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

From July 1, 1954 to June 30, 1955

COMMONWEALTH OF VIRGINIA
Division of Purchase and Printing
Richmond
1955
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)

<table>
<thead>
<tr>
<th>Name</th>
<th>City or County</th>
<th>Official Title</th>
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<tbody>
<tr>
<td>J. Lindsay Almond, Jr.</td>
<td>Roanoke City</td>
<td>Attorney General</td>
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<tr>
<td>G. Stanley Clarke</td>
<td>Henrico County</td>
<td>Assistant</td>
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<tr>
<td>D. Gardiner Tyler</td>
<td>Charles City County</td>
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<td>Kenneth C. Patty</td>
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<td>Francis C. Lee</td>
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<td>Clarence F. Hicks</td>
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<td>J. Eldred Hill, Jr.</td>
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<td>Robert D. McIlwaine, III</td>
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<td>Nerhea S. Evans</td>
<td>Charlotte County</td>
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<td>Louise W. Poore</td>
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<td>Eleanor W. Tilley</td>
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<td>Mary Lou Sims</td>
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ATTORNEYS GENERAL OF VIRGINIA
From 1776 to 1955

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

*Hon. J. D. Hanks, Jr. was appointed Attorney General on January 5, 1918, to fill the unexpired term of Hon. John Garland Pollard, and served until February 1, 1918.
**Hon. Abram P. Staples was appointed Attorney General on March 22, 1934, to fill the unexpired term of Hon. John R. Saunders, and served until October 6, 1947.
***Hon. Harvey B. Apperson was appointed Attorney General on October 7, 1947, to fill the unexpired term of Hon. Abram P. Staples, and served until his death on January 31, 1948.
****Hon. J. Lindsay Almond, Jr., was elected Attorney General by the General Assembly on February 11, 1948, to fill the unexpired term of Hon. Harvey B. Apperson.
REPORT OF THE ATTORNEY GENERAL.

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CASIES DECIDED IN THE SUPREME COURT OF APPEALS


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17. **Lamb, C. H., Commissioner, etc. v. Lawrence I. Driver, Jr.** From Hustings Court City of Richmond, Part II. Suspension of operation privileges. Affirmed.

18. **Lamb, C. H. Commissioner, etc. v. George L. Jones.** From Hustings Court City of Richmond, Part II. Reversed.

19. **Lamb, C. H., Commissioner, etc. v. Joseph James Joseph.** From Hustings Court City of Richmond, Part II. Suspension of operation privileges. Reversed.

20. **Lamb, C. H., Commissioner, etc. v. James Elson Scearce, Jr.** From Hustings Court, Part II, City of Richmond. Suspension of operation privileges. Reversed.


23. **Naim, Ham Say v. Ruby Elaine Naim.** From Circuit Court City of Portsmouth. Miscegenation; Annulment on grounds of; Virginia Code Section 20-54 et seq. Affirmed.


29. **Skipper, Bernard v. Commonwealth.** From Corporation Court City of Lynchburg. Rape. Affirmed.


33. **Van Dyke, Grant v. Commonwealth.** From Circuit Court of Tazewell County. Malicious wounding. Reversed.

34. **Western State Hospital v. George F. Winingder et als.** From Circuit Court of Montgomery County. Contested will. Affirmed.

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


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REPORT OF THE ATTORNEY GENERAL


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24. *Livesay, J. A. v. Evans Martin and Division of Motor Vehicles.* Trial Justice Court of Rockbridge County. Suit to recover security deposited with Commissioner. Division of Motor Vehicles dismissed as party to garnishee proceedings.


REPORT OF THE ATTORNEY GENERAL


29. Richardson, James Theron v. Chester H. Lamb, Commissioner, etc. Law & Equity Court of the City of Richmond. Appeal from Commissioner's action in revoking operator's license. Operator's license surrendered and appeal dismissed.


31. Rogers, Melvin Eugene v. C. H. Lamb, Commissioner, etc. Circuit Court of Princess Anne County. Appeal from Commissioner's refusal to reissue operator's license. Commissioner's action affirmed.


33. Sternheimer, Lewis v. Chester H. Lamb, Acting Commissioner, etc. Circuit Court of the City of Richmond. Appeal from Commissioner's action in revoking operator's license. Appeal dismissed and permit surrendered.


35. Via, Carl Edward, Sr. v. C. H. Lamb, Commissioner, etc. Circuit Court of Louisa County. Appeal from Commissioner's action in suspending operator's license. Commissioner's action affirmed.


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17. Reed, Charles Clyde v. W. Frank Smyth, Jr., Supt., etc. Hustings Court of the City of Richmond, Part II. Petition denied and dismissed. Petition for writ of error denied by Supreme Court of Appeals of Virginia.

