote in the special election. In addition, this office has ruled that those persons otherwise qualified who have paid all capitation taxes assessed or assessable against them for the three preceding years six months prior to the date of the special election to be held in December will be eligible to vote, even though they did not pay such capitation taxes six months prior to the regular election in November of this year. This means that, even though a person did not pay his capitation taxes in time to vote in the November election, but did pay them six months prior to the date of the special election, he will be eligible to vote in such election. The last day for the payment of the required capitation taxes to render a person eligible to vote in your election on December 8, 1953, was June 8, 1953.

**ELECTIONS—Special for one city ordered by Act of General Assembly;
no court order necessary. F-100 (287)**

May 24, 1954.

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

This is in reply to your letter of May 19, 1954 in which you ask to be advised whether there is a necessity for a court order calling for the election in the city of Hampton on the second Monday in July, 1954, as provided in chapter 245, Acts of Assembly of 1954.

* Chapter 245 provides, in part, as follows:

"A special election shall be held on the Tuesday after the second Monday in July, nineteen hundred fifty-four, at which election the electorate of the city who are qualified to vote in the succeeding general election shall determine which of the three legislative plans as provided herein shall be adopted for the government of the city, and it is hereby made the duty of the regular election officers of the city to prepare the ballots and provide for the submission of the question to the voters at the election. The election shall be conducted in the manner prescribed by law for the conduct of regular elections and the ballots shall be printed and voted in accordance with the provisions of section 24-141 of the Code of Virginia. The questions to be voted on shall be printed in separate lines thus: * * *

The foregoing quoted provisions call for the election and specifies that it shall be conducted in the same manner as is provided for regular elections. I am of the opinion that no other authority is necessary to authorize the conducting of this election.

ELECTIONS—Special for one city ordered by Act of General Assembly; act serves as writ of election. F-100c (293)

May 25, 1954.

HONORABLE VICTOR P. WILSON,
State Senator.

This is in reply to your letter of May 22, 1954 in which you request my opinion as to "Who will issue the Writ of Election under the provisions of House Bill No. 207, since the law does not designate any official."

Since House Bill 207, which was enacted by the General Assembly at its 1954 session, prescribes the date of the election, and directs the regular election officials of the City to prepare the ballots and prepare for the submission of the question to the voters of the City, I am of the opinion that no Writ of Election is necessary to start the election machinery. The Act in itself is a Writ of Election also. The regular election officials should direct the sergeant of the City to post a copy of subsection (d) of § 301 of the Charter of the City of Hampton as amended by House Bill 207 of the 1954 session of the General Assembly at each voting place in the City at least twenty days before the election.

ELECTIONS—Special; residence requirements for participating; to determine if area to be incorporated. F-100e (291)

May 25, 1954.

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

This is in reply to your letter of May 21, 1954 in which you request my opinion as to who is eligible to participate in a referendum to be held on June 9, 1954 to determine if a portion of Scott County should be incorporated as the town of Weber City.

Chapter 583 of the Acts of Assembly of 1954 is the enabling Act prescribing the boundaries and charter of the proposed town. This Act provides for the referendum as follows:

"2. The provision of this act providing a charter for the town of Weber City shall not become effective unless a majority of the qualified voters residing in Eastville Magisterial District in the county of Scott within the limits set forth in § 2 of this act, hereinafter referred to as the described territory, voting on the question in an election ordered and held as hereinafter provided, votes in favor of incorporating the described territory as a town."

In my opinion, under this provision of the Act, all qualified voters residing within the defined boundaries of the proposed town are eligible to vote in the referendum regardless of which precinct in Scott County they are now registered in.

ELECTIONS—Town and city; general if held at regular time, even if under new charter. F-100 (216)

March 23, 1954.

HONORABLE ERNEST ROBERTSON,
Member House of Delegates, Salem.

This is in reply to your letter of March 19, 1954, which I quote:

"Prior to the last session of the General Assembly the Town of Salem was authorized under its charter to have a Council composed of three members. An amendment to the charter was passed by the recent session of the Assembly authorizing an increase of two members. The election, to fill the two new seats, as well as those of two of the old members, will be held on June 8, 1954.

"Your opinion is respectfully requested as to the following question:

"Since this amendment was passed subsequent to the date by which the computation of the six months requirement on poll taxes is made, is this election, in your opinion, to be considered a special or general election?"

The election to be held in Salem for the election of members of the Town Council is to be at the June election as provided by the charter for the town. The regular June election falls on June 8 this year pursuant to the provisions of section 24-136 of the Code of Virginia, 1950, which provides:

"There shall be held throughout the State on the Tuesday after the first Monday in November in the counties and cities, and on the second Tuesday in June in the cities and towns, general elections for all officers required to be chosen at such elections respectively."

I am, therefore, of the opinion that this is to be a regular election even though two additional members are to be elected to Council for the first time.

It is felt that your attention should be drawn to the fact that the above conclusion has no bearing on the requirement for the payment of poll taxes in this instance. Section 24-22 of the Code of Virginia, 1950, provides, in part, as follows:

"The qualifications of voters at any special election shall be such as are hereinbefore prescribed for voters at general elections, but at any such special election, held before the second Tuesday in June in any year, any person shall be qualified to vote who was so qualified at the last preceding regular November election, or who is otherwise qualified to vote, and has personally paid, at least six months prior to the second Tuesday in June of that year, all State poll taxes assessed or assessable against him during the three years next preceding that in which such special election is held, * * *."

Inasmuch as the date for the election of members to Council is the second Tuesday in June, the requirement for the payment of poll taxes is six months prior thereto even if the election could be classified as special.

ELECTIONS—Town and city; residents of recently annexed territory eligible to participate. F-100d (139)

December 30, 1953.

HONORABLE A. C. FULLER, JR.,
Treasurer for Russell County

I am in receipt of your letter of December 21, in which you present the following question:

"In a recent annexation proceeding pending in the Circuit Court of Russell County an annexation order was entered whereby certain territory was annexed to the Town of Lebanon, effective December 31, 1953.

"An election of town officers will be held in June, 1954, and I would like for you to advise me whether or not the citizens residing in said annexed territory, who have paid their capitation taxes prior to December 7, 1953, should be placed on the voting list of the Town of Lebanon, which I am required to prepare prior to the June, 1954 Town Elections, although the residents of the annexed territory will have only been citizens of the Town of Lebanon five months prior to the next election."

Section 24-127 of the Code provides as follows:

"The treasurer of every county in this Commonwealth in which any incorporated town is located, in which a regular election is to be held on the second Tuesday in June in any year in pursuance of law, shall furnish the clerk of the circuit court of his county with a list of the residents of such incorporated town who have paid the State poll tax provided by law six months prior to the second Tuesday in June.

"The lists shall be prepared and posted in all respects as it is provided for in section thirty-eight of the Constitution."

Section 38 of the Constitution provides that the treasurer's lists mentioned therein shall be filed at least five months before the election. At that time the persons residing in the annexed area will be residents of the town. It is, therefore, my opinion that the persons you mention should be included on the list that you make up for the Town of Lebanon. This office has previously expressed the opinion that persons residing in the annexed area who are otherwise qualified to vote are eligible to vote in a town election.

ELECTIONS—Town; residence requirements for participating. F-100e (288)

May 24, 1954.

HONORABLE FRANK N. WATKINS,
Attorney for the Commonwealth, Farmville.

This is in reply to your letter of May 19, 1954 relative to the residence requirements for voting in the town election to be held on June 8, 1954 in the town of Farmville. You specifically inquire as to whether the residence requirement as set forth in section 24-23, Code of Virginia, 1950, is any different from the requirement as set forth in section 24-17, Code of Virginia, 1950, inasmuch as the term "actual residents" is employed in section 24-23 and the word "actual" is not used in section 24-17.

As you know, legal residence required for voting has been construed by this office to be synonymous with domicile. The person you have in question at one time was a domiciliary of the town of Farmville but has moved his

place of abode outside the corporate limits of the town. In determining whether such person changed his legal residence at the time of changing his place of abode you should be guided by the general principles that have been laid down with regard to the determination of whether a person gives up his domicile at the time of changing his place of abode.

In order to determine the residence necessary for qualification to vote in town elections the word "actual" in section 24-23 of the Code must be ignored in order that this provision may be reconciled with section 18 of the Constitution of Virginia. Therefore, the word "resident" as set forth in sections 24-17 and 24-23 of the Code must be construed as synonymous with domiciliary.

ELECTIONS—War Voters Act; suspends any city charter provisions to the contrary. F-100b (209)

March 16, 1954.

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

This is in reply to your letter of March 10, 1954 in which you ask to be advised if the filing date for candidates for members of city council for the city of Richmond is governed by the provisions of chapter 509, Acts of Assembly, 1952, or by the city charter provision which specifies a date contrary to the date specified in the aforementioned act of the General Assembly.

You are referred to former opinions of this office in which the view was expressed that chapter 2, Acts of the special session of the General Assembly of 1945, the former War Voters Act, superseded provisions of a city charter in which there were conflicting provisions with respect to filing dates. See Opinions of Attorney General 1945-1946, page 46; 1947-1948, page 80.

The views expressed in former opinions with respect to the act of 1945 are likewise applicable to chapter 509, Acts of Assembly, 1952, codified as chapter 13.1, Title 24, Code of Virginia, 1950, which has as its purpose to encourage, aid and facilitate voting by members of the armed forces.

It is to be noted that chapter 2, Acts of Assembly, 1952, provides, in part, as follows:

"All acts or parts of acts inconsistent with this chapter are, during the effective period of this chapter, with respect to the elections mentioned in this chapter, suspended to the extent of such inconsistency, but upon the expiration of this chapter, said other acts shall be restored to, and remain in full force and effect as to all matters, just as if this chapter had not been passed. This chapter shall have no effect upon the statutes and laws relating to elections other than those mentioned herein."

In view of the foregoing I am of the opinion that any city charter provision in conflict with chapter 13.1, Title 24, of the Code, is suspended during the effective period of such chapter with respect to the elections mentioned therein.

EMBALMERS AND FUNERAL DIRECTORS—Board; granting reciprocal licenses entirely within discretion of. F-91 (265)

May 14, 1954.

HONORABLE GLEN M. WILLIAMS,
Member of State Senate, Jonesville.

This is in reply to your letter of May 11, 1954, which I quote:

"The State Board of Embalmers and Funeral Directors has advised me that they do not issue reciprocal licenses for Funeral Directors and Embalmers. In view of the public policy as set forth in Section 54-251 through 54-254 of the Code of Virginia, it seems to me that the Board has taken an illegal action, otherwise these sections of the law are meaningless.

"I shall appreciate it if you will advise me as to whether or not you have rendered an opinion on this matter and if so will you please send me a copy. If you have not previously rendered an opinion, I shall appreciate your doing so now.

"I am informed that the Board has in the past rendered reciprocal licenses in proper cases where the statutes are fully complied with. And it is my understanding that this policy of granting no licenses is a relatively recent thing."

The determination of persons entitled to licensure as an embalmer or funeral director is vested in the State Board of Embalmers and Funeral Directors. Section 54-248 of the Code of Virginia, 1950, sets forth the qualifications for applicants for such licensure. Section 54-251 of the Code authorizes the Board to issue licenses to holders of licenses issued by foreign States under certain conditions. Such is generally referred to as a reciprocal license and such licenses are naturally dependent upon some reciprocal agreement between the States; otherwise, the term "reciprocal" means nothing. However, the Virginia State Board has decided against entering into reciprocal agreements with other States and, therefore, does not grant reciprocal licenses. Inasmuch as the provisions of Section 54-251 of the Code are permissive rather than mandatory, I am of the opinion that it lies within the discretion of the Board as to whether the reciprocal privilege will be granted.

EXECUTIONS—Sale; priority for proceeds more than one judgment; execution and garnishment may be levied at same time. F-72 (290)

May 25, 1954.

HONORABLE ROBERT L. DEHAVEN,
Sheriff of Frederick County.

This is in reply to your letter of May 14, 1954 in which you request my opinion on two questions concerning executions on judgments. Your first question is:

"1. I have four executions issued by four different plaintiffs on judgments of different dates against one defendant. Plaintiff number one and two, with first and second judgments, fail or refuse, after having been notified to post indemnifying bond, to post such bond. Plaintiffs having third and fourth judgments did post bond and a sale was made, but there is not sufficient money to pay all judgments. In that case, which plaintiffs should be paid, those with first judgments or those who posted bond?"

Section 8-421 of the Code of Virginia provides:

"Of writs of fieri facias, that which was first delivered to the officer, though two or more be delivered on the same day, shall be first levied and satisfied, and when several such executions are delivered to the officer at the same time they shall be satisfied ratably. But if an indemnifying bond be required by the officer as a prerequisite to a sale, and the same to be given by some of the creditors and not by others, and the officer sells under the protection of such bond, the proceeds of the sale shall be paid to the creditors giving the bond in the order in which their liens attached."

This section answers your question in my opinion. Therefore, the plaintiffs who posted indemnifying bonds should be paid out of the proceeds of the sale first.

Your second question states:

"2. I have execution and garnishee summons against same defendant, with instructions to levy upon defendant's car. Can these two processes be in effect at same time. If not, how should I proceed?"

It is my opinion that these two processes may be in effect at the same time.

**FEES—Clerk of court; earned prior, collected after becoming salary officer.
F-116 (30)**

August 5, 1953.

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

I am in receipt of your letter of July 30, in which you present the following question:

"The General Assembly of 1950 enacted Chapter 272 which removed the clerk of the Corporation and Circuit courts of the City of Newport News from the category of fee officers and, effective July 1, 1950, provided that he should receive a salary of \$8,000 per annum in full compensation for his services—said salary to be paid by the City of Newport News. The act further provided that, after he was placed on a salary basis, all fees collected by him were to be paid into the treasury of the city.

"For a number of years and through the date of June 30, 1950 this clerk had been earning excess fees and had promptly paid such excess fees into the State treasury for apportionment between the city and the State as prescribed by law. At June 30, 1950 the clerk had certain uncollected fees covering services rendered when he was on the fee basis and when his office was earning excess fees. He interprets Chapter 272 to provide that any fees collected subsequent to July 1, 1950, which were uncollected at June 30, 1950—although earned prior thereto—shall be paid into the city treasury when collected.

* * * * *

"Will you please give me your opinion as to whether collections of these fees subsequent to July 1, 1950 should be paid by the clerk into the treasury of the City of Newport News or the treasury of Virginia.

Your assistance in this connection, I assure you, will be most appreciated."

Chapter 272 of the Acts of 1950, to which you refer, is "in force on and after the first day of July, 1950". The effect of the act is to place clerks of courts of record in cities having a population of not less than thirty-five thousand inhabitants nor more than forty thousand inhabitants according to the U. S. census of 1940 on a salary basis instead of being compensated by fees, such salary to be paid by the city, and the expenses of the office, including the compensation of deputies and employees, also to be paid out of the City treasury. The clerk is to continue to collect all fees and commissions but such fees and commissions, when collected, shall be paid into the City treasury. I should have thought that the General Assembly, in enacting this legislation, would have provided that fees earned by the clerk prior to the effective date of the act, but not collected until after such date, should be paid into the State treasury for apportionment between the city and the state as required by law. This could easily have been done, but instead of so doing this very broad language is found in section 2 of the act:

"All fees and commissions of every kind or character received or collected by each of the officers mentioned in the preceding section of this act, and from whatever source derived, shall be paid into the City treasury by each of such officers monthly."

In view of the scope of this language I do not see how the conclusion may be escaped that all fees and commissions collected by the clerk after the effective date of the act, whether earned before or after that date, shall be paid into the City treasury. As I have said, if the General Assembly had intended that fees earned by the clerk prior to the effective date of the act, but not collected after such date, should be paid into the State treasury, it could easily have so provided, but it did not do so. I agree with the interpretation placed upon the act by the clerk.

FEES—Doctor's fee for conducting blood test for alcoholic content may not be paid out of public funds. F-6 (173)

February 9, 1954.

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

This is in reply to your letter of February 5, 1954 in which you ask to be advised whether public funds may be used to guarantee the payment of doctors' fees in those instances where an accused fails to pay such fee incurred in the taking of blood tests in order to determine the alcoholic content of the accused.

Generally speaking, such tests are made at the request of the accused. Inasmuch as there is no provision authorizing or requiring the law enforcement agencies to employ physicians for this purpose, I am of the opinion that such an expenditure of public funds would be improper in the absence of statutory authority.

FEES—Lunacy commission; judges to charge none. F-148 (26)

July 31, 1953.

HONORABLE H. B. GILLIAM,
Civil and Police Justice, Petersburg.

This is in reply to your recent letter inquiring whether it would be legal and proper for you to charge the sum of \$5.00 for holding lunacy commissions for repayment over to the city employing you upon a regular salary.

Kindly be advised that I have examined the applicable sections of the Code of Virginia and chapters 465 and 585 of the Acts of Assembly of 1950, which are somewhat conflicting in their provisions. Moreover, I have inquired into the matter and the office of the clerk of the Police Court of the city of Richmond and the clerk of the Trial Justice Court of the county of Henrico both advise that the Justices of their respective courts make no charge for holding commissions of lunacy, etc.

Accordingly, it is my view that in accordance with the applicable provisions of law and the apparently prevailing practice that where the justice is paid an annual salary he shall receive no fee for payment to his city or otherwise.

FEES—Pathologist may be paid out of state funds for expert testimony in the prosecution of a felony. F-293 (308)

June 8, 1954.

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

This is in reply to your letter of June 3, 1954 in which you request my opinion as to whether the Circuit Court, pursuant to § 19-291 of the Code of Virginia, can certify for payment the fee of a pathologist incurred as an expense in the prosecution of a felony.

The pertinent portion of § 19-291 is as follows:

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

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

**FEES—Summoning witnesses in criminal cases; can not demand in advance.
F-293 (251)**

April 22, 1954.

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

This is in reply to your letter of April 13, 1954 in which you state:

"Your official opinion is requested as to whether or not defendants in criminal cases are entitled to have witness summonses issued and executed without prepayment of fees, except in cases where an affidavit of personal poverty is filed with the Court or Clerk."

Sections 14-122 and 14-123 of the Code of Virginia provide, in part, as follows:

"The fees and allowances of sheriffs, sergeants and criers in criminal cases shall be as follows:

* * * * *

"For summoning a witness in a felony case, forty cents;

"For summoning a witness in a misdemeanor case, fifty cents;

* * * * *

"A clerk of a circuit or other court of record may, for services performed by virtue of his office, charge the following fees, to-wit:

* * * * *

"(14) For issuing each summons for witnesses, twenty-five cents.

* * * * *

"(57) Upon conviction in felony cases, in lieu of any fees otherwise allowed by this section the clerk shall charge the accused ten dollars.

"(58) Upon conviction in all other criminal cases, in lieu of any fees otherwise allowed by this section the clerk shall charge the accused five dollars."

It is my opinion that defendants in criminal cases are liable for the above prescribed fees for the issuance and execution of witness summonses, regardless of whether they are convicted or acquitted, unless they come within the poverty exception set out in § 14-180 of the Code. If the defendant is convicted, then the clerk's fee for issuing witness summonses is included within the lump sum charge of either five or ten dollars.

An officer cannot, in my opinion, demand these fees in advance for issuing and executing witness summonses in criminal cases. Section 14-166 of the Code sets out the cases where an officer may demand his fees in advance, and that section specifically provides that he may not demand them in advance in criminal cases.

**FINES—Jail sentence for failure to pay; more than one conviction.
F-75b (131)**

December 21, 1953.

HONORABLE E. HUGH SMITH, *Judge*,
Twelfth Judicial Circuit, Heathsville.

This is in reply to your letter of December 17, 1953 in which you ask that I express my opinion as to the limitation of confinement under section 19-309 of the Code when a person convicted of three separate offenses is confined in jail due to the failure to pay his fines and costs. It is assumed that upon each conviction there was an order of confinement until such fine and costs were paid.

Section 19-309 of the Code of Virginia, 1950, provides as follows:

"If a person is confined in jail by order of any court or trial justice until his fine and costs, or costs when there is no fine, are paid, or under a *capias pro fine*, such confinement shall not exceed five days when the fine and costs, or costs when there is no fine, are less than five dollars, when less than ten dollars it shall not exceed ten days, when less than twenty-five dollars it shall not exceed fifteen days, when less than fifty dollars it shall not exceed thirty days, and in no case shall the confinement exceed two months. The jailer, upon commitment, shall note the amount of fine and costs, or costs when there is no fine, and the date of commitment, and shall, without further order or direction, release the defendant from jail promptly upon the expiration of the limitation above prescribed, and the defendant shall not thereafter be imprisoned for failure to pay the fine and costs, or costs, in that case; but nothing herein or in the preceding section shall prevent the issue of a writ of *habeas corpus* after such release from jail."

I agree with you that this section appears to contemplate a person being confined until his fine and cost of each conviction are paid. The language employed bears out this conclusion in that the limitation for confinement provides that "in no case shall the confinement exceed two months". Had the Legislature intended that *in no event* should a person be confined in excess of two months for failure to pay fines and costs for more than one conviction, it would have employed the appropriate language.

In view of the foregoing I am of the opinion that the individual in question should be confined in jail not exceeding sixty days in each case in which he was convicted and sentenced to jail until fine and costs are paid.

I am fully appreciative of the sense of hesitancy which you are experiencing in the invoking of the discretionary powers vested in you by section 19-307, and I realize that in the final analysis the decision must be your own.

FIRE DEPARTMENTS, VOLUNTEER—Speed limit, warning devices on private vehicles of members; what permitted. F-61 (151)

January 14, 1954.

THE HONORABLE WILLIAM J. HASSAN,
Attorney for the Commonwealth, Arlington.

This is to acknowledge receipt of your letter of January 12 in which you state in part:

"I would like the benefit of your opinion as to whether or not the personal automobile of a volunteer fireman, driven by said fireman

responding to a fire alarm, would become a fire department vehicle within the meaning of Sec. 46-216 of the Code, if, (1) the said vehicle is equipped with a siren or exhaust whistle, as provided for in Sec. 46-241 and 46-291, (2) said vehicle is equipped with a flashing red warning light, but no siren, (3) the said vehicle is not equipped with either a siren or flashing red warning light.

"It is my understanding that some few years ago, either the State Police or the Superintendent of Motor Vehicles informed the County Government that the vehicles of the volunteer firemen could not be equipped with a siren or exhaust whistle, as provided for in Section 46-291 of the Code, (as an exception to Sec. 46-290). I would also appreciate your opinion on this matter, if your answer to the first two questions posed is in the affirmative."

Your attention is invited to the following sections of the Code:

Section 46-216. "The speed limitations set forth in this chapter shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violations, nor to fire department vehicles when traveling in response to a fire alarm or pulmotor call, nor to ambulances when traveling in emergencies outside the corporate limits of cities and towns. This exemption shall not protect the driver of any such vehicle from the consequences of a reckless disregard of the safety of others."

Section 46-291. "Every police and fire department vehicle and every ambulance used for emergency calls shall be equipped with a siren or exhaust whistle of a type not prohibited by the Superintendent."

Section 46-293. "The Superintendent is hereby authorized to adopt and enforce rules and regulations and uniform specifications relating to the construction, mounting, use and number of warning devices for which an approval fee shall be made as hereinafter provided."

I understand that the Superintendent of State Police, in administering the provisions of Section 46-293, supra, has adopted a rule that he will issue a permit to members of volunteer fire companies so as to permit them to use sirens and lighting equipment on their privately owned vehicles while acting in the capacity of volunteer firemen. I further understand that, at the present time, under this policy there is a limitation as to the number of permits issued per fire company, and that number is three. The Superintendent does not issue such permits to cover fire department vehicles.

I cannot find in the statutes any specific reference to volunteer firemen or concerning the use of vehicles privately owned in emergencies. The provisions of Section 46-216 making an exception to the applicability of speed limitations must be strictly construed. The term "fire department vehicles" used in that section and also in Section 46-291, in my opinion, applies to those vehicles that are built and adapted for fire fighting purposes and are owned by either the public authorities or a fire fighting company. The term does not apply to privately owned vehicles that are used by volunteer firemen.

FISH, OYSTERS, SHELLFISH—Crab license; when required. F-104 (24)

July 29, 1953.

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

This is in reply to your letter of July 24, 1953 in which you ask the following advice:

"Will you kindly advise whether in your opinion under the provision of Section 28-170 sub-section 8 of the Code of Virginia, a person buying crabs from individual crabbers and paying for them at his pier, and then selling the crabs to another buyer, who in turn transports them to a crab packing factory, has to have the license required by this section."

Section 28-170 of the Code of Virginia provides, in part, as follows:

"Any resident of this State desiring to take or catch crabs for market or profit from the waters of this Commonwealth, or waters under its jurisdiction, by any of the means hereinafter stated, or any person desiring to engage in the business of buying or marketing crabs for packing or canning the same in any way, shall pay to the oyster inspector of the district in which he resides the taxes and be subject to the provisions set forth in the other sections of this article and the following sub-sections:

* * * * *

"(8) For each boat used in buying crabs, or for each person or firm engaged in marketing hard crabs by barrel or crate, five dollars and fifty cents; * * *."

It is my opinion that the person described in your letter is engaged in marketing crabs and, therefore, is subject to the license required by § 28-170. A person is, in my opinion, engaged in marketing crabs if he purchases them for resale, regardless of whether that resale is to individual consumers or to a packing house.

GAME AND INLAND FISHERIES—Licenses issuance by clerks of corporation courts of cities; effect of 1954 Act. F-233 (292)

May 25, 1954.

HONORABLE I. T. QUINN, *Executive Director*,
Commission of Game and Inland Fisheries.

This is in reply to your letter of April 29 inquiring as to the applicability of section 29-61, Code of Virginia, as amended by the 1954 session of the General Assembly with respect to the issuing of State hunting, fishing and trapping licenses, etc., by clerks of city corporation courts.

Section 29-61, as amended in 1954, provides:

"The clerks of the corporation courts of cities having a population of not less than fourteen thousand nor more than seventeen thousand according to the last preceding decennial census shall issue State licenses and county licenses for those counties contiguous to their respective cities, 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."

Section 29-62, as also amended in 1954, provides:

"Applications for county resident licenses shall be made in the county wherein the applicant has been a bona fide resident six months next preceding, or the county wherein the applicant is a legal voter, or the county wherein an unnaturalized person owns real estate and in which he has resided five years or more next preceding, or the county wherein a commissioned or enlisted soldier, sailor or marine is located, or the county wherein the school a student is attending is located or by residents of cities of less than fifteen thousand population the county wherein such city is wholly located, *or the corporation court of any city authorized to issue licenses for any such county, provided, however, that the applicant for such county license shall file with the clerk of the corporation court his name and correct county address. Failure so to do will render said license null and void.*"

Section 29-64 provides:

"All applications shall be made in writing on blanks supplied by the Commission, setting forth the applicant's age, color of hair and eyes, height, post office address and such information as may be required by the particular application under the provisions of sections 29-57 to 29-60; provided, that the clerks of corporation courts of cities of the size defined in section 29-57, subsection (f) shall also have authority to issue county licenses for the county in which the city is located, to bona fide residents of such city, or of such county, making application to such clerk therefor, in accordance with the provisions of sections 29-62 and 29-63, concerning applications for and issuance of county licenses."

Section 29-65, as amended, provides:

"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 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."

Section 29-61, as amended, must be read and construed in the light of the other sections applying on the same matter. Accordingly, it would be my view that section 29-61 authorizes clerks of corporation courts of cities having a population of not less than fourteen thousand nor more than seventeen thousand to issue State licenses and county licenses for those counties contiguous to their respective cities. This would not appear to alter the au-

thority of clerks of corporation courts of cities in their issuance of such licenses as heretofore obtaining. Sections 29-62, 29-64 and 29-65 appear to contemplate that corporation court clerks of cities shall continue to issue such licenses. Therefore, it would not appear that section 29-61, as amended, was intended to change the authority to issue licenses of clerks of city corporation courts as heretofore obtained other than to add thereto the authorization of clerks of corporation courts of cities of the designated populations to issue such licenses as designated in section 29-61, as amended.

GAME AND INLAND FISHERIES—Licenses; issuance by clerks of corporation courts of cities. F-262 (233)

May 5, 1954.

HONORABLE I. T. QUINN, *Executive Director*,
Commission of Game and Inland Fisheries.

This is in reply to your letter of April 29, inquiring if Section 29-61 of the Code as enacted at the 1954 General Assembly affects clerks of corporation courts other than those mentioned in this recent amendment insofar as issuing State hunting, fishing and trapping licenses is concerned.

Section 29-61 prior to the amendment read as follows:

"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."

Section 29-61 as amended by the 1954 General Assembly provides:

"The clerks of the corporation courts of cities having a population of not less than fourteen thousand nor more than seventeen thousand according to the last preceding decennial census shall issue State licenses and county licenses for those counties contiguous to their respective cities, 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."

It would appear that the last draft and enactment of Section 29-61 has changed the wording which formerly authorized clerks of corporation courts of all cities in the State to issue licenses so that now the issuing of such licenses is limited to clerks of corporation courts of cities having a population of not less than fourteen thousand nor more than seventeen thousand. It would further appear that this change has revoked the authorization of clerks of corporation courts, other than those specified, in issuing such licenses.

GAME AND INLAND FISHERIES—Members of Commission; move from one district to another; effect of. F-233 (188)

February 24, 1954.

HONORABLE THOMAS B. STANLEY,
Governor of Virginia.

This is in reply to your letter of February 23, 1954, which I quote:

"Mr. Wm. C. Gloth, Jr. of Arlington is serving as a member of the Commission of Game and Inland Fisheries. He originally was appointed on April 28, 1947 to fill an unexpired term and was reappointed on June 9, 1949 from the Eighth Congressional District for a regular term of six years.

"Subsequent to the latter appointment the General Assembly of Virginia enacted a redistricting bill creating a new Tenth Congressional District which includes Arlington County. In the spring of 1953 Mr. Gloth moved from the former Eighth District (now the Tenth) to Mathews County in the First District. On June 30, 1953 Governor Battle appointed Homer G. Bauserman, Sr. of Arlington to the Commission from the Tenth District. Dr. Warren B. Rains of Warsaw, appointed to the Commission as a member from the First District, is now in the Eighth District by reason of the Redistricting Act.

"In the light of these circumstances, I shall appreciate your advice as to the status of Mr. Gloth as a member of the Commission. I understand that in an opinion rendered Governor Battle you advised that members serving on the Commission at the time of the redistricting could legally serve until the expiration of their terms, but the question has been raised as to whether that opinion covered a situation where a member moved from the district from which he was appointed."

On July 21, 1952 I wrote the Honorable John S. Battle my views relative to the effect of the Redistricting Act of 1952 upon the eligibility of members of the Board of Agriculture and the Commission of Game and Inland Fisheries. In that letter I stated:

"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."

The conclusion reached in my letter of July 21, 1952 is likewise applicable to the question now presented. Although it is unquestionably the intention of the General Assembly that each Congressional District should have representation on the Commission of Game and Inland Fisheries, a member thereof is not a district or local officer, but a State Officer with Statewide jurisdiction. Even though section 29-3 of the Code of Virginia, 1950, as amended, provides that the Commission shall consist of not more than one member from each Congressional District, there is no statutory or constitutional provision which would disqualify a member duly appointed due to his removal from the district from which he was appointed. Therefore, in the absence of legislative enactment, I am of the opinion that duly appointed members on the Commission of Game and Inland Fisheries may continue to

serve the terms for which they were appointed even though such members now reside in a district other than that from which they were appointed, whether such change be due to redistricting or voluntary change of residence.

GENERAL ASSEMBLY—Constitutional number of votes for passage of ordinary bill. F-1 (208)

March 11, 1954.

HONORABLE A. E. S. STEPHENS,
HONORABLE E. BLACKBURN MOORE.

You have consulted me relative to the construction of section 50 of the Constitution of Virginia, in so far as same pertains to the passage of ordinary bills.

That portion of the section pertaining to this inquiry is as follows:

"No bill shall become a law unless * * * (d) Upon its final passage a ye a and nay vote has been taken thereon in each house, the names of the members voting for and against entered on the journal, *and a majority of those voting, which shall include at least two-fifths of the members elected to each house, recorded in the affirmative.*" (Italics supplied).

In my approach to the question as to whether or not the majority of those voting must include at least two-fifths of the members elected, I have resorted to the Debates of the Constitutional Convention of 1901-02. At pages 629-30, Volume I of those Debates, I find that the Convention resolved itself into a Committee of the Whole for further consideration of the report of the Committee on the Legislative Department. Section 11 of that Committee's report contained the following provision relating to the subject under inquiry:

"No bill shall become law unless * * * (d) on its final passage in each house, the vote shall have been taken by the yeas and nays, the names of the members voting for and against the bill entered on the Journal, *and two-fifths of the members elected to each house, including a majority of those voting, shall vote and be recorded as voting in its favor * * * .*" (Italics supplied).

In connection with this phase of the Committee report, the chairman announced "if there is no objection that section as read will stand as presented by the Committee."

At a later date, January 17, 1902, Volume II, page 1870, the Convention again took up consideration of the Committee report. Section 11, inter alia, was read and adopted without amendment. No questions were raised relative thereto and there was no debate on this specific subject. Consideration of the report by the Convention was concluded on that day. The report, however, was referred to the Committee on Final Revision and Adjustment.

On May 22, 1902, Volume II, pages 3096-3097, the Convention took up consideration of the report of the Committee on Final Revision and Adjustment with a draft of the Constitution as revised by the Committee. This Committee reported that it was "making no changes in articles as they were adopted by the Convention except to give greater clearness and conciseness to the expression of what it believes to be the true intent and meaning of the Convention." This report also stated that such changes as had been made related generally to punctuation, diction and the arrangement and transposition of sentences "so as to secure greater conciseness and perspicuity."

On May 30, 1902, Volume II, page 3260, the Convention again considered the report of the Committee on Final Revision and Adjustment. The proposed Constitution was read section by section and article by article. Slight verbal changes were made, and unimportant amendments were adopted "without materially changing the report of the Committee." The Constitution as thus revised was adopted by the Convention on June 6, 1902.

The language which emerged from the Convention and went into the Constitution of 1902 was as follows:

"No bill shall become law unless * * * (d) a yea and nay vote has been taken in each house upon its final passage, the names of the members voting for and against entered on the journal, and a majority of those voting, which shall include at least two-fifths of the members elected to each house, recorded in the affirmative." (Italics supplied).

It is an axiomatic rule of construction that in the interpretation of the Constitution words must be construed with reference to their plain and ordinary meaning. The language employed in section (d) admits of but one interpretation. That interpretation clearly establishes that in order to accomplish enactment of a law "two-fifths of the members elected to each house, including a majority of those voting, shall vote and be recorded as voting in its favor * * *." This is the language which confronted the Convention when this phase of the Constitution of 1902 was first presented for its consideration. It is manifest from the language employed that it was the sense of the framers that the bill must receive the votes of a majority of those voting, and that majority must include two-fifths of the elected members. The original language, while transposed in its emerging form, in nowise altered the clear and manifest intention of the framers. The proceedings of the Convention made this indubitably clear.

It will be observed that such changes as were made in 1928, by the revisors, to subsection (d) of section 50 were nothing more than immaterial changes in phraseology. The language here under consideration remained identical with the language which emerged from the Convention of 1901-2; namely, "(d) and a majority of those voting, which shall include at least two-fifths of the members elected to each house, * * *." It is clear that the antecedent to the pronoun "which" is the noun "majority." To hold that the phrase "of those voting" is the antecedent of the pronoun "which" would render meaningless the employment of the word "majority" and do violence not only to the language of the provision, but to the manifest intent of the framers of the Constitution.

It is my opinion, therefore, that before a bill can become law it must not only receive the affirmative vote of a majority of those voting, but that affirmative majority must include at least two-fifths of the members elected to each house.

GENERAL ASSEMBLY—Members holding passes; not prohibited if part of compensation. F-243 (132)

December 21, 1953.

HONORABLE JOSEPH E. BLACKBURN,
Krise Building, Lynchburg.

This will acknowledge receipt of your letter of December 16, which I quote below:

"I have been elected to the House of Delegates to represent Lynchburg in the 1954 General Assembly. Prior to my election I was the

holder of passes entitling me to free transportation on buses of the Lynchburg Transit System, passenger trains of the Southern and The Chesapeake & Ohio Railroads. The law firm, of which I am a partner, represents these companies and has represented these companies for a long period of time and the passes are given to us as a part of our compensation. I am aware of the constitutional provision and of the Code section which prohibits members of the Legislature from having such passes. I am also familiar with the opinion of the Supreme Court of Appeals of Virginia which holds that such passes are not prohibited if given as part of compensation. However, I would appreciate an expression of your opinion relative to the circumstances of my particular case."

It is true, as you state, that Section 161 of the Constitution prohibits a transportation company doing business in this State from granting to any member of the General Assembly, or to any State, county, district, or municipal officer any "free pass". You state, however, that the passes given to you by the carriers you mention are a part of your compensation for representing these carriers. In *Commonwealth v. Gleason*, 111 Va. 383, it was held that a pass given by a carrier to one of the officers mentioned in Section 161 of the Constitution as compensation for services rendered was not "free" within the meaning of that section.

It is, therefore, my opinion that under the circumstances stated by you the passes which you hold are not prohibited by Section 161 of the Constitution.

GENERAL ASSEMBLY—Members; mileage for; inspection of state institutions. F-114 (22)

July 24, 1953.

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

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

"Chapter 102 of the Acts of Assembly of 1952 and Section 41 of Chapter 716 of the 1952 Acts fix different rates of pay for the use of personal automobiles on State business.

"Chapter 102 fixes a rate of five cents a mile for the travel authorized by that Chapter. Section 41 of Chapter 716 fixes a rate of six cents a mile for all such mileage generally.

"Will you please give me your opinion as to whether the rate of six cents a mile fixed by Chapter 716 supersedes the rate of five cents fixed by Chapter 102 for travel under the provisions of that Chapter, or whether such compensation must be limited to five cents a mile?

"The rate of five cents a mile fixed by Chapter 102 apparently applies only to travel to and from the person's home to the point of origin of the trips. If this rate cannot be exceeded for such travel, please write me whether the rate of six cents a mile could be paid for travel between the point of origin and the State institutions visited."

Chapter 102 of the Acts of 1952 is a new Act providing for the inspection of certain State facilities by persons who will be members of the General Assembly. The Act provides in part that the Director of the Division of the Budget shall arrange for these trips of inspection "from some central point from which trips to the several State agencies and institutions shall be made." The Act further provides that mileage at the rate of five cents per mile each

way shall be allowed the persons making such trips from their homes to the point of origin of the trips. It is true that Section 41 of the Appropriation Act fixes a rate of six cents a mile for expenses on account of the use of personal automobiles in the discharge of official duties by State officers and employees. This is a general provision applicable to all appropriations contained in the Appropriation Act. However, it is a well established rule that where an Act contains a special provision it must be read as an exception to a general provision in an earlier or subsequent Act. Applying this rule to your inquiry, I must conclude that the special provision allowing mileage at the rate of five cents a mile contained in Chapter 102 controls and must be treated as an exception to the general provision contained in the Appropriation Act.

You also ask whether mileage at the rate of six cents a mile could be paid for travel between the point of origin and the State institutions visited. I do not think that this question can arise under Chapter 102 of the Acts of 1952, for in that Act the Director of the Division of the Budget arranges for these trips of inspection and pays out of the appropriation made for transportation, meals, lodging and other necessary accommodations for the persons making the inspection trips. In other words, after the persons making the inspection reach the point of origin of any particular trip the Director of the Budget pays all of the expenses of the trip and it is not contemplated that persons making the trip shall submit expense accounts covering expenses after they have reached the point of origin.

GENERAL ASSEMBLY—Senator; special election to fill vacancy; district which has been changed. F-100c (253)

April 26, 1954.

HONORABLE WILLIAM B. SPONG, JR.,
Member House of Delegates, Portsmouth.

This is with reference to your letter of April 21, 1954 in which you make inquiry as to the area from which the successor to Senator Major M. Hillard, recently resigned, will be elected in the event that a special election is called to fill such vacancy.

At the time of resignation Senator Hillard represented the Third Senatorial District comprising Norfolk County, Portsmouth and South Norfolk. By Act of Assembly at the special session of 1952 the Senatorial Districts were reapportioned whereby the Tenth Senatorial District, Portsmouth, was given one Senator and the Third, Norfolk County and South Norfolk, were given one Senator. However, that Act does not become effective until January 1, 1955. Therefore, any special election to fill vacancies which may occur in the Senate prior to the effective date of the last mentioned Act will be filled by the electorate of the area comprising the present senatorial districts.

GOVERNOR—Budget; may require state institutions to furnish information on endowments. F-253 (73)

October 19, 1953.

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

This is in reply to your letter of October 13, which I quote below:

"Under Section 2-51 of the Code of Virginia, all 'departments . . . institutions, or other agencies . . . , upon request, shall immediately furnish to the Governor, in such form as he may require, any information desired by him in relation to their respective affairs or activities.'

"Paragraph 10 of Chapter 33 of the Acts of Assembly of 1927 provides that specified requirements regarding deposits of monies into the State treasury 'shall not apply to the endowment funds or gifts . . . or to the income from such endowment funds or gifts . . . '

"Referring to the 1927 Act, Chapter 707 of the Acts of Assembly of 1952 declares 'to be the public policy of the State that, in measuring the extent to which the State shall finance higher education in Virginia, the availability of the endowment funds of institutions of higher education received by such institutions on and after January 1, 1952, shall not be taken into consideration in, nor used to reduce, State appropriations or payments therefrom; but such funds shall be used in accordance with the wishes of the donors thereof to strengthen the services rendered by these institutions to the people of the Commonwealth.'

"It is the purpose of this letter to inquire whether the Governor may, within the authority granted and the limits stated by the cited or other provisions of law, continue to require inclusion of all endowment income in the budget data assembled. Inclusion of such data would have the purpose of making known the resources and expenditures of State departments and institutions and would not be 'taken into consideration in, nor used to reduce, State appropriations or payments therefrom.'

Section 2-51 of the Code, to which you refer, is in the Chapter of the Code relating to the State Budget and prescribing the powers and duties of the Governor in connection with the preparation of the Budget and its submission to the General Assembly. The section is very broad in its language providing, as you point out, that the various departments, officers, boards, commissions and institutions shall furnish to the Governor "in such form as he may require, any information desired by him in relation to their respective affairs or activities." I can see no escape from the conclusion that under this section the Governor clearly has the authority to require the various State institutions to advise him concerning all endowment income received by such institutions, and to furnish any other data that he may request in relation to the affairs of the institutions.

HEALTH DEPARTMENT—County; power to abate nuisances. F-224 (14)

July 16, 1953.

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

This is in reply to your letter of July 15, 1953, a portion of which I quote:

"From time to time, in this county, we have complaints from citizens who complain of stables, hog pens and other outbuildings as being obnoxious to their dwelling house or houses and possibly a menace to their health. I have been referring these cases to the Smyth County Health Department, who generally make a recommendation either favorable or unfavorable to the place complained of. However, if the place complained of is not considered proper by the Health Department, they claim there is nothing they can do about it."

You no doubt are familiar with chapter 1, Title 48, of the Code of Virginia, pertaining to the abatement of public nuisances. Section 48-5 provides the penalty for creating, causing or permitting the continuance of a nuisance.

Chapter 3 of Title 32 of the Code prescribes the manner by which the local board of health may abate a nuisance. Your attention is specifically invited to section 32-39 wherein the penalty is prescribed for the violation of any rules or regulations promulgated by the Board of Health.

HEALTH DEPARTMENT—Local board; to be appointed by state board for each county or corporation. F-224 (72)

October 19, 1953.

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

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

"We would appreciate advice from your office as to whether or not a local health department may be operated in a county having the conventional type of government without the local health board required by Section 32-32 of the Code. I can find no such authority except as to counties with County Executive or County Manager form of government as authorized by Sections 15-294 and 15-326 and except perhaps as to the general powers of the Board of Supervisors by proper ordinances to set up its own Health Department, under general grant of power to deal with health matters."

Section 32-32 of the Code is quoted below:

"The State Board of Health shall annually appoint three residents of each county or corporation, at least one of whom shall be a regularly licensed physician, who shall, with the county clerk and the chairman of the governing body of the county or the mayor of the corporation, as the case may be, constitute a county, town or city board of health; but where the charter of any city or town already provides for the creation of a board of health the provisions of this section shall not apply."

The following sections go on to provide for the organization of the Board and prescribe its powers and duties. It is my opinion that this section

is mandatory and that local Boards of Health shall be appointed as provided therein.

While Section 15-8 of the Code gives to the Boards of Supervisors of Counties broad powers, I do not think the section can be construed to authorize a Board of Supervisors to set up a local Health Department by-passing, so to speak, these mandatory provisions relating to a local Board of Health.

HEALTH DEPARTMENT—No authority to allocate state funds to county with an agreement with city to operate health program. F-224 (268)

May 18, 1954.

DR. MACK I. SHANHOLTZ,
State Health Commissioner.

This has reference to the letter of April 29, 1954, addressed to you from Mr. Paul B. Matthews, Executive Officer of the Roanoke County Board of Supervisors, wherein a local health program for the County of Roanoke is proposed. You ask to be advised as to whether the State Department of Health can legally aid in the operation of such health program, which is to be organized in the following manner:

The County would enter into a contract with the City of Roanoke whereby the City Health Department would extend its operations into the County and assume responsibility for the administration of the health program for the County. The County would finance such program with funds derived from local taxation as well as from the State Department of Health. Such funds would be delivered to the City of Roanoke, with no authority remaining in the State Department of Health or County Board of Supervisors to regulate or administer the manner of expenditure. The City would make periodic reports to the County and State Department of Health, and the arrangement could be terminated by withdrawal of all funds, either by the County or State Department of Health.

I assume that the authority by which the State Department of Health would allocate a portion of the cost of operation of such a program as proposed is that granted by the recent session of the General Assembly in Chapter 508, which provides as follows:

"§ 1. Any county may, through its governing body, enter into contractual agreement with the State Department of Health for the creation of a single county health department upon mutual agreement that such an arrangement is desirable and economically feasible.

"§ 2. Any combination of counties and cities, or either of them, may, by separate resolution duly adopted by a majority vote of their respective governing bodies, create a district health department. The governing bodies of such counties and cities may enter into contractual agreement with the State Department of Health for the operation of the district health department thus created.

"§ 3. This act shall not be construed to repeal the provisions of Title 15 of the Code of Virginia with respect to health departments in counties having the county manager or county executive type of government or any provisions for health departments operated by cities."

This Act provides for the creation of a single health department in a county by the State Department of Health and the county. The Act also provides for a district health department to be created by a combination of

counties and cities, or either of them. In connection with the latter, such a combination of governmental bodies may enter into a contractual agreement with the State Department of Health for the operation of the district health department.

Under the foregoing provisions any county may contract with the State Department of Health for the creation of a single health department in the county, and each may contribute to the operation of such a project. On the other hand, two or more counties, cities, or a combination of such may enter into an arrangement for the joint operation of a district health department. There is no provision for participation in the creation of such a department by the State Department of Health although the State Department of Health is authorized to enter into a contract for the operation of the district department. I do not believe that this is authority for the State Department of Health to allocate funds outright to a county which has entered into a contract to create a district department when the entire operation is to be conducted under the control of a city health department, functioning under an entirely separate authority, and over which the State Department of Health has no control. If the Department has no authority in the creation or operation of such a health department, I am of the opinion that it could not expend State funds in such counties. Hence, I cannot escape the conclusion that there is no authority in Chapter 508 for the State Department of Health to allocate funds to a county for the operation of a health department under an arrangement such as is proposed by the County of Roanoke.

HIGHWAYS—Local zoning ordinances; conflict between as to service stations; what applicable. F-60a (272)

May 10, 1954.

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

This is in reply to your letter of May 6, 1954, in which you ask for my opinion as to whether the Board of Zoning Appeals for the County of Henrico has authority under the provisions of Zoning Ordinance No. 87, Section 10, A, 4, to impose a condition upon the approval of layout plans for a service station that there should be no ingress or egress to the service station from a State highway where a permit has already been granted by the State Highway Commission for such right of access.

The ordinance in question, as quoted in your letter, provides as follows:

"A. In any B-1 Business District, no building or premises shall be used and no building shall be erected hereafter or structurally altered unless otherwise provided in this ordinance except for one or more of the following uses:

* * * * *

"4. Automobile service stations subject to approval of layout plans by the Board of Zoning Appeals. Layout plans must provide that all pumps, tanks or other facilities or accessories are placed not less than 35 feet from the centerline of any street or road and in such a manner that automobiles may be serviced off the street right of way."

By virtue of Section 33-12 of the Code of Virginia, 1950, the State Highway Commission has been vested with the power to make rules and regulations for the direction of and covering traffic in the State Highway System. Pursuant to this authority the State Highway Commission has enacted rules and regulations governing commercial entrances to a State highway.

Although you do not state in your letter the purpose motivating the Board of Zoning Appeals to limit the right of access to the service station to one driveway opening on Ridge Road, I believe the answer to your inquiry hinges upon the purpose of the regulation as to the property in question. If the restriction be construed as a regulation of the use of property which can be justified as a reasonable exercise of police power, applicable to all owners in similar circumstances, then such a restriction may be valid even though the State has already approved the manner of access to the State highway. However, if there is no justifiable reason for imposing such a restriction on this particular property owner in order to regulate the use of the property as a service station, the restriction can only be construed as a regulation of traffic, a power which has been exercised by the State agency authorized by statute to do so. In such case the County is thus precluded from exercising regulatory powers over the manner of ingress and egress from such public highways if such an exercise conflicts with the regulations of the State agency.

**HIGHWAYS—Permitting livestock to run at large on; no penal statute.
F-192 (105)**

November 27, 1953.

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

Receipt is acknowledged of your letter dated November 23, 1953, which I quote as follows:

"In Buchanan County the Board of Supervisors has not seen fit to adopt a fence law as to cattle. As a result a great number of citizens of this county allow their cattle to run at large on the right of ways of the highway. I need not tell you the nuisance of livestock on a heavily traveled highway.

"Section 33-125 of the Virginia Code provides 'that no person, firm or corporation, shall pasture or graze, or cause to be pastured or grazed, or otherwise permit to be on any right of way on any road of the State Highway System, except as . . .'. This section gives no punishment for any person found guilty of violating the section, nor can I find any section of that chapter of the Code with provisions of punishment for violating any section of said chapter. There is a question in my mind as to whether Section 33-125 of the Code is a penal statute. If this Section is a penal statute, what then is the punishment for violation?"

I find that Section 33-125 of the Code of Virginia to which you refer was enacted by the General Assembly March 31, 1938, as a portion of Chapter 347. Prior to the enactment of this section, substantially the same language was contained in a rule and regulation of the Highway Commission. These Rules and Regulations contained a provision providing for the punishment for the violations thereof. However, when this rule and regulation was enacted into law by the General Assembly, this feature was not included and the rule is no longer carried in the Rules and Regulations of the Highway Commission.

I am of the opinion that the present statute is not a penal statute because the violation thereof is not declared to be unlawful.

**HIGHWAYS—Preference to projects; when land donated by county to state.
F-192 (80)**

October 26, 1953.

HONORABLE WILLIAM J. HASSAN,
Attorney for the Commonwealth, Arlington.

I am very sorry that I have not been able to furnish you with the opinion you requested regarding the interpretation of § 33-32 of the Code of Virginia earlier. However, as you know, I have been required to be away from the office a great deal and it was necessary to review and trace the legislation pertaining to the general county road law before a conclusion could be reached. I quote the pertinent portion of your letter as follows:

"Section 33-32 of the Code, entitled 'Construction Districts; Allocation of Funds', provides, among other things 'the Commission shall give preference to projects on which the right of way is donated.' The questions which arise regarding the interpretation of this sentence are, if the County should acquire and donate to the State the necessary rights of way for projects:

- "(1) Would there be any obligation on the Commission to give a preference to these projects;
- "(2) Would there be any obligation on the Commission to allocate funds immediately to these projects;
- "(3) Would funds be allocated to these preferred projects on the basis of an apportionment *within* this particular construction district, or could the allocation be made on the basis of the Commission's total road building budget without reference to apportionment among the 8 construction districts;
- "(4) Could funds be allocated to these projects from the special fund created by paragraph 2 of Section 33-32?"

Section 33-32 is a provision of Article 2 entitled "The State Highway System." The provisions of this article deal exclusively with roads comprising the Primary System of State Highways. The provisions directing the apportionment of funds available for the Secondary System of State Highways are found in Article 4 of Title 33.

Therefore, my initial concern pertains to the authority of the County of Arlington to acquire land for the purpose of promoting the construction or improvement of roads in the Primary System of State Highways.

You will note that the County of Arlington, by its election to retain jurisdiction over its roads, still operates under the county road laws continued in effect as to said county by the provisions of Section 33-140 of the Code of Virginia of 1950.

After carefully reviewing the statutes concerning the Primary System of State Highways, I find that the obligation for their construction, maintenance, and improvement rests entirely upon the State. The counties have no obligation to contribute funds toward the construction or improvement of the Primary System. Arlington County does have an obligation with respect to the public roads within its boundaries that are not a part of the State Highway System. In order for the Board of Supervisors to meet this obligation the Legislature has authorized them to levy road taxes and expend certain county funds; but no authority has been granted to allow an expenditure upon the Primary System of State Highways.

I am, therefore, of the opinion that the County of Arlington has no authority to levy a tax or expend public funds for the purpose of acquiring right of way for the construction or improvement of the Primary System of State Highways.

Even if such authority did exist I am of the opinion that lands condemned or purchased by a political subdivision of the Commonwealth and paid for with money

collected by a general levy would not be a "donation" as envisioned by Section 33-32 of the Code of Virginia of 1950.

Having reached the foregoing conclusions, I deem it unnecessary to consider your questions individually.

**HIGHWAYS—Secondary; abutting property owners use of school road.
F-192 (27)**

August 3, 1953.

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

Receipt is acknowledged of your letter dated July 31, 1953 requesting my opinion on the following:

"I enclose diagram of land fronting on Route 17, Primary State Highway owned by Mrs. Nellie S. Smith and adjacent land fronting on Route 17 which is Middlesex High School ground on which a large new high school building has been erected. As provided by section 33-45 of the Code as amended, Acts 1952, Chapter 505, a second highway will be established from Route 17 along the line of Mrs. Smith's land as far back from Route 17 as Mrs. Smith's land goes.

"Both the School Board and Mrs. Smith want to know if when this secondary highway is established whether it can be used as any other secondary highway by Mrs. Smith and any parties who may purchase lots from Mrs. Smith fronting on the new secondary highway."

You refer to Section 33-45 of the Code, as amended in 1952 which is as follows:

"All roads leading from the State highways, either primary or secondary, to public schools in the counties of the Commonwealth to which school buses are operated and which have one or more buildings containing five or more separate class rooms shall continue to constitute portions of the secondary system of State highways in so far as these roads are on school property and as such shall be improved and maintained."

This section is intended to obviate the necessity of following the usual procedure for the establishment of a public road to become a part of the secondary system of highways. I assume that the road you refer to would be such a highway as contemplated by the provisions of this section.

Volume I, Section 488 of "Roads and Streets" by Elliott is in part as follows:

"Individual owners of abutting property have a private interest in the highway distinct from the public, of which they cannot be deprived without compensation. Of this right they cannot be deprived by any use that destroys the character of the road or street as a way for free and unobstructed passage."

If Mrs. Smith is an abutting property owner on the secondary road to be established, I am of the opinion that she and her successors in title would have all the rights and privileges enjoyed by an abutting property owner on any other road in the secondary system of State highways.

HOSPITALS—Construction; no 1954-56 appropriations to be used for new projects. F-224 (260)

May 4, 1954.

DR. MACK I. SHANHOLTZ,
State Health Commissioner.

This is in reply to your letter of April 26, 1954 in which you asked to be advised as to the statutory provisions relating to the distribution of State appropriated funds for aid in hospital construction programs under provisions of the Hill-Burton Act. You will recall we discussed these provisions generally at our recent conference. This letter is to confirm the remarks which I made at that time.

In Item 369 of the 1954-56 Appropriation Act the recent session of the General Assembly appropriated \$3,200,000 for the biennium 1954-56 for State participation in hospital construction projects. The Virginia statutes relative to the participation by the State in the Federal program of hospital construction are codified in chapter 12 of Title 32, Code of Virginia, 1950. Among the other sections of this chapter section 32-211 specifies the fund which is to be established for the disbursement of funds appropriated for the purpose by the Federal and State Governments. Section 32-211.1 sets forth the conditions for deposit and expenditure of State funds. That section provides as follows:

"Funds appropriated by the State for carrying out the purposes of this chapter shall be deposited in the Hospital Construction Fund established by section 32-211 only when the Commissioner certifies to the State Treasurer that:

"(1) Application has been made to the Surgeon General for federal funds for a construction project conforming to federal and State requirements; and

"(2) Sufficient funds, inclusive of State funds provided in accordance with this chapter, are available to the applicant for federal aid hereunder to defray its portion of the cost of construction of the project.

"The State Treasurer shall, upon receipt of such certificates, deposit in the Hospital Construction Fund such sums as will in the opinion of the Commissioner having due regard to State funds available, equitably match funds available from federal and local sources, in order to carry out the purposes of this chapter; *and should additional State funds become available, they shall be equitably apportioned between the several approved projects on which deposits of State funds have been previously made on the basis of their respective priorities, and in the manner aforesaid.* No moneys shall be so deposited until the approval in writing of the Governor shall have been first obtained. The funds so deposited shall be expended as provided in section 32-211." (Italics added).

You will note that the language which I have italicized requires any additional State funds becoming available be apportioned to the projects on which State funds have already been allocated. It would, therefore, appear that projects which have received State funds previous to the 1954-56 appropriations becoming available must be completed to the extent of the participating percentage which the State has undertaken to contribute prior to undertaking to participate in additional projects. To state this conclusion in other words there could be no State funds allocated to newly approved projects from the 1954-56 appropriations unless the projects which have already received State allocations have received the maximum participating State aid, which you state has been established at fifty-five per cent of participating costs.

HOSPITALS—Licensing and inspection—Petersburg city home. F-224 (66)

October 2, 1953.

DR. MACK I. SHANHOLTZ,
State Health Commissioner.

This is in reply to your letter of September 29, 1953 in which you request my opinion as to whether the Petersburg City Home comes within the provision of the Virginia Hospital Licensing and Inspection Law. Your letter, in part, is herein quoted:

"The Petersburg City Home maintains an infirmary building. Services in this infirmary are of the nature and type commonly accepted as nursing home services. Adequate nursing care is continuously available to 32 patients who are confined to bed for a major part of each 24 hour period. Those who are partially ambulatory are under medical and nursing supervision at all times. One-third of the patients of the infirmary are continuously bedridden. Admissions cover all age groups. As of September 1, the age of patients in the infirmary of the Home ranged from 33 years to 93 years.

"Medical services are provided by part-time physicians on salary. They are available for call by the nurse at all times. A medical record is kept for each patient. Facilities for care include a well equipped treatment room. The essential drugs and medical aids are kept on hand in the infirmary for use as directed by the physicians or nurses."

Please refer to my letter to you dated June 29, 1953, relative to the Richmond City Home. That letter reads, in part, as follows:

"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:

* * * * *

"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."

The conclusions reached in the survey of the Petersburg City Home would appear quite similar to those reached in the case of the Richmond City Home. I am, therefore, of the opinion that the views expressed by this office relative to the Richmond City Home are likewise applicable to the Petersburg City Home.

HOUSING AUTHORITIES—Former commissioner furnishing materials to contractor. F-165 (263)

May 6, 1954.

MR. GEORGE W. DIGGS, *Vice-Chairman*,
Portsmouth Redevelopment and Housing Authority.

This is in reply to your letter of May 5, 1954 in which you request my opinion as to whether a former Commissioner of your Housing Authority is permitted under Chapter 1 of Title 36 of the Code of Virginia to conduct business with the general contractor or the Housing Authority under the following factual situation:

"A former Commissioner of our Authority is the principal stockholder in two corporations which are furnishing materials and services to the general contractor, who, under sealed bid, was the low bidder for a demolition and rehabilitation of a slum area in this City."

There is no provision in the Housing Authorities Law, Chapter 1, Title 36 of the Code, which would, in my opinion, prohibit this former Commissioner from furnishing materials and services to the general contractor or to the Housing Authority.

INSURANCE—Commission of Fisheries; to cover damage to private boats and docks. F-233a (309)

June 8, 1954.

HONORABLE B. T. GUNTER, JR., *Attorney*,
Commission of Fisheries, Accomac.

I have your letter dated May 29, 1954, advising that a short time ago the Commission of Fisheries had a fire on one of its boats while tied to the dock, which dock was not owned by the State. You advise that the Commission carried insurance on this boat which also covers damage to other boats in a collision. You then inquire as follows:

"I was requested by the Commission to ask your opinion as to whether or not it should carry insurance for damages to a dock which might be caused by one of its boats. I will appreciate it if you will let us have an expression of your opinion as to the advisability of carrying this type of insurance."

I am not advised of any particular statute in Virginia relating to the authority of a State agency to insure the property of the State; however, the general powers conferred upon State agencies would authorize them, in my opinion, to purchase sufficient insurance coverage for the protection of the State property and damage which may be occasioned to the general public.

Your inquiry seems to present a question of policy which should be determined by the Commission of Fisheries; and, if it determines, as an administrative policy, to have insurance coverage for damage to a dock, which is incidental to the insurance coverage of its properties, I am of the opinion that there would be no legal objection.

**JAILS AND PRISONERS—Cost of prosecution; may be confined until paid.
F-173 (33)**

August 10, 1953.

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

This is in reply to your letter of July 8, 1953, the last paragraph of which is quoted:

"In view of these two opinions I have therefore come to the conclusion that a distinction is made between a case which only carries a jail sentence and one which commits the defendant to the penitentiary. In other words, it appears that a person cannot under any circumstances be held for costs where he is committed to the penitentiary but can be held for costs where there is no fine, if it is so stated in the order, where the defendant receives only a jail sentence. Is that the correct conclusion?"

Section 19-303 of the Code of Virginia provides as follows:

"If a person sentenced to be confined in jail a certain time and afterwards until he pay a fine and costs of prosecution, fail to pay such fine and costs before the end of such term, he shall continue in confinement until the same be paid or his discharge be ordered by the court, or the judge thereof in vacation, or he be released by reason of the expiration of the limitation for such confinement prescribed by law."

The applicability of the foregoing statute does not depend upon the offense nor the sentence imposed, but is an independent statute which authorizes the imposition of a jail sentence for the failure to pay any fine and cost of prosecution. In view of this I am of the opinion that the court sentencing the defendant, whether to jail or the penitentiary, could provide in the order for an additional jail sentence until the fine and cost of prosecution are paid, subject, of course, to the limitations provided in section 19-309 of the Code.

JAILS AND PRISONERS—Parole; can not be considered for until committed to major penal system. F-84 (146)

January 11, 1954.

MR. R. M. YUELL, *Director*,
Division of Corrections.

This is in reply to your letter of December 16, 1953 inquiring if a person who has received several misdemeanor sentences and a felony sentence and is serving the jail sentence, but has not commenced service of his felony nor yet committed to a part of the major penal system for service upon such felony, is eligible for parole consideration. You state that if such person were paroled prior to actually being committed to the major penal system for service upon a felony conviction there would be no finger prints or other records obtained, and should this person later be committed the law requiring repeaters to be tried and given an additional sentence could not be carried out.

Section 53-251 provides:

"(1) Except as herein otherwise provided, every person convicted of a felony, and sentenced and committed under the laws of this Commonwealth to the State Penitentiary, the State Penitentiary Farm, the State Industrial Farm for Women, or the Southampton Penitentiary Farm, or any

of the State convict road camps, and any subsidiary institution, if a part of the major penal system, shall be eligible for parole after serving one-fourth of the term of imprisonment imposed, or after serving twelve consecutive years of the term of imprisonment imposed if one-fourth of the term of imprisonment imposed is more than twelve years. In the case of terms of imprisonment to be served consecutively, the total time imposed shall constitute the term of imprisonment; in the case of terms of imprisonment to be served concurrently, the longest term imposed shall be the term of imprisonment.

"(2) Persons sentenced to die or to life imprisonment shall not be eligible for parole."

It is the considered opinion of this office that to be eligible for parole the convicted felon must have been first "committed" to a part of the major penal system. Accordingly, until such time as such convicted person has actually commenced serving his felony sentence and committed to a part of the major penal system he would not be eligible for parole consideration upon his felony conviction.

JUSTICE OF PEACE—Bail; authority to grant when contempt and probation involved. F-27 (39)

August 24, 1953.

HONORABLE BENJAMIN L. CAMPBELL, *Judge*,
Juvenile and Domestic Relations Court, Petersburg.

Your letter of August 17 addressed to Mr. J. Luther Glass, of the Department of Welfare and Institutions, has been referred to this office for reply. You present the following question:

"A man was placed under a court order to pay through the Juvenile and Domestic Relations Court facilities of Petersburg, Virginia, a certain amount weekly for the support of his minor children. He failed to comply with the order. The man was notified first by letter of his negligence, a rule was issued, both he ignored. An attachment was served on the man stating that he was in certain contempt by violating the terms of his probation, specifically non-support. A Justice of the Peace granted the subject bail. We wish to know whether the Justice of the Peace had the authority to grant bail without consulting the Judge who rendered the decision."

The attachment to which you refer is, of course, an order of your court directing an officer to bring the named defendant before you. I have examined the statutes relating to the authority of a Justice of the Peace to grant bail and I can find nothing in them to authorize this officer to grant bail in such a case. To do so, it seems to me, would have the effect of nullifying the order of the court.

JUSTICES OF THE PEACE—Drafting legal instruments; when bond required before taking office. F-136b (190)

February 25, 1954.

MR. D. L. SUTPHIN,
Justice of the Peace, Maxmeadows.

This is in reply to your letter of February 22, 1954 in which you ask to be advised on certain questions pertaining to your office.

You first inquire as to whether or not a Justice of the Peace may write deeds. The drafting of legal instruments for another has been determined as the practice of law, and such instruments include the drafting of deeds of conveyance of realty. See the case of *Commonwealth v. Jones and Robins*, 186 Va. 30; 41 S. E. (2d) 720. I am, therefore, of the opinion that it would be improper for a Justice of the Peace to draft a deed or any other written instrument for another unless he be a licensed attorney.

Your next inquiry is whether or not a Justice of the Peace may proceed with the duties of his office without giving bond and being registered in the county clerk's office as well as in Richmond. Section 15-475 of the Code of Virginia, 1950, provides as follows:

"Every county and district officer elected by the people, every city and town officer, unless otherwise provided by law, and every county surveyor and superintendent of the poor appointed for a term shall, on or before the day on which his term of office begins, qualify by taking the oath prescribed by section 49-1 and give the bond, if any, required by law, before the circuit court of the county or corporation court of the city, having jurisdiction in the county, district, town, or city for which he is elected or appointed, or before the judge of the circuit or corporation court of such county or city in vacation, or before the clerk of the circuit or corporation court of such county or city in his office."

Section 15-477 of the Code provides that failure to so qualify shall be deemed to vacate the office.

The only requirement for a Justice of the Peace to provide bond is found in section 19-107 of the Code of Virginia wherein a bond must be given in the penalty of \$500.00 prior to the acceptance by a Justice of the Peace of any cash deposits in lieu of recognizances as provided in section 19-106 of the Code.

In view of the foregoing I am of the opinion that it is not necessary for a Justice of the Peace to post bond at the time of qualifying although it is necessary that he be duly qualified as provided in section 15-475 of the Code prior to his proceeding with the duties of his office.

You also make inquiry concerning section 45:15, Acts of Assembly, 1952. I believe there must have been some oversight in referring to this section so it is requested that you refer again to the Acts of Assembly of 1952 in order to provide the chapter and page number. At that time I shall be happy to express my views relative to such chapter.

JUSTICES OF THE PEACE—Fees; not entitled to; civil warrants for the commonwealth. F-136b (225)

April 1, 1954.

MR. R. A. CARLISLE,
Department of Taxation.

This is in reply to your letter of March 15, 1954 in which you request the advice of this office on the correct procedure for your Department to follow in paying fees to justices of the peace for the issuance of civil warrants.

Section 14-98 of the Code of Virginia provides:

"No clerk, sheriff, sergeant or other officer shall receive payment out of the State treasury for any services rendered in cases of the Commonwealth, except when it is allowed by this or some other chapter."

I can find no provisions in the Code which allow fees to be paid to justices of the peace for issuing warrants in civil cases where the Commonwealth is the plaintiff.

Section 14-196 of the Code of Virginia provides:

"In a case wherein there is judgment or decree on behalf of the Commonwealth for costs, there shall be taxed in the costs the charge actually incurred to give any notice, although it be more than fifty cents; and the fees of attorneys and other officers for services, and allowances for attendance, as if such fees and allowances were payable out of the State treasury. What is so taxed for fees of, or allowance to, any person, shall be paid by the sheriff or officer who may receive such costs into the State treasury."

I am of the opinion that, in view of the above section 14-196, your Department should collect as part of the costs for issuing civil warrants from the defendants and pay these collected costs into the State treasury.

JUSTICES OF THE PEACE—May cite for contempt; while issuing warrant; appeal to court of record. F-136b (196)

March 4, 1954.

HONORABLE JOHN H. THOMAS,
Justice of the Peace, Chesterfield County.

This is in reply to your letter of February 25, 1954 in which you ask to be advised on the following inquiries:

"1. Does the phrase 'judicial proceedings' in the above mentioned section include the situation where a violator is brought before a Justice of the Peace for purposes of procuring a warrant and admission to bail?

"2. If the answer to the first question is answered affirmatively, to whom is the fine levied payable?

"3. If a contemptuous violator desires to appeal under section 18-257, is such appeal to the Trial Justice Court or to the Circuit Court of the county?

"4. Under section 18-257, what, if any, is the maximum recognition that could be required?"

Section 18-256 of the Code of Virginia provides as follows:

"A trial justice or justice of the peace, while engaged in the trial of a case or in any judicial proceeding, shall have the same power and jurisdiction as a court to punish summarily for contempt, but in no case shall the fine exceed twenty dollars, or the imprisonment exceed ten days, for the same contempt."

The power to fix bail is generally conceived to be a judicial one which in its nature belongs to the courts. Where the Legislature has designated the office of justice of the peace to be one which may issue warrants and fix bail those functions become judicial in nature. Therefore, any proceeding initiated by the Justice of the Peace in this respect would be a judicial proceeding as is contemplated in section 18-256 of the Code wherein lies the power to punish summarily for contempt.

As to your second inquiry, any fines imposed by virtue of section 18-256 of the Code should be made payable to the Commonwealth as provided in section 19-299 of the Code of Virginia.

Any appeal from a sentence imposed under section 18-256 of the Code would be to the court of record in the county or corporation, whether such sentence be imposed by a trial justice or justice of the peace, after entering into a recognizance with surety a penalty which the trial justice or justice of the peace deems sufficient. Each case must be determined individually in fixing the sufficiency of the penalty, but it should be borne in mind in doing so that the maximum fine for such contempt is twenty dollars.

JUSTICES OF THE PEACE—Security for good behavior of persons of ill fame. F-27 (153)

January 18, 1954.

HONORABLE D. L. SUTPHIN,
Justice of the Peace, Maxmeadows.

This is in reply to your letter of January 13, 1954 in which you ask to be advised if there is any law which would nullify section 18-9 of the Code of Virginia of 1950 which provides authority for a conservator of the peace to require from persons not of good fame security for their good behavior for a term not exceeding one year.

I am aware of no statute which would nullify the provisions of section 18-9 of the Code, but I point out that the authority to require security for good behavior is limited to persons not of good fame, which fact is not necessarily established simply because such person commits a crime.

JUSTICES OF THE PEACE—Should not admit to bail persons already released from custody. F-27 (9)

July 8, 1953.

HONORABLE C. LACEY COMPTON, *Judge*,
Trial, Juvenile and Domestic Relations Court, Prince William County.

This is in reply to your letter of July 3, 1953, a portion of which I quote:

"Frequently, when a summons has been issued by an officer, and accepted in writing by the accused, for the accused's appearance in

court on a later date, the accused will seek out some Justice of the Peace, exhibit the summons which was issued to him and give the Justice of the Peace his version of the incident which led to the issuance of the summons, and post a cash bond, usually in the amount equal to the minimum fine and costs with no intention of subsequently appearing in court. My question is, can a Justice of the Peace legally accept cash bonds under such circumstances?"

It is assumed that the cases in question involve violations of motor vehicle laws where the arresting officer may release from custody the person arrested upon a written promise to appear for trial as authorized by section 46-193, as amended. It is to be noted that no warrant is issued in such cases, but only a summons or other notice in writing is issued, notifying the person to appear at a time and place specified.

By virtue of section 19-88 of the Code of Virginia of 1950 a Justice of the Peace is authorized to admit to bail a person brought before him charged with a misdemeanor, or, in some instances, felonies. When a summons is issued and the person charged is released on his own recognizance there is no basis for invoking the bail statute.

Therefore, inasmuch as the persons mentioned in your letter have complied with the provisions of section 46-193 of the Code and have been released from custody, I am of the opinion that there is no occasion for such persons to be let to bail.

**JUSTICES OF THE PEACE—Warrants; may issue in all districts of county.
F-381 (36)**

August 13, 1953.

HONORABLE T. H. LILLARD,
Sheriff of Madison County

This is with reference to your letter of August 11, 1953, in which you inquire whether a justice of the peace may issue a warrant for crimes committed in a district other than the one in which he was elected.

Section 39-4 of the Code of Virginia provides, in part, as follows:

"Justices of the peace within their respective counties and on any property geographically within any city therein, which is owned and used by the county, shall, however, have the same power to issue attachments, warrants and subpoenas within the jurisdiction of such trial justice as is conferred upon the trial justice, * *."

The jurisdiction of the trial justice is set forth in section 16-66 of the Code, a portion of which is quoted:

"(1) The trial justice shall be a conservator of the peace within the limits of the territory for which he is appointed. For the purpose of this section the term 'territory for which he is appointed' shall mean the county or counties, including towns therein, and any city or cities for which he is appointed trial justice."

Inasmuch as the justice of the peace has authority to issue warrants within the jurisdiction of the trial justice, I am of the opinion that such warrants may be issued within any district of the county irrespective of the district in which the justice of the peace was elected.

JUVENILE AND DOMESTIC RELATIONS COURT—Administering corporal punishment to minors. F-278 (54)

September 10, 1953.

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

This is with reference to your letter of August 31, 1953 addressed to Colonel Richard W. Copeland, Director of Welfare and Institutions, which was forwarded to this office for consideration. A portion of your letter is herein quoted:

"Section 63-303 of the Code provides for the administration of corporal punishment to minors under certain conditions. The pocket part or supplement states that an entire group of Sections, 63-294 to 63-307 was repealed by the Acts of 1950, page 690. There is an editor's note, stating that the new Sections relating to similar subject matter will be found in Sections 16-172.1 to 16-172.84. I have looked at these latter Sections, which are found in the pocket parts or supplement to Vol. IV of the Code, and do not find any provision therein for corporal punishment.

"What concerns me now is whether or not there is any statute in effect allowing corporal punishment to be administered to minors under order of the Juvenile Court."

As pointed out in your letter, section 63-303 of the Code was repealed by the Acts of 1950. This entire subject was amended and reenacted as the "Juvenile and Domestic Relations Court Law" and is cited as chapter 7 of Title 16 of the Code of Virginia. It is noted that the General Assembly failed to reenact any provision comparable to section 63-303.

Inasmuch as this was the only authority by which corporal punishment could be administered to minors, I am of the opinion that no such authority now exists.

JUVENILE AND DOMESTIC RELATIONS COURT—Clerk; additional compensation for clerk of County Court in Arlington. F-116 (176)

February 12, 1954.

HONORABLE C. H. MORRISSETT, *Member,*
Compensation Board.

Receipt is acknowledged of your letter dated February 8, 1954, together with enclosures mentioned therein. You quote the pertinent provisions of Section 14-155 of the Code of Virginia, as amended by the Acts of the General Assembly of 1952, and set forth facts relating to your inquiry.

You wish to be advised if, under the provisions of Section 14-155 of the Code, the Juvenile and Domestic Relations Court of Arlington County is a statutory court separate and apart from the County Court of Arlington County. You are chiefly concerned with the question as to whether or not the Clerk of the County Court of Arlington County can receive additional compensation under the provisions of the aforementioned section of the Code as Clerk of the Juvenile and Domestic Relations Court, which is presided over by the same Judge as the County Court. The pertinent provisions of Section 16-172.4 of the Code, as amended, are as follows:

"In every county and in every city of the State there shall be a juvenile and domestic relations court. In all counties the judge of said court shall

be appointed for a term of four years by the judge of the circuit court of the judicial circuit within which such county is situated. If otherwise qualified he may be the same person as the trial justice of such county. * * *

The County Court of Arlington County was created pursuant to an act of the General Assembly of 1930, Chapter 266, page 447. This act, as amended, is carried in the present Code by reference as Section 16-50.

Chapter 494 of the Acts of 1950, Section 5904h, page 970, transferred the jurisdiction of justices of the peace, trial justices and juvenile and domestic relations justices to the county court. However, this act was amended in 1952, Chapter 612, page 1066, and excluded the juvenile and domestic relations court from the provisions of the statute.

In view of the legislative history of the jurisdiction of the County Court of Arlington and in view of the plain provisions of Section 16-172.4 of the Code of Virginia, as hereinbefore cited, I am of the opinion that the Juvenile and Domestic Relations Court of Arlington County is a statutory court separate and apart from the County Court.

I have observed with interest the letter from Honorable William J. Hassan, Attorney for the Commonwealth enclosed with your letter, in which he states, in part,

" * * * The County Court of Arlington County, as we all know, is the Trial Justice Court of Arlington County, that is, the position in the judicial hierarchy in the Commonwealth is the same as that of the Trial Justice Courts in the various other counties. Section 16-172.11 provides that in counties in the event that the Trial Justice (sic County Court Judge) is appointed Judge of the Juvenile and Domestic Relations Court, the clerk and other employees of the Trial Justice Court shall serve also the Juvenile and Domestic Relations Court. * * *

While I give great weight to this line of reasoning, I am unable to concur therein because the Trial Justice Court and the County Court of Arlington County are statutory and separate courts. Therefore, I am of the opinion that the provisions of Section 16-172.11 of the Code, insofar as they relate to Trial Justice Courts, are not applicable to the County Court of Arlington. This section, however, provides, insofar as here material, as follows:

"The judge of the juvenile court of any county or city shall have the power to appoint a clerk and a bailiff, and with the approval of the governing body of such city such other employees as may be necessary for the proper conduct of his court. * * *

You advise in your letter that Honorable Hugh Reid is Judge of the County Court of Arlington and you enclose an order by the Honorable Walter T. McCarthy and Honorable William D. Medley, two Judges of record of the Circuit Court of the County of Arlington, Virginia, appointing Judge Reid as Judge of the Juvenile and Domestic Relations Court, entered pursuant to the provisions of Section 16-174.4 of the Code of Virginia. It does not appear from your letter, or from the information furnished, that a clerk has been appointed for the Juvenile and Domestic Relations Court. I concur with Mr. Hassan's view as stated in the last paragraph of his letter and am of the opinion that Judge Reid, who is now Judge of both the County Court and the Juvenile and Domestic Relations Court, can under the plain provisions of Section 16-172.11 appoint a clerk for the Juvenile and Domestic Relations Court. If the present Clerk of the two courts of record and the County Court is appointed to this position, I am of the opinion that he would be entitled under the provisions of Section 14-155 of the Code to an additional thousand dollars in computing his maximum compensation.

JUVENILE AND DOMESTIC RELATIONS COURT—May commit minors to jail in traffic violation cases. F-239 (323)

June 22, 1954.

HONORABLE O. RAYMOND CUNDIFF, *Judge*,
Juvenile and Domestic Relations Court, Lynchburg.

This is in reply to your letter of June 18, 1954 in which you ask to be advised whether the Juvenile and Domestic Relations Court may proceed against juveniles in traffic violation cases and impose a sentence as if they were adults.

Excepting the provisions of sections 16-172.42 and 16-172.43 of the Code of Virginia of 1950, as amended, relative to transfer of certain cases to other courts, the Juvenile and Domestic Relations Court may dispose of cases involving minors pursuant to the provisions of chapter 7, Title 16, of the Code of Virginia. In certain types of violations the Legislature has drawn no distinction between minors and adults as to the procedure and the punishment to be imposed. By virtue of section 16-172.44(8) the Juvenile and Domestic Relations Court may impose the penalties which are authorized to be imposed on adults for traffic violations. The penalty authorized for violation of section 18-78 of the Code of Virginia of 1950, as amended, is confinement in jail and fine. I am of the opinion that no distinction is to be drawn as to minors when such section is violated. Therefore, the Juvenile and Domestic Relations Court may commit minors to jail under this section, subject, however, to the limitation as to separate room or ward as required by section 16-172.62 of the Code.

JUVENILE AND DOMESTIC RELATIONS COURT—Substitute judge for Suffolk. F-136c (42)

August 21, 1953.

HONORABLE WILLIS E. COHOON,
Member of House of Delegates.

I have your letter of August 19, in which you ask for my opinion on the following question:

"I would appreciate an expression of your opinion as to this specific question; under the charter of the City of Suffolk as amended by the Special Session of 1952 and under the general law, is the assistant substitute civil and police justice, when serving, also the substitute judge of the juvenile and domestic relation court?"

The answer to your inquiry is to be found in the Charter of the City of Suffolk and in Section 16-172.9 of the Code of 1950, as amended. By Chapter 15 of the Acts of Assembly at the Extra Session of 1952 a new section numbered 29½ was added to the Charter of the City of Suffolk providing for an assistant substitute civil and police justice. This section reads as follows:

"In addition to the substitute civil and police justice provided for by paragraph (e) of § 29 of this charter the council may appoint an assistant substitute civil and police justice who shall have the same qualifications and shall during the time he performs the duties of the office of civil and police justice exercise the same powers, perform the same duties and receive the same compensation as the substitute civil and police justice. Such assistant substitute civil and police justice shall serve only at such times as he shall be designated by the substitute civil and police justice to act in his place and stead."

Section 16-172.9 of the Code of 1950 as amended by Chapter 419 of the Acts of 1952 reads in part as follows:

"The judge or judges of each city or county who have authority to appoint the several juvenile judges shall by proper order of record appoint, upon the recommendation of the judge of the juvenile and domestic relations court, as a substitute judge for each judge and associate judge of such court, a discreet and competent person or persons and may at any time revoke the appointment and make a new appointment in like manner in the event of revocation or of the resignation, death, absence or disability of a substitute judge. In the event the police justice, civil justice, civil and police justice, judge of a county court or trial justice is appointed juvenile and domestic relations court judge, then the substitute police justice, civil justice, civil and police justice, judge of a county court or trial justice shall be substitute judge of the juvenile and domestic relations court. In the event of the absence or disability of the judge or associate judge of the juvenile and domestic relations court to perform the duties of his office or the impropriety of his acting, the substitute judge or judges shall perform the duties and possess the powers of the judge or judges during such periods and in the event of the resignation, death, removal or permanent disability of the judge or associate judge the substitute judge or judges shall act until a successor has been appointed and has qualified."

You state in your letter that your civil and police judge is the juvenile and domestic relations court judge. Pursuant to Section 16-172.9, then the substitute civil and police justice is the substitute judge of the juvenile and domestic relations court. Such substitute civil and police justice, while acting as substitute judge of the juvenile and domestic relations court, possesses all the powers of the judge of such court.

By Section 29½ of the Charter of the City of Suffolk the assistant substitute civil and police justice, while acting as such, has the powers of the substitute civil and police justice. It follows then that the assistant substitute civil and police justice, when acting as such, exercises the powers of the substitute judge of the juvenile and domestic relations court. I call your attention to the fact, which you doubtless already know, that Sections 16-30 through 16-172 of the Code of 1950 were repealed by Chapter 383 of the Acts of 1950.

LABOR LAW—Children; employment on delivery truck prohibited. F-56 (35)

August 13, 1953.

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

This is in reply to your letter of August 13, 1953, in which you inquire as follows:

"In your opinion, does the Child Labor Law of Virginia apply to minors employed as helpers on delivery trucks owned by a farmer who is commercially engaged in sales and delivery of processed food products or are such minor employees subject to the exemptions of this law."

Section 40-96 of the Code of Virginia provides, in part, as follows:

"No child under fourteen years of age shall be employed, permitted or suffered to work in, about or in connection with any gainful

occupation, except farm work performed outside of school hours with the consent of the child's parents or guardian, and except as specified in this chapter."

Section 40-96.1 provides, in part, as follows:

"Nothing in this chapter, except the provisions of section 40-112, shall be construed to apply to the employment of a child engaged in domestic work when such work is performed in connection with the child's own home and directly for his parent or the person standing in place of his parent, or to occasional work performed by a child outside school hours where such work is in connection with the home of the employer but not in connection with his business, trade, or profession.

"Nothing in this chapter shall relate to work outside of school hours on farms, in orchards or in gardens performed with the consent of the child's parent or guardian."

Section 40-99 of the Code provides as follows:

"No boy under fourteen and no girl under eighteen years of age shall be employed, permitted or suffered to work in a street or public place in connection with any gainful occupation, except as provided in sections 40-114 to 40-118."

Section 40-114 provides certain exceptions to the prohibition contained in section 40-99 as follows:

"Any boy between twelve and sixteen years of age may engage in the occupation of (1) bootblacking, (2) selling newspapers, magazines, periodicals or circulars which are by law permitted to be distributed and sold, (3) running errands or delivering parcels, or (4) caddying or other outdoor employment, at such hours between six o'clock ante meridian and seven o'clock post meridian as the public schools are not in session, provided such boy procures and carries on his person a badge as hereinafter provided."

From the foregoing quoted sections it is apparent that the exceptions to the general prohibition set forth in section 40-96 of the Code are chiefly employment in the fields of agriculture and miscellaneous occupations generally recognized as being engaged in by children. It is obvious that the principal object of the Child Labor Law is to protect the lives and limbs of children. With this objection as the prime consideration I am of the opinion that the employment of minors under fourteen years of age as helpers on delivery trucks commercially engaged in sales and delivery of processed food products is a violation of the Child Labor Law.

LABOR LAW—Public utilities; when Department of Labor and Industry acts as mediator. F-143 (170)

February 4, 1954.