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

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<thead>
<tr>
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<td>July 22, 1954</td>
<td>Joe Carter</td>
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<td>Oct. 5, 1954</td>
<td>Charles William Deadrick</td>
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<td>Nov. 3, 1954</td>
<td>Julian Bulock, alias Lester Crofton</td>
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<td>Robert Lee Stevenson</td>
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<td>Nov. 13, 1954</td>
<td>Earl Spake</td>
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<td>Douglas B. Porter</td>
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<td>McFall Columbus Gourdine</td>
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<td>Robert Gene Wilson</td>
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<td>June 17, 1955</td>
<td>Ernest Hartley, Jr.</td>
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A. B. C. LAWS—Board may repair buildings without approval of Governor.
F-210 (154)  

November 22, 1954.

HONORABLE G. STANLEY CLARKE,
Assistant Attorney General,
Alcoholic Beverage Control Board.

This will acknowledge receipt of your letter of November 19, from which I quote as follows:

"The Virginia A. B. C. Board has in contemplation the replacing of its worn out and obsolete boilers with new ones and the changing over from steam heat to hot water heat. At the same time that this change is to be made it is contemplating also having the new heating system so equipped as to air-condition the entire building owned by the Virginia A. B. C. Board at Fourth and Grace Streets. There will be also some other minor repairs and improvements made at the same time.

"An advertisement asking for bids on the accomplishment of this work has been published and the bids will be received some time early in December.

"A Member of the State Auditors' Staff has raised a question as to whether or not the A. B. C. Board may make these extensive repairs and improvements without previously obtaining the consent of the Governor."

The Board desires my opinion as to its authority to make these repairs and improvements without obtaining the consent of the Governor.

As you point out, Title 4, Section 7, Subsection E, of the Code of Virginia relating to the functions, duties and powers of the Board is as follows:

"To lease, occupy and improve any land or building required for the purpose of this chapter."

The building under consideration is owned by the Virginia Alcoholic Beverage Control Board and constitutes its central base of operations.

In my opinion, the statute above quoted provides ample authority for the Board to proceed with the plans for repairs and improvements as set out above. This view is reinforced in my judgment, by the language employed in subsection, f of Title 4, Section 7.

Under subsection f, the consent of the Governor is required in order for the Board to acquire or convey title to real estate or buildings. This language clearly manifests a legislative intent to vest broad discretion in the Board relative to the improvement of any land or building required by the Board for its purposes.

A. B. C. LAWS—College fraternity does not come within definition of a club.
F-210 (219)  

February 9, 1955.

HONORABLE ROBERT T. ARMISTEAD,
Commonwealth's Attorney for the City of Williamsburg and the County of James City.

I regret exceedingly the delay in replying to your letter of January 25. The same has been due, however, to the fact that I have been confined at my home with an illness.
The question propounded by your letter as I read it is whether or not the fraternity lodges at the College of William and Mary come within the definition of a "CLUB" as defined by the A. B. C. Act.

According to the decalogue of fraternity policy established by the National Interfraternity Conference it gives the ten purposes for college fraternities, which may be briefly summarized as follows: (1) training and discipline of the individual, (2) sharing college responsibilities and matching the discipline of the college administration, (3) developing business experience through the management of the fraternity houses, (4) promotion of scholarship, (5) promotion of moral and spiritual development, (6) encouraging appreciation of fine arts and sports, (7) developing social graces, (8) providing healthful and sanitary housing and encouraging healthful practices, (9) teaching civic responsibilities, (10) developing qualities of human understanding and kindness.

In the A. B. C. Act, Section 4-2, Sub-section 6, a Club is defined as follows: "Club" shall mean any non-profit corporation or association which is the owner, lessee or occupant of an establishment operated solely for objects of a national, social, patriotic, political or athletic nature, or the like, but not for pecuniary gain, the advantages of which belong to all the members. It also shall mean the establishment so operated."

Considering the declared purposes of fraternities and the definition of a Club in the A. B. C. Act, I have definitely come to the conclusion that when you use the word, "solely" as used in the A. B. C. Act definition of a Club enumerating its purposes and then view the declared purposes of fraternities you will find that there are so many divergent purposes it could be hardly said that the A. B. C. definition embraces the purposes for which college fraternities are organized.

I am further of the opinion that when the Legislature used the language set forth in the Club definition in the A. B. C. Act that it did not have in contemplation embracing the activities of a college fraternity.

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HONORABLE ERNEST W. GOODRICH, Commonwealth’s Attorney.