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

This is in reply to your letter of February 3, 1954, which was with furtherance to yours of January 28, 1954, pertaining to the situation which has arisen with regard to the collective bargaining agent for the employees of a utility. An election was held by the NLRB in 1952 and the union certified as

the bargaining agent for the employees of such utility. Since that time, however, many of the union leaders have quit their jobs and the question has arisen as to whether the union presently represents the majority of the employees. Inasmuch as it is your understanding that the NLRB has recently held that such a utility is no longer subject to its jurisdiction, the question now arises as to what action, if any, the employees may take in order to determine whether the union should be decertified as their bargaining agent.

There is no State statute requiring elections to be held for the determination of the proper bargaining agent for employees. However, section 40-95.2 of the Code of Virginia of 1950, as amended, is the general authority for the Department of Labor and Industry to act as mediator when such questions arise concerning such an utility where the federal legislation does not apply. Upon request in writing from both the employer and the union that an election be held to determine the bargaining agent for the employees of such an utility, the Department of Labor and Industry may conduct an election in order to determine this question.

It is my suggestion that you first assure yourself in writing that the NLRB no longer exercises jurisdiction over the utility in question prior to submitting this problem to the Department of Labor and Industry.

LOTTERIES—Carnival concession; which included as.

FORTUNE TELLERS—Traveling with carnival, prohibited. F-123 (57)

September 15, 1953.

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

This is in reply to your letter of September 4, 1953 in which you request my opinion concerning gambling and lottery laws as they relate to various carnival concessions. Your first question is as follows:

"1. Bingo, even though someone of the group playing the game wins a prize each time? Is bingo classed as a lottery if each person playing the game, having paid for his chance to play, is given some article which is of insignificant value or not of the value of the charge for playing the game of bingo?"

This office has repeatedly held that, if the three elements of a lottery, namely, prize, chance and consideration are present, a bingo game violates the laws of this State. I do feel that the giving to each player an article of insignificant value removes the game of bingo from the prior rulings of this office.

You ask secondly concerning:

"2. A shooting gallery where you pay to shoot, say ten or twenty cents for three shots, or if you shoot so many targets you get a prize?"

In my opinion this is not a violation of the gambling statutes of Virginia, nor does it constitute a lottery. Here, winning a prize depends upon the element of skill, not chance, thereby removing it from any definition of a lottery. The gambling statute of the State contains no specific prohibition with respect to shooting contests.

I believe that concessions where the player tosses money into, or a ring around, dishes or other similar items involve skill also, and, therefore, does not involve the necessary element of chance which would constitute a lottery

or gambling as defined by the Code of Virginia. I concur with your opinion that concessions in a carnival group having a person, gypsy or otherwise telling fortunes for compensation, violates Section 18-347 of the Code. That section provides as follows:

"It shall be unlawful for any company of gypsies or other strolling company of persons to receive compensation or reward for pretending to tell fortunes or to practice any so-called magic art.

"Every person violating this section shall be guilty of a misdemeanor, and fined not less than five hundred dollars, or confined in jail not less than one, nor more than six months, or by both such fine and imprisonment."

The term "strolling company" is broad enough in my opinion to include a carnival concession which moves from place to place with the carnival.

LOTTERIES—Theater bank nights; constitute. F-123 (7)

July 7, 1953.

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

This is in reply to your letter of July 3, 1953, relative to a "give away program" promoted by one of your local theatres. That portion of your letter relative to the plan is quoted:

"Anyone who applies at the box office, regardless of whether they buy a ticket to the show, is given a ticket for the 'Treasure Chest'. The holder of this ticket writes his name and address on the ticket and deposits it in a box kept in the lobby of the theatre. On each Thursday night a name is drawn from the box and if the person whose name is drawn is present a marble is drawn out of a glass jar. The color of the marble determines the percentage of the 'Treasure Chest' that the lucky person receives. The percentages are listed on each ticket that is given at the box office. If the person whose name is drawn isn't present they are sent a check for \$1.00 plus two passes to the theatre."

As stated in the case of *Maughs v. Porter*, 157 Va. 415, there are three requisites to any scheme to constitute a lottery in Virginia. Those elements are chance, prize and consideration. There appears no question that the first two elements are present in the proposed scheme. However, the element of consideration may appear questionable inasmuch as the ticket holder is under no obligation to purchase a ticket from the theatre.

The decision in the *Maughs v. Porter* case would appear to be ample authority for the conclusion that advertising value is sufficient to constitute the element of consideration in a lottery. Undoubtedly it is the desire of the theatre management to induce the participants to attend the theatre on the night of the contest. This is borne out by the comparison of the gifts which are won dependent upon whether or not the lucky person attends the theatre on the date of the drawing.

In view of the advertising value received and the inducement to attend the theatre, I am of the opinion that this proposed plan is a violation of section 18-301 of the Code of Virginia.

**MARRIAGE—Ceremony required; members of Society of Friends.
F-223 (135)**

December 28, 1953.

MISS ESTELLE MARKS,
State Registrar, Bureau of Vital Statistics, Richmond.

This is with reference to recent communications between your office and Mr. Lee of this office pertaining to the requirements for persons solemnizing marriages in this State. I have reviewed the certificate of marriage filed in your office by one H. B. Taylor certifying the marriage of Russell M. Shepherd and Jane S. Pancoast, members of the Society of Friends, as well as the printed material pertaining to the marriage solemnization of the Society.

Chapter 2, Title 20, of the Code of Virginia sets forth the requirements for a lawful marriage in Virginia.

Section 20-13 provides that every marriage in this State shall be under a license and solemnized in the manner provided by statute. Subsequent sections specify the persons who may solemnize the marriage. Provision is made for the courts to authorize certain ministers of religious denominations, as well as other persons, to perform such ceremonies after such persons have executed the appropriate bonds as is required by law. Provision is also made for marriages between persons of religious societies which have no ordained minister and who wish to be married in the manner prescribed by such religious society.

When construing all the provisions of chapter 2 of Title 20 together it appears that the legislative intent is clear that any person performing a marriage ceremony must be a person duly authorized by the court and bonded to perform such ceremony. From the printed material relative to the Friends Society (Quakers) it appears that the following procedure is employed in solemnizing a marriage:

A written proposal, signed by both parties, is presented at the Monthly Meeting of the Society in which the parties declare their intention to be married. A committee is then appointed to determine the suitability of such a union. After approval by the Society the persons are solemnized in marriage at another Meeting by standing and declaring before the Society that each takes the other as his or her spouse. At the conclusion of the Meeting a certificate is signed by the parties and is attested by at least twelve witnesses. At no time in the solemnization is there a ritualist who may be said to have performed a marriage ceremony.

It appears clear that the primary purpose of requiring solemnization of a marriage is to prevent illicit cohabitation between persons, which prevention may best be accomplished by requiring witnesses or court authorization for the person performing any marriage ceremony. In view of the statutory provision made for religious societies to have marriages solemnized in the manner prescribed by such society, I am of the opinion that the manner prescribed by the Friends Society removes all danger of secret or illicit cohabitation, and the purpose of chapter 2 of Title 20 of the Code has been fulfilled.

I believe you could advise Mr. Stilson H. Hall that Mr. Henry B. Taylor's actions are sanctioned by law, but I suggest that the words "persons who performs ceremony sign here" be stricken out on the marriage certificate when such persons are Quakers.

MARRIAGE—Miscegenation; white persons and Indians; Indians and colored persons. F-223 (127)

December 16, 1953.

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

This is in reply to your letter of December 11, 1953 which reads as follows:

"I call your attention to Sec. 20-54 of the Code of Virginia of 1950 and seek your advice as to whether or not, under the aforesaid section, first, if an Indian may marry a Caucasian and second, if an Indian may marry a Negro."

Section 20-54 of the Code provides as follows:

"It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter."

It is my opinion that, under this section, a pure-blooded Indian or an Indian with no other mixture of blood than Caucasian may marry a white person in Virginia. This section does not prohibit, and I know of no other section of the Code which would prohibit, an Indian from marrying a colored person.

MEDICAL EXAMINERS—No duty to grant license under reciprocity when Virginia's requirements not met. F-198 (156)

January 21, 1954.

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

This is in reply to your letter of January 19, 1954, a portion of which is quoted:

"I am writing to ask for your opinion about a problem which has arisen in connection with the State Board of Medical Examiners. This is, in brief, whether a man who appears not to be a graduate of medicine, but who is licensed in Vermont to practice medicine and surgery should be granted permission to practice in Virginia for 60 days by virtue of his Vermont license in order to clear up the matter by court action or otherwise."

The facts pertinent to your inquiry appear as follows:

1. There is no certification of graduation from a school of medicine on the license issued by the State of Vermont, but instead there is a photographic statement pasted thereon which purports to be signed by the Dean of the School of Medicine of the University of Maryland in the year 1923, to the effect that the licensee graduated in the year 1913 from the Baltimore Medical

College, which college was consolidated with the University of Maryland in the year 1913.

2. The Board is in receipt of a communication from the present Dean of the School of Medicine, University of Maryland, in which it is stated that the records of the University disclose that the person in question attended the Baltimore Medical College over a period of four years, having failed to pass six of his subjects in his fourth year, and failed to graduate in the year 1913 or any other year. Consequently the Dean has refused to certify the Endorsement Application submitted in the name of the applicant in question.

3. The applicant in question is not listed in the 1950 American Medical Association Directory of Physicians.

Section 54-310 of the Code of Virginia, 1950, provides, in part, as follows:

"The Board may, in its discretion, arrange for reciprocity with the authorities of other States, territories and countries having requirements equal to those established by this chapter, and issue certificates to applicants who have met such requirements."

From the foregoing quoted portion it is apparent that the Board of Medical Examiners may issue certificates to applicants licensed in a state having a reciprocal arrangement with this state, if such state has equal requirements to those established in this state, and provided the applicant has met those requirements. In view of the finding of fact that the person in question has not met requirements equal to those required of applicants for licensure in this state, the Board is under no duty to grant reciprocity to such person even though he be licensed in a reciprocating state.

The question of whether this applicant should be issued a temporary certificate as provided in section 54-311 of the Code of Virginia is a matter of discretion with the Board, and there is no provision in the statute to make such action mandatory.

MEDICAL SERVICES—Doctors may not form association and share fees. F-198 (243)

April 20, 1954.

HONORABLE JOHN A. K. DONOVAN,
State Senator, Falls Church.

This is in reply to your letter of April 7, 1954 in which you state:

"The question, as posed, is whether or not professional men, in this case of the medical profession, who locate themselves in association in Virginia for the purpose of offering their services to my constituency, may form an unincorporated or incorporated association or syndicate for the purpose of providing and operating physical facilities, hiring lay personnel and otherwise doing what is necessary to operate a medical building including employment of skilled persons not members of the medical profession. It seems to me that this part of the problem is not the serious part and that such could be done without too much difficulty. However, the crux of the matter involves the pooling of gross fees for this purpose and the division of the residue to employees of the association upon previously agreed upon ratios. No system would be set up by the association which would deter any patient from making his freedom of choice and the same ethical standards would be provided by the individual members of the association in the practice of their

profession as are provided by general law and the ethics of the medical profession."

Section 54-278 of the Code of Virginia provides as follows:

"No surgeon or physician shall directly or indirectly share any fee charged for a surgical operation or medical service with a physician who brings, sends or recommends a patient to such surgeon for operation, or such physician for such medical services; and no physician who brings, sends, or recommends any patient to a surgeon for a surgical operation or medical services shall accept from such surgeon or physician any portion of a fee charged for such operation. Any physician or surgeon violating the provisions of this section shall be guilty of a misdemeanor."

The proposed medical association or syndicate that you describe in your letter would, in my opinion, violate § 54-278 of the Code. If all the gross fees are pooled and then distributed according to previously agreed upon ratios, each doctor in the association or syndicate would share the fees received by all of the other members of the association.

MILK COMMISSION—Assessments to cover expenses; on all milk and cream. F-23 (25)

July 29, 1953.

VIRGINIA STATE MILK COMMISSION,
King Carter Hotel, Richmond.

This is in reply to your letter of July 24, 1953, which I quote:

"There appears to be a difference of opinion between the various distributors on the interpretation of Section 3-377 of the Code of Virginia, which reads as follows:

"The expenses of the milk board, including salaries and the per diem of such personnel as the board finds it necessary to employ properly to carry out its functions under this article, and including the assessments levied by the Commission, shall be met by an assessment of not over two cents per hundred pounds of milk or cream (converted to terms of milk of four per cent butterfat) handled by distributors and not over two cents per hundred pounds of milk or cream (converted to terms of milk of four per cent butterfat) sold by producers. The exact amount of each monthly or semi-monthly assessment shall be determined by the milk board as necessary to cover its expenses. All assessments shall be paid at the time the distributors pay the producers for the milk. All officers and employees of the milk board who handle funds of the board, or who sign or countersign checks upon such funds, shall severally give bond in such amount and with such sureties as shall be determined by the milk board. The cost of such bonds shall be paid by the milk board and the milk board shall determine the amount and sufficiency of such bonds. (1934, p. 565; Michie Code 1942, Section 1211 gg.)"

"A number of distributors construe this Section as paying an assessment only on milk and/or cream sold for retail and wholesale con-

sumption. The Commission, at its meeting held on March 6, 1953, were of the opinion that an assessment should be paid on all milk and/or cream received from producers originally intended for fluid consumption even though part of these receipts due to flush seasons ultimately found their way into manufacturing channels.

"It is requested that you give us an interpretation of the above-mentioned Code citation as to whether or not a distributor is required to pay an assessment on all milk and/or cream received and intended for fluid consumption irrespective of its utilization."

It is noted that through the above stated statute the Legislature made provision for an assessment on the quantity of milk or cream "handled by distributors" without providing for any exception or differentiation as to the utilization of such milk or cream so handled by the distributors. Accordingly, this office must concur in the opinion of the State Milk Commission that distributors are subject to an assessment in the manner as prescribed by law "on all milk and/or cream received from producers * * *" and handled by such distributors irrespective of its utilization.

MOTOR VEHICLES—Chauffeur's license; required of operator of truck used as common carrier. F-149 (71)

October 14, 1953.

THE HONORABLE W. D. PRINCE,
Trial Justice of Sussex County.

This is to acknowledge receipt of your letter of October 7 in which you state:

"Will you please construe, or give me your opinion on Section 46-343 of the Code of Virginia pertaining to Chauffeur's license. Would the owner of a truck that is used as a common carrier of property be required to have a chauffeur's license, and would a person hired to drive the truck, other than the owner, be required to have a chauffeur's license."

Section 46-343(1) of the Code reads as follows:

"'Chauffeur'.—Every person employed for the principal purpose of operating a motor vehicle *and every person who drives a motor vehicle while in use as a public or common carrier of persons or property.*"

I am of the opinion that, if the vehicle is driven by the owner while in use as a common carrier of property, such owner would have to secure a chauffeur's license. I am further of the opinion that, if a person is hired by the owner to drive a truck as a common carrier of property, that person must be licensed as a chauffeur.

MOTOR VEHICLES—Confiscation; use of by city police department. F-210a (64)

September 28, 1953.

HONORABLE EUGENE A. LINK,
Attorney for the Commonwealth, Danville.

This is in reply to your letter of September 11, 1953 inquiring as to my view with regard to whether or not a city police department could obtain title

from the Division of Motor Vehicles to an automobile seized for illegal transportation of whiskey by drivers of unknown identity and make use of such automobile in the daily police work of such department without going through confiscation proceedings as outlined in section 4-56 of the Code of Virginia.

You state that it is your opinion that the Commonwealth's Attorney should file an information against such property seized under section 4-56 praying that the same be condemned and sold and the proceeds disposed of according to law.

Section 4-56 provides for disposition of automobiles abandoned on highways. It further appears that this section authorizes the seizure and sale of such automobiles by the Motor Vehicle Commissioner and the paying of the proceeds received therefrom into the State Treasury. Section 4-56 provides the manner in which automobiles engaged in the illegal transportation of alcoholic beverages may be seized and confiscated. Subsection (j) of section 4-56 provides that the sale of the automobiles so declared to be forfeited shall be made by the sheriff of the county or the sergeant of the city wherein the property was seized and the proceeds, after payment of costs, shall be paid into the Literary Fund. This section appears to be the only provision in the A B C Act relative to the confiscation of automobiles.

In accordance with the foregoing it does not appear that the laws of Virginia presently provide for the disposition desired, namely, that confiscated cars be turned over to the police department of a city for use in police work.

MOTOR VEHICLES—County licenses; maximum amount; penalty for failure to obtain. F-149 (276)

May 12, 1954.

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

I am in receipt of your letter of May 10, in which you present the following questions:

"The Board of Supervisors of Middlesex County will consider charging County license fees for automobiles owned by residents of the County but, before the Board takes final action on the matter, there are two questions about House Bill Number 615 which amends Section 46-64 of the Code and authorizes any County to charge license fees to be paid by all residents of the County for automobiles owned by them.

"The first question is as to 'the amount of *fees and taxes imposed*' (H. B. No. 615, lines 27-28-29-30) which 'shall not be greater than the amount of license tax imposed by the State on vehicles of like class.' Note that the italicized words are not in the disjunctive. The present tax rate in this County is \$2 on \$100 assessed value. If a man owns an automobile assessed at \$500 he now pays \$10 County tax on it and pays \$10 for his State license. So how under H. B. No. 615, lines 29-30 can he be required to pay more?"

"The second question is if the Board charges County license fees and a resident of the County fails to pay a County license fee for his automobile, is he guilty of a misdemeanor under Section 46-18 of the Code for violating a provision of Title 46, Chapters 1 to 4, which provision was not a provision of Chapter 3, Section 46-64 when the Code of 1950 went into effect?"

As to your first question, it is my view that Chapter 594 of the Acts of 1954, amending Section 46-64 of the Code, deals with license or privilege taxes imposed on vehicles and not with property taxes. While at first blush it may appear that the language is somewhat ambiguous, yet, when it is considered that the State imposes no property tax as such on vehicles, I think it is clear that, when

the section provides that the localities may impose license fees and taxes upon vehicles not greater than the amount of license tax imposed by the State, it is referring to license taxes imposed by the localities.

As to your second question, I direct your attention to the fact that Section 46-64 of the Code as amended is in the nature of an enabling act. It imposes no tax or duty upon anyone, but simply authorizes the localities to impose a license tax upon vehicles. Therefore, I do not think that the failure of a person to pay such local license tax as may be imposed by a locality can be said "to violate any of the provisions of Chapters 1 to 4 of this Title" of the Code within the meaning of Section 46-18. Therefore, if a locality desires to impose a penalty for the violation of an ordinance levying a license tax on vehicles, the penalty should be included in the ordinance.

MOTOR VEHICLES—County license only license vehicles in towns if town has no license; pro-ration for less than year. F-149 (255)

April 27, 1954.

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

This is in reply to your letter of April 14, 1954 in which you ask my opinion as to the construction to be placed upon the amendatory language to section 46-64 of the Code of Virginia which provides as follows:

"If in any county imposing license fees and taxes under this section a town imposes like fees and taxes upon vehicles of owners resident in such town, then such vehicles and owners shall be subject to only one such local license fee and tax, it being the intent of this section to permit counties to tax only vehicles and owners resident outside a town when the town imposes any such fee or tax on vehicles and owners resident in the town, to the end that double taxation of such vehicles and owners be avoided."

It appears from the expressed intent of this amendment that the Legislature intended that a county should impose license fees and taxes upon vehicles and owners resident in a town within the county only in the event such town does not impose a similar tax or fee. I am of the opinion that in referring to "like fees and taxes" the Legislature intended fees and taxes of a similar character and not a like amount. Therefore, in those counties wherein a town has imposed license fees, regardless of amount, it is my opinion that the county is prohibited from imposing like fees or taxes.

With reference to your inquiry as to the manner of pro-ration for fractional periods of years, as required in section 46-64, it would appear that the principle of charging reduced amounts for fractional parts of a year as set forth in section 46-176 may be carried out with reference to licenses issued under section 46-64 of the Code even though the county tax does not cover the same twelve months period as is covered by the licenses mentioned in section 46-176. Although the months for charging reduced fees in the counties may be different from the months set forth in section 46-176 of the Code, the periods of time may be the same.

MOTOR VEHICLES—Division's records; introduction into evidence of photostatic copies. F-353 (56)

September 15, 1953.

HONORABLE WILLIAM A. JONES,
Commonwealth's Attorney for Richmond County.

This is in reply to your letter of September 9, 1953 inquiring as to my view and advising that it is your opinion that photostatic copies of abstracts of convictions duly attested by the Commissioner of the Division of Motor Vehicles pursuant to section 8-266 of the Code of Virginia should be admissible in evidence in lieu of the original in matters pertaining to second offenses involving alleged violations under sections 18-75, 18-76, 18-78 and 18-79 of the Code of Virginia.

Section 8-266 of the Code of Virginia, as amended, reads as follows:

"A copy of any record or paper (1) in the clerk's office of any court, or in the office of the Secretary of the Commonwealth, Commission of Fisheries, State Treasurer, Comptroller, Auditor of Public Accounts, Division of Motor Vehicles, or the Commissioner of Agriculture and Immigration, attested by the officer in whose office the same is; (2) in the office of the State Corporation Commission, the State Board of Education, or the board of supervisors or other governing body of any county, attested by the secretary or clerk of such Commission or board; (3) in the office of surveyor of lands of any county, attested by the surveyor in whose office the same is, may be admitted as evidence in lieu of the original. But for good cause shown, the original records in the office of the surveyor of lands of any county may be required to be produced.

"Any such copy purporting to be sealed, or sealed and signed, or signed alone, by any such officer, secretary or clerk, may be admitted as evidence, without any proof of the seal or signature, or of the official character of the person whose name is signed to it."

In accordance with the foregoing providing that any such copy of any record in the office of the Division of Motor Vehicles attested by the officer in whose office the same is signed by any such officer may be admitted in evidence without any proof of the seal or signature or the official character of the person whose name is signed to it, this office concurs in your view that such photostatic copies are admissible in evidence.

MOTOR VEHICLES—Insurance; proper form for companies to file with division showing required increased coverage. F-149a (294)

May 25, 1954.

THE HONORABLE C. H. LAMB, *Commissioner*,
Division of Motor Vehicles.

This is to acknowledge receipt of your letter of May 20 in which you state in part:

"The various companies doing business in Virginia have on file with this Division thousands of their certificates showing the issuance of motor vehicle liability policies as proof of financial responsibility. These present certificates indicate a minimum liability coverage of \$5/10,000 bodily injury and \$1,000 property damage. The National Bureau of Casualty Underwriters, representing the stock companies, has made the suggestion that the companies be permitted to file a letter with this Division certifying that

as of July 1, 1955, all filings made by them be considered as affording the limits required as of July 1, 1955. A copy of the referred to letter is attached.

"In view of the provisions of Section 46-459 of the Code, will you please advise me if this Division may accept such a blanket letter of certification in appropriate legal form or will it be necessary that we require the companies to file a new certificate for each individual case. Your advice will be appreciated."

Your attention is invited to Section 46-455 of the Code of 1950, as amended by the Acts of 1954. As you point out, the amendment increases the amount of insurance coverage from \$5/10,000 to \$10/20,000 for death or bodily injury. Section 46-459 reads as follows:

"Proof of financial responsibility may be made by filing with the Commissioner the written certificate of any insurance carrier, authorized to do business in this State, certifying that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. This certificate shall give the effective date of the policy which must be the same date as the effective date of the certificate, and, unless the policy is issued to a person who is not the owner of a motor vehicle, must designate by explicit description or by appropriate reference all motor vehicles covered.

"No motor vehicle shall be, or continue to be, registered in the name of any person required to file proof of financial responsibility unless it is so designated in the certificate."

As I understand, these insurance companies have complied with the provisions of Section 46-459 by furnishing the necessary certificates, but these certificates, of course, set forth the amount of coverage as required by Section 46-455 as now enforced; and after June 30, 1955, it will be necessary for these companies to furnish you with necessary evidence that the amount of coverage is in accordance with the provisions of that section as amended.

I am of the opinion that the procedure suggested by the National Bureau of Casualty Underwriters that the companies be permitted to file a letter with the Division that, as of July 1, 1955, all filings made by them be considered as affording the limits required as of July 1, 1955, would comply with the provisions of Section 46-459 of the Code, but I believe, however, that each company should be required to file a separate letter or blanket certificate and that appropriate reference be made therein to the facts and circumstances under which it is made and to the pertinent statutes.

MOTOR VEHICLES—Insurance; requirement for informing purchaser "no liability insurance." F-149a (278)

May 17, 1954.

MR. C. H. LAMB, *Commissioner*,
Division of Motor Vehicles.

This is to acknowledge receipt of your letter of May 11 in which you state:

"House Bill 55, enacted in the last session of the General Assembly and enrolled as Chapter 113, takes effect June 30, 1954. It provides in part that:

" . . . Whenever any charge for a summary of insurance coverage appears on such statement, and the insurance coverage effected or to

be effected thereunder does not include a policy of motor vehicle liability insurance, the seller or his assignee shall stamp or mark upon the face of such writing in red letters no smaller than eighteen point type the following words:

“‘No Liability Insurance Included.’

“With this in mind, it has been brought to my attention that many of the larger finance companies and banks would prefer to prepare their contracts and at the time of printing also print the above quoted information.

“Your opinion is respectfully requested as to whether such an operation would comply with this law, or whether such stamping or marking must be done at the time the transaction takes place.”

The purpose of this bill, which is now a law, is to make it incumbent upon the sellers of automobiles to inform the purchasers the type of insurance which they are purchasing at the time the deal is consummated. Apparently, the purchasers have heretofore been under the impression that when they place insurance upon the automobile at the time of purchase, the car is covered with liability insurance, but, as a matter of fact, the only type of insurance that they have purchased is collision insurance, which neither affords them nor the public any protection, but is placed there for the protection of the bank or finance company lending the money.

It is my opinion that the stamping or marking must be done when the transaction takes place and that printing this information on the contracts beforehand is not in compliance with the spirit or letter of this law.

MOTOR VEHICLES—Licenses; local tags; nonresident college student subject to. F-149 (137)

December 30, 1953.

HONORABLE PORTER R. GRAVES,

Trial Justice for Rockingham County and The City of Harrisonburg.

I regret that I have been unavoidably delayed in replying to your letter of December 14, in which you present the following question:

“As Trial Justice of Rockingham County and the City of Harrisonburg, I would like to ask whether or not an incorporated town of Rockingham County has a right to require a non-resident student, who is attending college in said incorporated town, to buy a town license tag.

“I am familiar with Section 46-111 of the Code of Virginia, which, in effect, states that they may operate their vehicles on the highways of Virginia for a period of six months. These students are not gainfully employed, and probably should be classed as sojourners. Once or twice during the year they return to their out-of-State homes.”

The authority of incorporated towns to impose a license upon the operation of motor vehicles therein is to be found in Section 46-64 of the Code, as amended, with certain limitations on the amount of the tax. Section 46-65 of the Code, as amended, contains certain limitations on the imposition of such taxes. Among other things, the latter section provides that:

“No such county, city or town shall impose any taxes or license fees upon any vehicle on which similar taxes or fees are imposed by the county, city or town of which the owner of such vehicle is a resident; nor shall more than one county, city or town impose any such license fee or tax on

the same vehicle. Nor shall any such county, city or town impose taxes or license fees upon any vehicle belonging to any person who is not a resident of such county, city or town, when used exclusively for pleasure or personal transportation * * * provided, that such vehicle is not used in said county, city or town in the conduct of any business or occupation other than those herein set out."

I think it reasonably plain that the words "not a resident" in the above quoted language are not used in the sense of domicile, but rather with the meaning of physical residence or place of abode. Otherwise, an owner of a motor vehicle actually residing in one town, but retaining his domicile in another city or town, or even in another State, could, without a license, maintain his place of abode in the first town and operate his motor vehicle there indefinitely. In my opinion, it was not the intent of Section 46-65 to enable this to be done. The real purpose of the limitation, I think, was to take care of such a situation where a resident of a county adjoining a city or town used his automobile for his personal transportation to and from his place of work in the city or town and incidentally transportation for pleasure, provided, of course, the automobile was not used in the conduct of a business or occupation in such city or town. As I have said, I cannot believe that the limitation was intended to prohibit a town from imposing a license tax for the operation of an automobile over the streets of such town by a person who is actually maintaining his physical residence there. My conclusion is that the town to which you refer may by appropriate ordinance impose a license tax upon the operation of their automobiles by these students who are residing in the town for nine months of the year.

**MOTOR VEHICLES—Licenses; local tag; not required of nonresident.
F-149 (41)**

August 18, 1953.

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

I received your letter of August 14 in which you make the following inquiry:

"A owns a pick up truck and works in the Town of Z. A is not a resident of the Town of Z as A lives in a small community in an adjoining county. A works in the Town of Z and drives his pick up truck from his home to his place of employment. A does not operate this vehicle for hire within the Town of Z. The authorities of the Town of Z have ordered A to purchase a town license tag. A has refused to purchase said license tag as he feels a nonresident under certain conditions does not have to buy a town tag."

Section 46-64 of the Code of 1950, as amended, grants to certain cities, towns and counties the authority to impose license fees upon motor vehicles. However, in 46-65, there are certain limitations placed on the imposition of such license fees. The following appears in that section:

"Nor shall any such county, city or town impose taxes or license fees upon any vehicle belonging to any person who is not a resident of such county, city or town when used exclusively for pleasure or personal transportation and not for hire, * * *."

From what you state, A uses his pick up truck solely for the purpose of going to his place of employment from home and return. The use made by

him of his car under these circumstances I interpret to be included in the term "used exclusively for pleasure or personal transportation". Of course, if he used his car for some business within the corporate limits, although he may be a nonresident, he must secure city or town tags for the same.

I am, therefore, of the opinion that, under the circumstances, A is not required to have his car licensed by Town Z.

MOTOR VEHICLES—Licenses; not required of two wheeled vehicle used exclusively as manhole pump. F-253 (297)

May 26, 1954.

MR. C. H. LAMB, *Commissioner*,
Division of Motor Vehicles.

This is to acknowledge receipt of your letter of May 24 in which you ask whether or not a two-wheel contrivance or vehicle upon which a manhole pump is mounted comes within the definition of a trailer as set forth in Section 46-1(26) of the Code of Virginia of 1950. This contrivance is described in a letter from the Chesapeake and Potomac Telephone Company dated May 7, 1954, as follows:

"The trailers to which we refer, and about which there exists some doubt in our minds as to whether they are required to be licensed for operation on the highways of this State, are of two types. The first is a simple trailer upon which we have mounted a manhole pump. This installation, while not absolutely of a permanent nature, is certainly contemplated by us to be a permanent arrangement. * * * * *

"The second type is identical with the first except that the manufacturer of the pump has mounted the pump on wheels originally, rather than it being done locally. * * * * *

You enclose a photograph of the said vehicle.
Section 46-1(26) of the Code of Virginia of 1950 reads as follows:

"'Trailer'.—Every vehicle without motive power designed for carrying property or passengers wholly on its own structure and for being drawn by a motor vehicle."

As indicated in the definition, a trailer is a vehicle designed for carrying passengers or property. From the description of this vehicle or contrivance, it would appear that it is not designed to carry property or passengers, and it falls in the same category as a cement mixer mounted on wheels.

I am, therefore, of the opinion that the contrivance or vehicle does not have to be licensed or titled under the provisions of the Motor Vehicle Code so long as it remains in the same condition as described.

MOTOR VEHICLES—Licenses; state trooper can pick up plates for improper brakes. F-353b (40)

August 25, 1953.

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

Receipt is acknowledged of your letter dated August 15, 1953, requesting my opinion on the following:

"Section 46-56 of the Code of Virginia provides as follows: 'The Division shall revoke, rescind and cancel the registration of any motor vehicle, trailer or semi trailer which the Division or Department of State Police shall determine is unsafe or unfit to be operated or is not equipped with proper brakes, proper lights, proper horns or warning devices, proper mirror, muffler, cutout or windshield wiper or proper steering gear adequate to insure the safe control of the vehicle as required by this title, or when such vehicle is equipped with a smoke screen device or is not equipped with the proper electrical or mechanical signalling device when such device is required by law.'

"Please advise if under this Section a State Highway Patrolman has authority to pick up the license plates from an operator whose operator's license has been revoked, and who is operating his automobile with improper brakes. This question was raised in our Trial Justice Court, and the Court indicated that a Highway Patrolman did not have this authority; that it would have to be done through the Department of State Police."

You explained in your letter dated August 21, 1953, that your inquiry concerns a State Trooper and not a State Highway Patrolman employed by the Department of Highways.

I am advised that the Commissioner of Motor Vehicles by written authority dated July 21, 1942, designated "all of the officers of the Department of State Police to act as agent of, and on behalf of, the Division of Motor Vehicles to exercise all of the authority vested by Paragraph (a) of Section 33 of the Motor Vehicle Code of Virginia, * * *."

The section of the Motor Vehicle Code referred to was Section 2154(79) of the 1942 Code and is now Section 46-56 of the present Code of Virginia.

The present Acting Commissioner, Division of Motor Vehicles, by letter dated March 6, 1953, to the Superintendent of State Police, confirmed this prior authority.

If a member of the Department of State Police, that is a State Trooper, determines that a motor vehicle is unsafe or unfit to be operated or is not equipped with proper brakes, etc., Section 46-56 of the Code imposes upon him, as an agent of the Commissioner of Motor Vehicles, a mandatory duty to revoke, rescind and cancel the registration of such motor vehicle. The aggrieved party, pursuant to the provisions of Section 46-60 of the Code, is given an appeal as a matter of right to any court of record having competent jurisdiction.

If a State Trooper, as agent of the Commissioner of Motor Vehicles, revokes, rescinds or cancels the registration of an automobile for having improper brakes, I am of the opinion that he has the authority to demand the license plates of such automobile. If the owner fails or refuses to surrender and deliver to the officer the license tags so revoked, he would be guilty of a misdemeanor and punishable as prescribed by Section 46-61 of the Code.

If a person is found by a State Trooper to be operating a motor vehicle after his license has been revoked, the procedure for repossessing the registration certificate and registration plates is prescribed by Section 46-59 of the Code.

I am of the opinion that the functions of the Department of State Police enumerated in the foregoing statutes can be exercised by a State Police officer as a member of the Department of State Police.

MOTOR VEHICLES—Licenses; when permissible for farm vehicles to use highway without. F-149 (233)

April 12, 1954.

THE HONORABLE D. L. SUTPHIN,
Justice of the Peace, Maxmeadows.

This is to acknowledge receipt of your letter of April 6 in which you make inquiries concerning the use of trucks and trailers for agricultural purposes. Your attention is invited to Section 46-45 of the Code of Virginia, which reads as follows:

"No person shall be required to obtain the annual registration certificate and license plates or to pay the fee prescribed therefor, pursuant to the provisions of this title, for any truck upon which is securely attached a machine for spraying fruit trees and plants of the owner or lessee of the truck or for any motor vehicle, trailer or 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 it 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. Any vehicle exempted hereunder from the requirements of annual registration certificate and license plates and fees therefor shall not be permitted to use the highways as above provided between sunset and sunrise unless said vehicle is equipped with headlights, tail lights and other lights required by law."

The questions that you raise are as follows:

(1) Whether the ten miles mentioned in the statute only applies to the farms that are owned by the same individual.

Answer: I think the language in the statute contemplates that the farmer is not required to license his equipment so long as it is driven or drawn between lands that he operates for farm purposes. As you know, a good many farmers rent farms in the adjoining areas, and it is necessary for them to transport their equipment from one farm to the other.

(2) Can a trailer or truck be operated without a license if it is used to transport farm produce or livestock to a storage house or to a packing plant?

Answer: So long as the farm trailer is so used a distance not exceeding ten miles, it is not required to be licensed. However, the truck that pulls the trailer under these circumstances is required to be licensed.

(3) Whether there is any limitation to the distance a truck can be driven without a license to a repair shop.

Answer: I agree with you that there is no limitation as to the number of miles, so long as the truck is on the highway for this purpose.

(4) Is the operator (driver) of a farm truck required to be licensed before he can lawfully drive a truck on the highway although the truck is not required to be licensed?

Answer: Such operator must have a valid operator's or chauffeur's license issued by the Division of Motor Vehicles before he can lawfully drive such a truck.

It is well to point out here that the truck that is operated upon the highways must be properly equipped with lights if the operation is effected after sunset and before sunrise. Further, such truck or trailer must be equipped with proper brakes.

MOTOR VEHICLES—Maximum weight laws; effect on private property which is a highway. F-192 (51)

September 4, 1953.

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

Receipt is acknowledged of your letter dated September 2, 1953, requesting my opinion on the following:

"The Virginia Ferry Corporation is the fee simple owner of the land constituting what is now recognized as that portion of the U. S. Highway Route #13 extending from the point where its ferries dock to the Eastern boundary line of the Ferry Corporation's property, a distance of approximately three fourths of one mile.

"All traffic destined to and from the ferries travel over this part of Route #13.

"It is my understanding that the present hard-surface roadway leading from the ferry dock to the Eastern boundary line of the Ferry Corporation's property was constructed by the Ferry Corporation at its own cost and expense and I do not know that there has been any form of actual dedication of any easement to the State nor am I familiar with just what arrangements exist between the Ferry Corporation and the Highway Department in respect to this road. I do know that it is generally recognized as constituting a link in Route #13 and that it is the one and only means of access to the ferries.

"Several weeks ago one of our State Troopers stationed in Northampton County apprehended two trucks which he suspected of being too heavily loaded and, acting with due authority as provided by statute, the trucks were weighed and found to be loaded considerably in excess of the maximum gross weight allowed by law, thus confirming the officer's original suspicions.

"The operators of the two trucks were thereupon charged with the violation of the maximum weight law; thereupon the case was tried in the Trial Justice Court and the defendants, upon being found guilty of the charge, were fined pursuant to the penalties provided in the statute.

"The defendants have appealed to the Circuit Court of Northampton County the convictions imposed upon them in the Trial Justice Court,

and it is my understanding that they may undertake to show as their main defense, when the case comes up for trial in the Circuit Court, that that part of the highway extending from the ferry dock to the Eastern boundary line of the ferry property does not constitute any part of Route # 13 upon which an arrest of the above described nature may lawfully be made. I do not subscribe to such view and I feel perfectly confident that the conviction in the Lower Court can and will be sustained, but I would appreciate having the benefit of your views on the question."

It has been a long standing policy of this office to refrain from rendering official opinions on questions involved in litigation unless requested by the court. However, I feel, without establishing a precedent, I should point out to you that the Supreme Court of Appeals of Virginia, in the case of *Joyner v. Matthews*, 193 Va. 10, at page 15, has declared the purpose of the overweight statutes to be as follows:

"The apparent purpose of the Virginia legislature, in the exercise of its police power under the sections of the Code above cited, was to promote public safety in the first instance, and secondarily to protect the highways of this State from unreasonable wear and tear."

The primary purpose of these sections being to promote public safety, it would seem to be immaterial insofar as a violation of these sections is concerned whether or not a road open to the use of the public for purposes of vehicular traffic is owned and maintained as a part of the State Highway System.

Since the instant case involves the violation of Title 46 of the Code, your attention is called to Section 46-1, which reads, in part, 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 traffic in this State, including the streets and alleys in towns and cities."

I trust that the foregoing will be of assistance to you in substantiating the view expressed by you in your letter.

MOTOR VEHICLES—Operating under influence of intoxicants; when attempting to get out of a ditch. F-353 (247)

April 20, 1954.

HONORABLE MEREDITH C. DORTCH,
Commonwealth's Attorney for Mecklenburg County.

This is in reply to your letter of April 10, 1954 requesting my opinion relative to the sufficiency of certain facts and circumstances to support a conviction under § 18-75 of the Code of Virginia on a charge of operating a motor vehicle while under the influence of intoxicants.

The factual situation submitted by you is as follows:

"The typical case is where the driver is apprehended when his vehicle is stalled, standing still, or moving back and forth in an effort to get out of a ditch, with the motor running and various other mechanical parts of the vehicle in operation."

Considering the light of the purposes for which the statute was intended and the dangers it is designed to suppress, and considering its broad scope as reflected by the language "drive or operate," it is my opinion that if a person has the motor running and is attempting to put the car in motion, or if the car is in motion, whether the motor be running or not, then these facts would be sufficient to support a conviction of this person of driving or operating a motor vehicle while under the influence of intoxicants.

I am enclosing an opinion of this office of May 11, 1948 to the Honorable J. Melvin Lovelace, Attorney for the Commonwealth of Nansemond County, Virginia, which also relates to your inquiry.

MOTOR VEHICLES—Operator's license; driving after revocation; section applicable; lack of financial responsibility. F-149 (244)

April 20, 1954.

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

This is to acknowledge receipt of your letter of April 13, 1954, in which you inquire as to the meaning of Sections 46-347.1 and 46-347.2 of the Code of Virginia as amended. Your attention is invited to the following sections of the Code of Virginia of 1950:

Section 46-347.1, as amended in 1952. "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 in addition be punished by a fine of not less than one hundred nor more than one thousand dollars."

Section 46-347.2, as amended in 1952. "Notwithstanding any other provisions of law, no person whose operator's or chauffeur's license has been suspended or revoked by any court or by the Commissioner *shall, after such suspension or revocation shall have terminated*, drive any motor vehicle in this State unless and until *such license has been reinstated* or a new license issued in accordance with law. Any person violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, punished accordingly." (*Italics supplied.*)

Section 46-484. "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, either or both."

There seems to be an overlapping of Section 46-484 by the other two sections. However, I believe that 46-484 now only applies to those cases where the restoration of the license is contingent upon furnishing proof of financial responsibility.

It seems to me that Section 46-347.1 applies to those cases where the license has been revoked for a specified period, and the person, during that time, drives his automobile. If he is convicted of so doing, it is the mandatory duty of the court or jury to send him to jail for a period of not less than ten days nor more than six months.

Apparently, Section 46-347.2 applies to those cases where the specified period of suspension or revocation has terminated and the person drives thereafter before his license has been reinstated. In your letter you raise the following questions which will be answered seriatim:

(1) "In a hypothetical case, 'A' is apprehended for driving one year and fifteen days after a conviction for drunk driving. The compulsory period has expired but the operator's license has not been restored because financial responsibility has not been furnished. Which of the statutes is applicable to that situation?"

Answer: I am of the opinion that Section 46-484 is applicable in this situation, as the restoration of his driving license is contingent upon the furnishing of proof of financial responsibility. The minimum fine under that section is twenty-five dollars, and the convicted person is also subject to a jail sentence of not less than two days nor more than six months. He also could be prosecuted under 46-347.2.

(2) "In another instance, 'A' is involved in a motor vehicle accident resulting in property damage to 'B' at a time when 'A' has no liability insurance and the accident was his fault. The Commissioner of Motor Vehicles, pursuant to statutory authority, suspends the license of 'A' until proof of financial responsibility is furnished and maintained. During that period 'A' is apprehended for driving. Which statute is applicable to his situation?"

Answer: It is necessary for the individual whose license has been suspended under the provisions of 46-436 to furnish proof of financial responsibility unless he has paid the claim made against him or furnished security to satisfy any judgment resulting from the accident (46-447.1). The period of suspension is indefinite. I am of the opinion that Section 46-484 applies.

MOTOR VEHICLES—Operator's license; driving vehicle when officer has license. F-149 (229)

April 7, 1954.

HONORABLE W. ROY SMITH, *Member,*
House of Delegates, Petersburg.

Receipt is acknowledged of your letter dated April 6, 1954, in which you request my opinion on the following:

"(1) Does a local police officer have authority to cause a motorist to turn over to the officer his state driving permit and registration

- card, then requiring the motorist to drive his car to the police station, either following, or followed by, the officer?
- "(2) Does the motorist, under the above circumstances, violate state law by operating his automobile without having his driving permit in his possession?
- "(3) Does the motorist who is thus following, or being followed by, the officer, commit a violation if—due to being separated from the officer by traffic conditions—he drives without escort to the police station?
- "(4) What burden of proof of guilt is upon the political subdivision's officers in instances of alleged speeding violations in which the defendant maintains his innocence?"

The pertinent provisions of Section 46-375 of the Code of Virginia are as follows:

"The licensee shall have such license in his immediate possession at all times when driving a motor vehicle and shall display the same upon demand of any person charged with the duty of enforcing the motor vehicle laws of this State. Any person violating the provisions of this paragraph shall be guilty of a misdemeanor and upon conviction punished by a fine of not less than one dollar nor more than ten dollars; provided, however, if any person, when summoned to appear before a court for failure to display his license upon such demand being made of him, shall present to the officer making such demand before the return date of the summons a proper license duly issued to him prior to the time of such demand or shall appear in pursuance of such summons and produce before the court a proper license duly issued to him prior to the time of such demand, he shall in either event be deemed to have complied with the provisions of this section."

Your questions will be answered in the order set forth in your letter.

(1) I am not advised of any statute conferring such authority upon local police officers.

(2) and (3) I am of the opinion that this would be a violation of the above quoted statute; however, the court trying the case may consider such a violation excusable.

(4) Speeding violations are declared by statute to be misdemeanors, and the Commonwealth, or a political subdivision prosecuting the same, is required to prove such offenses beyond a reasonable doubt.

MOTOR VEHICLES—Operator's license; effective date for revocation.
F-149 (303)

June 1, 1954.

MR. C. H. LAMB, *Commissioner*,
Division of Motor Vehicles.

This is to acknowledge receipt of your letter of May 27 in which you say in part:

"Please advise me as to whether on and after June 30, 1954, in issuing orders of revocation under Section 46-416 of the Code based on convictions for operating a motor vehicle while intoxicated, we should make such orders effective for one or three years as the case may be

from the date on which the licensee surrenders to this Division or its agent or to the court his license."

Your attention is invited to the following:

Section 46-427.1 of the Code of Virginia of 1950, as amended by the Acts of 1954:

"Wherever it is provided in this Title that the operator's or chauffeur's license, or the registration certificates or license plates of any person be suspended or revoked for a period of time on conviction of certain offenses, or after a hearing before the Commissioner of Motor Vehicles as provided by law, such period *shall be counted* from one hundred eighty days after said conviction becomes final or after the order of the Commissioner, as a result of such hearing, becomes final, or shall be counted from the date on which said license, certificate or plates are surrendered to the Commissioner or his agent, *or to the court or clerk thereof*, regardless of whether or not the record of conviction has been received by the Commissioner or his agent, whichever period shall first commence; provided, however, that the provisions of this section shall not apply in any case where the person whose license is subject to suspension or revocation gives a false name or otherwise conceals his identity." (Italics supplied.)

Section 46-195.1 of the Code of Virginia of 1950, as amended by the Acts of 1952:

"In any case in which the accused is convicted of an offense, upon the conviction of which the law requires revocation or suspension of the operator's or chauffeur's license of the person so convicted, such justice or judge shall order the surrender of such license, which shall remain in the custody of the court until (1) the time allowed by law for appeal has elapsed, when it shall be forwarded to the Commissioner, or (2) an appeal is effected and proper bond posted, at which time it shall be returned to the accused.

"Provided, however, when the time of suspension or revocation coincides or approximately coincides with the appeal time, such justice or judge may retain the license and return the same to the accused upon the expiration of the suspension or revocation."

You will note that, under the provisions of the last mentioned section, it is the duty of the judge to require the defendant to surrender his driving permit when the defendant has been convicted of an offense for which revocation is required. This includes a revocation by virtue of Section 18-77 (drunken driving statute).

In administering the Safety Responsibility Act, I think it would be proper for you to request the judges to indicate on the abstracts or reports of conviction the date on which the permit is surrendered to the court. In accordance with the provisions of Section 46-427.1, you would indicate in your order of revocation that the period of revocation will be counted from the date the license was surrendered to the court. In the rare cases where the court has not complied with Section 46-195.1, *supra*, by requiring the defendant to surrender his license upon the violation of Section 18-77, you should recite in your order that the period of revocation will be counted from the date the permit is surrendered to the Division of Motor Vehicles. The order of revocation is always effective, i.e., enforceable, from the date the same is issued by you.

MOTOR VEHICLES—Operator's license; government permit only good for driving military vehicles while in service. F-149 (246)

April 20, 1954.

MR. J. D. CHRISTIAN,
Chief of Police, Abingdon.

This is to acknowledge receipt of your letter of April 17 in which you ask the following question:

"If a person who has been serving in the armed services and who had not previously had a Virginia operators or chauffeurs permit but has a permit issued by the Army and since the permit was issued has been separated from service how long after separation would this permit be valid for operating private vehicles."

According to Section 46-350 of the Code of Virginia of 1950, a member of the armed forces is exempted from having a driving license when he possesses a driver's permit issued by the branch of the armed services of which he is a member and while he is operating an official motor vehicle in such service. Such a person cannot use the official government driving permit to operate a privately owned car. Section 46-377.1, which was enacted in 1952, extends the validity of the operator's license issued by the Division of Motor Vehicles for a period of six months from the time the person is discharged from the service. This provision of law does not apply to a driver's permit issued by the Army, Navy, or Marine Corps.

MOTOR VEHICLES—Operator's license; person committed as inebriate. F-149 (13)

July 14, 1953.

HONORABLE FELIX E. EDMUNDS,
Member House of Delegates.

This is in reply to your letter of July 10, 1953, which I quote:

"According to Section 46-418 of the Code of Virginia as amended by Legislative Act of 1950, the Commissioner of Motor Vehicles shall forthwith revoke the license of any person committed to an institution as an inebriate, etc., the amendment reads as follows: 'And, it is further provided that the Commissioner shall not revoke license of any person committed to an institution as an inebriate or a habitual user of drugs, in the event such person is released within thirty days after admission or commitment of such institution.'

"Please advise, if in your opinion such amendment would be applicable in a case where a person was committed to an institution as an inebriate and discharged as restored within thirty days of such commitment. The commitment and discharge having taken place in the year 1949, but the subject now being required to keep SR22 on file with the Director of Motor Vehicles."

I am of the opinion that the amendatory act of 1950 is not applicable to those cases arising prior to the effective date of such amendment. Inasmuch as S. R. 22 was required at the time of reinstating the operator's license of those persons released from such institutions as a necessary consequence of such commitment, I am of the opinion that such persons released prior to

1950 must continue to keep such S. R. 22 on record with the Division of Motor Vehicles even though such persons were released from such institutions within thirty days.

**MOTOR VEHICLES—Operator's license; suspension by court for speeding.
F-149 (92)**

November 12, 1953.

HONORABLE E. HUGH SMITH, *Judge*,
Twelfth Judicial Circuit, Heathsville.

This is in response to your letter inquiring whether the Judge or Jury, under section 46-215.1, Code of Virginia, determines in an appropriate case if an operator's permit shall be suspended for the ten day first offense provision contained in that section. Section 46-215.1 provides 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 section 46-215.1 shall apply to speed violations which occur in cities and towns. Nor shall the provision 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 section 46-195.1. The provisions of sections 46-59 and 46-425 shall not apply to any person whose license is revoked under the provisions of this section." (*Italics added*).

Kindly be advised that inquiries made by this office have not disclosed any other situation in which this matter has been previously determined by other courts. Where a court sits without a jury the matter, of course, resolves itself as the Judge makes all determinations of law and fact and fixes such penalties as prescribed by law. However, where the question arises in a case where a jury is sitting, while the answer is not free from doubt, it would be my view that upon appropriate instructions to the jury whereby it, as the trier of facts, could and did specially determine that "such person exceeded the prescribed speed limit by more than five miles per hour," then "the operator's permit of such person may be suspended for a period of ten days" by the Judge making such determination to suspend the permit in his discretion.

MOTOR VEHICLES—Violations; arrest by state police; must be for state law rather than town ordinance. F-353b (102)

November 27, 1953.

HONORABLE I. A. BEAUCHAMP,
Town Attorney, St. Paul.

Receipt is acknowledged of your letter dated November 24, 1953, requesting my opinion upon the following:

"I am advised by State Troopers in this area that they have been instructed under your direction that all people who are arrested by them for violation of the Motor Vehicle Laws must be taken before a Justice of the Peace and the case must be handled by the Trial Justice of the County in which the offense was committed, and that in no case should said prisoner be taken before the proper authority of a Town where the case can be handled. This does not sound right to me.

"The Town of St. Paul has an ordinance adopting the Motor Vehicle Laws of the State of Virginia for the purpose of handling violations of said laws. If a man is arrested in the limits of the Corporation of the said Town, especially when the State Trooper is in company with a Town officer, I can see no reason why said alleged offense should not be tried by the Mayor of said Town. I can see no reason for the law to be otherwise, especially since we all want cooperation between all law enforcement officials in Virginia. If the Town Authorities are to be disregarded in all violations handled by the State Police in the corporate limits of the Town of St. Paul, how can the said State Police expect any cooperation?

"I personally believe in good law enforcement and cooperation of all law enforcement officials, but I do not believe in a centralized police power. All small Towns are dependent on the revenue derived from prosecution of violators in the Town in order to finance their police department, but if the State Police will not handle matters in a Town which are violations of the Town ordinances, how can the local authorities be expected to cooperate or lend a willing hand if all the violators caught by said State Police are taken to the County seat before the Trial Justice. Our Mayor has the jurisdiction to try violations of Drunk Driving and such violations should be handled in the Town of St. Paul if the violations takes place here.

"The Mayor and Council will thank you for an opinion in this matter."

Your attention is called to Section 52-22 of the Code of Virginia which confers upon the Superintendent of State Police and his assistants authority to execute warrants for violations of ordinances of counties, cities and towns when requested to so do by such local authorities. The authority conferred by this section is discretionary and prohibits the exercise thereof in cases where it will in any way interfere with, delay or hinder the officer in the discharge of his duties.

Your attention is further directed to Section 46-199 of the Code, as amended in 1952, which I quote as follows:

"In such cities and towns in which the council shall adopt the ordinances above authorized, all fines imposed for a violation of such ordinances shall be paid into the city or town treasury.

"But in all cases in which the arrest is made or the summons is issued by an officer of the Department of State Police or of any other division of the State government, for violation of the motor vehicle laws of the State, the person arrested or summoned shall be charged with and tried for, a violation of some provision of this title and all fines and forfeitures collected upon convictions or upon forfeitures of bail of any person so arrested or summoned shall be credited to the Literary Fund. Wilful failure, refusal or neglect to comply with this provision shall subject the person who is guilty thereof to a fine of not less than ten dollars nor more than fifty dollars and may be ground for removal from office. Charges for dereliction of the duties here imposed shall be tried by the court of record having jurisdiction over the officer charged with its violation."

Your attention is also called to an opinion of this office construing the last mentioned section, dated September 29, 1938, addressed to Honorable L. Brooks Smith, Trial Justice for Accomack County, contained in the Annual Report of the Attorney General for the year 1938-1939, at page 113, from which I quote:

"This section makes it plain that it is the duty of the State Police in cases of arrest for violation of the motor vehicle laws to charge a violation of a State law, and, upon conviction on such charge, the fine should go to the State to be paid into the literary fund. This is true even in the case where there is a local ordinance paralleling the State law."

It is recognized that Section 52-22 of the Code conferring authority upon State Police to arrest for violations of county, city and town ordinances was enacted subsequent to the opinion referred to; however, this does not affect the interpretation given by this office to Section 46-199 of the Code.

I am of the opinion that the Superintendent of State Police and his assistants may, within their discretion, make arrest for the violation of local ordinances if it does not interfere with, delay or hinder them in the discharge of their official duties, and violations of the State Motor Vehicle laws are not involved. If, however, the offense is a violation of both the Motor Vehicle laws and a local ordinance, the arrest, if made by a State Police officer, should be for the violation of the State law, and if a fine is imposed, the same should be credited to the Literary Fund.

You will further note from the provisions of Section 46-199 of the Code that a penalty is provided against any officer who willfully fails, refuses or neglects to comply with the provisions of this section.

MOTOR VEHICLES—Violations; crossing solid line; when reckless driving. F-353 (228)

April 6, 1954.

THE HONORABLE WILLIAM D. PRINCE,
Trial Justice of Sussex County.

This is to acknowledge receipt of your letter of March 31 in which you state:

"I would appreciate it very much if you would give me your opinion as to whether passing another vehicle on a single, or double solid line, when the line is on the driver's side, regardless of whether there is a hill or curve, considered reckless driving."

Section 46-209, Paragraph 2, provides that the overtaking or passing of a vehicle proceeding in the same direction, upon approaching the crest of a grade or upon approaching a curve in the highway where the driver's view is obstructed, constitutes reckless driving. There is no mention of lines in this section. However, in Section 46-222, a motorist is prohibited from crossing double lines. This in itself constitutes a misdemeanor. Then, Section 46-228 prohibits the motorist from driving to the left side of the center line in overtaking and passing another vehicle unless such left side is clearly visible and free from oncoming traffic. The violation of this section is a misdemeanor. Section 46-208 provides that the driving of a motor vehicle so as to endanger the life, limb or property of any person constitutes reckless driving.

The double lines are usually placed on the road either by the Highway Department or some other public authority at locations where the sight distance is

impaired. The only exception to this use of the double lines is on four-lane highways. An illustration of this would be Route No. 1 from Richmond to Washington. The purpose of the double lines there is to prohibit any passage to the left thereof, although it may be placed at locations where the sight distance is not impaired. However, the volume of traffic on that and similar routes is so heavy that the operation of a motor vehicle in the lane to the left of the double line would, in my opinion, constitute reckless driving.

In the case of *Commonwealth v. Willis*, 194 Va. 210, the Court held that proof of the fact that the driver did, in overtaking and passing a vehicle, cross the double lines is sufficient to make a prima facie case and to meet the burden placed on the Commonwealth by Section 46-420. The burden then shifts to the defendant to show how he could be entirely sure of the saving fact. I think that, although the statute under construction is different from the statutes here, the same reasoning is applicable.

My conclusion is that the overtaking or passing of a vehicle to the left of the single line is in violation of Section 46-228, being a misdemeanor, and is not, in itself, reckless driving.

I am of the opinion, however, that passing another vehicle over a double solid line is prima facie reckless driving. If there is credible evidence to this effect, the burden then passes to the defendant to show that his actions did not constitute reckless driving.

MOTOR VEHICLES—Violations; juveniles under 18 to be tried in Juvenile and Domestic Relations Court. F-136c (179)

February 16, 1954.

HONORABLE C. S. MINTER,
Police Justice of Covington,

This is in reply to your letter of February 10, 1954 in which you request my opinion on the following question:

"When such a case arises before me as Police Justice do I have the right to try offenders for traffic violations when the defendant is under 17 years of age?"

Section 16-172.23 of the Code of Virginia of 1950 as amended reads, in part, as follows:

"The judges of the juvenile court elected or appointed under this law shall be conservators of the peace within the corporate limits of the cities and the boundaries of the counties for which they are respectively chosen and within one mile beyond the corporate limits of such cities.

"Except as hereinafter limited they shall have within the corporate limits of a city or the boundaries of a county in which they sit exclusive original jurisdiction, and within one mile beyond the corporate limits of said city concurrent jurisdiction with the juvenile court or courts of the adjoining county or counties over all cases, matters and proceedings involving:

"1. The custody, support, control or disposition of a child:

"(i) Who violates any State or Federal law, municipal or county ordinance—provided, however, that in violation of Federal law jurisdiction in such cases shall be concurrent and shall be assumed only if waived by the Federal court; * * *."

Section 16-172.3 defines a child as being any person less than eighteen years of age.

It is my opinion that, in view of the above referred to sections of the Code, the Police Justice Court does not have jurisdiction to try persons under eighteen years of age for traffic violations.

MOTOR VEHICLES—Violations; owner may be convicted of speeding if present, and consents while someone else driving. F-353 (154)

January 18, 1954.

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

This is in reply to your letter of January 15, 1954 in which you ask for an opinion on the following question:

Whether or not a person who is the owner of and a passenger in an automobile being operated by a person who greatly exceeds the speed limit can be convicted of the offense of speeding when it can be shown that the operator is driving the automobile with the permission and consent of the owner who is present in the car and who made no protest to the operator concerning the manner in which he was operating the automobile.

I am enclosing a copy of an opinion which this office rendered to the Honorable Martin F. Clark, Commonwealth's Attorney for Patrick County, on February 9, 1953 stating the same question in regard to an owner allowing an intoxicated person to operate his car while he, the owner, was present. I agree with you that the conclusion reached in that opinion would apply to the case confronting you.

It is my opinion, therefore, that the owner may be convicted along with the operator of exceeding the lawful speed limit if he is present in the automobile and if the operator is driving the car with the owner's consent and permission and the owner made no protest to the operator against the manner in which he is operating the car greatly exceeding the speed limit.

MOTOR VEHICLES—Violations; passing school bus while loading or unloading. F-201 (112)

December 9, 1953.

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

This is in reply to your letter of December 8, 1953 which reads, in part, as follows:

"We have had considerable difficulty in connection with the operation of school buses involving operators of motor vehicles passing the buses while discharging and taking on children.

"Under the provisions of Section 46-209 (5) the Statute specifically provides that failure to stop at a school bus *while taking on or discharging school children, etc.* is reckless driving.

"Our problem arises in a case where the school bus has come to a complete stop but the children either have not actually gotten off the bus, or in some cases the door has not been opened for them to get off, when the bus is passed by another car.

"Our Trial Justice has interpreted this section as meaning that the children must actually be in the act of stepping from the bus to the ground,

or highway, or stepping from the highway into the bus in order to constitute a violation of this section, and if the bus has come to a stop and the children are not in the act of stepping to the ground, or highway, or the door has not been opened for them to do so, there is no violation of this section if an automobile passes the bus under these circumstances."

As you no doubt know, this office has long adhered to a policy of refraining from rendering official opinions on matters pending before the courts of the Commonwealth unless requested to provide advice by the judge. Therefore, from the facts stated in your letter, I feel it would be improper for me to render my opinion in the matter. I should, however, like to advise you that, on June 10, 1953, the Supreme Court of Appeals of Virginia refused to grant a writ of error and supersedeas on a petition filed in the case of *Cyrus W. Beale v. Commonwealth*. In his petition Mr. Beale raised the identical point set forth in your letter and presented the same argument in support of his position that the latter paragraphs of your letter present. The language of the order refusing the writ of error and supersedeas was to the effect that the judgment of the Trial Court was plainly right. I believe that the citing of this authority should be sufficient to sustain your position in cases of this type, inasmuch as the Court of Appeals recognizes the refusal of a writ of error as being the same as affirming the judgment of the trial court.

MOTOR VEHICLES—Violations; report of convictions to commissioner.
F-116 (6)

July 7, 1953.

HONORABLE ROBERT G. BASS, *Clerk*,
Hustings and Circuit Courts, Petersburg.

This is in reply to your letter of July 2, 1953, which I quote as follows:

"Section 46-414 of Michie's Code of Virginia, 1952, requires the Clerk of Courts or Courts, to report certain convictions of violation of the Motor Vehicle laws to the Division of Motor Vehicles.

"Please advise the *specific* violations that are to be reported under said section."

Section 46-414 of the Code of 1950 provides 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 forfeitures 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."

It may be readily seen that to list all possible charges of violations of "any provision of chapters 1 to 4 of Title 46 of the Code 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" would be a monumental task. However, generally speaking, this section provides for a report of any conviction and any forfeiture of collateral which arises from a charge of violating *any* state law or ordinances of cities, counties and towns pertaining to motor vehicles. In addition to such records, it is also necessary to prepare a copy or abstract of any judgment as defined in section 46-429 of the Code, which I quote:

"The judgment herein referred to means any judgment for fifty dollars or more for damages because of injury to or destruction of property, including loss of its use, or any judgment for damages, including damages for care and loss of services, because of bodily injury to or death of any person arising out of the ownership, use or operation of any motor vehicle."

**NATIONAL GUARD—Effective date for determining rates of pay.
F-225a (245)**

April 20, 1954.

MAJOR GENERAL S. GARDNER WALLER,
Adjutant General of Virginia.

This is in response to your inquiry of April 15, 1954 on the question of whether or not a ruling by this office, dated June 22, 1943 to yourself, that 1930 rates prevail until changed by legislative enactments under sections 44-82, 44-83 and 44-91, Code of Virginia, which sections deal with the calling of troops in the aid of civil authorities.

It is the view of this office that the reasoning applied in the aforesaid opinion is still applicable, but that since the sections are now embodied in the 1950 Code of Virginia, adopted by the Legislature and pronounced effective February 1, 1950, in accordance with section 1-2, Code of Virginia, the rate of pay would now be determined as of February 1, 1950, the present effective date, rather than 1930.

OIL AND GAS BOARD—Bonds for wells; blanket coverage to be retroactive. F-393 (23)

July 27, 1953.

MR. J. IRVING SMITH, *Chairman*,
State Oil and Gas Board, Richmond.

This is in reply to your letter of June 23, 1953 in which you request my opinion concerning the enforcement of § 45-115 of the Code of Virginia. That section provides, in part, as follows:

"Before any such well is drilled, the operator shall secure from the Board a permit to drill. The application for such permit shall be accompanied by a fee of twenty-five dollars and such operator shall, in addition, give bond in the sum of one thousand dollars, payable to the Commonwealth of Virginia, with surety acceptable to the Board. * * * When such operator makes or has made application for permits to drill a number of wells, the Board, on request of such operator, may, in lieu of requiring a separate bond for each well, require a blanket bond in such sum as it deems adequate, and

the Board may increase or reduce the amount of such bond from time to time as it may deem proper in view of the number of wells drilled by the particular well operator and the number of wells abandoned and plugged in the manner prescribed herein by such operator."

You state in your letter that, due to printing difficulties, organization of office, etc., the Board delayed the effective date of the requirements for permits from July 1, 1950 to March 1, 1951. Your question now is whether "all wells drilled after July 1, 1950 and shut in (capped) as producers should be covered by any blanket bond required of companies that drilled a number of wells under permits after March 1, 1951."

Chapter 109 of the Acts of Assembly of 1950, which contains the oil and gas law, provides that this section of the Code shall take effect and be in force from and after July 1, 1950. It is my opinion that the Oil and Gas Board should require all wells drilled and capped as producers to be covered under any blanket bond required of companies that drill after March 1, 1951.

The fact that the Board was unable, due to organizational difficulties, to enforce the act before March 1, 1951, does not excuse or exclude the owners of wells drilled after July 1, 1950 but before March 1, 1951 from posting sufficient bond to cover those wells also when giving blanket bond from wells drilled after March 1, 1951, as required by § 45-115 of the Code.

OPTOMETRY—Unlawful practices; misleading advertisement. F-207 (213)

March 19, 1954.

DR. W. W. ROYALL, JR., *Secretary*,
State Board of Examiners in Optometry, Newport News.

This is in reply to your letter of March 15, 1954 in which you request my opinion as to whether an optometrist may use National Transitad cards to be displayed on city buses. The display card pictures a pair of glasses on which is inscribed an advertising slogan reading "SEE DR. TODAY, SEE BETTER . . . RIGHT AWAY." Three office locations are given. Inserted in a slot marked, "Take one," are to be small cards which may be taken at the option of any bus rider. The cards contain printed matter from an authorized source, stating simple facts relative to eye care.

Section 54-396 of the Code of Virginia provides in part:

"It shall be unlawful for any person:

* * * * *

"(6) To use, employ or cause to be used or employed any false, misleading or trick advertisement or sign or any advertisement or sign which would tend to deceive or mislead the public concerning any matter relating to the practice of optometry or to the furnishing, supplying or dispensing of any article used or employed in connection with the practice of optometry whether such advertisement be printed, radio, display or by any other means."

I am not familiar enough with the practice and science of optometry to give a positive opinion on this matter. However, it appears to me that the use of the slogan "SEE BETTER . . . RIGHT AWAY" may be a misleading advertisement and prohibited by § 54-396. It seems to me that this is a matter that your Board should discuss. Can an optometrist enable everyone with defective vision to see better within a week or two after they first visit him? If an optometrist can improve the sight of all persons with defective vision within a relatively short time, the slogan would not be misleading, in my opinion.

PERSONNEL ACT—Virginia State Ports Authority subject to. F-97 (88)

November 6, 1953.

MR. D. H. CLARK, *Director*,
Virginia State Ports Authority, Norfolk.

This is in reply to your letter of October 30, 1953 in which you inquire whether the Virginia State Ports Authority is exempt from the provisions of Chapter 9, Title 2 of the Code of Virginia of 1950, designated as the Virginia Personnel Act.

The Virginia State Ports Authority, as created by the 1952 session of the General Assembly, is a political subdivision of the State, vested with certain rights and duties for a specific purpose. The Authority is subject to the control of the State and has no authority to exercise powers beyond those granted by the General Assembly. It is dependent upon appropriations from the General Assembly in order to operate. No specific power has been granted the Authority which exempts its employees and personnel from the provisions of the Virginia Personnel Act.

In view of the foregoing, I am of the opinion that the Virginia State Ports Authority is subject to the provisions of Chapter 9, Title 2 of the Code of Virginia, unless exempted by the Personnel Act itself under § 2-84 of the Code.

PHARMACY—Board of; authority to give examination to applicant without required practical experience. F-198 (142)

January 6, 1954.

MR. RALPH M. WARE, JR., *Secretary*,
Board of Pharmacy.

This is in reply to your letter of January 5, 1954, which I quote:

"In accordance with Section 54-422 of the Code of Virginia, (as amended in 1952) a candidate for licensure as a pharmacist in Virginia, must, among other pre-requisites have had 'not less than twelve (12) months practical experience in pharmacy in Virginia, under the direct supervision of a licensed pharmacist'. . . .

"Pursuant to this section, the Board adopted a regulation in June of 1953 which sets forth the procedure by which this experience is to be gained, and how a year is to be evaluated. (Regulation 5-f, a copy of which is enclosed.)

"The Board, in order to aid those students who were in school when the above statute was amended, has been giving the examination in two parts, theoretical portion when the student graduates, followed by the practical portion when the experience requirements have been satisfied. When the practical portion is successfully completed, the graduate is given his certificate of registration.

"The Board has been giving consideration to giving the entire examination, both theoretical and practical, immediately upon graduation to all graduates. If the graduate is successful in both parts of the examination and has not completed the required year of experience, he would be placed on the internship program as set forth in the regulation which is working under the supervision of a pharmacist. When the required experience has been satisfied, the graduate would then be eligible to receive his certificate of registration.

"In your opinion, would such a procedure satisfy Section 54-422, as amended in 1952."

Section 54-421 of the Code of Virginia, 1950, is the pertinent statute relating to the examination of applicants for registration as pharmacists. That section provides as follows:

"The applicant for registration as a pharmacist shall appear at the time and place designated by the Board and submit to an examination as to his qualifications for such registration. The Board shall conduct examinations of applicants for registration when so determined by the Board, and not less frequently than once in six months."

Section 54-422, as amended, sets forth the requirements for the issuance of a certificate as a registered pharmacist. That section provides as follows:

"In order to be licensed as a registered pharmacist within the meaning of this chapter, an applicant shall present to the Board satisfactory evidence that he is at least twenty-one years of age; that he is a graduate of a school of pharmacy approved by the State Board of Pharmacy; that he is a citizen of the United States of America, and that he has had not less than twelve months' practical experience in pharmacy in Virginia under the direct supervision of a licensed pharmacist, provided that a person entitled to practice pharmacy in Virginia under the provisions of section 54-424, and who has had twelve months' practical experience in some other state in which he was registered as a pharmacist, shall not be required to have twelve months' experience in Virginia before becoming eligible for license in this State."

From the foregoing quoted statutes it may be seen that it is not necessary that an applicant for registration as a pharmacist meet all the requirements as set forth in section 54-422 of the Code prior to the time of taking the examination. It is only necessary that all such requirements be met prior to the issuance of a certificate to such applicant. Therefore, I am of the opinion that the procedure for examining applicants which is proposed by the Board is not in conflict with section 54-422 of the Code.

Although your inquiry was limited to the provisions of section 54-422 of the Code, I feel it my duty to draw to your attention the apparent conflict in the proposed procedure of examination with the existing regulations of the Board of Pharmacy.

Regulation 5 provides, in part, as follows:

"In order to qualify for the examination for the certificate of registered pharmacist in Virginia, the Board requires that all students in a school of Pharmacy approved by the Board (who intend to be examined by the Board) register with the Board when beginning work in a pharmacy, to gain twelve months practical experience in pharmacy in Virginia, under the supervision of a pharmacist. Separate registration is required for each place of employment. Applications may be obtained from the Board office. Students gaining experience shall be called 'Student Externs'."

Inasmuch as the foregoing quoted portion requires an applicant for examination to gain twelve months' practical experience in pharmacy as a condition precedent to qualifying for the examination, it appears that the proposed procedure of giving the examination prior to an applicant gaining the required experience would be in conflict with the quoted regulation.

In the event that the Board determines to adopt the proposed procedure as set forth in your letter, I suggest that Regulation 5 be amended to conform with such procedure.

PINE TREE SEED ACT—Does not apply to cities. F-220 (240)

April 19, 1954.

MR. GEORGE W. DEAN,
State Forester, Charlottesville.

This is in reply to your letter of April 16, 1954 in which you ask to be advised as to whether or not the provisions of Article 6, Chapter 4, Title 10 of the Code of Virginia are applicable to pine timber within the corporate limits of cities such as Hampton, and those areas formerly the counties of Elizabeth City and Warwick. You state that the county of Warwick adopted the provisions of this article prior to its incorporation as a city.

Article 6, Chapter 4, Title 10, of the Code of Virginia is made applicable only in those counties adopting the provisions thereof by appropriate resolution, except in specified instances. The penalty for violating the provisions of the article are set forth in section 10-79 of the Code, such penalty being a forfeiture to the Commonwealth of the sum of ten dollars for each such seed tree cut from the land on which it is required by law to be left, which forfeiture is to be recovered in the county in which such land is situate.

The General Assembly has made no provision for the adoption of Article 6 by the cities of the Commonwealth nor has any penalty been provided for the violation of such article in the cities. For this reason I am of the opinion that this article does not apply to pine trees within the corporate limits of a city. I am further of the opinion that the incorporation of a territory in which the article was previously applicable removes such territory from the application of the article even though the entire territory may have been incorporated as a city.

PINE TREE SEED ACT—Percentage of pine trees on land. F-220 (271)

May 7, 1954.

MR. GEORGE W. DEAN,
State Forester, Charlottesville.

This is in reply to your letter of May 5, 1954 in which you ask to be advised with regard to the provisions of Chapter 4, Article 6, Title 10 of the Code of Virginia of 1950 as amended pertaining to the Pine Tree Seed Law. You are particularly interested in knowing whether the provision of § 10-77 applies to land from which the pine trees were cut prior to the amendments to the statutes which now make the law inapplicable to such lands, inasmuch as the percentage of pine trees on such land does not exceed ten percent of the total live trees thereon.

Prior to 1950 § 10-76 of the Code was applicable to acres whereupon pine trees predominated and represented fifty percent or more of the total trees thereon. That section, prior to the 1950 amendment, provided, in part, as follows:

"Every landowner who cuts, or permits to be cut, or any person who is responsible for cutting, or actually cuts, or any person who procures another to cut, for commercial purposes, timber from one acre or more of land on any acre of which loblolly pine (*Pinus taeda*), or short-leaf pine (*Pinus echinata*), singly or together, predominate and represent fifty per centum or more of the total number of trees present thereon, shall reserve and leave uncut and uninjured not less than four cone-

bearing loblolly or shortleaf pine trees fourteen inches or larger in diameter on each acre thus cut and upon each acre on which loblolly and shortleaf pine, singly or together, predominate as aforesaid; * * *."

The 1950 session of the General Assembly deleted the fifty-percent provision, and until 1952 the section was applicable regardless of the percentage of pine trees on an acre, except those lands excluded by the amendment to § 10-83 of the Code making the article inapplicable as to the necessity of leaving seed trees where less than fifty percent of the trees were pine, if the cutting rights were acquired prior to 1950. The 1952 session of the General Assembly placed a proviso in § 10-76 which now makes that section applicable only to the lands where pine trees composed at least ten percent of the total live trees thereon.

Neither the 1950 or 1952 Act was expressly made retroactive. Therefore, it is necessary to apply the statute in force at the time of the cutting in order to determine whether the article is applicable. Lands from which the timber was cut prior to 1950 were only affected by the seed law, unless fifty percent or more of the total trees on an acre were either loblolly pine or shortleaf pine. Lands from which the timber was cut between the years 1950 and 1952 were affected by such law, regardless of the percentage of such pine trees thereon, except for lands where cutting rights were acquired prior to July 1, 1950. Lands from which the timber was cut subsequent to 1952 are affected only in the event that ten percent or more of the total live trees are either loblolly or shortleaf pine.

Section 10-77 of the Code provides as follows:

"Pine trees, which are left uncut for purposes of reseeding, shall be the property of the landowner but shall not be cut until at least ten years have elapsed after the cutting of the timber on such lands."

In view of the foregoing, it follows that § 10-77 is applicable in all instances to the lands which were affected by the provisions of § 10-76 at the time of cutting. Thus, lands whereon pine seed trees were left when the timber was cut therefrom, as required by the provisions of § 10-76, may not be cut until a lapse of ten years, even though such lands may have been unaffected under the revised § 10-76 if such lands had been cut subsequent to the effective date of the revised section.

PROCESSES—Civil; misdemeanor to interfere with officer while attempting to serve. F-381 (166)

February 2, 1954.

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

This is in reply to your letter of January 26, 1954 in which you state:

"There was filed in the Circuit Court of this County a divorce cause and the address in this County where the defendant could be served was given to the Sheriff's office. Mr. Roseberry, the deputy sheriff, went to the place in this County where he was advised that the defendant could be served, and knocked on the door of the dwelling house. It developed that the defendant was employed as a maid in this home. The lady of the house (not the maid) came to the door, and Mr. Roseberry explained that he was a deputy sheriff and wanted to know

if the defendant was there, and if he could see her. The lady of the house advised Mr. Roseberry that the maid was in the house, but she denied Mr. Roseberry the right to see the maid so that he could serve the paper on her. The lady of the house advised Mr. Roseberry that she did not want any trouble in her home, and Mr. Roseberry told the lady of the house that there would be no trouble; that he merely wanted to serve court papers on the defendant. The lady of the house continued to deny Mr. Roseberry the right to see the maid. The lady of the house was standing at the front door with Mr. Roseberry, and the maid was inside the house behind the front door during all this conversation. Mr. Roseberry did not force his way into the house for the purpose of serving the paper, and the paper has not been served up to this time. Mr. Roseberry attempted to serve the defendant on the 12th day of January, 1954. The type of process that Mr. Roseberry had to serve on the defendant was a bill of complaint in a divorce cause and a copy of a decree of injunction which had been entered by the Court on the 30th day of December, 1953 in connection with the divorce proceeding.

"Will you be good enough to advise me whether or not in your opinion a crime has been committed, and will you further advise whether or not under the Virginia law the sheriff has a right to force his way into a dwelling house to serve a civil process?"

It is my opinion that the person in question could be tried and convicted of violation of § 18-272 of the Code of Virginia for obstructing an officer in the performance of his duties. That section provides:

"If any person, by threats, or force, attempt to intimidate or impede a judge, justice, juror, witness, or any officer of a court, or any sergeant or other peace officer, or any revenue officer, in the discharge of his duty, or to obstruct or impede the administration of justice in any court, he shall be deemed to be guilty of a misdemeanor."

I do not feel that an officer can force his way into a house to serve a civil process. However, if the door is open and someone refuses him admission when he has knowledge that the person he is seeking to serve process on is inside, I am of the opinion that he can arrest the person who is obstructing his entry for obstructing an officer in performing his duty.

PROCESSES—Interrogatories against execution debtor to issue out of court where judgment rendered. F-72 (320)

HONORABLE H. BRUCE GREEN,
County Clerk, Arlington.

June 10, 1954.

This is in reply to your letter of June 1, 1954 in which you ask whether you may issue interrogatories against an execution debtor to appear before a Commissioner of Chancery in the County of Arlington based on an abstract of judgment docketed in your court.

The provisions of Article 6, Chapter 19, Title 8 of the Code of Virginia provides the manner of proceedings by interrogatories against judgment debtors. The summons against the debtor issues from the clerk of the court from which the writ of *feri facias* issued and the Commissioner returns the interrogatories with his report to the court in which the judgment is, as provided in sections 8-435 and 8-437 of the Code. I am aware of no provision for a writ of *feri*

facias to be issued from the court wherein an abstract of judgment is docketed. Section 8-399 of the Code provides that it shall be the duty of the clerk of the court in which the judgment was rendered to issue a writ of *feri facias*.

In view of the foregoing I am of the opinion that proceedings on interrogatories should issue out of the court in which the judgment was rendered.

PUBLIC FUNDS—Depository bank may deposit securities to secure with state treasurer. F-107 (10)

HONORABLE JESSE W. DILLON,
Treasurer of Virginia.

July 9, 1953.

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

"I have been asked by Mr. John D. Whitehurst, Vice-President of the First and Merchants National Bank of Richmond, Virginia, if we could hold for safe-keeping bonds of the First and Merchants National Bank to secure a deposit of county funds of Norfolk County.

"Chapter 585 of the Acts of the General Assembly of 1952 provides: 'In any county of the Commonwealth * a depository of county funds may, in lieu of depositing securities as provided in Section 58-945, deposit such securities with the State Treasurer, whereupon the faith and credit of the Commonwealth shall be pledged for their return to the depository in accordance with the provisions of the agreement under which they are deposited. * * *'

"I shall greatly appreciate it if you will give me your opinion in this matter."

I assume that the First and Merchants National Bank of Richmond is a depository for the funds of Norfolk County and that the securities to be deposited are those belonging to the said Bank.

It is my opinion that Section 58-946 of the Code as amended by Chapter 585 of the Acts of 1952 is applicable to the case you put and that the First and Merchants National Bank of Richmond may deposit with you as Treasurer of Virginia securities to protect the funds of Norfolk County instead of depositing such securities with a bank or trust company in this State, as provided in Section 58-945 of the Code. It is my view that Section 58-946 of the Code authorizes any depository of county funds to deposit securities to protect such funds with the Treasurer of Virginia instead of with a bank or trust company in this State.

PUBLIC FUNDS—Proper security for deposits in national banks. Priority in case of insolvency not sufficient. F-28 (224)

HONORABLE ARTHUR B. CRUSH, JR.,
Commonwealth's Attorney for Craig County.

March 30, 1954.

This is in reply to your letter of March 19, 1954, which reads as follows:

"Section 6-65 of the Code of 1950 of Virginia provides that any bank or trust company may by its Board of Directors adopt a resolution to the

effect that in the event of the insolvency or failure of such bank or trust company, in the distribution of the assets of such bank or trust company any public funds deposited in said bank or trust company shall be paid in full before any other depositors shall be paid deposits. As can be seen from the statute, certain requirements must be met pertaining to the passing of such resolution. This act has been complied with by a local Federal bank and the proper resolution and proper form was approved by its Board of Directors. A part of our County funds have been deposited in this bank under this arrangement for several years. Recently a bank examiner informed an officer of the bank that this section of the Code was inapplicable, and in the event of a failure by the bank the County would not stand in any better position than any other creditor in so far as the distribution of assets.

"I would appreciate it very much if you would give me your opinion as to:

"(1) Is there any Federal act which conflicts with this act thereby rendering it invalid:

"(2) If there is not such a Federal Act, is this Act valid otherwise?"

I assume that in your reference to a "local Federal bank" you are speaking of a National Bank which has received its charter from and is subject to regulation by the Federal government or an agent thereof. These national banks are not subject to State laws except where Federal law has expressly so provided.

Section 90 of Title 12 of the United States Code Annotated provides, in part, as follows:

"Any association [national bank] may, upon the deposit with it of public money of a state or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the state in which such association is located in the case of other banking institutions in the state."

There have been numerous decisions by Federal courts interpreting and construing this provision of the National Banking Act. The various Federal courts have held that state law governs as to the definition of "public money" and as to what security is required by the states. Those courts have also held that laws of Congress alone control the right of national banks to pledge securities or other assets as security for deposits and trust or priorities created by state laws will be disregarded where such laws interfere with ratable distribution established by the United States laws.

The courts have ruled favorably on national banks pledging definite securities or assets to secure these deposits of public money. They have held that the execution by a bank of a general lien on all of its assets to secure deposits of public money is valid. However, I can find no case where any court has rendered a decision on the question of whether a national bank can, under Title 12, § 90, U. S. C. A., obligate itself to give preference to the payment of public funds deposited in the bank in the event of insolvency or failure of the bank.

There is a great deal of difference, in my opinion, between a bank pledging definite securities or giving a general lien on all of its assets, and a bank agreeing to give priority to certain depositors in the event of failure or insolvency. In the latter case it has not given "security for the safe-keeping and prompt payment of money" as prescribed in Title 12, § 90 of U. S. C. A. Pledging securities or giving a general lien gives the depositor a present existing right at all times. Priority in the event of insolvency or failure does not have any effect unless the bank does fail. For the purpose of securing the deposits of the state or its political subdivisions, priority in the event of failure is sufficient. But a Federal court, in a case concerning the distribution of the assets of an insolvent national bank, could conceivably hold that the bank had no authority to give priorities in the event of insolvency to secure the deposits of public money. If a

Federal court so held, then the County would stand in no better position than any other creditor.

In view of the fact that I can find no decision of any court on the question involved, it is my opinion that the better practice to follow in depositing public money in national banks would be to require the bank to give bond or pledge and deposit assets in the manner prescribed in § 58-944 of the Code of Virginia, excluding paragraph (b) of that section.

PUBLIC OFFICE—Eligibility for; third or fourth class postmaster for school trustee. F-249 (147)

January 12, 1954.

HONORABLE ROBERT WHITEHEAD,
Member House of Delegates.

This is in reply to your letter of January 8, 1954 in which you make the following inquiry:

"Assuming his eligibility in other respects, is a fourth-class or third-class postmaster eligible to appointment as a member of a school trustee electoral board under the provisions of section 2-27 and 2-29 of the Code of Virginia; and if so, would his acceptance of membership on the school trustee electoral board adversely affect his status as such postmaster?"

Section 2-27 of the Code of Virginia, 1950, prohibits persons from holding office of honor, profit or trust, under the Constitution of Virginia who hold any office or post of profit, trust or emolument, civil or military, legislative, executive or judicial, under the government of the United States. Several exceptions to this prohibition are set forth in section 2-29 of the Code, a portion of which provides as follows:

"Section 2-27 shall not be construed:

* * * * *

"(4) To prevent United States commissioners or United States census enumerators, supervisors, or the clerks under the supervisor of the United States census, or fourth-class or third-class postmasters, or United States caretakers of the National Guard of Virginia, from acting as notaries, school trustees, justices of the peace, or supervisors, or from holding any district office under the government of any county, or the office of councilman of any town or city in this State."

From the foregoing quoted section it may be seen that a fourth class or third class postmaster is eligible as a school trustee. I am of the opinion that the school trustees as used herein may be construed to include both members of the school trustee electoral board and members of the school board. This conclusion is borne out by the fact that the provisions relating to electoral boards and school boards were originally enacted as one section and codified as section 653a1 of the Code of 1942, a portion of which provided as follows:

"The present trustee electoral boards and county school boards now in office, shall continue to hold office until their successors have been appointed and qualified. All of such school trustees shall qualify before the county clerk by taking the oath prescribed for State officers."