This will acknowledge receipt of your letter of September 21. You desire my opinion on whether or not a motor vehicle “used for the transportation of distilling apparatus where the driver is being charged with the possession of distilling apparatus may be forfeited under Title 4, Section 53,” or any other provisions of Virginia law.

As you point out, Section 4-53 as amended would deem to be contraband and subject to forfeiture a motor vehicle “which shall be found in the immediate vicinity of any place where alcoholic beverages are being unlawfully manufactured.”

It would, in my opinion, be incumbent upon the Commonwealth to establish that the vehicle used for the transportation of the apparatus was found in the immediate vicinity of the place of manufacture and was being used to aid in illegal manufacture. In the absence of such proof I do not believe that the vehicle could be deemed to be contraband and subject to forfeiture. Section 4-56 applies when the vehicle is transporting alcoholic beverages illegally acquired or the transportation of such beverages being illegally transported. These are the only two statutes relating to your inquiry.

On the facts stated, without more information, it is my opinion that forfeiture proceedings could not be successfully maintained.
A. B. C. LAWS—What constitutes second conviction under. F-381 (214)

February 3, 1955.

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

This is in reply to your letter of February 1, 1955 in which you request my opinion concerning the proper interpretation to be given to § 4-58 of the Code of Virginia under the following statement of facts.

An ABC agent purchases whiskey from a bootlegger. Approximately one week later the agent again purchases whiskey from this same bootlegger. After the second purchase the agent secures two warrants from the magistrate charging the bootlegger with the unlawful sale of whiskey on each occasion under § 4-58 of the Code. The warrants are returnable to the Trial Justice on the same date and are generally tried together. The Trial Justice convicts the bootlegger for the first offense and then finds him guilty of the second offense also.

You ask if this bootlegger, under the statement of facts, is to be considered guilty of a second or subsequent conviction as set out in § 4-58 of the Code. While the question is not free from doubt, I am of the opinion that this second conviction is not really a second or subsequent conviction with the meaning of § 4-58. Although two warrants have been issued for this bootlegger, they constitute in reality one warrant with two counts. I am of the feeling that any violation by the bootlegger before he is convicted of the first offense is not a second or subsequent conviction as contemplated by § 4-58 of the Code of Virginia.

Second offender provisions of our criminal laws were enacted by the General Assembly with the intent that a law violator who had been convicted of violating the law one time should be penalized more severely should he violate the law the second time. Until he is convicted of his first violation, any subsequent violation does not come within the scope of second offender laws.

AGRICULTURE DEPARTMENT — Registration and control over Virginia quality label. F-59 (117)

October 22, 1954.

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

This is in reply to your letter of October 18, 1954 in which you request an opinion concerning the registration and control of a Virginia quality label for selected agricultural products, which your department, in conjunction with the Virginia State Chamber of Commerce, has been endeavoring to promote. You state that in registering this label as a trade mark the State Chamber is anxious for the registration to be made jointly by the Chamber and the Department, and inquire whether there is any legal prohibition against the Department's joining in such an application. You also present the question of whether this label, which reads "A Product of Virginia—Traditional Quality—State Inspected and Approved" could be brought under Sections 3-259 through 3-280.1 of the Code of Virginia, thus giving the Department control over its use.

Considering these questions in the inverse order of their presentation, I am of the opinion that the label under consideration does not properly fall within the purview of any of these statutory provisions. I understand that the Department of Agriculture does not contemplate the use of an outline map of Virginia in connection with the wording set out above, nor does it propose to restrict the application of these labels to products which have been under continuous official State inspection. Thus, it does not come within the scope of Sections 3-270 through 3-280.1 of the Code of Virginia, authorizing the preparation and utilization of a Virginia Quality Label. See particularly Sections 3-271 and 3-273. Moreover, I do not think that its promulgation may be predicated upon the authority of Sections 3-259 through 3-269, relating to grades, marks and brands generally. These latter sections of the Code obviously contemplate the establishment of brands or trade marks which are indicative of the grade, classification, quality,
condition, size, variety, quantity or other more or less specific characteristics of the product in question. This statutory intendment is highlighted by the prescription contained in Section 3-260 that the Director of the Division of Markets shall establish and promote grades recommended or adopted by the United States Department of Agriculture in so far as available and suitable for use in Virginia. Since the label under discussion does not purport to convey such specific information, but is fundamentally a quality insignia intended primarily to identify high grade products of this State as having a Virginia origin, it is my opinion that its establishment is not comprehended by these provisions of the Code.