Referring to the second part of your inquiry pertaining to the effect of such an appointment on the status of the office of postmaster, there is no law of this State which would adversely affect his status. However, inasmuch as there may

possibly be regulations of the post office department which would affect the status of a postmaster so appointed, I am seeking the advice of the Postmaster General on this question. I shall be happy to advise you as to his reply immediately upon its receipt.

PUBLIC OFFICE—Employee of Commissioner of Revenue is not; may also be clerk in post office. F-249 (324)

June 23, 1954.

HONORABLE J. S. HUDNALL,
Commissioner of the Revenue, Heathsville.

I am in receipt of your letter of June 19, in which you ask if a clerk in the Post Office at Callao, Virginia, may at the same time be a part-time employee (as distinguished from a deputy appointed pursuant to Section 15-485 of the Code) in the office of the Commissioner of the Revenue for Northumberland County.

The prohibition against officers and employees of the United States holding at the same time a State or local office is to be found in Section 2-27 of the Code. This prohibition is applicable to any person "holding any office or post mentioned in the preceding section", that is to say, Section 2-26 of the Code. The "person" referred to in this section is one who holds "any office of honor, profit, or trust, under the Constitution of Virginia, * * *."

Construing Sections 2-26 and 2-27 together, it is my conclusion that they only prohibit State or local *officers* from being employed by the United States. An employee such as you describe in the office of the Commissioner of the Revenue is not an officer and, therefore, it is my view that your inquiry must be answered in the affirmative.

PUBLIC OFFICE—Holding job of Treasurer and Director of Finance; Commissioner of Revenue and City Manager; constitutional if charter permits. F-60 (282)

May 24, 1954.

HONORABLE L. MCCARTHY DOWNS. *Chairman,*
Compensation Board.

Receipt is acknowledged of your letter dated May 20, 1954, which I quote as follows:

"The Compensation Board has before it a request for salary and expenses of office from the Treasurer of the city of Galax, Virginia. We also have before us a request for salary and expenses of office from the Commissioner of the Revenue of the city of Galax. We are advised by the City Treasurer that she holds the position of Director of Finance of the city of Galax and the Commissioner of the Revenue also holds the position of City Manager of Galax.

"In view of the provisions of Code Section 15-486, the Compensation Board is doubtful whether or not the Treasurer and Commissioner of the Revenue may hold the office of Director of Finance and City Manager respectively. The Compensation Board has examined the charter of the city of Galax, Chapter 562, approved by the Governor April 6, 1954, to ascertain whether or not charter provisions would give us positive information. Paragraph 21-08 provides as follows:

"May Combine Offices.—The council may, in its discretion, combine in one person an elective and an appointive office, or combine in one person two or more appointive offices, where the duties of such offices do not conflict, and are not prohibited by law."

"It has seemed to the Board that the charter provision gives us little help in arriving at our problem.

"The Compensation Board would appreciate very much if you would give us the benefit of your views in this matter. * * *"

The provisions of Section 117 of the Constitution of Virginia, paragraph (b), seem to be applicable to your inquiry and provide, in part, as follows:

"The General Assembly may, by general law or by special act (passed in the manner provided in article four of this Constitution) provide for the organization and government of cities and towns without regard to, and unaffected by any of the provisions of this article, except those of sections one hundred and twenty-four, one hundred and twenty-five (except so far as the provisions of section one hundred and twenty-five recognize the office of mayor and the power of veto), one hundred and twenty-six and one hundred and twenty-seven of this article, and except those mentioned in subsection (d) of this section. * * *"

Pursuant to this section of the Constitution, the General Assembly of 1954 enacted Chapter 562 to provide a new charter for the City of Galax. You quote in your letter language contained in Section 21-08 of the new charter, which is not embraced in any of the foregoing exceptions, and call attention to the provisions of Section 15-486 of the Code of Virginia which prohibits certain officers holding more than one office. This latter section was enacted pursuant to the provisions of Article VII, Section 113, of the Constitution of Virginia which deals with the organization and government of counties. Article VIII of the Constitution provides for the organization and government of cities and towns. It, therefore, follows that Section 15-486 of the Code has no application to the government of cities.

I am, therefore, of the opinion that Section 21-08 of the new charter of the City of Galax is valid and would permit the Treasurer and Commissioner of the Revenue to hold the office of Director of Finance and City Manager, respectively.

The opinion herein expressed would also be applicable to your inquiry dated May 20, 1954, concerning the Treasurer of the City of Norton holding the office of the Director of Finance.

PUBLIC OFFICE—Legal residence for purposes of holding office.
F-33 (227)

April 5, 1954.

HONORABLE VOLNEY H. CAMPBELL,
Commonwealth's Attorney for Washington County.

This is in reply to your letter of March 29, 1954 in which you ask to be advised whether the residence requirement set forth in section 15-487 of the Code of Virginia, 1950, with respect to district officers should be interpreted to mean actual physical residence within the district or as legal residents for such purposes as voting.

Section 32 of the Constitution of Virginia provides, in part, as follows:

"Every person qualified to vote shall be eligible to any office of the State, or in any county, city, town or other subdivision of the State, wherein he resides, except as otherwise provided in this Constitution, and except that this provision as to residence shall not apply to any office elective by the people where the law provides otherwise; and except, further, that the requirements of this section as to residence and voting qualifications shall not apply to the appointment of persons to fill positions or posts requiring special technical or professional training and experience."

You are referred to the case of *Williams v. Commonwealth*, 116 Va. 272, in which the Court of Appeals stated:

"For the purpose of voting and holding office a man cannot have more than one legal residence. A legal residence once acquired by birth or habitancy is not lost by temporary absence for pleasure, health or business, or while attending to the duties of a public office. Where a man has two places of living, which is his legal residence is to be determined largely, where the right to vote or hold office is involved, by his intention. When he acquires a new legal residence he loses the old, but to effect this there must be both act and intention."

In view of the foregoing I am of the opinion that the provisions of section 15-487 of the Code should be construed in the sense of domicile rather than mere physical presence.

PUBLIC OFFICE—May not be Deputy Commissioner of Revenue and assistant postmaster. F-249 (304)

June 1, 1954.

HONORABLE WALTER JOHNSON,
Commonwealth's Attorney for Northumberland County.

I am in receipt of your letter of May 26 in which you present the following question:

"This is to respectfully request your opinion as to whether or not a person may, under the law, hold at one and the same time the salaried office of the Assistant Postmaster under the government of the United States and the salaried office as Deputy Commissioner of Revenue under the government of Virginia."

A Deputy Commissioner of the Revenue, appointed pursuant to § 15-485 of the Code, is undoubtedly a public officer. It is my opinion, therefore, that § 2-27 of the Code is applicable to the case you put and that a person may not at the same time hold the office of Deputy Commissioner of the Revenue and that of Assistant Postmaster. Section 2-29 of the Code contains a number of exceptions to the prohibition contained in § 2-27, but none of these exceptions apply in this case.

PUBLIC OFFICERS—Acts of de facto officer valid; entitled to compensation. F-249 (316)

June 10, 1954.

HONORABLE WALTER JOHNSON,
Commonwealth's Attorney for Northumberland County.

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

"Thank you for your opinion of June 1, 1954, on the matter of dual office holding as applied to a Deputy Commissioner of Revenue. This poses two more questions which I respectfully propound:

"1. Inasmuch as Section 2-27 of the Code provides that the local office is ipso facto vacated upon entering federal office what then happens to validity of official acts in the local office, such as assessment of property and what about validity of salary payments out of public money?

"2. Would a Deputy Sheriff who also carries mail under a contract with the Federal Government wherein he provides the vehicle and service on a per annum basis of compensation also fall into the prohibited class under Section 2-27 of the Code? Or would that differ from the situation of the Deputy Commissioner of Revenue salaried by the Federal Government as Assistant Postmaster?"

First replying to the questions in paragraph numbered 1 of your letter, it is my view that the Deputy Commissioner of Revenue to whom you refer in performing the functions of the office to which he was appointed was acting as a de facto officer and that, insofar as the public and third persons are concerned, his acts are valid. 43 American Jurisprudence, Public Officers, Section 495. I am also of the opinion that the compensation paid this de facto officer for services rendered by him may not be recovered by the County or State. 43 American Jurisprudence, Public Officers, Section 491.

Replying to your second question, a Deputy Sheriff appointed pursuant to Section 15-485 of the Code is undoubtedly a public officer. However, before passing on the question as to whether or not Section 2-27 of the Code prohibits him from carrying mail under a contract with the Federal Government, I should prefer to see a copy of the contract. If you will secure this for me, I shall be glad to write you further.

PUBLIC OFFICERS—Memorial Hospital Commission; members of may not contract with. F-34 (199)

March 8, 1954.

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

This is in reply to your letter of March 4, 1954 in which you ask to be advised as to whether it is legal for a member of the Alleghany Memorial Hospital Commission to sell merchandise to or otherwise carry on business transactions with the said Commission.

A Commission created pursuant to chapter 14, Title 32 of the Code of Virginia of 1950, as amended, is a public body corporate and the members thereof necessarily are public officers. While it may appear doubtful that Article 4 of chapter 16, Title 15, of the Code expressly prohibits such officers' contracting with the Commission of which they are members, it nevertheless appears that the common law prohibition against conflicting interests of public

officials would prevent such contracts as mentioned in your letter. As stated in 42 Am. Jur., 105:

"It is a rule, embodied in the stateutes of some states, that public officers are debarred from contracting with the public agency which they represent or from having a private interest in its contracts. The rule is intended to be applied to all cases where there would be conflicting interests. In the absence of a statute on the subject, such a conflict of interest is the test of the disqualification of an officer by reason of his office to make a contract."

No definite rule can be given indicating the line of demarcation between that which is proper and that which is unlawful. The question really is whether the officer, by reason of his interests, is placed in a situation of temptation to serve his own personal interests to the prejudice of the interests of those for whom the law authorizes or requires him to act as an official.

In view of the foregoing I cannot escape the conclusion that it would be improper for a member of a Commission as provided in chapter 14, Title 32 of the Code, to enter into a contract to furnish merchandise to the Commission even in the absence of a statutory prohibition.

PUBLIC OFFICERS—Mileage allowance; when privately owned automobiles on State business. F-114 (279)

May 19, 1954.

HONORABLE SIDNEY C. DAY, JR.,
Assistant Comptroller.

This is in reply to your letter of May 10, 1954, which reads as follows:

"House Bill 32, Chapter 708, and House Bill 420, Chapter 709; were both signed by the Governor on April 9, 1954.

"Section 42 of Chapter 709 authorizes 6¢ per mile for the use of personally owned automobiles when traveling on State business, whereas, Section 14-5 of Chapter 709 authorizes 7¢ per mile. We feel that it was the intent of the Legislature to authorize 7¢ per mile, but in view of the conflict in the two chapters, we are in doubt as to the proper amount to allow, and will appreciate it if you will advise us."

As you observe in your letter chapters 708 and 709 were both signed by the Governor on April 9, 1954. In addition, both chapters provide that all acts or parts of acts in conflict therewith are repealed to the extent of such conflict. It is a well recognized principle of statutory construction that where the Legislature has given special attention to a narrow phase of the law and has made special provision regarding that phase which conflicts with a similar provision made in a more general statute, the special act must prevail. This rule prevails because of an effort by the courts to uphold the legislative intent where possible. The rule as stated in Crawford on Statutory Construction is as follows:

"It is not uncommon to find one statute treating a subject in general terms and another treating only a part of the same subject matter in a more minute manner. Where this situation exists, the two statutes should be read together and harmonized. This is especially true where the two statutes are in *pari materia*. In the event of repugnancy, the special statute should prevail, in the absence of a contrary legislative

intent, since the specific statute more clearly evidences the legislative intent than the general statute does. And this rule—that a statute relating to a specific subject controls a general statute which includes the specific subject—is not necessarily dependent on the time of the enactment of such statutes, although it may be a vital and important consideration.”

In the recent case of *Gardner v. Commonwealth of Virginia*, decided May 3, 1954 in an opinion by Mr. Chief Justice Hudgins, the Supreme Court of Appeals of Virginia cited with approval an opinion of this office predicated upon the rule that sections of the Code dealing with a specific subject should control in spite of conflicting provisions in a more general statute.

In view of this rule it is my opinion that the provision in chapter 709 allowing seven cents per mile for the use of personally owned automobiles when traveling on State business should prevail over the provision in chapter 708 which authorizes six cents for such travel. In the instant case I feel that a reading of the text of the two acts adds great weight to the view that the clear legislative intent was to provide seven cents per mile for such travel. Sections 14-5 and 14-5.1 are both composed of entirely new language but reference to sections 42 and 43 of former appropriation acts will reveal that the language of these new sections is identical to the language in old appropriation acts except that the rate has been increased from six to seven cents which in my opinion clearly indicates that the Legislature intended to make this provision a part of the Code of Virginia and to omit it from the appropriation act but inadvertently failed to delete sections 42 and 43 from chapter 708.

PUBLIC OFFICERS—Photographs obtained in course of duty improper to sell to private organizations. F-136e (274)

May 11, 1954.

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

This is in reply to your letter of May 6, 1954, a portion of which I quote:

“The Chief of Police of Henrico County has recently raised the question of whether or not there is any prohibition against a member of the County of Henrico police force selling to magazines, newspapers, etc. extra copies of photographs taken by such officers during the course of official investigation of offenses committed in the County.”

Although I am aware of no statutory prohibition against such action by members of the police force, I am, nevertheless, of the opinion that such is improper under the general principles applicable to public officers. It is well recognized that public officials must refrain from entering into business transactions which are by their very nature incompatible with their duties as public officials. I am impressed with the logic set forth in 43 American Jurisprudence 83, public officers, Section 271, which reads in part as follows:

“The question whether records, discoveries, inventions, devices, data, and the like, made or prepared by an officer while he is occupying the office, belong to the public, must, of course, be determined with reference to the facts of each case. A controlling fact in some cases has been that the devices, records, or indexes were indispensable in the proper conduct of the office. If such is the case, it is held that the officer may not take them as his own property even though he has pre-

pared them on his own time and paid for them with his own funds. If, on the other hand, the devices are not required by law, are prepared by the officer apart from his official duties, and are not indispensable in the proper conduct of the office, it appears that the officer may acquire a property right therein which will entitle him to remove them upon leaving office."

Inasmuch as the photographs taken by the officers were taken during the course of official investigations, it would appear that such photographs are rightfully the property of the County, and not that of the individual which he may dispose of for personal gain.

PUBLIC WELFARE—Assistance to parents of crippled children over eighteen. F-231 (59)

September 21, 1953.

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

This is in reply to your letter of September 15, 1953, which I quote:

"At its meeting on September 8 the State Board of Welfare and Institutions adopted the following resolution subject to clearance with you as to its legality:

"For the purpose of determining eligibility for public assistance, the parent of a disabled child of eighteen years of age or over shall be considered responsible for his support provided disability began before the child became emancipated and has continuously prevented his earning a living.

"In determining the amount of support to be considered available from the parents, the requirements of the parents and of any other persons for whose support they are legally responsible, shall be computed on the assistance level on the basis of 100 per cent of need. All income in excess of such requirements shall be considered as available to the disabled adult child."

"I shall appreciate an expression of your opinion as to whether it is within the purview of the State Board's authority to promulgate the stated policy."

Under the provisions of section 63-209 of the Code of Virginia the State Board has authority to promulgate rules and regulations by which the relief a person shall receive may be determined. The above policy statement by the Board appears to be a reasonable exercise of the power invested in it.

I feel it advisable to draw your attention to section 20-61 of the Code of Virginia which provides, in part, that a parent is responsible for the support and maintenance of his or her child of whatever age who is crippled or otherwise incapacitated for earning a living. The first paragraph of the above quoted resolution would appear to exclude from consideration for public assistance such parents where the child is more than eighteen years of age and such child was not under disability prior to becoming emancipated. I mention this merely as a precaution against enacting a resolution too stringent to admit of possible exceptions under circumstances in which the board might otherwise consider rendering public assistance.

PUBLIC WELFARE—Juveniles; revoking and suspending commitment orders. F-239 (114)

December 10, 1953.

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

This is in reply to your letter of December 7, 1953 in which you request my opinion on "the proper way in which to handle a commitment to the local Department of Public Welfare when the Welfare Department feels that it has accomplished its purpose and should no longer supervise the case."

You ask the question, "whether the court should revoke this commitment or whether the commitment should be suspended and remain in the files of the Welfare Department and the court simply authorize the Welfare Department to discontinue its supervision?"

Section 16-172.46 of the Code of Virginia provides that all commitments shall be for an indeterminate period having regard to the welfare of the child and interest of the public. Section 16-172.49 permits the court to reopen any case and to modify or revoke its commitment order. It is my opinion that, in view of the above mentioned sections of the Code, the Juvenile and Domestic Relations Court may either revoke or suspend the commitment orders, whichever action appears to the Court to be in the best interest of the child.

PUBLIC WELFARE—Local Boards; contract between second class city and another city or county. F-231 (267)

May 18, 1954.

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

This is in reply to your letter of May 14, 1954, which I quote:

"The General Assembly of 1954 amended Section 63-53 of the Code so as to make it read as follows:

"The local board in each city of the second class shall consist of three members, residents of the city, appointed by the judge of the corporation court of such city, or if there be no such court, then by the judge of the circuit court having jurisdiction within such city; provided, however, that the governing body of any city of the second class, in which no such local board has been so appointed, may constitute itself as the local board and may enter into a contract with any adjoining city or county providing for administration of the welfare program of such city."

"Representatives of this Department have had informal conversations with both Mr. Gray and Mr. Lee of your office with respect to interpretation of this provision, and I am now requesting your opinions on the following questions:

"1. When the council of the city of the second class constitutes itself the local board of public welfare and enters into a contract with an adjoining city or county, does it enter into that contract in its capacity as city council or in its capacity as the local board of public welfare and is such contract negotiated with the governing body or the board of public welfare of the adjoining city or county?

"2. When a contract is negotiated for the administration of the public welfare program in a city of the second class pursuant to the

provisions of Section 63-53, as amended, should a separate budget be prepared for the said city of the second class? If so, is the board of the city of the second class or the board of the city or county administering the program responsible for submitting budgets in accordance with the provisions of Section 63-69?

"3. When a contract has been negotiated, should payments to cover assistance and administrative costs within the city of the second class be made by the treasurer of such city or may such payments be made through the treasurer of the city or county which is administering the program in accordance with the contract?

"4. In event payments are made by the treasurer of the city or county administering the program, should state reimbursements be made to the city or county making the payments or to the city of the second class in whose behalf such payments were made under the terms of the contract?"

Your inquiries will be answered seriatim:

1. The amendatory language to section 63-53 of the Code refers to the authority of the governing body of the cities of the second class and not the local board of welfare. The governing body may constitute itself as the local board, and may also enter into the contract there contemplated. There is no provision in this section for local boards to contract with each other. Therefore, as to your first inquiry, such contracts would be negotiated between the governing bodies of the political subdivisions.

2. Each local board is charged with the duty of administering the provisions of Chapters 5 through 9 of Title 63 of the Code by virtue of section 63-66 of the Code. Section 63-69 and subsequent sections provide for budgets to be submitted by the local board to the governing body, and by the governing body to the State Department of Welfare. In view of these sections, it appears that the governing body has certain duties with regard to approving and submitting budgets which could not be performed by the governing body of another political subdivision. Although the administrative details could be performed by another governing body, I am of the opinion that such discretionary acts as approving or recommending expenditures of funds derived from taxation within a locality can only be exercised by the body responsible for levying the tax. Hence, as to your second inquiry, I feel it necessary that a separate budget be prepared for each city or county, and, irrespective of which body actually prepares the budget, such should be formally channeled through the governing body of the political subdivision responsible for appropriating funds to meet such budget.

3. It is possible under section 63-53 of the Code, as amended, for a city of the second class to provide that payments to recipients of public welfare be made through the treasurer of the locality administering the welfare program. However, section 63-105 of the Code imposes a duty upon the governing body of each county and city to yearly appropriate sufficient funds to provide for the payment of public assistance and cost of administration. Such appropriation would necessarily be disbursed by the treasurer of the county or city appropriating such funds. However, such disbursements could be made by lump sum payment to the adjoining city or county contracting to administer the welfare program for cities of the second class. This would be a contractual arrangement which would leave the two political bodies to their own remedies to insure compliance.

4. Section 63-106 of the Code provides the procedure for reimbursement by the State to the localities. That section provides as follows:

"(a) The Commissioner shall monthly reimburse each county and city to the extent of one dollar of State money for each sixty cents of local money expended for old age assistance, aid to dependent children,

and general relief, under the provisions of this law. Such funds as are received from the United States and agencies thereof as grants-in-aid for the purpose of providing, or assisting in providing, for old age assistance, aid to dependent children, and general relief, shall monthly be paid by the Commissioner to each county and city as reimbursement of the federal share of such grants as have been paid by each county and city under the provisions of this law. Administrative expenditures incurred by the localities in connection with aid to the needy aged, aid to dependent children, and general relief, shall be ascertained by the State Board, and the Commissioner shall monthly reimburse each county and city therefor out of State and federal funds in an amount not less than fifty per centum nor more than sixty-two and one-half per centum of such administrative costs.

"(b) Claims for reimbursement shall be presented by the local board to the Commissioner, and shall be itemized and verified in such manner as the Commissioner may require. Such claims shall, upon the approval of the Commissioner, be paid out of funds appropriated by the State and funds received from the federal government for the purposes of this law, to the treasurer or other fiscal officer of the county or city."

It is to be noted that the claims for reimbursements are made by the local boards of welfare, but the funds paid by the State are paid to the treasurer or other fiscal officer of the county or city. There is no provision in the law for this section to be so construed as to authorize the State funds to be paid to the treasurer of the city or county contracting to administer the welfare program of the cities of the second class. Therefore, such reimbursement by the State must be made to the governing body making the appropriation under section 63-105 of the Code, even though the actual disbursement of the funds appropriated by such governing body is administered by the adjoining county or city by virtue of a contract.

PUBLIC WELFARE—Old age assistance; recovery from estate of recipient; local board cannot waive claim. F-231 (218)

March 24, 1954.

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

This is in reply to your letter of March 23, 1954, a portion of which is quoted.

"The County Welfare Board has requested me to give them an answer to the following question:

"Where a real estate owner has received advancements or payments under the presently existing Old-Age Assistance Program and dies without possessions other than real estate, does the local Welfare Board have the authority to waive any part or all of their claim or lien against the said real estate in favor of funeral expenses that may be in excess of \$100.00."

The claim against the estate of the recipient of assistance under Chapter 6, Title 63, of the Code of Virginia, 1950, is created by virtue of section 63-127 of the Code. There is no authority vested in the Department of Welfare to waive or release this claim which is prior to all other claims except those specified in such section. The proceeds received from such estate are pro-

rated among the local, State and Federal Governments as directed by section 63-129 of the Code. I am, therefore, of the opinion that your inquiry may be answered only in the negative.

PUBLIC WELFARE—Old age assistance; recovery of support from son of applicant. F-383 (97)

November 19, 1953.

HONORABLE J. H. FALLWELL,
Director of Public Welfare, Roanoke.

This is in reply to your letter of November 5, 1953 concerning old age assistance for an applicant who the Welfare Department feels has a son capable of supporting him. You further state that the Welfare Department petitioned the Juvenile Court for support for this applicant by his son and the Juvenile Court dismissed the case. Your questions are: Is this applicant now entitled to old age assistance provided he meets all the requirements? Can the Welfare Department or the applicant himself institute another suit to require the son to support the applicant?

I am enclosing a copy of an opinion of this office dated September 19, 1951, addressed to the Honorable L. H. Shrader, Trial Justice of Amherst County, in which I said that old age assistance may be paid to an applicant, though he has a minor child capable of supporting him while such steps are being taken to require the legally responsible person to act. Therefore, it is my opinion that assistance may be legally given to the applicant at the present time if he meets all the other requirements.

As to the second question concerning the legal steps to be taken against the applicant's son, I should like to refer you to § 20-88 of the Code of Virginia. That section provides, in part, as follows:

"It shall be the joint and several duty of all persons sixteen years of age or over, of sufficient earning capacity or income, after reasonably providing for his own immediate family, to provide or assist in providing for the support and maintenance of his or her mother or aged or infirm father, he or she being then and there in destitute or necessitous circumstances.

* * * * *

"Where such courts have been or shall be established, the juvenile and domestic relations court shall have exclusive original jurisdiction in all cases arising under this section. Where no such courts have been established, jurisdiction for the enforcement of this section shall be vested in the corporation or hustings courts in cities and in the circuit courts of the counties. The person accused, or whose estate is to be subjected, shall have the same right of appeal as is provided by law in other cases."

It is my opinion that the only action which can be brought against a person for the support of his parent is that provided for in § 20-88. If the Juvenile Court has dismissed such an action, I do not feel that the Welfare Department or the applicant would be justified in instituting a new proceeding in the Juvenile Court against the son unless new evidence is available or there is a material change in the financial circumstances of either the son or the applicant.

REAL ESTATE BROKERS—Advertising without including name; owner consents. F-273 (158)

January 26, 1954.

MR. TURNER N. BURTON, *Director*,
Department of Professional and Occupational Registration.

This is in reply to your letter of January 25, 1954, which I quote:

"The Virginia Real Estate Commission is desirous to know if a real estate broker is in violation of Section 54-762 (13) of the Code of Virginia, 1950, if he places the following advertisement in the newspaper:

"'BUNGALOW OR HOUSE—Wanted by Army officer; must be good value in nice neighborhood. Dial 4-0870.'

"We appreciate your cooperation in this matter."

Section 54-762 of the Code of Virginia, 1950, as amended, provides, in part, as follows:

"The Commission may upon its own motion and shall upon the verified complaint in writing of any person, provided such complaint or such complaint together with evidence, documentary or otherwise, presented in connection therewith, makes out a prima facie case, investigate the actions of any real estate broker or real estate salesman, or any person who assumes to act in either capacity within this State, and shall have the power to suspend or to revoke any license issued under the provisions of this chapter, at any time when the licensee has by false or fraudulent representation obtained a license, or when the licensee in performing or attempting to perform any of the acts mentioned herein, is deemed to be guilty of:

* * * * *

"(13) Causing any advertisement for sale, rent, or lease to appear in any newspaper or periodical without including in the advertisement the broker's or firm's name except with consent of the property owner."

In view of the provision in the foregoing section making an exception to certain advertisements when the consent of the property owner has been given to refrain from including in the advertisement the broker's or firm's name, I am of the opinion that it is unnecessary to include the name of a broker or firm advertising on behalf of a prospective lessee.

REAL ESTATE BROKERS—Loans and mortgages; salesman may negotiate directly. F-273 (89)

November 9, 1953.

MR. TURNER N. BURTON, *Director*,
Department of Professional and Occupational Registration.

This is in reply to your letter of October 26, 1953 in which you ask the following question:

"It is requested that you advise this office if a licensed Real Estate Salesman employed by a licensed Real Estate Broker is permitted, under Chapter 18, *Title 54*, Code of Virginia, 1950, to negotiate a real estate mortgage loan and sell the mortgage loan to a bank and have the entire transaction consummated by him completely independent of his employing broker

and receive a brokerage paid directly to the salesman for such services."
(Italicized portion added)

It is my opinion that Chapter 18 of § 54 of the Code does not apply to this transaction. Chapter 18 covers the sale, offering for sale, or purchase or offering to purchase, or the negotiation of the purchase or sale or exchange of real estate, or the leasing, renting, or offering for rent any real estate, or the negotiation of leases thereof, or of the improvements thereon. The negotiation of a loan or mortgage on real estate is not included within the provisions of this Chapter.

REAL PROPERTY—Effectiveness of deed releasing covenant creating reversionary interest. F-252 (306)

June 4, 1954.

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

Receipt is acknowledged of your letter dated May 26, 1954, in which you advise that a tract of land was conveyed to the County School Board of Smyth County on March 11, 1952, and the deed is duly recorded. This deed contained the following covenants:

"The County School Board of Smyth County, Virginia, shall begin erection of a school building on the land here conveyed within five years from March 11, 1952, and upon failure of said school board to begin construction of said public school within the time specified, said land shall revert to the grantor, if she is living, and if not living to John M. Preston, V, of Columbia, South Carolina."

* * * * *

"Should the land hereby conveyed ever cease to be used as a public school, then the said land shall revert to John M. Preston, V, or the heirs of his body."

You state that due to these covenants in the deed you could not approve the School Board's title for a loan on this property, and the grantor and John M. Preston, V, have subsequently executed a new deed for the purpose of releasing the restrictions and reversionary clause in the former deed. It is your opinion that the subsequent deed would remove the objection as to the first covenant, but you are uncertain as to whether or not the parties would be vested with authority to release the second reversionary clause and request my opinion.

Section 55-14 of the Code of Virginia, to which you refer in your letter, is applicable to estates of remainder. In the case of remainder, a new title is created. However, in the instant matter, I assume that there was no grant of title to John M. Preston, V, or the heirs of his body, but the grantors merely undertook to retain the old title for their benefit upon the happening of a condition subsequent. If this is correct, there would be no remainder, but a quasi reversion. For distinction of reversion and remainder, see *Minor on Real Property* Section 809. I quote from *Minor on Real Property*, Section 819, as follows:

"In contradistinction to reversions, which are *vested* estates, these interests are *contingent*, and are well described by the term '*mere possibilities of reverter*.' They arise, at common law, upon a conveyance in fee conditional, or upon the creation of a fee qualified, or upon the conveyance of a *fee simple upon condition subsequent*. In none of these cases is there any *vested* interest in the land left in the grantor by way of *reversion*, but only

a bare *possibility* that the land will return to him, upon the happening or failure to happen of the various *contingencies* upon which the estate granted may depend. The interest of the grantor is purely *contingent*."

It is recognized that the courts have construed Section 55-6 of the Code as permitting the conveyance of a possible reverter, nevertheless, there is no vested interest until the happening of the condition subsequent. Therefore, I am of the opinion that a grantor could release a covenant in a deed creating such a reversion at any time prior to the happening of the condition although the matter is not entirely free from doubt.

SANITARY DISTRICT—Residents outside can not be charged less than residents of district. F-328 (213a)

June 30, 1954.

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

I refer to recent correspondence in which you advised me that some years ago there was established in Stafford County a sanitary district, which sanitary district has built a water system therein. For this purpose the sanitary district issued bonds in the amount of \$50,000, which bonds now constitute an indebtedness against the district.

It appears from the correspondence that residents of the district are charged a cut-in fee for connecting up with the system. It is now proposed that residents of a subdivision outside of the district be allowed to connect up with the system without the payment of a cut-in fee. You ask for my opinion as to the validity of this proposal.

It is my view that to allow residents outside of the district to cut in on the system without the payment of the fee which residents have to pay would clearly constitute an unlawful discrimination against the residents and that, therefore, such action would be invalid. I do not see how there can be any doubt about such conclusion.

**SCHOOLS—Battle Funds; handling of for New London Academy.
F-2681 (201)**

March 9, 1954.

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

This is in reply to your letter of May 4, 1954 in which you ask my opinion as to the procedure to be followed in the proposed construction of a new school building at New London Academy which is operated pursuant to the provisions of chapter 475, Acts of Assembly, 1926. Inasmuch as the counties of Bedford and Campbell have designated a portion of construction funds, known as "Battle Funds", to this project, the questions have arisen as to who are the appropriate parties to the construction contract, whether the construction fund should be segregated and who are proper parties to the issuing of warrants for payments.

As pointed out in your letter, the Auditor of Public Accounts has suggested to the State Board of Education that all Battle Funds be administered from a special fund known as the School Building Construction Fund. I am further advised by the State Board of Education that the school boards of the counties of

Bedford and Campbell have agreed that the treasurer of the county of Bedford is to handle all funds allocated to the New London Academy as its fiscal agent. The procedure for disbursement has been by means of warrants signed by the Board of Managers of New London Academy by its chairman, the clerk of the board and the treasurer of Bedford County as the fiscal agent.

Inasmuch as New London Academy has authority vested in the Board of Managers which is tantamount to a separate school district and subject to the general control and supervision of the State Board of Education, I see no legal prohibition against its following the same procedure with regard to the new construction as has been followed in the past with respect to funds coming into the hands of the Board of Managers. Of course, it will be necessary for the Treasurer of Bedford County, in whose hands the funds have been placed, to disburse such funds from a segregated fund with some appropriate earmark. I, therefore, concur in your suggestions that the construction contract should be executed by the contractor and the Board of Managers of New London Academy; that expenditures be made from a special construction fund administered by the fiscal agent and all warrants signed by the chairman and clerk of the Board of Managers as well as the fiscal agent.

SCHOOLS—Board; authority to examine land for school purposes.
F-203 (121)

December 14, 1953.

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

This is in reply to your letter of December 10, 1953, a portion of which I quote:

"The School Board of Scott County, Virginia, is planning to build a large consolidated high school in the area of Gate City. It has chosen a site on which said building is sought to be constructed. The School Board employed its engineers and architects who were in the preparation of preparing the preliminary plans. The Board employed the service of a geologist to go upon the site to ascertain whether or not the site was a proper one for the construction of a large building. The geologist found evidence of caves under the surface, and recommended certain amount of core boring on the premises. The owner of the lands objects to such core boring.

"Section 25-3 of the Code of Virginia gives the School Board the right to go on said land for the purpose of examining the same, and surveying and laying out such as may seem fit and proper. The School Board would like your opinion as to whether or not the word examining could be construed as giving the School Board and its agents the right to make said core borings."

Although permissible to enter upon land proposed to be condemned for the purpose of examining, surveying and laying out the same, the State must do so with due regard to the rights of the property owner. Whether or not the type of examination required on the property of an individual is one which necessitates damaging such property, is a question which must be answered with regard to the circumstances in the individual cases. Whereas core boring in one instance may necessarily damage the property, it is entirely possible that such borings would have no adverse effect in the case of property in another locality. For this reason I am of the opinion that the authority of the School Board to make such an examination is dependent upon the circumstances in the individual case.

SCHOOLS—Board; may not contract with company employing a supervisor. F-200 (21)

July 21, 1953.

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

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

"I have been requested by the School Board of Prince George County to obtain an opinion from you on the question of a contract for insurance covering school buildings against loss by fire and liability and collision insurance covering school buses. The facts are as follows: For more than ten years the School Board has placed a part of its insurance coverage on school buildings and its collision and liability coverage on school buses through a corporation doing a general insurance business. Approximately five years ago a present member of the Board of Supervisors of Prince George County, who for many years has been engaged in the insurance business, was employed by this corporation on a salary basis. This member of the Board of Supervisors does not solicit insurance contracts from the School Board of Prince George County.

"Is it lawful for the corporation in question to continue to place fire insurance coverage upon school buildings and collision and liability coverage upon school buses while this member of the Board of Supervisors of the County is a salaried employee of the corporation?"

Section 15-504 of the Code as amended provides in part as follows:

"No supervisor, superintendent of the poor, special policeman, commissioner of the revenue, treasurer, attorney for the Commonwealth, clerk of the court, trial justice, sheriff or any paid officer of the county shall become interested, directly or indirectly, in any contract, or in the profits of any contracts, made by or with any officer, agent, commissioner, or person acting on behalf of the supervisors, the county school 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."

I assume that the principal source of income of the corporation of which the member of the Board of Supervisors is an employee is commissions on insurance premiums which would, of course, include commissions on premiums paid on insurance on school buildings and on liability and collision insurance covering school buses. The salary of the member of the Board of Supervisors must come in part from these commissions. It appears to me inescapable, therefore, that this member of the Board of Supervisors is directly or indirectly interested in a contract or in the profits of a contract made with the County School Board. I must conclude, therefore, from the facts you state that the question contained in the last paragraph of your letter must be answered in the negative.

SCHOOLS—Board; no authority to appropriate to Mountain Empire Guidance Center. F-203 (175)

February 10, 1954.

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

This is in reply to your letter of February 5, 1954 in which you ask to be advised whether the School Board of Montgomery County may legally include in its budget an appropriation to the Mountain Empire Guidance Center at Radford, Virginia, in order to expand the services and facilities of such Center.

The Mountain Empire Guidance Center is one of the mental hygiene clinics in the State operated under the direction of the State Department of Mental Hygiene and Hospitals. Any contribution toward the furtherance of such services and facilities would be expended under the supervision of the Department of Mental Hygiene and Hospitals and could in no manner be controlled by the School Board of Montgomery County. I am, therefore, of the opinion that the School Board could make no such appropriation in the absence of legislative sanction.

The program for expansion which you included with your letter is herewith returned.

SCHOOLS—Board members; may also serve on Selective Service Board. F-249 (192)

February 26, 1954.

HONORABLE SAM L. HARDY,
Commonwealth's Attorney for Bland County.

This is in reply to your letter of February 25, 1954 in which you ask to be advised as to whether a member of the local Selective Service Board may also serve on the county school board.

This question was presented to the General Assembly at the extra session of 1952 and the incapacity removed by the enactment of chapter 21, approved December 17, 1952, which provided as follows:

"1. No State, county or municipal officer or employee shall forfeit or vacate, or be held to have forfeited or vacated, his office or position, by reason of serving or of having served as an officer, member, agent or employee, or in any other position or capacity, in the Selective Service System of the United States.

"2. No person shall be ineligible to hold any State, county or municipal office or position by reason of being engaged in service in Virginia in the Selective Service System of the United States."

SCHOOLS—Board members; may sell gravel to contractor for maintenance of property. F-203 (28)

August 4, 1953.

HONORABLE LYON G. TYLER, JR.,
Commonwealth's Attorney for Charles City County.

This is in reply to your letter of August 3, in which you present the following question:

"One of the members of the Charles City County School Board owns a gravel pit from which he sells gravel. I would like your opinion as to whether or not the school board member can properly sell gravel for use in maintaining or constructing roads and parking areas surrounding a local public school. The gravel will be purchased from the school board member by a contractor and not by the school board.

"I read Virginia Code § 22-213 to prohibit the school board member from selling gravel to be used in the construction of a public school house but that the school board member could sell gravel for maintenance. However, there seems to be no legitimate differentiation between the two.

"Please advise me if you think the school board member could violate the spirit of the law by selling the gravel for maintenance or ground improvement purposes."

The pertinent portion of § 22-213 of the Code to which you refer reads as follows:

"It shall be unlawful for any member of the State Board, division superintendent of schools, member of the school board or any other school officer, principal or teacher in a public school, except by permission of the State Board evidenced by resolution spread on the minutes of such Board, to have any pecuniary interest, directly or indirectly, in any contract for building a public schoolhouse, or in furnishing material to a contractor for building such schoolhouse, * * * ."

This section being highly penal must be strictly construed. It is my opinion that a person selling gravel to a contractor to be used by the contractor in maintaining or constructing roads and parking areas surrounding a local public school, or as you describe it "for maintenance" cannot be said to have an interest in a contract for building a public schoolhouse or in furnishing material to a contractor for building such schoolhouse. I conclude, therefore, that the school board member to whom you refer would not be violating § 22-213 of the Code in selling gravel to a contractor for the purposes mentioned by you.

SCHOOLS—Board members; not to serve as clerk of. F-203 (202)

March 9, 1954.

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.

This is in reply to your letter of March 8, 1954, which I quote:

"Attached hereto is a copy of a letter which I have received from the Commonwealth's Attorney of Clarke County, Virginia, relative to the individual who holds the position as clerk of the school board of

that county. This letter was written in response to a telephone conversation which I had with Mr. Edward McC. Williams in regard to the situation. It appears that the clerk of the school board is also a member of that body, and apparently the only function which the clerk performs is the signing of warrants and other school board records concerning meetings of the board. If I interpret the statutes correctly, the position of clerk of a school board is a full-time position and requires the performance of all of the duties imposed upon a clerk of a school board by statute. From information which has been furnished me by our auditors who examine the accounts of Clarke County, it would appear that most of the duties imposed upon the clerk are performed by the superintendent of schools. The letter from the Commonwealth's Attorney appears to confirm this conclusion.

"I would appreciate it if you would review the letter of the Commonwealth's Attorney and the information contained in this letter and advise me

- "(1) Whether it is compatible for a member of a school board also to be clerk of the school board of which he is a member;
- "(2) Whether any of the duties of a clerk of a school board can be delegated to another person by the clerk of such a board."

Section 22-48 of the Code of Virginia provides for the election of a school board chairman as well as a clerk of the board. Section 22-48.2 of the Code provides that no mayor, member of council, or treasurer, his deputy, or *other officer* shall be eligible to the office of clerk. Section 22-71 requires a clerk to be bonded while no such provision is made for other officers of the board. Section 22-75 provides for warrants to be signed by the chairman or vice-chairman and countersigned by the clerk or his deputy. Other sections of the Code provide for the approval of the actions of the clerk by the board.

In view of the foregoing it appears conclusive that the law contemplates some person other than a school board member to act as clerk of the school board, and it necessarily follows that neither the clerk nor the members of the board may perform the duties or exercise the powers conferred upon the other. Therefore, in answer to your first inquiry it is my opinion that the office of clerk is incompatible with the office of a school board member.

With respect to your second inquiry certain of the duties of the school board clerk may be relegated to a deputy who has been elected by the school board pursuant to section 22-48.1 of the Code. It should be noted that such deputy is prohibited from performing the duties which may be conferred upon him until he has been bonded pursuant to section 22-71 of the Code.

SCHOOLS—Bond issue; acts of de facto board members would be valid.
F-103 (50)

September 4, 1953.

JAMES H. SIMMONDS, ESQ.,
Attorney for the County School Board of Arlington County.

This is in reply to your letter of September 1, 1953, in which you request my opinion as to the validity of school bonds of Arlington County in the amount of \$2,500,000, which are a part of an issue of \$8,280,000 authorized pursuant to the vote of the electors of the county on May 27, 1952.

I have examined the legal papers in relation to this bond issue and find that I concur in the opinion of Mitchell and Pershing, bond counsel, who

state in a letter dated July 30, 1952, that they are of opinion that the "proceedings and proofs show lawful authority for the issuance and sale of said bonds pursuant to the Constitution and laws of the Commonwealth of Virginia, and that said bonds constitute valid general obligations of said Arlington County, Virginia, for the payment of which the full faith and credit of said County are pledged, and all taxable property in said County is subject to the levy of an ad valorem tax without limitation of rate or amount for the payment of said bonds and the interest thereon."

You have called to my attention the fact that there is pending in the Circuit Court of Arlington County an action challenging the qualifications of certain of the school board members to serve as such, in view of their employment by the Federal Government. While I have not seen the pleadings in this case, I do not feel that its outcome will affect the validity of these bonds.

On July 24, 1952, in an opinion to the Honorable William J. Hassan, Attorney for the Commonwealth of Arlington County, I dealt with a situation which was substantially similar to the instant case. At that time I said that, regardless of the decision of our Court of Appeals on the question of the validity of the Code section under which certain members of the county board were holding office, they were at least de facto officers, and that their acts would be as valid as if they were de jure officers. In the instant case, I am convinced that the members of the school board whose qualifications are questioned are at least de facto officers, and that their actions with respect to the bonds in question would be upheld by the courts of this State.

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. While I have been unable to find a decision of the Supreme Court of Appeals of Virginia bearing on the specific points raised, it is my belief that our Court would follow the weight of authority on this subject and sustain the validity of the actions of these officers taken prior to an adjudication that they were ineligible to hold office.

SCHOOLS—Bond issue; cafeteria equipment is within furnishing and equipping school. F-203 (60)

September 21, 1953.

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

This is in reply to your letter of September 17, 1953, a portion of which is herein quoted:

"The resolution of the school board, with reference to floating this bond issue contained, among other things, the following provision:

"'BE IT RESOLVED BY THE COUNTY SCHOOL BOARD OF MONTGOMERY COUNTY, VIRGINIA:

There shall be issued One Million, Five Hundred and Forty-five Thousand (\$1,545,000.00) Dollars, school improvement bonds of Montgomery County, for the purpose of providing funds for school improvements in Montgomery County, Virginia, including the purchase of sites for school buildings or additions to school buildings, the construction of school buildings or additions to school buildings, the furnishing and equipping of school buildings or additions to school buildings * * * .'

"The plans for the building of the Christiansburg School, called for two rooms, one to be used as a kitchen and the other as a dining room, which have been built and completed with the school building.

"What I would like to know is whether or not the wording in the resolution with reference to the furnishing and equipping of school buildings would apply to the furnishing and equipping of the kitchen and dining room to be used as a cafeteria by the school children. This cafeteria will be operated by the P.T.A., and the money received from meals served the children, is paid to the P.T.A. If there is any profit on the meals, it is used in the continuous furnishing of proper meals for the children, as the sole interest of the P.T.A., in this matter is to see that children who have been transported to the school and do not have the opportunity to get a warm meal, have the opportunity to do so at the school. Would the obligation of furnishing and equipping the kitchen and dining room in the school be upon the P.T.A.?"

It is generally conceded that cafeteria facilities are an inherent part of the school building. In the great majority of the State's localities the Board of Education assumes some responsibility in providing cafeteria facilities to the pupils. In some localities they are conducted by the School Board as an official function of the Board, while in others the School Board simply provides space and acts as sponsor without assuming any financial responsibility for its operation.

In view of the concept that the School Board has a definite responsibility in providing, either directly or indirectly, cafeteria facilities, I am of the opinion that the School Board would be authorized to construct the kitchen and dining room contemplated in the Christiansburg school pursuant to the resolution hereinabove set forth.

I am further of the opinion that the School Board would be authorized to make expenditures for furnishing and equipping the kitchen and dining room even though the actual operation of the cafeteria is carried out by the P.T.A.

SCHOOLS—Bond issue; repaying temporary loan; proceeds expended before bonds authorized. F-103 (230)

April 9, 1954.

HONORABLE MEREDITH C. DORTCH,
Commonwealth's Attorney for Mecklenburg County.

This is with further reference to your letter of February 3, 1954 pertaining to the question of the legality of the expenditure from the proceeds of a bond issue by the County of Mecklenburg of an amount for the retirement of a temporary loan negotiated by the school board in contemplation of the bond issue.

From the information supplied it appears that a temporary loan was negotiated pursuant to the provisions of section 22-120 of the Code of Virginia prior to the special election which was held for the purpose of determining whether bonds should be issued by the county for school improvement purposes. The purpose of the temporary loan was to complete the reconstruction of an elementary school in South Hill which had been destroyed by fire. The Board of Supervisors and the school board contemplated the repayment of the temporary loan from the proceeds of the bond issue at the time of determining the amount for the proposed bond issue. Following the entry of the court order which authorized the referendum the school board pub-

licized a notice to the citizens of Mecklenburg County specifying the purposes for which the bond proceeds were to be utilized, which notice included a \$50,000 item for the repayment of the temporary loan.

Assuming the mode of publication of the aforementioned notice was sufficient to fully apprise the electors of Mecklenburg County of the purpose of the school bond issue, I am of the opinion that the \$50,000 temporary loan may be repaid from the proceeds of the bond issue irrespective of the fact that such loan had been expended prior to the issuance of the bonds authorized in the referendum.

SCHOOLS—Bond issue; use of surplus from special levy after bonds deemed. F-103 (232)

April 12, 1954.

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

This is in reply to your letter of April 7, 1954 in which you ask my opinion regarding the expenditure of a surplus fund now on hand derived from special taxes which were levied for the purpose of redeeming school bonds issued for the purpose of building and furnishing a school building in the Springfield Magisterial District of Page County, Virginia. You state that all such bonds will have been redeemed at the close of this fiscal year and that a small surplus exists due to the impossibility of fixing the levy for the last year which would cover exactly the balance of the bonded indebtedness.

You are well aware that taxes derived from a special levy may not be expended for any purpose not authorized at the time the levy was laid. In this case, however, the proposed use of the small surplus existing after the retirement of the bonded indebtedness authorized by the voters of the Springfield Magisterial District is one expressly authorized at the time of the bond issue. So long as such fund is utilized to furnish the school which has been constructed from the proceeds of the bond issue, I see no objection to the expenditure.

SCHOOLS—Bond issue; using proceeds for athletic center at county high school. F-203 (275)

May 11, 1954.

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

This is in reply to your letter of May 6, 1954, a portion of which I quote:

"The County School Board of Henrico County had presented to it recently a problem as to whether or not it has any authority to develop an athletic center at one of the County high schools and, if so, in what manner the financing on such a project can be accomplished. It occurs to me that this is a problem in which other school boards of the State might also be concerned.

"The problem arose in the following manner: A citizens committee from the vicinity of the county high school concerned presented to the County School Board carefully worked out plans for the erection of new bleachers, a field house, a concession stand, ticket booths and public

toilets at an estimated cost of \$41,000.00 for the development of an athletic center at the County high school concerned."

You point out several proposed methods of financing such a project, one of which would draw from the funds to be available from the \$4,000,000 school improvement bond issue authorized by referendum on December 30, 1953, pursuant to provisions of Sections 22-167 and 22-168 of the Code of Virginia. You state that the question submitted to the voters in the referendum was the language set forth in Section 22-168 of the Code, which provides in part as follows:

" * * * for the purpose of providing funds for school improvements in said county, including the purchase of sites for school buildings or additions to school buildings, the construction of school buildings or additions to, or alterations of existing school buildings, and the furnishing and equipping of school buildings or additions to school buildings."

The term "school improvements" is broad in scope and is inclusive of the facilities generally recognized as being appropriate or necessary in connection with public schools. I do not feel that it can be strongly urged that facilities for physical training and athletics are not recognized parts of the educational program. I, therefore, feel that the School Board is empowered to allocate a portion of the funds to be derived from the authorized school bond issue for such a project.

SCHOOLS—Bond issue; using proceeds for different project. F-33 (124)

December 15, 1953.

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

This is in reply to your letter of December 11, in which you present the following questions:

"The Board of Supervisors of Wise County, about twenty years ago, laid a ten cent levy on the taxpayers of the Lipps Magisterial District of the County for the purpose of building a gymnasium in said district at St. Paul, Virginia.

"About Thirty Thousand (\$30,000.00) Dollars has been collected in that fund.

"The School Board of Wise County is now in the process of making extensive improvements to St. Paul High School. The Superintendent of Schools in Wise County appeared before the Board of Supervisors and requested the authority to use the Thirty Thousand (\$30,000.00) Dollars for improvements to classrooms at St. Paul.

"Can the Board of Supervisors, under the law, authorize the use of this money, or reallocate same for building and converting other buildings into classrooms at St. Paul, when the levy was laid for the purpose of building a gymnasium?"

I take it from your letter that the additional levy was made in Lipps Magisterial District for the specific purpose of building a gymnasium and not for the purpose of capital improvements generally. The taxpayers in the District must have been aware of this fact. It is my opinion, therefore, that the proceeds of this levy must be used for the purpose for which it was made. This office has uniformly expressed the opinion that a special levy in a district must be used for the purpose for which it is laid.

SCHOOLS—Bonuses for teachers; when board may pay. F-203 (239)

April 19, 1954.

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.

This is in reply to your letter of March 31, 1954, which reads, in part, as follows:

"Mr. J. Hoge T. Sutherland, Superintendent of Schools of Dickenson County, has advised me that the teachers' contracts with Dickenson County School Board for the school session 1953-54 includes the following provision, 'If money is available for any bonus for the 1953-54 session, said bonus will be paid before June 30, 1954.' He requests that he be advised whether a bonus may be paid if funds are available before June 30, 1954, in conformity with the provision above cited in the contracts of the teachers of Dickenson County. Since this question involves a point of law, I would appreciate it if you would give me your opinion with respect to the question."

On October 17, 1944, in an opinion to the Honorable T. Moore Butler, Attorney for the Commonwealth, Covington, Virginia, the former Attorney General, the late Honorable Abram P. Staples, ruled that a school board might pay a bonus if it acted well in advance of the end of the school year, his theory being that the school board might treat the completion of the contract by the teacher as the consideration to the school board for the payment made to the teacher. Judge Staples carefully pointed out, however, that it was necessary for the Board of Supervisors to approve such payments at one time or another. I believe that Mr. Sutherland's inquiry may be answered in the affirmative with the added caution that, unless the Board of Supervisors has in some manner approved the expenditure for this purpose, it will be necessary to secure their approval. I might add that I have discussed this matter with Mr. J. G. Blount of the Department of Education, and while the Department does not favor the payment of bonuses and seeks to discourage that practice, Mr. Blount agrees with the conclusion which I have reached.

SCHOOLS—Compulsory attendance; parents do not violate law when child placed on bus and later plays hookey. F-203 (99)

November 25, 1953.

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

This is in reply to your letter of November 19, 1953 in which at the request of the Trial Justice of Page County you ask my opinion on the application of §§ 22-255 and 22-256 of the Code of Virginia. Those sections provide as follows:

"Every person having under his or her control a child between the ages above set forth, shall cause the child to attend school or receive instruction as required by this article."

"Any person violating any of the five preceding sections shall be guilty of a misdemeanor."

Specifically, you desire to know whether these sections cover the following set of facts as set forth in your letter:

"There are a number of instances in which the parents when summoned to Court for violation of the Act, state on oath that the child is prepared for school and actually boards the school bus. However, during the trip to school when the bus stops to pick up another child, the first child jumps out the door of the bus and runs. Or the child actually is delivered to the school property by the bus, but when class meets is among the missing."

In my opinion it would be difficult, if not impossible, to sustain a conviction against a parent on the facts stated for, as I understand the operation of the school laws and the regulations of the State Board of Education, the child is considered to be under the control of the school officials after he is aboard the school bus. I call your attention to the provisions of §§ 22-260 and 22-270 of the Code which sections provide that the child may be proceeded against as a neglected child if he is habitually absent or if his parents fail in their duty to comply with the Compulsory Attendance Law. It would seem to me that the situation presented might be remedied by action under these sections.

**SCHOOLS—Construction; board to let all contracts by competitive bidding.
F-203 (254)**

April 26, 1954.

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

This is in reply to your letter of April 22, which I quote below:

"The General Assembly at its 1954 session passed certain legislation concerning school construction projects financed in whole or in part by appropriations, grants-in-aid, or loans. House Bill No. 624, as amended by the committee, reads in part as follows:

"Section 5. 'No contracts for the construction of any State-aid project shall be let except after competitive bidding. The procedure for the advertising for bids, and letting of the contract, shall conform, mutatis mutandis, to Chapter 4 of Title 11 of the Code of Virginia. No person or firm shall be eligible to bid on any such contract, nor to have the same awarded to him or it who has been engaged as architect or engineer for the same project.'

"Under our interpretation, we have construed this section to apply only to those projects which are let to contract and such legislation does not prohibit a school board from acting as its own contractor. Do you agree with this interpretation?

"Assuming that a school board may act as its own contractor, but awards contracts for plumbing, electricity, or some other phase of the construction project, will such local school board be permitted to award such contracts on any basis other than competitive bidding?"

I cannot say that the provision you quote from Chapter 675 of the Acts of 1954 compels the school board to employ a general contractor for the erection of a school building, but it is certainly the sense of this legislation that contracts for the construction of State-aid projects shall be let to competitive bidding and so, if the school board chooses to erect a building by awarding sub-contracts for the various phases of the work, I am of the opinion

that these contracts should not be awarded except after competitive bidding. To hold otherwise would, in my opinion, defeat the intention of the General Assembly. My conclusion is that the answer to the inquiry contained in the last paragraph of your letter is in the negative.

SCHOOLS—Construction; public official not to be interested in sub-contract. F-203 (259)

May 3, 1954.

HONORABLE BASIL C. BURKE, JR.,
Commonwealth's Attorney for Madison County.

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

"The Clerk of the Circuit Court of Madison County is a partner in The Farm and Home Service, a partnership engaged in the building and plumbing business.

"The Madison County School Board is about to let contracts for the construction of several public schools. The Clerk realizes that Section 15-504 of the Code as amended bars his firm from bidding on such contracts. However, he feels that this section does not bar his firm from subcontracting with another contractor on these school jobs in the County. More specifically, he wants to know whether or not Section 15-504 would bar his firm from submitting bids to Oscar Underwood, General Contractor, on Madison County School buildings."

The pertinent portion of Section 15-504 of the Code as amended is as follows:

"No supervisor, superintendent of the poor, special policeman, commissioner of the revenue, treasurer, attorney for the Commonwealth, clerk of the court, trial justice, sheriff, or any paid officer of the county shall become interested, directly or indirectly, in any contract, or in the profits of any contracts, made by or with any officer, agent, commissioner, or person acting on behalf of the supervisors, the county school board, or superintendent of the poor of the county, or in any contract, fee, commission, premium or profit therefrom, paid, in whole or in part, by the county or any board, commission or agency thereof, or in the sale or furnishing of supplies or materials to such county, and shall not become interested, directly or indirectly, in any contract, or in the profits of any contract, made by or with any officer, agent, commissioner, trustee or overseer for working and keeping in repair the public roads in the county."

The funds from which the subcontractor will be paid come from the County School Board, although they may pass through the hands of the general contractor. It seems to me, therefore, that under the circumstances you relate the officer you mention as a subcontractor would be interested "directly or indirectly" in a contract with the County School Board, or in the profits of such a contract, and it is, therefore, my conclusion that Section 15-504 bars the Clerk from acting as a subcontractor in the construction of a public school.

SCHOOLS—Funds; borrowing operating funds from surplus building funds. F-203 (12)

July 10, 1953.

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

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

"Section 22-120 of the Code of Virginia provides in part: The school board of any county or the school board of any city which may find it necessary to make a temporary loan, is hereby authorized to borrow a sum, or sums, of money not to exceed in the aggregate one half of the amount produced by the county school levy laid in such county or city for the year in which such money is so borrowed, or one half of the amount of the cash appropriation made for schools in such county or city for the preceding year . . . No such loan shall be negotiated by a county or city school board without the approval of the tax levying body.

"The local school board did not ask the Board of Supervisors for a temporary loan but rather for the authority to transfer from the school building fund to the county school operating fund a sum sufficient to operate the schools until October 1, 1953, at which time the funds would be transferred back to the school building fund. No use is now being made of the school building fund and the funds therein remain idle.

"My question is does the Board of Supervisors have the authority under the section quoted above to empower the school board to make this transfer of funds temporarily? If the Supervisors have such authority the school board will be relieved of any interest obligations should the funds have to be borrowed from the local banks."

I assume for purposes of reply that the school building fund to which you refer does not constitute a sinking fund for the retirement of a bond issue, nor is the fund obligated for the payment of a school construction program now under way. In other words, I assume that the fund is just what you say it is, namely, a surplus building fund not at present committed. Under these assumptions it is my view that the School Board, with the approval of the Board of Supervisors, may borrow temporarily from this surplus building fund, under the authority of Section 22-120 of the Code, for the purpose of operating the schools until October 1, 1953. The loan should be made, however, in accordance with the terms set out in said section. I must add that I do not think the question is free from doubt, but, as a practical matter, it would seem foolish for the Board to have to pay a bank interest when it has to its credit a surplus uncommitted fund such as you describe, and I, therefore, conclude that Section 22-120 may be construed so as to authorize a temporary loan from the school building fund.

SCHOOLS—Present effect of Supreme Court decision on segregated system; none until decree entered. F-228 (299)

May 27, 1954.

HONORABLE BLAKE T. NEWTON, *President*,
State Board of Education.

The State Board of Education at its session on this date propounded the following inquiry upon which it has requested my opinion:

In view of the opinion handed down by the Supreme Court of the United States on May 17 in the case of *Dorothy E. Davis, et al., Appellants*, —v—

County School Board of Prince Edward County, Virginia, et al., what is the legal vitality and efficacy of section 140 of the Constitution of Virginia, and the statute enacted pursuant thereto, providing, in substance, that white and colored children shall not be taught in the same school?

I am sure the Board is familiar with the opinion of the Supreme Court in this case. In its opinion, the Court said:

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. * * *."

As an integral part of the Court's conclusion, the following language was employed:

"Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this term. * * *."

Question 4 referred to by the Court is as follows:

"Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?"

Question 5 is not deemed material in answering your inquiry.

While the basic issue before the Court has been determined, yet, the Court has ordered the case restored to the docket and has not entered, and will not enter, a final decree adjudicating the respective rights of the parties litigant until further hearings and proceedings are had and held.

Pending a final adjudication, it is my opinion that section 140 of the Constitution of Virginia, and the statute of Virginia enacted pursuant thereto, remain intact and unimpaired, imbued with full legal vitality and efficacy.

It is clearly manifest from the Court's opinion that it reserves judgment on the matter of final disposition of the cause before it until it could be further advised as to matters procedural relating to adjustment to the Court's opinion on the basic issue.

You have also requested my opinion, in the event I conclude that our constitutional and statutory provisions retain vitality, as to whether the State Board of Education would be within its legal rights to direct the Division Superintendents throughout the State to proceed with plans for the coming school year on the same basis as have heretofore obtained.

It is my opinion that the Board would have full legal authority to issue such directives, in view of the Court's retention of the question as to how and when the Court's opinion on the basic question is to be implemented.

SCHOOLS—Purchase of supplies; board may not purchase from supervisor. F-203 (77)

October 16, 1953.

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

This is in reply to your letter of October 15, in which you request my opinion concerning the construction of section 22-213, relating to the members of the School Board making sales to the Board; and section 15-504, relating to a member of the Board of Supervisors selling supplies to the School Board.

The two instances you relate concerning the purchase of supplies from a member of the school board, in my opinion, come within the last portion of section 22-213, which provides:

" * * * But the prohibitions of this section shall not apply to a merchant who, in the regular course of trade and without employing agents to solicit such business, sells either books selected and adopted by the State Board, or supplies used in the schools and by the pupils."

In an opinion rendered by the late Honorable Abram P. Staples, then Attorney General, to the Superintendent of Schools of Warren County on August 26, 1935, he said, in construing this same statute:

"I am of the opinion that certainly the spirit of this language is broad enough to cover the sale of gas and oil to the school buses, although such sales are not covered by the specific language of the section. * * *"

I concur in this opinion and feel that it is equally applicable to the purchase of gas and oil by school bus drivers, which purchases are paid for by the School Board, from a local merchant who is also a member of the School Board.

The exception in section 23-213 is also, in my opinion, broad enough to cover the second instance mentioned in your letter, wherein the School Board occasionally makes over the counter purchases of school supplies from a store in which one of the members of the School Board has a financial interest.

The third instance you refer to in your letter concerns the purchase of tires for school buses from a store which is partially owned by a member of the Board of Supervisors. The statute covering this situation is section 15-504 of the Code. This section, in part, provides:

"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."

Section 15-504 does not contain any exception pertaining to the sale of supplies by a merchant in the regular course of business such as that found in section 22-213. Section 22-213 deals specifically with what a "member of the State Board, division superintendent of schools, member of the school board or any other school officer, principal or teacher in a public school" may and may not do. Section 15-504 relates specially to what a "supervisor, superintendent of the poor,

special policeman, commissioner of the revenue, treasurer, attorney for the commonwealth, clerk of the court, trial justice, sheriff" may or may not do. Therefore, in determining the law as it relates to the third instance, we are bound by section 15-504.

A sale is in any and all legal definitions also a contract. Therefore, the sales of supplies to the school board is also a contract with the school board. A member of the board of supervisors may not be interested, either directly or indirectly, in any contract or in the profits of any contract with the school board because it is specifically prohibited by section 15-504.

The opinion of the Attorney General, then the late Honorable Abram P. Staples, of March 30, 1944, is not applicable to this instance for at the time that opinion was written the statute which we are applying did not prohibit a supervisor from contracting with the school board. This prohibition was added to the statute by the General Assembly in 1948.

SCHOOLS—Renting building when not used; board's liability for accidents; liability insurance. F-203 (208)

December 16, 1953.

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

This is in reply to your recent letter, which I quote below :

"The Alexandria School Board permits the use of school auditoriums and other school facilities by certain groups in the community. The School Board charges a fee which in reality is rental but which they consider to cover minimum expenses incurred as a result of the use of the building.

"The question has been raised as to whether or not the School Board would be liable in the case of accident suffered by individuals who might attend meetings or other gatherings in the school facilities under these circumstances. I would like to raise the following questions:

"1. Is the School Board liable either as a corporate body or as individuals under such circumstances?

"2. If the School Board should see fit to purchase insurance can they pay the premiums on such insurance from public funds?"

The School Board of any County is expressly authorized to permit the use of school property under its control upon such terms and conditions as it deems proper. See Sections 22-164.1 and 22-164.2 of the Code of 1950 as amended. Therefore, it would appear that the Alexandria School Board may permit the use of school property in Alexandria, charging a fee therefor to cover "minimum expenses incurred as a result of the use of the building." The School Board, therefore, in allowing the use of the school building is acting within the scope of its authority, and there can be no liability upon the Board in a tort action on account of the governmental immunity from such liability. Of course, if a case could be presented where there is shown some personal negligence of an individual member of the School Board, I am of opinion that such member would be liable. It is difficult to see, however, how such a case could be presented in permitting the use of a school building for a public meeting. It is a general principle that a governmental employee is always liable for his personal acts of negligence.

Replying to your second question, I will say that, although there is no liability on the School Board if, as a matter of policy and for the protection of the public generally, the Board should desire to carry liability insurance, I am of opinion that public funds may be used for paying the premium on such insurance. For your information, I enclose a copy of an opinion given to Honorable W. Carring-

ton Thompson, Commonwealth's Attorney for Pittsylvania County, under date of March 15, 1950, dealing generally with the liability of the School Board in a tort action and also dealing with the question of using public funds to secure liability insurance.

SCHOOLS—Restraining suspended pupil from continuing to attend.
F-203 (181)

February 17, 1954.

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

This is in reply to your letter of February 16, 1954, which I quote:

"I have a question arising under Sections 22-230 and 22-231 of the Code, concerning the suspension or expulsion of pupils from the public schools.

"The facts are as follows: the principal of a school has suspended a pupil, and reported the facts to the division superintendent and to the parent of the pupil involved. The School Board will be asked to act in the case to expel the pupil at its next regular meeting in March. However, the pupil continues to come to school, ignoring the suspension by the principal.

"Under these facts, what steps may be taken to enforce the suspension by the principal? Do you think it will be advisable to wait until the School Board officially enters its order of expulsion before taking steps to enforce the suspension? If, after the School Board expels the pupil, and she continues to come to school, what steps may be taken to enforce the expulsion order of the School Board?"

Inasmuch as the principal of a school has authority to suspend pupils from attending school until the case is decided by the school board, I see no necessity in delaying appropriate action to restrain the child who has been suspended from continuing in the school until the school board has taken action on the case.

This appears to be a case to be disposed of by appropriate court action. I suggest that you either proceed against the child in the Juvenile and Domestic Relations Court as a trespasser on school property or else proceed against the parent in a suit for injunctive relief to restrain such parent from continuing to send the child to the school premises.

SCHOOLS—Temporary loan; to purchase school buses permissible.
F-203 (302)

June 1, 1954.

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

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

"We have received a letter from Superintendent G. H. Givens of Russell County, in which he raises a question relative to the legality of certain proposed action of the Russell County School Board in light of the provisions of Section 22-120 of the Code of Virginia.

"The Russell County School Board proposes to make a temporary loan for one year to purchase buses now owned by private contractors and to

erect a county garage for the purpose of servicing and repairing school buses. The Board of Supervisors has questioned the legality of this procedure and has withheld its approval contingent upon an Attorney General's opinion.

"The question seems to be: Can the Russell County School Board legally make such a loan under the provisions of Section 22-120 for the purposes specified?"

Section 22-120 of the Code provides for temporary loans to county or city school boards, such loans to be negotiated only with the approval of the tax levying body, and such loans to be repaid within one year of their date. If the loan to which you refer meets these and the other conditions of the section, I am of the opinion that it may be made and the proceeds thereof used for the purposes indicated in the second paragraph of your letter. It is true that § 22-120 also authorizes loans "to purchase new school buses to replace obsolete or worn out equipment." These loans, the section provides, shall be repaid within not less than five years of their dates. However, the loan now proposed to be made by the Russell County School Board is not a loan to replace obsolete and worn out buses, but is a loan for another purpose and to be repaid within one year.

SEARCHES AND SEIZURES—Searching persons found on premises under search warrant. F-123 (322)

June 15, 1954.

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

This is in reply to your letter of June 2, 1954, which I quote:

"We have a situation in Wise County wherein Section 18-301 of the Code of Virginia is being flagrantly violated.

"A number of employees in gambling houses are selling ball tickets from their persons and when the officer goes into the establishment the sellers are signaled to hide the ball tickets on their persons. I have had search warrants for these persons issued on information received from reliable sources.

"Please advise me your opinion as to that procedure, or should a warrant of arrest be issued against the people whom we have probable cause to believe have the tickets on their persons for the purpose of conducting a lottery."

This office has previously expressed the view that the purpose of search warrants as provided in Chapter 3, Title 19, of the Code of Virginia, 1950, is for the discovery of property on described *premises* as an aid in the detection of crime. It was there stated that mere presence at the scene of the search does not of itself warrant the search of persons by virtue of search warrants. Opinions of Attorney General 1951-52, page 173. This does not mean, however, that it is unreasonable or unlawful to search the person of the proprietor and employees of a gambling house where there is reason to believe that the property which is the subject of the search is being concealed on the person of such individual. It would appear unreasonable to allow a search of the entire premises under a search warrant and yet prohibit a search of the persons believed to be concealing the subject matter of the search.

For the reasons stated I am of the opinion that the procedure which you are now employing would conform to the practice recognized in such cases if the search warrant which you have issued is directed to described premises rather than against specified individuals.

SECRETARY OF THE COMMONWEALTH—Foreign corporations; ceased doing business; service of process. F-68 (143)

January 6, 1954.

MISS MARTHA BELL CONWAY,
Secretary of the Commonwealth.

This is in reply to your letter of December 30, 1953 concerning the service of process upon foreign corporations which have withdrawn from the Commonwealth of Virginia. If a foreign corporation has surrendered its authority to do business as provided for in § 13-211 of the Code of Virginia, then it is my opinion that you should still accept service of process for them as provided for in § 13-217 of the Code.

As to your next question concerning the disposition to make of the folders of the corporations which have ceased to do business in Virginia, I feel that this is a policy matter to be determined by your office. In the event that you decide to destroy them, I would like to call to your attention § 42-59 of the Code which requires that the State Librarian and Comptroller be notified before any agency of the State destroys any of its records.

I feel that it is a good policy for your office to send out notices of service of process under § 13-216 by registered mail.

SHERIFFS—Allowable expenses; telephone is, State to pay two-thirds, county one-third. F-136 (234)

April 12, 1954.

HONORABLE R. PAGE MORTON,
Commonwealth's Attorney for Charlotte County.

Receipt is acknowledged of your letter dated April 7, 1954, in which you request my opinion on the following:

"We have a Sheriff and two deputy sheriffs in Charlotte County. The Sheriff lives at Keysville, about ten miles from the county seat, one deputy sheriff lives at Charlotte Court House and the other deputy sheriff lives at the jail, located at Charlotte Court House. The State Compensation Board and the Board of Supervisors have been paying for a telephone at the jail, another telephone at the home of the Sheriff and another at the home of the deputy sheriff, located here. There is no telephone in the office of the Sheriff, and is rarely used by him except for storing contraband and finger printing prisoners.

"Recently the State Compensation Board has refused to pay for their share of the costs of the telephone at the home of the Sheriff in Keysville, and at the home of the deputy sheriff here. They still agree to pay their share of the long distance calls from these two telephones on official business, but refuse to pay their share of the monthly rental bill.

"The Board of Supervisors consider that it is necessary for these two officers to have telephones in their homes, and this is particularly true since we do not have enough officers to remain in the Sheriff's office and there is no telephone there. The Board of Supervisors want to know whether they can legally pay the entire monthly rental on these two telephones from county funds."

You will observe from reference to Section 14-81 of the Code of Virginia that a telephone is included as a part of the expenses of the sheriff and his full-time deputies.

The provisions of Section 14-91 of the Code are as follows:

"The Commonwealth shall pay two-thirds of the salaries and expense allowances of such sheriffs and sergeants and their full-time deputies, and of the compensation and expense allowances of their part-time deputies, fixed as hereinbefore provided. The other one-third of the salaries and expense allowances of such sheriffs and sergeants and full-time deputies, and of the compensation and expense allowances of their part-time deputies, shall be paid by the respective counties or cities for which they are elected or appointed. Such salaries shall be paid in equal monthly instalments and the expense allowances shall be paid monthly when the amount thereof is established as hereinabove provided."

Your attention is also directed to Section 14-63 of the Code which provides that all salaries, expenses and allowances shall be fixed by the Compensation Board, and Section 14-65 of the Code provides for an appeal by the officer or the county or city affected thereby.

In view of the foregoing, I am of the opinion that the Board of Supervisors cannot legally fix an additional expense for the sheriff and his full-time deputies without the concurrence of the Compensation Board, and, in the event such concurrence is obtained, then the Board of Supervisors could pay only one-third of the expense so allowed.

SHERIFFS—City Sergeant; authority in second class city. F-136 (138)

December 30, 1953.

HONORABLE H. E. HALSTEAD,
City Sergeant, Virginia Beach.

This is in reply to your letter of October 3, 1953, and with further reference to your letter of December 2, 1953, the former of which I quote:

"By the charter of the City of Virginia Beach, which was passed by the Legislature of Virginia in 1952, it provided for the office of City Sergeant, to which office I was duly appointed and have qualified.

"The question has arisen as to my authority and the authority of the Sheriff of Princess Anne County. I would thank you to inform me just what my duties are and just what the duties are of the Sheriff of Princess Anne County in the City of Virginia Beach. I would appreciate it, if you would advise me as to my authority in criminal matters and in civil matters."

The statutory provisions governing the transition of towns into cities of the second class are embodied in Chapter 6, Title 15, of the Code of Virginia, 1950. Section 15-89 provides:

"The sergeant of the town, if there be one, shall be and continue the sergeant of the city and discharge all the duties imposed on him by the charter or by the general law. The duties and compensation of the sergeant shall be such as are provided by law for the sergeants of towns. He shall serve until his successor is elected and qualified."

The authority and duties of the sergeant are prescribed in section 15-389 of the Code as follows:

"In every city and town, unless otherwise provided by its charter, there shall be elected by the qualified voters thereof a sergeant. The term of office of a city sergeant shall be four years and of a town sergeant two years and their duties shall be as prescribed by law. Sergeants of towns shall have the same powers and discharge the same duties as sheriffs within the corporate limits of the towns and to a distance of one mile beyond the same."

Although Virginia Beach is now a city of the second class, the authority of the sheriff of Princess Anne County within Virginia Beach is the same as that which he exercised in the town of Virginia Beach due to the provisions of section 15-94, which provides:

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

You are referred to the recent decision, rendered at the November, 1953 term, by the Supreme Court of Appeals of Virginia, in the case of *Commonwealth v. C. Roger Malbon*, in which the above statute was applied.

In view of the foregoing I am of the opinion that the City Sergeant of Virginia Beach and the Sheriff of Princess Anne County have concurrent jurisdiction within the city of Virginia Beach. As a practical matter it appears that no difficulty should arise as to the authority of your office and that of the sheriff, for your letter of December 2, 1953 indicates that an agreement has been reached between the two offices as to the exercise of jurisdiction within the city.

SHERIFFS—City Sergeants; service of civil process; have concurrent jurisdiction in towns. F-136 (286)

May 24, 1954.

HONORABLE H. B. McLEMORE, JR., *Clerk*,
Circuit Court of Southampton County.

This is in reply to your letter of May 20, 1954 in which you ask to be advised as to the following:

"We have had several requests recently to issue executions on judgments docketed in the Clerk's Office and direct them to Sergeants of the various towns in the County. It has always been our custom to direct them to the Sheriff of the County and not to the Sergeants of towns, although I can find nothing in the Code which prohibits me from doing so."

Section 15-389 of the Code of Virginia, 1950, provides as follows:

"In every city and town unless otherwise provided by its charter, there shall be elected by the qualified voters thereof a sergeant. The term of office of a city sergeant shall be four years and of a town ser-

geant two years and their duties shall be as prescribed by law. Sergeants of towns shall have the same powers and discharge the same duties as sheriffs within the corporate limits of the towns and to a distance of one mile beyond the same."

In view of the foregoing I am of the opinion that sergeants of towns have the same authority as the sheriff of the county within the corporate limits of the town.

SHERIFFS—Cost of administering estate; should be recovered from estate when possible. F-136 (53)

September 10, 1953.

HONORABLE L. MCCARTHY DOWNS, *Chairman*,
Compensation Board, Richmond.

This is in reply to your letter of August 31, 1953 in which you ask the opinion of this office with reference to the compensability for expenses incurred by Sheriff W. C. Bickers as set forth in the letter of August 27, 1953 from the Honorable Harold H. Purcell, a portion of which is quoted:

"At the request of Sheriff W. C. Bickers I am writing this letter. In the opinions of the Attorney General of Virginia and Report to the Governor of Virginia dated July 1st 1950 to June 30th 1951 on page 130 the Attorney General advised that the Compensation Board is supposed to pay the expenses of an administrator appointed under Sec. 64-124 of the Code of Virginia.

"Sheriff W. C. Bickers qualified as Administrator of the Estate of Thelma Margaret Apperson and as Admr of Carl Peyton Nicholson on the 3rd day of April 1952 under the above mentioned section of the Code. He received on each estate \$85.00 commission which he has forwarded to the State Treasurer. He has expenses on each qualification as follows:

"To Commr. of Accounts.....	\$10.00
"To L. A. Keller, Jr., Clk.....	2.00
"Harold H. Purcell, Atty.....	10.00
	<hr/>
	\$22.00"

It would appear from the foregoing that the items listed are in the nature of costs of administering the estates. Costs of administration as well as commissions are charged against the estate and should be deducted by the administrator prior to distribution or payment of debts.

This office has previously expressed the view that the expenses incurred by the sheriff by virtue of his appointment under section 64-124 may be treated as necessary expenses incurred in the performance of his duties and, accordingly, the Compensation Board would have the authority to make an allowance for such expenses if so requested. This is not to say, however, that the Compensation Board may pay the cost of administering the estate when such costs could rightly be collected from the estate of the decedent. In those instances where the cost of administration may exceed the value of the estate the sheriff should not be made to suffer for exercising a duty imposed on him by statute. In such event the Compensation Board would be justified for reimbursing the sheriff for the expense incurred by him in the exercise of his duty.

SHERIFFS—Execution and levy; procedure. F-136 (205)

March 10, 1954.

MR. JAMES T. CLARK, *Sheriff*,
Princess Edward County.

Receipt is acknowledged of your letter dated March 9, 1954, in which you inquire as follows:

"Please tell me what the proper procedure is in handling an Execution on a Judgment. Does the Plaintiff in the suit have to advance the \$1.50 levy fee or 50 cents for returning the Execution 'No Effects' before the levy or 'No Effects' return is made? Is the Execution of any value when the levy fee has not been advanced by the Plaintiff? What action can be brought against the Sheriff or Sergeant if no levy is made, when personal property is owned by defendant and not exempt under the Poor Debtors Law, and the Plaintiff has not advanced the levy fee? If your opinion is that the Plaintiff must advance the levy fee or 'No Effects' fee and request that a levy be made, what is the proper procedure at the end of the life of the Execution when the fee has not been advanced and the request to levy has not been made by the plaintiff. Is it permissible under the law for the Trial Justice or Clerk of the Circuit Court to collect the levy fee or fee for making the Execution 'No Effects' when the Civil Warrant is issued by the Trial Justice or the Fi Fa is issued by the Clerk of the Circuit Court? Of course, I want you to give your opinion on a Fi Fa on all the questions I asked as well as on Executions."

My predecessor in office, the late Honorable Abram P. Staples, had occasion to express opinions on inquiries similar to yours on October 7, 1943, to Mr. H. E. Valentine, Sheriff of Brunswick County, Virginia, and on June 22, 1944, to Mr. B. H. Wayland, Sheriff of Culpeper County, Virginia. I concur in these opinions and enclose copies thereof for your information.

The enclosed opinions seem to fully answer your inquiry except the one concerning what action could be brought against a sheriff or sergeant if no levy is made when personal property is owned by defendant and not exempt under the "poor debtor's exemption" and the plaintiff has not advanced the levy fee.

Since the holding of the enclosed opinions is that the sheriff may not require the judgment creditor to pay his fee in advance, I am of the opinion that if the judgment creditor sustains a loss as a result of the failure of such officer to make a levy, an appropriate action could be maintained against him and his surety to recover such loss.

I am further of the opinion that a judgment creditor under such circumstances may maintain a mandamus proceeding against the sheriff to compel such officer to execute the levy.

You will see from the enclosed opinions that they are applicable to levies and to executions issued by the court directed to a sheriff or sergeant.

**SHERIFFS—Police officers; *capias pro fine*; searches under; receiving fine.
F-136 (187)**

February 24, 1954.

MR. ROBERT L. DELLAVEN,
Sheriff of Frederick County.

Receipt is acknowledged of your letter dated February 19, 1954, in which you asked my opinion on the following:

"1. Does an officer have a right to search a dwelling, defendants or other persons, on a *capias pro fine*, if the officer has reason to believe the defendant is in said dwelling?

"2. In the event the defendant is arrested on a *capias pro fine* and has the money to pay, is the arresting officer obligated to receive the money there and then, or should the defendant be taken before a person who is authorized to take bond in criminal cases?"

The law applicable to searching a dwelling house when executing a criminal process is stated in 6 C. J. S., Section 14, page 615, as follows:

"The doctrine that a man's house is his castle has no application to criminal process, and, under the familiar rule that no man can have a castle against the king, a person who is armed with a warrant of arrest is entitled, after due demand, to break the outer or inner door of the dwelling house of the person sought, in order to arrest him for either felony or misdemeanor, at least where it amounts to a breach of the peace. * * *

While a *capias pro fine* may be said to be a criminal process, the purpose of the writ is to enforce a judgment of the Commonwealth against the defendant for fine and cost. Notwithstanding the foregoing provisions of law, I have grave doubt if the courts of Virginia would give their approval to an officer searching a dwelling, defendant or other persons, when he is armed only with a writ of *capias pro fine*. I am of the opinion that the courts would not approve of this practice except perhaps under very unusual circumstances.

In reference to your second inquiry, you are advised that I am not informed of any statute in Virginia which obligates an officer executing a *capias pro fine* to receive the fine and cost. Your attention is called to Section 19-325 of the Code of Virginia, which reads as follows:

"A constable or sheriff shall in no case receive any fine or costs imposed by a trial justice, except under process duly issued, but the same may be paid to the justice before he commits the defendant to jail in default of such payment."

In view of the foregoing, I am of the opinion that an officer executing a writ of *capias pro fine* is not obligated to accept money from defendant prior to taking him before a person authorized to take bond in criminal cases.

SHERIFFS—Rewards; may not receive for acts performed in course of duty. F-136 (62)

September 24, 1953.

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

I am in receipt of your letter of September 21, in which you present the following question:

"The Sheriff of Clarke County has been successful in arresting a number of thieves who have been stealing gasoline from time to time from a local industrialist. A reward had been offered by the industrialist and a check has been handed to the Sheriff of Clarke County who handled the case and he wishes to know whether or not he may legally accept it."

The right of the Sheriff to accept this reward depends upon whether or not his actions in apprehending the criminals consisted of the performance of the official duties imposed upon him by virtue of his office. This office has heretofore expressed the opinion that it is well established generally, and in this State, upon consideration of public policy, that an officer cannot lawfully receive or recover a reward for the performance of a service which it is his duty to discharge. See *Buck v. Nance*, 112 Va. 28. You do not state the precise circumstances under which these criminals were apprehended and so I am reluctant to answer your inquiry categorically. However, since the Sheriff made the arrests on account of crimes committed in his County, unless the facts in connection therewith are quite unusual, I should think that the officer was discharging one of the duties of his office.

SOIL CONSERVATION—Definition of land occupier; for purpose of participating in election. F-172 (236)

April 12, 1954.

HONORABLE JOHN H. DANIEL,
Member House of Delegates, Charlotte C. H.

This is with reference to a conference held in this office relative to the authority of the district supervisors under Article 6, Chapter 1 of Title 21, known as the Soil Conservation Districts Law.

Your specific inquiry was whether such supervisors may define "land occupier" as one who has custody over three acres or more of land, in order to determine the eligible voters for referendums to be held pursuant to section 21-68 of the Code of Virginia.

Section 21-73 of the Code specifies that all occupiers of lands within the district shall be eligible to vote in such referendums, and only such land occupiers shall be eligible to vote.

Section 21-3(6) of the Code of Virginia, 1950, as amended, defines "occupier of land" as any person, firm or corporation who shall hold title to, or shall be in possession of, any lands lying within a district organized, or proposed to be organized, in the capacity of owner, lessee, renter, tenant, or cropper.

In view of the fact that the General Assembly has undertaken to define the meaning of land occupiers I am of the opinion that the supervisors of a district have no authority to change this definition so as to place a greater restriction on those eligible to vote than has already been imposed by the legislative body.

STATE EMPLOYEES—Compensation; when on jury duty. F-166 (20)

July 21, 1953.

HONORABLE W. M. WHITEHEAD, *Superintendent*,
Virginia State School, Hampton.

This is in reply to your letter of July 17, 1953, from which I quote:

"Some question has arisen regarding a part-time employee at this institution who has been called away from his regular duties to serve on Jury duty in excess of a month, based of course, on the part-time basis during the year 1952-1953. I know that he has to serve on Jury duty when called. The question that I am raising is does he not have to make up his hours with us or are we required by law to pay him while not working, and employ some one else to do his work as an accountant?

Whether or not an employee of the State is entitled to regular compensation while serving on jury duty depends upon the nature of his employment. One employed on a monthly or yearly basis is entitled to regular compensation, less compensation paid while on jury duty, and is charged against such employee's civil leave. However, an hourly employee is compensated only for the time actually put in, and thus would not be entitled to compensation while serving on jury duty.

The foregoing is based upon the established policy of the State Personnel Division.

STATE SEAL—Use of; may not be used for newspaper masthead. F-4 (85)

November 2, 1953.

MISS MARTHA BELL CONWAY,
Secretary of the Commonwealth.

This is in reply to your letter of October 29, 1953 in which you inquire as to the legality of the use of the State Seal for the mast-head for the Alexandria Gazette.

Section 18-355 of the Code of Virginia provides as follows:

"No person shall, in any manner, for exhibition or display:

"(1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this State, or authorized by any law of the United States or of this State;

"(2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed, any such word, figure, mark, picture, design, drawing or advertisement; or

"(3) Expose to public view for sale, manufacture or otherwise, or sell, give or have in possession for sale, for gift or for use for any purpose, any substance, being an article of merchandise, or receptacle, or thing for holding or carrying merchandise, upon or to which shall have been produced or attached any such flag, standard, color, ensign or shield, in order to advertise, call attention to, decorate, mark or distinguish such article or substance."