The answer to the initial inquiry presented in your communication is to some extent foreshadowed by the conclusions just reached. In the absence of any statutory authority for the preparation of the label in question. I am unable to perceive how the Department may properly join with the State Chamber in an application for trade mark registration. Generally speaking, I would be inclined to believe that the Department, in its individual capacity, might apply for registration of any of its properly issued brands or labels as a reasonable safeguard against impermissible use, even though this action is not specifically authorized by statute. Such a situation is not here presented, however, and as the label purports to assure that the product to which it is affixed has been “State Inspected and Approved”, I can think of no valid ground upon which the State Chamber could press for registration in its own name. This is especially true in view of the language contained in the pertinent Federal Statute (15 USCA, Section 1054) which provides that collective and certification marks, including indications of regional origin used in commerce, shall be registrable by persons, nations, States, municipalities and the like, “exercising legitimate control over the use of the marks sought to be registered * *”. Since the Department has not been empowered by the Legislature to establish, issue or control the use of labels of the character in question, I am of the opinion that it may not join with a private group in applying for its registration as a trade mark.

AGRICULTURE—NURSERY STOCK—Certificate of registration required if grown for resale. F-5a (138)

MR. T. H. LILLARD, Sheriff of Madison County.

I have your letter of October 29, 1954, in which you request an opinion concerning the scope of Section 3-175 of the Code of Virginia (1950). As you state in your communication, this section reads in pertinent part as follows:

“It shall be unlawful for any person, either for himself or as agent for another, to offer for sale, sell, deliver, or give away, within the bounds of this State, any plants, or parts of plants, commonly known as nursery stock, unless such person shall have first procured from the State Entomologist a certificate of registration, which certificate shall contain such rules and regulations concerning the sale of nursery stock as the State Entomologist may prescribe.”

You inquire whether this section applies to boxwoods and other plants grown by farmers on their own farms. In addition to the above quoted provisions, Section 3-175 also prescribes:

“The State Entomologist shall not issue any certificate of registration except upon the payment of the sum of Ten Dollars for each nurseryman or dealer, and One Dollar additional for each agent of such nurseryman or dealer.”
Notwithstanding the broad reference to "any person" contained in the initial sentence thereof, it would seem—in view of the italicized language—that the statute under consideration contemplates the issuance of certificates of registration only to nurserymen or dealers and their agents. The term "dealer" requires no elaboration, and, while no specific definition of the term "nurseryman" is set out in the related provisions of the Code, Section 3-151(a) describes a "nursery" as: "any grounds or premises on or in which nursery stock is propagated or grown for sale or distribution, including any grounds or premises on or in which nursery stock is being fumigated, treated, packed or stored, or otherwise prepared or offered for sale or movement to other localities."

It thus appears that the statute in question envisions the issuance of certificates to those engaged in the buying or selling of nursery stock and to those employed in growing, treating or handling such stock for sale or distribution. I believe that, in essence, this statute contemplates the registration of persons engaged in a more or less continuing process of dealing in or with nursery stock, or persons who raise, package or store such stock with the intention of selling or distributing it, and that it was not intended to apply to persons who may make an isolated sale or casual gift of items which have not been grown for the purpose of sale or distribution. I think this conclusion is reinforced to some extent by the following considerations:

1. A single certificate may remain in force for a period of one year and separate certificates for individual transactions are not required.

2. Continuing compliance with the rules and regulations of the State Entomologist is imposed upon the recipients of a certificate of registration upon pain of cancellation for violations.

In view of the foregoing I am of the opinion that the statute under discussion applies to boxwoods and other nursery stock, as defined in Section 3-151(b), grown by farmers on their own farms, if such stock is grown for the purpose of sale or distribution, but not otherwise.

AGRICULTURE—WEIGHING OR MEASURING DEVICES—Moisture meters come within terms of statute. F-5 b (24)

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

This is in reply to your letter of July 21, 1954, from which I quote as follows:

"During the past decade the use of electric moisture meters for determining the moisture content of commercial grains have come into general use at mills and grain storages.

"It is the general practice to apply discounts for moisture in excess of a specified content. For instance, wheat is bought on a basis of 14% moisture content and is usually discounted about 5¢ per bushel for each 1% of moisture in excess of 14%. Corn is bought on a 15½% moisture content basis and a discount approximating 5¢ per bushel is made for each 1% moisture content above 15½%. Soy beans and peanuts are priced in a like manner.

"Our experience indicates that some of these machines, like scales, are inaccurate, and that in a good many instances producers have been penalized an excessive amount due to this inaccuracy."
"It seems to me that moisture content is just as much a measure as is weight since weight times moisture equals total volume in these transactions. "I would like to have your official opinion as to whether or not we have the authority for this enforcement under Sections 59-78 and 59-90 of the Code of Virginia."