This office has previously expressed an opinion that the foregoing section

is applicable to the Seal of Virginia and copies thereof, as well as the complete State Flag.

Generally speaking, a newspaper is considered an article of merchandise, being a commodity of trade which is sold on the market for a profit. Therefore, to use a reproduction of the State Seal on the mast-head of a newspaper would be in violation of section 18-355(3).

STATE SEAL—Use of on monument of former State official. F-4 (167)

February 2, 1954.

MISS MARTHA BELL CONWAY,
Secretary of the Commonwealth.

This is in reply to your letter of February 1, 1954 in which you inquire as to whether the Virginia State Seal may be reproduced on the face of a monument to be erected in memory of a distinguished former State official.

This office has formerly expressed the opinion that the Uniform Flag Act applies to the Seal of Virginia or copies thereof as well as the complete State Flag. Section 18-355 of the Code of Virginia provides, in part, as follows:

"No person shall, in any manner, for exhibition or display:

"(1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this State, or authorized by any law of the United States or of this State;

"(2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed, any such word, figure, mark, picture, design, drawing or advertisement."

Provided there are no markings annexed to or imposed upon the Seal and no alterations or distortions are made thereto, I am of the opinion that the proposed use of the reproduction of the State Seal is not in violation of the Uniform Flag Act.

STATUTE OF LIMITATIONS—Does not run against Commonwealth; execution of judgment. F-72 (106)

November 27, 1953.

HONORABLE G. H. PARKER, JR.,
Commonwealth's Attorney for Southampton County.

This is in reply to your letter of November 24, 1953, which I quote:

"A judgment was obtained in favor of the Commonwealth of Virginia against Arthur Spensky in 1930 in the Circuit Court of Southampton County. No execution has ever been issued. This man is a resident of Norfolk County and owns property there. I would like to record this judgment in Norfolk County and proceed to collect under execution and levy or sale of defendant's property. Can you tell me whether the judgment, being a Commonwealth judgment, is still of full force and effect? It has always been my understanding that Commonwealth judgments did not go out of date."

Section 8-35 of the Code of Virginia provides as follows:

"No statute of limitations which shall not in express terms apply to the Commonwealth shall be deemed a bar to any proceeding by or on behalf of the same. This section shall not, however, apply to agencies of the State incorporated for charitable or educational purposes."

In a prior opinion this office has pointed out that no action may be maintained by the Commonwealth for the recovery of fines and costs after a twenty year period due to the express language of section 19-299 of the Code.

Section 8-393, 8-396 and 8-397 of the Code are pertinent to the limitation on actions to collect on a judgment. Those sections, in so far as germane, provide as follows:

"Sec. 8-393.—No suit shall be brought to enforce the lien of any judgment heretofore or hereafter rendered upon which the right to issue an execution, or bring a scire facias, or an action, is barred by sections 8-396 and 8-397, nor shall any suit be brought to enforce the lien of any judgment, heretofore or hereafter rendered, against lands which have been conveyed by the judgment debtor to a grantee for value, unless the same be brought within ten years from the due recordation of the deed from such judgment debtor to such grantee. This section so far as it affects such grantees for value or those claiming under them, shall apply as well to judgments in favor of the Commonwealth as to other judgments."

"Section 8-396.—On a judgment, execution may be issued and a scire facias or an action may be brought within twenty years after the date of the judgment, except that when the scire facias or action is against a personal representative of a decedent it must be brought within five years from the date of his qualification."

"All of the provisions of this section apply mutatis mutandis to any judgment obtained upon such scire facias or action as well as to an original judgment except that there may be only one revival or extension as to a personal representative. And the rights of a judgment creditor as to a purchaser for value who records his deed shall be governed by the provisions of section 8-393. * * *"

"Section 8-397.—No execution shall issue, nor any scire facias or action be brought, on a judgment in this State, other than for the Commonwealth, after the time prescribed by the preceding section, except that: * * *"

From the foregoing quoted sections it may be seen that there are no express terms which apply to the Commonwealth as a bar to actions for the recovery of a judgment. To the contrary, it appears that there is no time limitation against the Commonwealth due to the express terms of sections 8-397 which makes the Commonwealth an exception to the general rule.

In view of the foregoing I am of the opinion that the Commonwealth is not precluded from pursuing to execution a judgment obtained in 1930 against a surety on a forfeited bond.

SUPPORT ACT—Illegitimate child; father can be compelled to support; mother married to someone else. F-383 (258)

May 3, 1954.

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

This is in reply to your letter of April 27, 1954 in which you request my opinion on the following problem:

"If a married woman becomes the mother of a child by a man other than her husband, can the father of the child be compelled to support it? In addition to the above facts I might state that if the mother of the child and the husband are actually living together but the baby is admittedly the child of another man, can this other man be compelled to support the child where he, the other man, admits he is the father of the child?"

Section 20-61.1 of the Code of Virginia is the pertinent section of the Code in answering your questions. This section provides 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."

A child born to a married woman during wedlock is presumed to be legitimate and the woman's husband is presumed to be the child's father; however, this is a rebuttable presumption. If the other man admits that he is the child's father, there certainly is, in my opinion, evidence to overcome the presumption of legitimacy.

It is my opinion that in § 20-61.1 the phrase "parents of a child are not married" means the parents are not married to each other. Therefore, it is my conclusion that the other man may be compelled to support the child if he admits before the court that he is the father of the child.

SURPLUS PROPERTY—Disposal of by State; permanent fixture. F-211 (145)

January 11, 1954.

MISS MARTHA BELL CONWAY,
Secretary of the Commonwealth.

This is in reply to your letter of January 5, 1954 in which you ask to be advised as to the procedure in purchasing a fog bell which is located in a State owned light house on the James River, which I understand is no longer being utilized by the State.

Assuming this bell to be of such a nature so as to be removable from the light house without damage, it could be disposed of as surplus property through the Comptroller pursuant to section 2-265 of the Code of Virginia, 1950. However, if the bell in question is so affixed to the light house so as to constitute a permanent fixture, it cannot be disposed of in any other manner than that required in cases of realty.

TAXATION—Assessment when fraudulently not reported; six year statute of limitation. F-274 (314)

June 9, 1954.

HONORABLE CURRY CARTER,
Member of State Senate.

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

"The question has arisen as to what limitation there is, if any, on the collection of Virginia State income taxes which have been avoided by fraudulent income tax returns.

"I should appreciate very much an opinion from you as to when the collection of delinquent taxes, the payment of which has been fraudulently avoided by making untrue returns of income by the taxpayer."

From the tenor of your letter I assume that you refer to the assessment of State income taxes as distinguished from the collection of such taxes which have previously been assessed. The answer to your question may be found in Section 58-1161 of the Code, which reads as follows:

"If any person, firm or corporation shall hereafter fraudulently, or with a view to evade the payment of proper taxes, fail or refuse to secure a proper license, whenever a license is required by law, or to make out and deliver to the proper assessing authority a list of his, their or its intangible personal property, or income, or with like intent list the same at less than its true value, then such property or income when discovered, or such license when the liability therefor is ascertained, shall be listed and assessed for taxation for the proper amount for each and every year of the six tax years last past when it was not so assessed, with additional penalty of one hundred per centum of such unpaid taxes, and the failure to secure such license or to make out a return of income or any class of intangible personal property, as required by law, or the listing of such intangible personal property or income at fifty per centum or less of its actual value, shall be taken as prima facie evidence of intention so to evade the taxes."

From the above quoted section you will note that where the assessment of State income taxes has been avoided by fraudulent failure to file a proper return the Department of Taxation may assess the proper taxes for a period of six tax years.

TAXATION—Constitutionality of license fees and taxes on motor vehicles. F-149 (305)

June 1, 1954.

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

This is in reply to your letter of May 21, 1954 in which you request my opinion as to the constitutionality of the amendatory language of § 46-64 of the Code of Virginia pertaining to license fees and taxes upon automobiles. Specifically, you have raised the question of whether the section of the Code, as amended, violates the provision of § 168 of the Constitution of Virginia which provides that "all taxes * * * shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, * * *."

After carefully considering your inquiry and the cases which have been decided by the Supreme Court of Appeals of Virginia dealing with § 168 of the Constitution, I am compelled to the view expressed by the Court in *Commonwealth v. Whiting Oil Company*, 167 Va. page 73, *Hunton v. Commonwealth*, 166 Va. 229, *Commonwealth v. Bibee Grocery Company*, 153 Va. 935 and *Bradley & Company v. Richmond*, 110 Va. 521 that the provisions of § 168 requiring the equality and uniformity of taxation apply only to a direct tax on property and not to license taxes. In view of these decisions, it is my opinion that § 46-64 of the Code, as amended, is not in contravention of § 168 of the Constitution.

TAXATION—Distraining property for; procedure to be followed by Treasurer. F-262 (307)

June 4, 1954.

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

This is in reply to your letter of May 27, 1954 in which you request my opinion on the following question:

"My question is: How is the Treasurer to proceed under Section 58-965 and 58-1001 relating to the collection of taxes by distress? Is the property so distrained to be sold on the premises or shall it be removed and advertised for sale? If the latter method is proper, how is the Treasurer to effect this removal without police powers; * * * ?"

Section 58-965 of the Code of Virginia provides that the treasurer shall proceed to collect delinquent taxes by distress or otherwise. Section 58-1001 gives treasurers, sheriffs, sergeants, constables and collectors of taxes authority to distraint any goods or chattels in the city or county belonging to a person assessed with taxes.

The procedure as outlined in the Code for collection of delinquent personal property taxes by the treasurer by distress permits the treasurer to distraint property for taxes without a warrant. The treasurer may, in my opinion, take the action on the tax bill itself, with the tax bill in his hand at the time he makes the distress.

Section 8-422.1 of the Code provides the prescribed procedure to be followed by the treasurer in selling the property to satisfy the delinquent taxes.

It is my opinion that the treasurer has been given the authority to remove the property from the premise by § 58-1001 of the Code. To make effective the power to distraint property there must also be the power to remove the property from the premises.

Article 9 of Chapter 20 of Title 58 of the Code of Virginia gives the treasurer authority to also institute a civil suit for the collection of any state, county or municipal taxes.

TAXATION—Exempt from; churches; property used to house persons attending Bible conference. F-260 (161)

January 26, 1954.

HONORABLE LOWELL A. MILLER,
Commissioner of the Revenue, Rockingham County.

This is in reply to your letter of January 20, 1954 in which you request my opinion as to whether certain property owned by the Massanetta Bible Conference is exempt from real estate taxes or not. You state in your letter:

"1. Massanetta Bible Conference operated by the Presbyterian Church owns and operates a summer camp located several miles east of Harrisonburg. The Conference has leased numerous lots on this property to individuals and churches for a sum of \$50.00 for a fifteen or twenty year period. The people or churches holding these leases have constructed cottages on these lots to accommodate those attending the Conference and some of the cottages are rented for a substantial fee each summer. It is my understanding that these leases may be renewed at the termination of the old lease if the people or churches so desire.

"2. The Conference owns and operates a fair sized hotel, swimming pool, etc. on this property for the accommodation of those attending the Conference for which regular charges are made.

"Your opinion on whether these properties are exempt or subject to the real estate tax as imposed by Rockingham County will be greatly appreciated."

Section 183 of the Constitution of Virginia provides in part:

"Unless otherwise provided in this Constitution, the following property and no other shall be exempt from taxation, State and local, including inheritance taxes:

* * * * *

"(b) Buildings with land they actually occupy, and the furniture and furnishings therein and endowment funds lawfully owned and held by churches or religious bodies, and wholly and exclusively used for religious worship, or for the residence of the minister of any such church or religious body, together with the additional adjacent land reasonably necessary for the convenient use of any such building.

* * * * *

"(e) Real estate belonging to, actually and exclusively occupied and used by, and personal property, including endowment funds, belonging to Young Men's Christian Associations, and other similar religious associations, orphan or other asylums, reformatories, hospitals and nunneries, conducted not for profit, but exclusively as charities, also parks or playgrounds held by trustees for the perpetual use of the general public.

* * * * *

"Whenever any building or land, or part thereof, mentioned in this section, and not belonging to the State, shall be leased or shall otherwise be a source of revenue or profit, all of the buildings and land shall be liable to taxation as other land and buildings in the same county, city or town. But the General Assembly may provide for the partial taxation of property not exclusively used for the purposes herein named."

The Supreme Court of Appeals in construing this section of the Constitution has held that if the use made of rooms in a building owned and operated by an organization coming under this section has direct reference to the purpose for which the organization was formed and tends immediately and directly to promote those purposes, then its use is within the provisions of the Constitution exempting

the property from taxation, although revenue or profit is derived therefrom as incident to such use. *Commonwealth of Virginia v. Lynchburg Y. M. C. A.*, 115 Va. 745.

I feel that this opinion of the Supreme Court is applicable to the situation which you state in your letter. This Bible Conference is operated by the Presbyterian Church for religious educational purposes. In operating the Conference the Church provides lodging for persons who attend the Conference and receives some revenue from this, which revenue is used to help defray the cost of operating the Conference. I feel that the property which has been leased to churches under long-term leases for this purpose is also exempt for the same reason. The fact that the churches receive some revenue from these cottages, which revenue is used to help offset the cost of building and maintaining the cottages as places of lodging for persons attending the Bible Conference or other religious activities, does not, in my opinion, make the property subject to taxation.

**TAXATION—Exempt from; churches; recordation taxes and writ taxes.
F-260 (86)**

November 4, 1953.

HONORABLE ROBERT H. OLDHAM, *Clerk*,
Circuit Court for Accomack County.

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

"Several times recently we have had Deeds of Trust to record whereby Church trustees have borrowed money and we have charged the regular tax of 15 cents per hundred. After thinking this over, we are of the opinion that such deeds, relative to trustees of a Church, are exempt from taxes. Are we correct in assuming this?

"As to Section 68-71, whereby trustees of a Church bring suit to borrow money on church property, we have always charged the writ tax of \$1.50 as in any chancery suit. The Constitution of Virginia, Section 183, exempts all religious organizations from taxation. Therefore, we are wondering if we have been wrong all these years in making such religious organizations pay the writ tax."

In response to your first question, Section 58-64 of the Code, as amended, expressly exempts from the recordation tax a "deed of trust or mortgage given by the trustee or trustees of a church or religious body." In view of this exemption, your first question must be answered in the affirmative.

As to your second question, a writ tax on chancery suits of \$1.50 is imposed by Section 58-72 of the Code. There is no exemption from the writ tax given to a suit brought by the trustees of a church, and I am of opinion, therefore, that such a suit is subject to the tax. It is true that Section 183 of the Constitution exempts certain property of churches from taxation, but a writ tax is not a tax upon property and, therefore, does not come within the exemption.

**TAXATION—Exempt from; Coast Guard is branch of armed forces.
F-356a (115)**

December 11, 1953.

HONORABLE W. R. MOORE,
Commissioner of the Revenue, Norfolk.

This is in reply to your letter of December 9, 1953, which I quote:

"Under the armed service act, members of the armed forces are protected against local taxes at a point of military service other than their legal residence. It is the writer's information that the Coast Guard has been reverted back to the Treasury Department. This being so, is it your opinion that they are still protected by the armed service act?"

"The writer feels that they have been taken from under the Navy's wing and are not afforded any further protection under the armed service act."

Title 14, USCA, Section 1 provides as follows:

"The Coast Guard as established January 28, 1915, shall be a military service and a branch of the armed forces of the United States at all times. The Coast Guard shall be a service in the Treasury Department, except when operating as a service in the Navy. Aug. 4, 1949, c. 393, § 1, 63 Stat. 496."

Inasmuch as the foregoing section establishes the Coast Guard as a branch of the armed forces of the United States at all times, I am of the opinion that the "armed service act" is applicable to such branch, whether it be operating as a service in the Navy or a service in the Treasury Department.

**TAXATION—Exempt from; homes of disabled veterans may not be.
F-273 (101)**

November 25, 1953.

HONORABLE JULIAN H. RUTHERFOORD, JR., *Chairman*,
Commission on Veterans' Affairs.

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

"The National Paralyzed Veterans of America has made the following recommendation to the Commission on Veterans' Affairs:

"Under Public Law 702 of Congress, the Federal government grants 50% of the cost, up to a certain maximum, of a specially designed house for totally disabled veterans (which includes the blind, the totally paralyzed, double amputees, etc.) These veterans require specially designed houses on account of their condition and pay the other 50% of the cost. They propose that the Commission recommend legislation whereby such houses would be exempted from the payment of local real estate taxes."

"Some question has arisen as to the constitutionality of this proposal. I, as Chairman, therefore respectfully request your opinion on the following:

"(1) Would such exemption as proposed by the National Paralyzed Veterans of America be constitutional?"

"(2) If your answer to (1) is affirmative, would it be constitutional

to permit the county or city to decide whether such an exemption would be applied in that county or city?"

I assume that the title deed to each of these houses will be held by the Veteran.

Section 183 of our Constitution provides in part that: "Unless otherwise provided in this Constitution, the following property and no other shall be exempt from taxation, State and local, including inheritance taxes: * * * ." Then follow various subsections listing the classes of property that are exempt from taxation. The same section also contains a provision to the effect that "Except as to Class (a) above, general laws may be enacted restricting but not extending the above exemptions." Class (a) refers to property owned directly or indirectly by the Commonwealth or any political subdivision thereof. In prescribing the classes of property exempt from taxation no one of these classes could by any reasonable rule of construction be said to include real estate of the Veterans you describe.

In view of the provisions of Section 183 of the Constitution, I am of the opinion that the General Assembly has no power to exempt or authorize the locality to exempt this property from taxation. It is unnecessary for me to say that I would be pleased if I could answer your questions in the affirmative, but I cannot give an opinion which would be clearly contrary to the constitutional provision.

TAXATION—Exempt from; merchants' capital in town may not be exempt from county levy. F-65 (289)

May 25, 1954.

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

This is in reply to your letter of May 20, 1954 in which you ask to be advised whether the Board of Supervisors for the County of Rockbridge may exempt from a county wide levy on merchants' capital the merchants within the town of Lexington, the desire to so do being due to the fact that the town merchants have already paid a license tax based on gross receipts imposed by the town for the privilege of doing business.

The proposed tax levy is a property tax having no relation to a license required for the privilege of doing business and comes within the purview of section 168 of the Constitution, which provides as follows:

"All property, except as hereinafter provided, shall be taxed; all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general law. The general assembly may define and classify taxable subjects, and, except as to classes of property herein expressly segregated for either State or local taxation, the general assembly may segregate the several classes of property so as to specify and determine upon what subjects State taxes, and upon what subjects local taxes may be levied."

In view of the foregoing I am of the opinion that the Board of Supervisors may not exempt merchants of the town of Lexington from a general county tax levy.

TAXATION—Exempt from; property owned by town. F-273 (78)

October 22, 1953.

HONORABLE W. A. WOOD,
Commissioner of the Revenue, Buckingham.

I am in receipt of your letter of October 20, in which you present the following question:

"Among our 1953 land transfers was one for $36\frac{1}{2}$ acres to the Town of Scottsville. As Scottsville is across James River and not in Buckingham County we carried 1953 tax on the $36\frac{1}{2}$ acres.

"The County Treasurer is in receipt of letter from the Treasurer of the Town of Scottsville who writes that property belonging to a town is exempt from taxation. Mrs. Beale does not state that the $36\frac{1}{2}$ acres has been incorporated into the town of Scottsville.

"Will you please advise me as to whether we should make Memorandum of Corrected Assessment for 1953 tax on the above named property."

Property owned by a political subdivision of the State is by Section 183 of the Constitution exempt from taxation unless such property is leased or is otherwise a source of revenue or profit. See Section 58-14 of the Code.

I assume that the conveyance of the land which you describe to the Town of Scottsville took place in 1953 and that the 1953 tax was assessed to the owner of the land as of January 1, 1953. If this assumption is correct, the former owner is liable for the tax, but he is entitled to credit on the 1953 tax as provided in Section 58-822 of the Code. For the year 1954 and the following years, as long as the land is owned by the Town of Scottsville it is exempt from taxation and should not be assessed.

TAXATION—Licenses; junk dealers; issued by Commissioner of Revenue upon certificate of court. F-365 (16)

July 17, 1953.

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

This is in reply to your letter of July 14, 1953, which I quote:

"Section 58-382 of the Code provides that junk dealers shall pay a certain sum for doing business as such and a certain sum for appointing canvassers. This section apparently contemplates that a license may be issued thereunder by the Commissioner of Revenue.

"Sections 54-825 and 54-829, inclusive, also relate to licenses for junk dealers and canvassers and apparently contemplate that such licenses shall be issued by the Court.

"A State License Inspector recently instructed a junk dealer to obtain a license from the Commissioner of Revenue who, when the application was made, raised the question as to whether or not he had authority to issue such license under Section 58-382.

"I will appreciate your opinion as to whether or not the Commissioner of Revenue may issue a junk dealers's and canvasser's license under Section 58-382 or whether such license must be issued by the Circuit Court under Sections 54-825 to 54-829, inclusive, and if the consent of the Court must be obtained I would like your opinion as to whether or not such licenses should be granted directly by the Court or whether or not the Court should order

the Commissioner of Revenue to issue such licenses upon payment of the proper license fees.

"Since the license in question is being held in abeyance pending your opinion, I will appreciate a reply as early as possible."

Your attention is invited to sections 58-241 and 58-243, portions of which are herein quoted:

"Sec. 58-241. Every person, firm or corporation desiring to obtain a license to prosecute any business, employment or profession shall, unless otherwise provided by law, make application therefor in writing to the commissioner of the revenue of the county or city wherein such business, employment or profession is proposed to be conducted. * * "

"Sec. 58-243. Upon the receipt of every application for a license, the commissioner of the revenue, if satisfied of its correctness, shall compute the tax prescribed by law and shall issue a license to the applicant to prosecute the business, employment or profession named in the application, unless it be a business, employment or profession for which a license can be granted only on the certificate of a court, in which case the applicant upon obtaining such certificate shall be entitled to a license. The form of every license issuable by the commissioner of the revenue shall be prescribed by the Department of Taxation. * * "

The above mentioned sections as well as the sections mentioned in your letter were originally embodied in Chapter 14 of the Tax Code. An examination of Chapter 14 would indicate that all licenses to engage in any business, employment or professions must be issued by the commissioner of revenue unless otherwise provided by law. The business of junk dealer would thus appear to be such a business as requires a certificate of court prior to obtaining a license as provided in section 58-243 of the Code. I am, therefore, of the opinion that the license mentioned in section 54-826 of the Code is simply the certification required prior to the issuance of the license as provided in section 58-382.

TAXATION—Merchants' licenses; non-profit or philanthropic organization subject to. F-65 (3)

July 2, 1953.

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

This is in reply to your letter of June 30, 1953, from which I quote as follows:

"Please be kind enough to advise the undersigned whether or not the Senior Woman's Club of Clarke County, an affiliate of the National Woman's Club organization, which desires to operate a store for the purpose of selling second hand clothes and miscellaneous articles of bric-a-brac and furniture, some of which are given to them and some of which they are handling on a commission basis, is required to secure a license under the tax laws of the state.

"I am advised that the organization is a non-profit one and the profit obtained from carrying on a store will be used for philanthropic purposes."

In view of the provisions of § 58-320 of the Code of Virginia it is my opinion that should the Senior Woman's Club of Clarke County engage in the business of selling merchandise they would be liable for a retail merchant's license. The statute makes no exception for non-profit organizations, nor does it exclude those who conduct business for philanthropic purposes.

TAXATION—Merchant's license; not to be issued to business under assumed name until certificate of name filed in clerk's office. F-65 (331)

June 22, 1954.

HONORABLE SAMUEL W. SWANSON,
Commissioner of the Revenue, Chatham.

I am in receipt of your letter of June 15, in which you present the following question:

"I am confused as to the meaning of Section 59-169, Code of Virginia, requiring persons and corporations transacting business under an assumed name to file a certificate.

"In other words, if a Mr. John Smith should buy a State retail merchant's license under the name of John Smith operating as Acme Foods Store, would he be required to present to the Commissioner of Revenue evidence pursuant to Section 59-174 of the Code that he has made and filed in the Clerk's Office of the Court the certificate required by Section 59-169 before I, as Commissioner of Revenue, would be permitted to issue him a license."

Section 59-169 of the Code requires every person transacting business in this State under an assumed or fictitious name to sign and acknowledge a certificate setting forth the name under which such business is to be conducted and the name of each and every person or corporation owning the same with their respective post office and residence addresses, and to file the certificate in the office of the Clerk of the Court in which deeds are recorded. Section 59-174 of the Code provides in effect that no license shall be issued by the Commissioner of Revenue until the certificate required by Section 59-169 has been filed and evidence of such filing produced before the Commissioner.

In view of the above statutory provisions, I am of opinion that, if a person applies to you for a State retail merchant's license and such person is conducting his business under an assumed or fictitious name such as you state in your illustration, you should require such person to present to you evidence that the certificate required by Section 59-169 has been appropriately filed.

TAXATION—Motor fuel; applicable section for refund of. F-150 (249)

April 21, 1954.

HONORABLE C. H. LAMR, *Commissioner*,
Division of Motor Vehicles.

This is in reply to your letter of April 6, 1954, which I quote:

"This is to inquire your opinion of a procedure of the Division of Motor Vehicles in allowing gasoline tax refunds to certain carriers under certain circumstances related herein."

"To my knowledge, three carriers are affected in this regard, as shown by the attached statements. Under present circumstances, these carriers purchase motor fuel in Virginia upon which the Virginia gasoline tax is paid. This fuel is delivered into the tanks of their vehicles which are connected with the motors propelling the vehicles and are driven into Tennessee. Tennessee collects an additional tax on the portion of this fuel which is used within the confines of Tennessee. The carriers obtain receipts for these additional payments which they in turn forward this Division of Motor Vehicles for refund under the provisions

of Sec. 58-718 of the Code of Virginia. Upon proper authentication, these refunds are certified by this Division for payment to the applicant.

"There has arisen the question of whether such refunds or credits should be allowed under the provisions of Sec. 58-718; or whether the controlling statute is Sec. 58-629, which is administered by the State Corporation Commission.

"I am not informed as to the practices and procedures of the State Corporation Commission in this regard, but I would appreciate your opinion as to the proper procedure in concluding transactions as related above."

Section 58-629 of the Code of Virginia is codified as a part of Article 12, Chapter 12, Title 58, of the Code, which relates to the tax imposed on motor carriers calculated on motor fuel used within this State. Section 58-628 provides as follows:

"Every motor carrier shall pay a road tax equivalent to six cents per gallon calculated on the amount of gasoline or other motor fuel used in its operations within this State."

Section 58-629 provides as follows:

"Every motor carrier subject to the tax hereby imposed shall be entitled to a credit on such tax equivalent to six cents per gallon on all gasoline or other motor fuel purchased by such carrier within this State for use in its operations either within or without this State and upon which gasoline or other motor fuel the tax imposed by the laws of this State has been paid by such carrier. Evidence of the payment of such tax in such form as may be required by, or is satisfactory to, the Commission shall be furnished by each such carrier claiming the credit herein allowed. When the amount of the credit herein provided to which any motor carrier is entitled for any quarter exceeds the amount of the tax for which such carrier is liable for the same quarter, such excess may under regulations of the Commission be allowed as a credit on the tax for which such carrier would be otherwise liable for another quarter or quarters or upon application within ninety days from the end of any quarter, duly verified and presented, in accordance with regulations promulgated by the Commission and supported by such evidence as may be satisfactory to the Commission, such excess may be refunded if it shall appear that the applicant has paid to another State of the United States or the District of Columbia under a lawful requirement of such jurisdiction a tax, similar in effect to the tax herein provided, on the use or consumption of the same gasoline without this State, to the extent of such payment in such other jurisdiction but in no case to exceed the rate per gallon of the then current gasoline tax of this State. Upon receipt of such application the Commission shall proceed in the manner provided in sections 58-1122 to 58-1128, except insofar as such sections may be inconsistent with some provision of this article, to grant or deny the same. Whenever any refund is ordered it shall be paid out of the highway maintenance and construction fund."

The last quoted section was enacted by the General Assembly for the obvious purpose of preventing double taxation on motor fuel purchased in this State by carriers for operation of their vehicles either in or out of this State. A procedure for determining the amount of fuel used in this State is provided in subsequent sections of Article 12.

Section 58-718 is codified as a part of Article 3, Chapter 13, Title 58 of the Code, which relates to motor fuel tax generally. That section provides as follows:

"Any person, firm or corporation who purchases motor fuel upon which the motor fuel tax imposed by this Chapter has been paid and who subsequently transports the same to another state, district or country for sale or use without this State and delivers the same without this State shall be entitled to a refund of the tax paid upon presentation to the Division of Motor Vehicles of an application for a refund setting forth the fact that such motor fuel was transferred out of this State for sale or use. The claim must be filed with the Commissioner and refund shall be paid from the same funds as provided under sec. 58-716; provided, however, that the entire tax shall be refunded and no deductions shall be made."

It is to be noted that this section relates to refunds to anyone who has paid the Virginia tax on motor fuel and then delivers the fuel without this State for sale or use where it is there imposed with a like tax.

The contents of your letter disclose that the refunds claimed are by motor carriers who have paid the tax imposed by Virginia on motor fuel purchased for use in their motor vehicles, a portion of which was used for operations in the State of Tennessee. Such cases do not appear to be those contemplated in section 58-718 of the Code. I am, therefore, of the opinion that refunds cannot be made in such cases under section 58-718 of the Code.

TAXATION—Motor fuel; proper share for distribution to counties not in secondary system. F-192 (186)

February 23, 1954.

HONORABLE CHARLES R. FENWICK,
Senate Chamber.

This is in reference to your inquiry dated February 19, 1954, which I quote as follows:

"Was the Comptroller justified as a result of Chapter 415, Acts of 1932, (creating the Secondary road system) in freezing the distribution of secondary road funds as to those counties staying out of the system, based on funds received in 1931? At that time, he calculated what percentage these monies represented to the total distribution of secondary road funds, set a percentage, and that percentage has been used since then relative to the total amount of secondary road funds available each year.

"In 1931, the formula used was 30% of all road funds collected to be used on secondary highways. Of the 30%, one-third was based on the percentage of taxes collected by the counties for the State as of 1924. Two-thirds of the 30% was distributed on the basis of (1) *area* (to be determined by the latest U. S. population each 10 years as census is taken); (2) *population* (to be determined by the latest U. S. Census); and (3) total taxes collected by county treasurers on State and local levies in the next preceding fiscal year.

"Apparently the Comptroller interpreted the 1932 Act as permitting counties out of the secondary system to collect the monies that they received in 1931 *without any equalization factor* and then computed the percentage that this amount of money represented to the total gasoline road money for secondary highways and has continued this percentage each year on a total secondary highways money collected instead of giving those counties the benefit of changes in population, area and increase in local taxes."

The legislative history pertaining to your inquiry has been carefully reviewed beginning with the 1906 Acts of the General Assembly. It is not deemed necessary to quote from all of the Acts of the General Assembly pertaining to your question because the pertinent provisions are set forth in Chapter 415 of the Acts of 1932, at page 879, as follows:

"In event of an election to be held in any county under the provisions of this act, the amount available for expenditure in such county under the provisions of this act shall be held by the State, pending the final determination of such election. If, as a result of such election, such county shall withdraw from the operation of this act, it shall continue to receive from the motor vehicle fuel tax, for expenditure under existing law, as heretofore *the amount of motor vehicle fuel tax to which it was entitled for the calendar year, nineteen hundred and thirty-one, including the normal increase if any but not including any additional amount for equalization as provided by law for that year * * * .*"

You advise that the Comptroller apparently interpreted this act as permitting counties out of the secondary system to collect the monies that they received in 1931 without any equalization factor, and then computed the percentage that this amount of money represented to the total gasoline road money for secondary highways, and has continued this percentage each year on the total secondary highway money collected instead of giving those counties the benefit of change in population, area and increase in taxes collected.

The law, as it existed in 1931, is contained in Chapter 45 of the Acts of 1930 at page 42, which provides:

"Thirty per centum of the revenue derived from the tax levied as aforesaid, is hereby appropriated primarily for the maintenance of the roads and bridges of the several counties of this State, and shall, on and after January first, nineteen hundred and thirty-one, be apportioned and distributed monthly, by the Comptroller, among the several counties of the State, as follows: one-third of the amount thereof shall be distributed by the same method now being practiced for the distribution of motor vehicle fuel tax to the counties. Two-thirds of the amount thereof shall be apportioned and distributed among the several counties in proportion to area as one factor, population as one factor, and the total of all State taxes and all local levies including levies on public service corporations, collected by the county treasurers in their respective counties, during the next preceding fiscal year, as one factor, giving equal consideration to each of the three factors, the factors of area and population to be always determined by the latest United States census; * * * ."

In comparing the 1930 and 1932 Acts, as herein quoted, it would appear that those counties voting out of the Secondary System would be entitled to receive the same proportion of the revenues from the motor vehicle fuel tax as before, including the normal increase, if any, but were not to receive any additional amount for equalization as provided by law for that year. The Comptroller must have interpreted, as you point out, the language of the 1932 Act to preclude counties withdrawing from the secondary System even from receiving the equalization fund. This interpretation is debatable because the language used in the 1932 Act regarding the equalization fund is somewhat ambiguous.

Sutherland's Statutory Construction, Section 5109, provides, in part, as follows:

"Where a statute has received a contemporaneous and practical interpretation and the statute as interpreted is re-enacted, the practical in-

terpretation is accorded greater weight than it ordinarily receives, and is regarded as presumptively the correct interpretation of the law. * * *

Chapter 415 of the Acts of 1932 has been amended and reenacted several times but at no time has the Legislature changed the language with which we are here concerned.

Section 6709 of the same authority on Statutory Construction provides, in part, as follows:

"One of the most significant aids of construction in determining the meaning of revenue laws is the administrative interpretation given such acts by the agency that is responsible for its administration and enforcement. * * *

In view of these well recognized rules of statutory construction and being required to give great weight to administrative construction, I have reached the conclusion, and am of the opinion, that the construction placed on the 1932 Acts by the Comptroller's Office should be adhered to.

TAXATION—Personal property; constitutional amendment required to abolish tax. F-266 (149)

January 13, 1954.

HONORABLE W. GRIFFITH PURCELL,
Member of the House of Delegates.

This is in reply to your letter of January 11, in which you ask for my opinion on the following question:

"I am contemplating introducing legislation in the current session of the General Assembly to abolish the personal property tax on household goods and personal effects and I would appreciate your opinion as to the constitutionality of abolishing such tax under Sections 58-9 and 58-12 of the Virginia Code, in view of Section 168 of the Virginia Constitution."

Section 168 of the Constitution provides that: "All property, except as hereinafter provided, shall be taxed * * *."

Section 171 of the Constitution, among other things, segregates tangible personal property (which includes "household goods and personal effects") for local taxation only.

Section 183 of the Constitution prescribes what property shall be exempt from taxation, providing, "Unless otherwise provided in this Constitution, the following property *and no other* shall be exempt from taxation, State and local, including inheritance taxes." (Italics supplied)

Then follow several subsections listing what property shall be exempt from taxation, but the property you mention is not included in these exemptions. The section also contains a provision that, except as to property owned directly or indirectly by the Commonwealth or any political subdivision thereof, "general laws may be enacted restricting but not extending the above exemptions."

In view of the above constitutional provisions, the conclusion is inescapable and it is my opinion that the General Assembly may not exempt from taxation such tangible personal property as household goods and personal effects. To effect such an exemption it is my opinion that a constitutional amendment is necessary.

TAXATION—Personal property; tangible personal property of wholesale merchant taxable. F-65 (44)

August 27, 1953.

HONORABLE LLOYD C. BIRD,
Member of State Senate.

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

"I would like to inquire of you whether or not, in your opinion, the cities having elected to tax wholesale merchants on purchases also have authority to further tax the wholesaler on capital. The additional tax on capital is levied by interpreting that the equipment (automobiles, trucks, office furniture, and equipment conveyors, and other warehouse loading devices) required to perform the function for which the wholesaler pays a license tax to both state and city as tangible personal property.

"Section 58-829, in defining tangible personal property, does not mention office furniture and business equipment. Today, equipment, even in a small office, runs into several thousand dollars.

"Section 58-833 exempts tangible personal property from capital for the purpose of local taxation, but it would seem that this is where the tax is levied on capital and not on purchases.

"One wholesaler reports that for the year 1952 their tax on equipment (capital), classed by the city as personal property, amounted to 6½% of their purchase tax to the city. It seems to me that there is evidence that it has not been the thought of the Legislature that taxes levied for the purpose of doing business should be allowed to pyramid."

The local license tax which a wholesale merchant pays to a city for the privilege of doing business is not by State law in lieu of a tax on merchants' capital or a tax on the tangible personal property of such wholesale merchant not included in the definition of merchants' capital.

By Sections 58-9, 58-10 and 58-833 of the Code, merchants' capital is segregated for local taxation exclusively and, of course, may be taxed by the cities if there is an ordinance imposing such a tax. Section 58-833 of the Code defines merchants' capital as

"Inventory of stock on hand; the excess of bills and accounts receivable over bills and accounts payable; money on hand and on deposit; and all other taxable personal property of any kind whatsoever, except tangible personal property not offered for sale as merchandise, which tangible personal property shall be reported and assessed as such."

If, therefore, a city imposes a tax on merchants' capital (my information is that no city in the State imposes such a tax), the tangible personal property of such merchants not included in the definition of merchants' capital is taxable as such. This would include automobiles, trucks, office furniture and equipment, and all other tangible personal property other than inventory of stock on hand. Section 58-829 of the Code is clearly broad enough to include all items of tangible property owned by a wholesale merchant. See items 5 and 15 of Section 58-829.

I think it is probable that the merchant to whom you refer is confused by the thought that the local license tax which he pays is in lieu of the tax on merchants' capital and other tangible property of the merchants not included in the statutory definition of merchants' capital. But there is no State law to this effect.

TAXATION—Probate; estate in Virginia subject to when foreign will probated. F-157 (45)

August 27, 1953.

HONORABLE AUSTIN EMBREY, *Clerk*,
Circuit Court of Nelson County.

I have your letter of August 25, in which you present the following question:

"Section 64-88 of the Code of Virginia provides for the admitting to probate in Virginia of authenticated copies of foreign wills relative to an estate in this state when such wills have been proved without the same.

"I should like to know whether a probate tax, as required by Section 58-68, should be collected on the estate in Virginia when a foreign will is admitted to probate in this state under the provisions of Section 64-88."

Section 64-88 of the Code, as you point out, provides for the admitting to *probate* in this State of certain foreign wills. Section 58-66 et seq. of the Code provides for a tax on the *probate* of every will or grant of administration.

I think it plain, therefore, that in the case of a foreign will admitted to probate in this State the regular probate tax should be assessed, measured by the value of the estate having a situs in Virginia.

TAXATION—Property; different levy on public utilities. F-270 (113)

December 9, 1953.

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

I am in receipt of your letter of December 3, in which you ask the following question:

"The question presented is whether or not a Board of Supervisors legally may impose one levy on the County property generally and a different levy on the property of public utilities as assessed by the State Corporation Commission. Specifically, if the general county assessment is raised by reassessment, may the Board of Supervisors legally lower the present levy on County property but retain the former higher levy on public utility property?"

I may say that, without passing on any constitutional question that may be involved, your inquiry is answered by the statutes dealing with the taxation of the different classes of public service corporations. For example, Section 58-518 of the Code, relating to the taxation of railway and canal companies, provides that: "On the real estate, * * * and tangible personal property of every railway and canal corporation, there shall be local levies at the same rate or rates as are assessed upon other real estate and tangible personal property in such localities, * * *." There is a similar provision as to express companies in Section 58-546 of the Code. As to steamship companies, see Section 58-574. For telephone and telegraph companies see Section 58-578. Local taxes on pipeline transmission companies are controlled by Section 58-596. As to water or heat, light and power companies, see Section 58-605.

The sections of the Code to which I have referred make it plain that as to the public utilities mentioned the answer to your question must be in the negative.

TAXATION—Real property; constitutionality of act moving forward payment deadline in some counties. F-273 (281)

May 21, 1954.

HONORABLE COLIN C. MACPHERSON,
Treasurer of Arlington County.

This is in reply to your letter of May 18, 1954 in which you request my opinion as to whether Chapter 277 of the Acts of Assembly of 1954 is constitutional with respect to § 63 of the Constitution of Virginia and whether it is applicable to the 1954 real property taxes in Arlington County.

Chapter 277 of the 1954 Acts amends and reenacts §§ 59-963 and 58-964 of the Code of Virginia. Section 58-963, as amended by the recent session of the General Assembly, provides:

"Any person failing to pay any State taxes or county and city levies on or before the fifth day of December shall incur a penalty thereon of five per centum, which shall be added to the amount of taxes or levies due from such taxpayer, which, when collected by the treasurer, shall be accounted for in his settlements, provided, that any person other than a public service corporation owning taxable real property in any county having a density of population in excess of two thousand inhabitants per square mile, according to the last preceding United States census, shall pay, on or before August fifteenth of each year, the taxes assessed against such real property for that year, and upon failure so to do shall incur a penalty as hereinabove provided."

It is my opinion that the exception in this section excluding public service corporations from the August 15th tax payment deadline is not unconstitutional. The General Assembly may provide reasonable discrimination for different classes of corporations or property owners for taxation purposes. *City of Richmond v. Commonwealth of Virginia*, 188 Va. 600.

I am also of the opinion that section 58-963, as amended, does not conflict with paragraph 5 of § 63 of our Constitution. Chapter 277 of the Acts of 1954 is not special legislation if the classification of localities which the August 15th tax payment deadline applies to is a reasonable one. The Supreme Court of Appeals of Virginia has in the past ruled favorably on classifications such as the one here based on population per square mile. Counties with populations in excess of 2000 persons per square mile are urban communities, and there exists, in my opinion, several valid reasons for allowing them to collect real property taxes earlier than counties predominantly rural.

In answer to your second question, it is my opinion that Chapter 277 of the Acts of Assembly of 1954 is applicable to the 1954 real property taxes. The Act was passed as emergency legislation and, therefore, would be effective as of the date it was approved, March 15, 1954. It is true that January 1, 1954 is the legal assessment date for real property taxes and this date was prior to the effective date of the Act in question. However, Chapter 277 of the Acts of Assembly of 1954 does not in any way affect the assessment date of real property taxes. The Act concerns only the date of payment of taxes, the date of imposing penalty for and interest on delinquent taxes. The dates

specified for these events are all subsequent to the effective date of the statute. The fact that the General Assembly enacted Chapter 277 as emergency legislation evinces their intention that the Act should apply to the present tax year.

Mr. William J. Hassan, Commonwealth's Attorney for Arlington County, in his letter to me accompanying your request, lists several sections of the Code of Virginia which prescribe certain dates for the Commissioner of Revenue to turn land books over to your office, for your office to mail tax bills to the taxpayers and for your office to prepare delinquent tax lists. The conflicts between these dates and the August 15th tax deadline would apply to subsequent years as well as to the present one; therefore, I cannot concur with his reasoning that these conflicting dates would prevent Chapter 277 from applying to the present tax year, but that the Act would apply to subsequent tax years.

The sections listed by Mr. Hassan provide that certain acts "shall [be done] as soon as may be in each year, not later than" the date prescribed, but these sections do not provide that the acts cannot be done sooner. Obviously, if the tax is due on August 15th of each year, your office will have to mail out the tax bill a sufficient number of days prior to this date to give proper notice to the taxpayers. In order for your office to accomplish this the Commissioner of Revenue must turn the land books over to your office well in advance of this date. This would apply to the present tax year as well as all subsequent tax years.

TAXATION—Real property; hospitals subject to if not charitable institution. F-273 (43)

August 21, 1953.

HONORABLE I. L. HARDING,
Commissioner of the Revenue, Halifax.

I am in receipt of your letter of August 19, in which you present the following question:

"The Halifax Community Hospital is located in Halifax County, and I will appreciate it if you will advise me whether or not the County should tax it.

"The hospital is incorporated and its charter states that it was 'not organized for profit.' However, it is not a charitable institution. It was built under the provisions of the Hill-Burton Act. The County has contributed money towards the construction, maintenance and operation. It apparently expects to continue these contributions."

I can find no constitutional or statutory provision exempting from taxation the hospital which you describe. Section 183 of the Constitution exempts from taxation real estate belonging to hospitals "conducted not for profit, but exclusively as charities, * * * ." However, you state that the Halifax Community Hospital is not conducted as a charitable institution. It is my opinion, therefore, that this hospital is subject to the County tax on real estate. I might add that I have heretofore expressed the same opinion in a similar situation.

TAXATION—Reassessment; Board of Supervisors may direct at any time. F-261 (148)

January 13, 1954.

HONORABLE WILLIAM C. CARTER,
Commonwealth's Attorney for Cumberland County.

I am in receipt of your letter of January 5, in which you present the following question:

"The 1940 United States census for Cumberland County was 7,505 and the last general re-assessment of real estate in this county was in the year 1947, at which time the assistance of the Department of Taxation was not utilized.

"In 1950 the Legislature passed the following Act:

"There shall be a general re-assessment of real estate in the year nineteen hundred fifty-two and every sixth year thereafter in each of the counties of this Commonwealth containing less than twenty-one thousand population according to the United States census of nineteen hundred forty that had a general re-assessment of real estate in the year nineteen hundred forty-seven or nineteen hundred forty-eight in which the assistance of the Department of Taxation was not utilized; * * * ."

"Would it be within the rights of the Board of Supervisors of Cumberland County to have a general re-assessment of real estate in the year 1954, or would it be necessary for the Board of Supervisors of this county to request the Legislature to pass, at this session of the Legislature, an enabling Act to have a re-assessment this year as the result of its failure and oversight in complying with Section 58-782."

I direct your attention to Section 58-784.3 of the Code, which reads as follows:

"Notwithstanding any other provision of this article to the contrary, there may be a general re-assessment of real estate in any county in any year if the governing body so directs by a majority of all members thereof, by a recorded yeas and nays vote."

This section is in the same article as the Act (Section 58-782 of the Code) which you quote.

In view of Section 58-784.3 it is my opinion that your Board of Supervisors may direct a general reassessment of real estate in your county in 1954.

TAXATION—Reassessment; county manager form; appointment of appraisers, procedure. F-261 (119)

December 14, 1953.

HONORABLE DOWNING L. SMITH,
Commonwealth's Attorney for Albemarle County.

This is in reply to your letter of December 9, 1953 in which you ask whether the Board of Assessors for a reassessment of real estate in Albemarle County should be appointed by the Judge of the Circuit Court of Albemarle County or whether the Board may be appointed by the Board of Supervisors.

I concur with your opinion that § 15-288(d) is the controlling statute on this question since Albemarle County has the County Executive form of government. The great preponderance of authority is to the effect that when there is a

conflict in the provisions of a special or local act and the general law on the subject, the special act is controlling.

Section 15-288(d) of the Code provides:

"(d) Real estate reassessments.—Every general reassessment of real estate in the county, unless some other person be designated for this purpose by the board of county supervisors in accordance with § 15-281 or unless the board shall create a separate department of assessments in accordance with § 15-287 shall be made by the director of finance; he shall collect and keep in his office data and devise methods and procedure to be followed in each such general reassessment that will make for uniformity in assessments throughout the county."

It is my opinion that the Board of Assessors for Albemarle County should be appointed by the Board of Supervisors, and that if the Board of Supervisors does not appoint such a board, then the Director of Finance shall make the reassessment in Albemarle County.

You also ask my opinion on the following question:

"In the event that a Board of Assessors is appointed and the assistance of the Department of Taxation is secured in making the general reassessment, would it be necessary for the Board of Assessors to view every piece of property assessed? Would it be permissible to have the Department of Taxation experts view the property, and the information obtained by them be reviewed by the Board of Assessors, and the final decision for the assessment be made by the Board of Assessors?"

Section 58-795.1(a) is as follows:

"(a) In any year in which a general reassessment of real estate in any county or city is to be made, the State Department of Taxation within the limits of such appropriation as may be made therefor, shall make an appraisal of the real estate in such county or city if the Department does not have available to it sufficient information to determine accurately the values of such real estate. After completing the appraisal, the Department of Taxation shall make the same available to the governing body of the county or city for such use as the governing body deems proper."

It is my opinion that, under this provision, the Board of Assessors may use the information made available to them by the Department of Taxation and if the Board in its opinion can make a fair and accurate assessment from this information, coupled with whatever other information it has, it may make such assessment without actually viewing each piece of property.

TAXATION—Reassessment; county may employ technical assistants.
F-33 (210)

March 16, 1954.

HONORABLE DOWNING L. SMITH,
Commonwealth's Attorney, Albemarle County.

This is in reply to your letter of March 3, 1954 concerning the employment by Albemarle County of technical assistants from the Department of Taxation for the general reassessment of 1954.

I concur with your opinion that the County has authority to employ technical assistants, if the Board of Supervisors authorizes such employment. However, these assistants are not to be employed from the Department of Taxation. The

Department of Taxation has a list of recommended persons who the Department feels are qualified to assist counties in general reassessment.

You are correct in your interpretation of § 15-795.1. That section applies only to the Department of Taxation's obtaining information in connection with State equalization funds.

It is my opinion that §§ 15-288(d) and 15-281 of the Code authorize the Board of Supervisors to appoint more than one person to make this required general reassessment of 1954.

TAXATION—Reassessment; notice to taxpayers; appeals; Board of Equalization. F-261 (126)

December 15, 1953.

HONORABLE W. E. BAGWELL,
Treasurer of Northampton County.

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

"I will appreciate your opinion in regard to the following: General County Reassessment on Real Estate—1. In your opinion should confirmations of the reassessment in the form of a written statement be mailed by the Board of Supervisors or their representative to the individual taxpayer, reflecting their new assessment, providing the negative form of reply when the assessment is correct, and providing certain dates whereby the taxpayer may be heard by the reassessors if incorrect, prior to the assessment being turned over to the County Treasurer for collection. 2. In your opinion should a Board of Equalization be appointed consisting of members other than the reassessors to answer complaints not previously satisfied by the reassessors?"

Section 58-791 of the Code provides that when a general reassessment shall have been completed the original of such reassessment shall be filed in the clerk's office and one copy of the reassessment delivered to the commissioner of the revenue and one copy to the local Board of Equalization. There is no statutory provision that I know of that requires the Board of Supervisors or the assessors to notify the individual taxpayers as to the valuations imposed upon their properties. Therefore, whether or not this shall be done is a matter of policy to be determined by the local authorities. I should think it would be helpful to the individual taxpayers, especially where their assessments have been increased, to be advised of the valuations determined by the assessors, but I know of no statute that requires such a notification to be sent out.

In reply to your second question, Section 58-898 of the Code is, I presume, the statute applicable to Northampton County insofar as a local Board of Equalization is concerned. This section provides that the circuit court of any county, or the judge thereof in vacation, may in any year, if the Board of Supervisors so directs, appoint for the county a Board of Equalization of Real Estate Assessments. The appointment of such a Board is not mandatory.

TAXATION—Recordation; indebtedness on property included when determining tax. F-90a (98)

November 25, 1953.

HONORABLE ROBT. H. OLDHAM, *Clerk*,
Accomac.

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

"Jones purchases from Smith for \$10.00 a tract of land which is subject to a deed of trust. The purchase deed does not assume the indebtedness of the deed of trust.

"Should Clerk collect recordation tax on said indebtedness as part of purchase price or only on what purchaser claims as equity?"

Section 58-54 of the Code provides that on every deed, except deeds exempt from taxation, which is admitted to record the tax shall be fifteen cents on every hundred dollars or fraction thereof of the consideration of the deed or the actual value of the property conveyed, whichever is greater.

In view of this section, I am of the opinion that the tax upon the recordation of the deed before you should be based upon the consideration thereof or the actual value of the land, whichever is greater. The statute makes no provision for deducting from the base of the tax the amount of the deed of trust to which the land may be subject.

TAXATION—Residence for State income tax purposes. F-274 (321)

June 14, 1954.

HONORABLE VERNON C. SMITH,
Member of House of Delegates.

I am in receipt of your letter of June 10, in which you request my opinion on the following statement of facts:

"We have a young Doctor who was reared in this (Buchanan) county and whose parents reside here. He practiced his profession part of the year in this county and then moved to the State of Tennessee, where he now lives and practices. He filed a return in this county for State Income Taxes on the income received while practicing in this State and has now been advised that he will have to give in the total of his income received during the year, whether received in Virginia or Tennessee. He advises that he pays taxes in the form of a sales tax in Tennessee and does not think that he should pay on that portion of his income earned in Tennessee.

"This young man has his voting residence here and I would like for you to advise me if it is necessary for him to change his voting residence to the State of Tennessee in order to avoid payment of taxes on the income derived by him from his practice in Tennessee."

It appears from your letter that the young man about whom you write is retaining his legal residence in this State. In this situation I am of opinion that he is subject to the Virginia State income tax upon his entire net income, including that portion of it earned in Tennessee. See Section 58-101 of the Code. Under certain circumstances this taxpayer would be entitled to credit on his Virginia tax for State income tax paid to Tennessee. See Sec-

tion 58-103 of the Code. However, I understand from your letter that he does not pay a State income tax as such in Tennessee; therefore, he would not be entitled to the credit to which I have referred.

TAXATION—Retail sales tax; Board of Supervisors; no authority to enact. F-33 (120)

December 14, 1953.

HONORABLE H. STUART CARTER,
Member of House of Delegates, Bristol.

I am in receipt of your recent letter in which you present the following questions:

"The Washington County School Board has passed a resolution requesting that the Board of Supervisors enact a retail sales tax for the County, and are requesting that enabling legislation be enacted, authorizing the Board of Supervisors to enact this tax law."

I do not recall that this office has ever dealt with your inquiry in a written opinion. However, it has consistently held that counties may not impose license taxes unless they are expressly authorized to do so by statute. As you know, there are a number of statutes authorizing counties to impose license taxes upon certain designated activities. It is my view that the opinions relating to the authority of counties to impose license taxes are applicable on principle to the imposition of a retail sales tax. Counties are arms of the State and have only the power which is expressly given by statute. It is my opinion, therefore, that in the absence of enabling legislation the Board of Supervisors of Washington County does not have authority to impose a retail sales tax in the County.

TREASURERS—Check signing; may not use rubber stamp. F-54 (46)

August 27, 1953.

MISS REBEKAH F. ELDRIDGE,
Treasurer of Buckingham County

I am in receipt of your letter of August 26, in which you present the following question:

"Mr. Harry F. James, who is making an audit of this office, has called my attention to your ruling on use of signature by stamp.

"Due to injury to right arm, the Board of Supervisors has allowed me to use signature fac-simile on check-warrants issued by County where one or more board members have signed ahead of me. This signature stamp is kept locked in safe and is accessible only to my bonded deputy and myself."

I assume that you have reference to the use of a rubber stamp in signing checks. In my opinion, there is no statutory authority for signing checks in this way, and I am further of the opinion that it would be unlawful for them to be so signed. The Auditor of Public Accounts advises me that such a practice would be an exceedingly dangerous one for the reason, among others,

that any person in possession of a letter bearing your signature would have the opportunity to have a rubber stamp of your signature made.

As a solution to your problem I refer you to Section 58-951 of the Code, which provides in part as follows:

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

TREASURERS—Sureties on bonds; limits on liabilities when more than one.
F-185 (123)

December 14, 1953.

HONORABLE F. B. BARHAM, *Clerk*,
Corporation Court, City of Newport News.

This is in reply to your letter of December 9, 1953, which I quote:

"The Treasurer of the City of Newport News must execute his official bond in the sum of \$275,000.00 before January 1st, 1954. He desires to offer two or more surety corporations as sureties on said bond. These surety corporations desire that the proportionate amount that each corporation desires to become liable for be set out in the bond. The question is, is this permissible in this type of bond or does the bond have to show that all the sureties are jointly and severally liable for the full amount of the bond?"

Section 49-12 of the Code of Virginia, 1950, provides, in part, as follows:

"Every bond required by law to be taken or approved by or given before any court, board or officer, unless otherwise provided, shall be made payable to the Commonwealth of Virginia, with surety deemed sufficient by such court, board or officer. * * In any such bond the liability of the surety or sureties may be limited to such sum or sums as they may respectively require."

Section 8-353 of the Code provides as follows:

"When there is a recovery on a bond with condition for the payment of money the judgment shall be for the penalty of the bond to be discharged by the payment of the principal and the interest due thereon, but when the judgment is against a surety of limited liability in such bond the sum to be paid by such surety in discharge thereof shall not exceed the amount to which he has limited his liability on such bond."

From the foregoing quoted statutes it appears that a limited suretyship is permissible on official bonds. However, I am advised that the underwriting method generally employed on official bonds is unlimited suretyship, whereby each surety signs the bond without specifying the extent of its liability. By this method all sureties are jointly and severally liable for the full amount of the bond, and the sharing of premiums and liability is a matter to be settled among the sureties. This would appear to be the better method of executing the treasurer's bond.

**TRESPASS—Mountain lands in certain counties; remedies of land owner.
F-85 (93)**

November 13, 1953.

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

This is in reply to your letter of November 10, 1953 in which you request an interpretation of §§ 29-166 and 29-169 of the Code of Virginia as they apply to "unenclosed mountain land not used for cultivation" located in Augusta County. These two sections provide:

"§ 29-166. * * * Any person who goes on the lands, waters, ponds, boats or blinds of another upon which signs or posters prohibiting hunting, fishing or trapping, have been placed to hunt, fish or trap without the written consent of the owner of his agent shall be guilty of a misdemeanor and punished by a fine of not more than fifty dollars or by confinement in jail for not more than thirty days or by both such fine and imprisonment in the discretion of the court or jury trying the case."

"§ 29-169. * * * No person shall be deemed guilty of trespass hereunder upon uninclosed mountain lands not used for cultivation, except in the counties of Giles east of New River, Craig, Bath, Alleghany, Botetourt and Highland and in the mountains in the western part of Rockingham County, and in any county having a population of more than fourteen thousand and less than twenty thousand inhabitants, which adjoins a county within the geographical bounds of which is located a city having a population of not less than sixty thousand nor more than one hundred thousand inhabitants, all according to the last United States census; provided that §§ 29-165 to 29-167 shall apply to any person who goes upon uninclosed mountain land of another, in that part of the county of Giles which lies on the western side of New River, to trap, or to hunt for any game other than elk."

It is my opinion that, under the provisions of the Code of Virginia, a person would not be guilty of a misdemeanor as defined in § 29-166 for trespassing upon unenclosed mountain lands not used for cultivation in Augusta County.

You inquire as to what remedies owners of such mountain lands have against persons who invade their boundaries if they post them. Section 29-170 of the Code is as follows:

"Nothing in this chapter shall be construed to affect in any way the civil rights of a landowner as against trespassers against his property."

These landowners can bring civil action for damages against any person who trespasses upon their property.

**TRESPASS—Property rights; non-navigable, tidal creeks and marshes.
F-93 (129)**

December 16, 1953.

HONORABLE I. T. QUINN, *Executive Director*,
Commission of Game and Inland Fisheries.

This is in reply to your letter inquiring, under the provisions of sections 62-1 and 62-2, Code of Virginia, hereinafter set forth, as to the property status

of the beds of non-navigable tidal creeks and marshes, which areas are embraced within tracts of land heretofore lawfully granted and conveyed to private holders:

"All the beds of the bays, rivers, creeks, and the shores of the sea within the jurisdiction of this Commonwealth, and not conveyed by special grant or compact according to law, shall continue and remain the property of the Commonwealth of Virginia, and may be used as a common by all the people of the State for the purpose of fishing and fowling, and of taking and catching oysters and other shellfish, subject to the provisions of Title 28, and any future laws that may be passed by the General Assembly. And no grant shall hereafter be issued by the State Librarian to pass any estate or interest of the Commonwealth in any natural oyster bed, rock, or shoal, whether the bed, rock or shoal shall ebb bare or not."

"Subject to the provisions of the preceding section, the limits or bounds of the several tracts of land lying on such bays, rivers, creeks and shores, and the rights and privileges of the owners of such lands, shall extend to low watermark, but no farther, unless where a creek or river, or some part thereof, is comprised within the limits of a lawful survey."

Reference is especially made to chapter 13, "Embrey's, Waters of the State", which chapter, in stating the common law, commences "where a non-navigable stream flows over the land of a private owner he has the title to the whole bed of the stream within the boundaries of his land". (Citations omitted).

Moreover, attention is directed to *Crenshaw v. Slate River Company* (1828), 6 Rand. 245 (271), which provides, in part, " * * it must be considered a private unnavigable stream; and that the patent to Skelton in 1726, conveying the land on both sides, and including the river in its bounds, gave him the property in the bed of the stream; and that he had, to the extent of his land, the exclusive right of fishery. * * "

Reference is also made to the case of *Miller v. Commonwealth*, 159 Va. 924, in so far as it may be pertinent to this inquiry.

Accordingly, without discussing the subject of patent dates from which various owners may claim, it is my view that the beds of non-navigable tidal creeks and marshes which are embraced within the boundaries of areas which have heretofore been lawfully granted or conveyed constitute private property of the land owner.

This office is also unofficially advised that the Circuit Court of New Kent County, in the case of *Commonwealth v. Chenault* (1953) and the Circuit Court of Alleghany County, in the case of *State v. Boerner* (1951) sustained convictions of persons on water course areas embraced within tracts held by private owners.

TRIAL JUSTICES—Appeal of conviction from upon a plea of guilty.
F-136a (264)

May 7, 1954.

HONORABLE R. O. GARRETT,
Trial Justice, Cumberland.

This is in reply to your letter of May 6, 1954 in which you ask to be advised as to the right of appeal from a conviction in a trial justice court where the person convicted plead guilty to the offense.

Section 16-6 of the Code of Virginia provides as follows:

"Any person convicted by a trial justice under the provisions of § 16-4 shall have the right, at any time within ten days from such conviction, and whether or not such conviction was upon a plea of guilty, to appeal to the circuit court of the county or corporation or hustings court of the corporation, as the case may be."

You will note that this quoted section authorizes an appeal to the circuit court, even though the person convicted plead guilty to the offense.

TRIAL JUSTICES—Effective date of new retirement act. F-136a (295)

May 26, 1954.

HONORABLE H. B. McLEMORE, JR., *Clerk*,
Circuit Court of Southampton County.

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

"The Trial Justice of Southampton County has passed the age of seventy years and has served more than fifteen years in office. His present term expires June 30, 1954.

"Under Chapter 274 (Page 329) of the 1954 Acts of the General Assembly I understand the Trial Justice Retirement Fund will go into effect on June 29, 1954.

"If the Trial Justice should not seek reappointment but elect to retire at the end of his term (June 30, 1954) would he be eligible to receive compensation under this Act? We are anxious to ascertain this information as the Judge does not wish to do anything to cause the Trial Justice to lose the benefits provided by this Act."

The Trial Justice Retirement Act (Chapter 274 of the Acts of 1954) goes into effect at the first moment of June 30, 1954, that is to say, it is in effect on June 30, 1954. I assume from your letter that the term of office of the Trial Justice of your County does not expire until midnight of June 30, 1954. If my assumption as to the expiration of the term of office is correct, he is in office when the Retirement Act goes into effect. I am, therefore, of the opinion that he is entitled to the benefits of the Act, provided that he gives the notices required and otherwise complies with the provisions of the Act.

TRIAL JUSTICES—Fees; civil cases continued or dismissed. F-136a (31)

August 6, 1953.

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.

This is in reply to your letter of May 11, 1953, which I quote:

"Under the statutes it is provided that the trial fee of a trial justice or civil and police justice court is to be paid by the plaintiff on or before the time of hearing (Section 14-133, and also 16-101 for cities with a population of 10,000 to 45,000, of the Code of Virginia) of a particular civil case before either of these courts. I have been asked what constitutes a hearing. I therefore should appreciate it if you would give me your opinion with respect to the following questions:

"(1) When a plaintiff in open court or by telephone asks for a continuance of a civil suit before a trial justice or a civil and police justice does this request have the effect of a hearing as referred to in Section 14-133, and also 16-101 for cities with a population of 10,000 to 45,000, of the Code and should the trial fee be paid before a continuance is granted?"

"(2) In the event the matter is settled out of court between the plaintiff and the defendant between the date on which the continuance was requested and the new hearing date fixed has the trial justice or civil and police justice earned the trial fee which would have been paid at the time the continuance was requested if your answer to the first question is in the affirmative?"

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

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

* * * * *

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

Section 14-134 of the Code of Virginia provides as follows:

"Enumeration of the foregoing fees shall not relieve any trial justice or clerk from performing any duty imposed upon him by law, although no fee be herein set forth covering the services required. In all proceedings the trial justice shall tax as costs all charges properly constituting the same."

Section 16-101 of the Code of Virginia provides as follows:

"At or before the time of hearing had before such civil and police justice on any claim of which the civil and police justice is given jurisdiction by paragraph (b) of section 16-90 the plaintiff in such claim shall pay to the civil and police justice a trial fee of fifty cents for each hundred dollars of value, or fraction thereof, claimed in such warrant. The trial fee shall be taxed as part of the cost. The civil and police justice shall pay monthly into the treasury of his city all trial fees collected by him."

In view of the clear language of the foregoing statutes it is apparent that a fee cannot be charged for continuing a case on the docket unless the determination to grant such "continuance" may be construed as "trying and giving judgment".

A request by telephone or in open court for continuance of a civil suit does not constitute a "hearing" of the case. To hold a "hearing" in a civil case is to hold a "trial", unless it be a hearing for a special purpose, such as taking evidence, determining special issues, etc. A motion to continue is nothing more than a request that the trial be set for a subsequent date. Therefore, as to your first inquiry I am of the opinion that it must be answered in the negative.

In view of the conclusion reached with respect to your first inquiry, it would necessarily follow that the same answer is applicable to the second.

If the parties settle their dispute prior to the new date set for hearing there is nothing left for the court to do but dismiss the case from the docket. This office has previously expressed the opinion that a motion to dismiss does not constitute a trial of the case. The rights of the parties have not been adjudicated, and, in instances where the case is dismissed without prejudice, they are at liberty to institute another action on the same merits.

This matter has been discussed at great length with the Honorable Trial Justices Powers and Landrum, and in view of the grave hardship which is worked upon the courts in such instances, it is with great reluctance that I have arrived at the foregoing conclusions. However, in the face of the clear mandate of the statutes, I am unable to otherwise conclude.

TRIAL JUSTICES—Proper location for office and holding hearings.
F-136a (250)

April 22, 1954.

HONORABLE JAMES H. JOINES,
Trial Justice for Grayson County.

This is in reply to your letter of April 16, 1954 in which you request my opinion on the following questions:

"Galax has become a second-class city and I would like to know whether it would be proper for me to establish the Trial Justice Office in the City of Galax. There has been some question here as to whether the office of the Trial Justice would have to be in the County since Galax is no longer a part of the County.

"Also I would like to know whether I will be able to continue holding the Trial Justice Court for Grayson County in the City of Galax as it has been held in the past."

In my opinion the office of the trial justice, where the docket and records are kept, is required by statute to be located within the territory for which the trial justice was appointed. Since in Virginia a city is not a part of a county, I must conclude that, if your appointment as Trial Justice was for Grayson County, only, the Trial Justice Office located in the City of Galax would not be within the territory for which you were appointed.

The answer to your second question is found in § 16-76 of the Code of Virginia. That section provides, in part, as follows:

"The trial justice shall sit for the hearing and trial of criminal and civil matters and cases at the county seat of the county, * * * and at such other times and places in the county, or in a city of the first or second class located therein or adjoining the same, as may, from time to time, be designated and prescribed by the circuit court of the county and a schedule of the times and places of his sitting shall be kept posted at the courthouse of the county and at each of the designated places * * * .
* * * * *

"Notwithstanding the foregoing provisions, the circuit court may prescribe and require that all hearings and trials of all cases shall be at the county seat."

This statute, in my opinion, requires that the trial justice court be held in the county seat of the county, but that in addition to being held in the county seat, the trial justice may also hold hearings and trials at other places in the county or in a city surrounded by or adjacent to the county if the circuit court

so prescribes. In the light of this statute, it is my opinion that you may continue to hold hearings and trials in Galax if the Circuit Court of Grayson County so prescribes. These hearings and trials can be held in Galax only at the times prescribed by the Circuit Court, which times must be posted at the Courthouse of Grayson County, and at the designated place for the holding of trials and hearings in Galax.

TRIAL JUSTICES—Town attorney; two offices are incompatible.
F-249 (194)

March 1, 1954.

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

This is in reply to your letter of February 12, 1954 requesting my opinion "as to whether or not a Trial Justice of a county may also legally hold office of attorney for an incorporated town within the jurisdiction of the said Trial Justice."

It is my opinion that the position of trial justice and town attorney are not compatible. The town attorney would aid in the drafting of town ordinances. As trial justice he would have occasion to hear cases involving the constitutionality or interpretation of these same ordinances. There is also the possibility that the town attorney will have to prosecute violations of town ordinances in the Trial Justice Court.

McQuillen on Municipal Corporations, Volume 2, Page 143, states that "Two offices are said to be incompatible when the holder cannot in every instance discharge the duties of each."

Upon consideration of the duties imposed upon a person as trial justice and as town attorney, it is my opinion that these two offices are incompatible.

VIRGINIA STATE BAR—Authority to print and distribute legal aid pamphlet. F-190 (300)

May 28, 1954.

MR. R. E. BOOKER, *Secretary-Treasurer*,
Virginia State Bar.

This will acknowledge receipt of your letter of May 26, requesting my opinion as to the authority of the Virginia State Bar to print and distribute in pamphlet form through the several local bar associations the material submitted with your letter. The title of the material is "Sound Steps in Purchasing a Home," and calls to the attention of prospective purchasers various legal incidents attendant upon the acquisition of real estate.

I have carefully examined the material submitted with your request.

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

The printing and distribution of the material described is not, in my opinion, prohibited by section 54-52.

VITAL STATISTICS—Birth certificates; changing racial designation on F-141 (157)

January 25, 1954.

MISS ESTELLE MARKS, *Registrar*,
Bureau of Vital Statistics.

This is in reply to your letter of January 21, 1954 pertaining to a birth certificate on file in your office and the question of the appropriate action to pursue in response to a letter addressed to the Bureau of Vital Statistics in which a demand is made that you furnish a certified copy of a birth certificate, which copy is to be different from the original filed in 1893, with respect to racial designation.

The primary function of the Bureau of Vital Statistics is to compile and preserve statistics with respect to births, deaths and marriages. Section 32-337 of the Code of Virginia, as amended, provides, in part, as follows:

"The State Registrar may in his discretion, upon request of the person whose birth is recorded, if he be sui juris, and if not upon the request of his legal representative, or in any case upon the request of a person legally entitled to the information, or upon the order of a court of competent jurisdiction, furnish a certified copy of the record of any birth registered under the provisions of this law, for which a fee of fifty cents may be charged."

Sections 2234 and 2235 of the Code of Virginia, 1887, provided for the registration of births and deaths by the Commissioners of Revenue in their respective districts, and, among other things, it was necessary to record the color of the child. Section 2241 of the Code of 1887 provided that such records were prima facie evidence of the facts therein set forth.

When the Bureau of Vital Statistics was created it assumed the duties formerly performed by the Commissioners of Revenue with respect to recordation of births and deaths. The Registrar is not at liberty to alter or destroy the records compiled by the former recorder of births, except in cases where the General Assembly has made provision for correction. One such provision is set forth in section 32-337.2 of the Code of Virginia, 1950, as amended, as follows:

"Whenever the State Registrar is requested to furnish a certified copy of a birth, death or marriage certificate of a person and the records in his office or other public records concerning such person or his parents or forebears are such as to cause the Registrar to doubt correctness of the racial designation or designations contained in the certificate, a copy of which is requested, it shall be the duty of the State Registrar to enter upon the backs of the original certificate and certified copy an abstract of such other certificates or records, showing their contents so far as they are material in determining the true race of the person or persons named in the original certificate and the certified copy, with specific reference to the records, indicating where same are to be found open to public inspection."

As may be seen by the express language of the foregoing statute, when there exist good cause to doubt the correctness of the racial designation contained in a birth certificate, a copy of which is requested, the duty of the State Registrar extends only to marking entry upon the original and the certified copy such notations as to show the contents and location of the records or certificates upon which there is reliance that the original record is incorrect.

After careful consideration of the birth certificate in question I am of the opinion that there has been a substantial compliance with the provisions of the Code relating to the recordation and furnishing of copies of birth certificates.

I suggest that you answer the letter of January 18, 1954 addressed to the Bureau of Vital Statistics by quoting so much of my letter as may appear germane, and inform the party in question that your office is not at liberty to issue an abstract of a birth certificate which differs from the original in any manner other than that authorized by statute.

VITAL STATISTICS—Birth certificates; court order necessary to change name. F-141 (48)

September 2, 1953.

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

This is in reply to your letter of August 28, 1953 relative to the change of a person's given name from that shown on the birth certificate on record in the Bureau of Vital Statistics. As gathered from the correspondence which you enclosed it would appear that the facts, briefly stated, are that one Merrill Vincent Taylor was registered with the Bureau of Vital Statistics by that name in 1935. Shortly after the birth the parents determined to call him Robert Grafton Taylor, but it was not until 1951 that any mention was made of this change to the Bureau of Vital Statistics. At that time the name Merrill Vincent was struck out and the name Robert Grafton inserted in lieu thereof on the birth certificate.

Section 8-577.1 of the Code of Virginia provides the manner in which a person may have his name changed. This section draws no distinction between given and surnames. I am, therefore, of the opinion that one may not lawfully change his name until he has complied with that section.

This is not to say that mistakes entered on the birth certificate of a person may not be corrected by the Bureau of Vital Statistics. However, under the circumstances as set forth above I am of the opinion that the person's name was actually changed and constitutes more than a mere mistake. In such cases I concur in your view that a court order should be obtained in order to validate such change.

WAR MEMORIAL COMMISSION—How vacancy created on. F-21c (256)

April 28, 1954.

HONORABLE JOHN J. WICKER, JR., *Chairman*,
Virginia World War II Memorial Commission.

I have your letter of April 22, in which you direct my attention to Chapter 244 of the Acts of 1950 creating the Virginia World War II Memorial Commission. The Act provides that the Commission is to be composed of fourteen citizens of Virginia, as follows: Five members of the House of Delegates to be appointed by the Speaker of the House; four members of the Senate to be appointed by the President of the Senate; four citizens at large to be appointed by the Governor; and the Adjutant General of Virginia. The Act further provides that:

"The Commission shall be continued during and after the construction of said Memorial as herein provided, and shall be the official custodian of said Memorial, and have complete control thereof with authority to do or cause to be done all things necessary in connection

therewith, subject to any directions the General Assembly of Virginia may from time to time hereafter provide."

The Commission was duly appointed as provided by statute, but you state that for one reason or another some of its members from the House of Delegates and the Senate are no longer members of those bodies. You then ask the following question:

"The question, therefore, arises as to whether a Commission member who has been duly appointed and who has accepted and entered upon such service, and who has not resigned, automatically loses his membership on the Commission merely because he ceases to be a member of the group (viz. House, Senate, or citizen at large) from which he was originally appointed."

The Act contains no provision to the effect that a vacancy occurs on the Commission when one of its members originally appointed from the House or Senate ceases to be a member of either body. Indeed, the Act contemplates, as pointed out above, that the Commission shall be a continuing one, and shall be the official custodian of the Memorial and have complete control thereof subject to any future Acts of the General Assembly. The appointments to the Commission were valid when made and after careful consideration it is my conclusion that the Commission is a continuing one and no vacancy occurs when a member thereof ceases to be a member of the group from which he was originally appointed.

I must frankly say that I do not think the question is at all free from doubt, but it is my opinion that the view I am expressing herein is the better one.

WAR ORPHANS EDUCATION FUND—Child of disabled veteran who dies is eligible. F-356a (183)

February 17, 1954.

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

I have your letter of February 11, in which you present the following question:

"As you no doubt know, the State Board of Education has the responsibility of administering the World War Orphans Education Act. We have a case of a child of a deceased veteran seeking assistance under this act. The veteran at the time of his death was in receipt of service connected compensation in the amount of 100%. His death, however, was the result of suicide and not the result of his service connected disability. We feel rather certain that the child of this veteran would have been eligible for assistance under the War Orphans Education Act prior to the death of his father. We are not certain, however, that this child would be eligible for benefits after the death of his father.

"Would the child in this case be entitled to benefits under the provisions of the World War Orphans Education Act? I shall greatly appreciate your help in the matter."

I assume from your letter that the veteran at the time of his death was totally and permanently disabled due to service rendered during the World War. Item 203 of the Appropriation Act of 1952 makes an appropriation for

the education of orphans of soldiers, sailors and Marines who were killed in action or died, or who were totally and permanently disabled as a result of service during the World War. I quote the following paragraph from this item:

"It is provided that the sum hereby appropriated shall be expended for the sole purpose of providing for tuition, institutional fees, board, room rent, books and supplies, at any educational or training institution of collegiate or secondary grade in the State of Virginia, approved in writing by the Superintendent of Public Instruction, for the use and benefit of the children not under sixteen and not over twenty-five years of age either of whose parents was a citizen of Virginia at the time of entering war service and was killed in action or died from other causes in World War I extending from April 6, 1917, to July 2, 1921, or in any armed conflict subsequent to December 6, 1941, while serving in the army, navy, marine corps, air force or coast guard of the United States, either of whose parents was, or is, or may hereafter become totally and permanently disabled due to such service during either such period, whether such parents be now living or dead."

Please note that the appropriation is applicable to children "either of whose parents was, or is, or may hereafter become totally and permanently disabled due to such service during either such period, whether such parents be now living or dead." This language makes the test total and permanent service connected disability "whether such parents be now living or dead." The nature of the legislation calls for a liberal construction and it is my view that the child you refer to unquestionably would have been entitled to the assistance if the totally and permanently disabled veteran were still living, and it is further my view that, in the light of the language which I have emphasized, the fact that the parent is now dead does not destroy the child's eligibility.

WATER CONTROL BOARD—Local sewage plants; county boards also have jurisdiction over minimum requirements. F-378 (277)

HONORABLE OMER L. HIRST,
Member House of Delegates.

May 13, 1954.

This is in reply to your letter of April 30, 1954 in which you ask if, in my opinion, exclusive jurisdiction in the matter of the construction and operation of sewage treatment plants is vested in the State Water Control Board or whether Fairfax County also has jurisdiction to the extent of prohibiting an installation that meets the requirements of the State Water Control Board.

The State Water Control Board does not, in my opinion, have exclusive jurisdiction in the matter of the construction and operation of sewage treatment plants. The State Department of Health also has jurisdiction over the construction and operation of sewage treatment plants. A local zoning board and a local board of health also have jurisdiction over the construction and operation of sewage treatment plants to the extent that they effect more stringent requirements than those required by the two State agencies mentioned above, but the local boards do not have authority to lessen the requirements established by the State agencies.

The Board of Zoning Appeals could, therefore, disapprove the proposed location of a sewage treatment plant under local zoning ordinances. A local

health board or health officer, under the proper local health ordinance, could require a higher degree of treatment of sanitary sewage, a larger plant, longer sewer lines and better operating results than those required by either the State Water Control Board or the State Department of Health.

WELFARE AND INSTITUTIONS—Board may not impose blanket nine month minimum confinement of female vagrants. F-231 (315)

June 10, 1954.

HONORABLE WALTER JOHNSON,
Commonwealth's Attorney for Northumberland County.

This is in reply to your letter of June 3, 1954 in which you state that a woman convicted for vagrancy in your county was sentenced under the provisions of section 18-94 of the Code of Virginia, 1950, for an indeterminate period of not less than three months nor more than three years and has been committed to the custody of the Board of Welfare and Institutions and is confined in the State institution in Goochland County. You ask to be advised whether such prisoner may be considered for release at the end of three months or may the Department of Welfare and Institutions impose a nine month minimum as a blanket proposition.

When construing sections 18-94, 18-95 and 18-96 together it appears that the purpose in committing such females to the control and supervision of the Board of Welfare and Institutions is to provide for the training, rehabilitation, release and supervision of such females. Section 18-94 provides the minimum and maximum periods for which such persons may be committed to the control of such Board. Section 18-96 provides, in part, that after the expiration of the minimum sentence of any such female the Board may at any time order the release of such female under certain conditions.

In view of the fact that the Legislature has prescribed the minimum and maximum periods in which such females may be committed to the control of the Board of Welfare and Institutions and of the provision for release following the minimum period of three months, I am of the opinion that the Department of Welfare and Institutions has no authority to prescribe a nine month minimum as an arbitrary period of confinement for such females inasmuch as such persons have a right to consideration for release at the end of three months.

WELFARE AND INSTITUTIONS—Contract with Chesterfield county for water. F-231 (91)

November 10, 1953.

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

This is in reply to your letter of November 4, 1953, a portion of which is quoted:

"The water supply at the Study Home for White Boys located in Chesterfield County has been obtained from two wells located on the property. Because of the severe drought that has existed this year, these wells will not furnish the water necessary for this institution. As a matter of fact, we are obtaining only sufficient water to provide the amount necessary

for cooking and drinking. It appears that sufficient water could be obtained by deepening the present wells or by drilling new wells; however, a sufficient and assured water supply could be obtained from the Chesterfield County water system.

"This matter has been discussed with the Chesterfield County Manager, who has offered to furnish water to the institution, but this would necessitate installing a new water line by the County approximately 3,100 feet in length. It is estimated that this line would cost the County approximately \$5,270 to install. The County has made proposals to the State concerning the financing of the construction of this new water line, and we would like for you to advise us concerning our legal authority to enter into agreements as proposed."

With your letter you enclosed a copy of a letter of November 3, 1953 from Mr. M. W. Burnett, Executive Secretary of the County of Chesterfield, a portion of which is quoted:

"This project can be financed in two ways: (1) The State could pay to the County said sum of \$5270.00, which would be returned, less 5% depreciation per year, when the system pays a gross revenue of 20%. (2) The State to guarantee a monthly return of 20% or \$88.00 per month. From the \$88.00 per month would be subtracted \$2.00 for each customer connected to said line. In both contracts there will be a provision to cover unforeseen contingencies. However, the estimate is sufficiently high to take care of everything except hard rock which necessitates blasting. Also, if the work is done at a cheaper price than estimated you will be credited with the difference."

I find no objection to the State's entering into a contract with the County of Chesterfield extending over a period of years, based on the second method of financing as set forth in Mr. Burnett's letter. This is conditioned upon the contract containing a clause to the effect that the guaranteed monthly return is to be conditioned upon each session of the General Assembly making an appropriation for the purpose.

WILLS—Admitting copy to probate; cannot be done if testator died domiciled in Virginia. F-157 (248)

MISS EVA W. MAUPIN, *Clerk*,
Circuit Court of Albemarle County.

April 21, 1954.

This is in reply to your letter of April 13, 1954 requesting my opinion on a question involving the probate of a will. Your letter reads, in part, as follows:

"I have a resident of Albemarle County, who died several weeks ago owning about \$500,000 of real estate in New York City and his residence and tangible personal property in this county which amounts to approximately \$200,000.

"This man left a will, which I contend should be probated in this office first and then authenticated to New York, because he is a resident and so acknowledged.

"Do I not have the right to demand the original will to be probated here?"

The whole subject of probate of wills rests upon and is regulated by statute law. The statute governing the situation described by your letter would be § 64-88 of the Code of Virginia which reads as follows:

"When a will relative to an estate within this State has been proved without the same, an authenticated copy thereof and the certificate of probate thereof may be offered for probate in this State. When such copy is so offered, the court or the clerk thereof to which it is offered shall presume, in the absence of evidence to the contrary, that the will was duly executed and admitted to probate as a will of personalty in the State or country of the testator's domicile and shall admit such copy to probate as a will of personalty in this State. And if it appear from such copy that the will was proved in the foreign court of probate to have been so executed as to be a valid will of lands in this State by the law thereof, such copy may be admitted to probate as a will of real estate. The probate of any such copy of a will before any such clerk shall have the same legal operation and effect as if such copy had been admitted to probate by the court."

One of the prerequisites to your acceptance of an authenticated copy of a will which has been probated and proved in another state is that the will was duly executed and admitted to probate as a will in the state of the testator's domicile. You may presume this prerequisite if there is no evidence to the contrary. However, you state that the testator was a resident of Albemarle County, and that this has been acknowledged to you. In the light of this, it is my opinion that you cannot accept an authenticated copy of a will probated in New York, but rather that you are correct in your position of demanding the original will to be probated in your office.

In answer to your second question, the probate of the original will of a testator in a state would be evidence of where he was domiciled at death, which place of domicile at death determines what state has jurisdiction to impose an inheritance tax on intangible personalty. Therefore, if you admit to record an authenticated copy of this will probated in some other state, this fact could be used as evidence by the beneficiaries of the will to attack the jurisdiction of the Commonwealth of Virginia to impose an inheritance tax on any intangible personalty passing under the provisions of the will.

WITNESSES—Summoning; procedure for. F-293 (38)

August 20, 1953.

HONORABLE CHARLES E. REAMS, JR.,
Culpeper County Trial Justice.

This is in reply to your letter of August 18, 1953, which I quote:

"Reference is made to Code Section 19-72, and your opinion is requested on the following points:

"1. A warrant issued in accordance with this section and the officer is directed to summons certain witnesses: is it sufficient under this section that the officer summon the witnesses orally without delivering a written copy of summons to witness summoned?

"2. Is a witness summoned orally under the directions obtained in the warrant as provided for in this section, subject to the same penalty for non-appearance as he would be if he were given a copy of written summons or would the witness be in the position where he could appear or not appear at his pleasure?

"I am enclosing a copy of the criminal warrant form furnished by the Comptroller of the State of Virginia, for your information and your attention to this will be greatly appreciated."

When considering the sufficiency of notice for the appearance of a witness the probing question is always whether or not such witness has actually received notice that he is to appear. However, the answer must be considered with the manner of receiving such notice when concerned with the results of the failure to appear.

The manner in which witnesses may be compelled to attend trial is governed by statute. I am aware of no statute which provides for oral summoning of witnesses. Upon examination of sections 19-72 and 8-296 of the Code, as well as other pertinent sections, I am convinced that a copy of the process must be delivered to a witness who is summoned and the nature of such service should be stated on the return of such summons. Of course, if a witness who has been summoned orally appears, he is competent to testify. Unless a witness be properly summoned as above stated, I am of the opinion that no penalty could be invoked against such witness for his failure to appear.

The foregoing is subject to the well recognized exception that a person already in the court room may be orally summoned and compelled to testify.

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