Section 59-71 of the Code of Virginia defines weighing and measuring devices and provides, in part, that such weighing and measuring devices shall be construed to include all weights, scales, beams, measures of every kind, instruments and mechanical devices for weighing or measuring, and any appliances and accessories connected with any or all such instruments. In view of the practice which you say exists with respect to the sale of commercial grain as set forth in your letter, it seems clear to me that a device for measuring the moisture contained in grain is a measuring device within the meaning of the definition set forth in § 59-71 and that, therefore, your Department does have the authority for enforcement under the sections referred to in your letter.


HONORABLE THOMAS B. STANLEY.
Governor of Virginia.

This will acknowledge receipt of your letter of July 7, through which you call my attention to Item 253⅓ (Page 977) of the general Appropriation Act for this biennium. This Item appropriates to the University of Virginia $5000 each year "For extension school in Wise County."

Section 31 of the Appropriation Act (Page 1040) provides, in substance, that no State institution of higher learning shall hereafter undertake to engage in the operation of any new or additional extension school without first obtaining the approval of the General Assembly.

You desire my opinion as to whether the appropriation by the General Assembly, as reflected by Item 253⅓, constitutes the approval contemplated by Section 31.

It is my opinion that the appropriation made by the General Assembly under Item 253⅓ for an extension school in Wise County constitutes the authorization and approval of the General Assembly as contemplated by Section 31 of the general Appropriation Act.

ARCHITECTS, ENGINEERS, SURVEYORS—May form association and practice under name of. F-195 (194)

January 5, 1955.

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

This will reply to your letter of December 31, in which you request an opinion on whether or not it is permissible under the provisions of Section 54-27, Code of Virginia (1950) for a group of architects and professional engineers to practice their respective professions as a firm, company or association.

Specifically, you point out that it is a common practice in this State for a group of professional engineers and architects to practice as an association and, in filing plans and specifications with the local building inspector's office, to identify such plans and specifications by inserting, in the lower right hand corner, the name of the firm, company or association, i. e., John Smith and Associates,
Architects and Engineers, or R. Stuart Doe and Company, Architects and Engineers. In addition, you state that in many instances the name of the individual used in identifying the association or firm is either deceased or retired.

You inquire whether the practice outlined above constitutes a violation of Section 54-27 of the Code, which reads:

"Who required to obtain certificate.—In order to safeguard life, health and property, any person practicing or offering to practice as an architect, a professional engineer or land surveyor in this State shall hereafter be required to submit reasonable evidence to the Board that he or she is qualified so to practice, and to be certified as herein provided. It shall be unlawful for any person to practice or to offer to practice the profession of engineering, architecture or land surveying, in this State, or to use in connection with his name, or otherwise assume, use or advertise any title or description tending to convey the impression that he is a professional engineer, architect or land surveyor, unless such person has been duly registered or is exempted under the provisions of this chapter."

Manifestly this statute applies, and contemplates the issuance of certificates, solely to individuals. Moreover, it is evident that the proscription enunciated in the terminal sentence thereof was designed to prevent one who has not been certified (or is not exempt) from using in connection with his name any title or description tending to represent that he is a professional engineer. The statute does not purport to prohibit those who have been duly certified from practicing together as a firm or from using a title or description signifying the existence of such an association. I am, therefore, of the opinion that so long as the procedure under consideration is employed only by individuals who have been duly registered, it does not constitute a violation of the statute in question.

ART COMMISSION—Authority only over works to become property of State.
F-40 (280)
April 18, 1955

HONORABLE THOMAS B. STANLEY,
Governor of Virginia.

I acknowledge receipt of your letter of April 14, 1955, in which you refer to the action of the State Art Commission with respect to the Busts of Marshall, Wythe and Blackstone, by Felix de Welden, Sculptor, which were unveiled at a ceremony at the College of William and Mary on September 25, 1954. It appears that these busts were executed under the auspices of the College Law Alumni Association and placed on indefinite loan with the College and that the busts are not to become the property of the Commonwealth.

At a meeting of the State Art Commission on March 4, 1955, the Commission voted unanimously against recommending approval on the ground that the Commission was of the opinion that the busts lack sufficient artistic merit.

You have requested my opinion as "to whether these works of sculpture, on loan to the College of William and Mary, require approval of the Art Commission for display at the College."

The answer to your question depends upon the interpretation of § 9-11(1) of the Virginia Code, which reads as follows:

“(1) Works of art.—Hereafter no work of art shall become the property of the State by purchase, gift or otherwise, unless such work of art or a design thereof, together with its proposed location, shall have been submitted to and approved by the Governor acting with the advice and counsel of the Art Commission; nor shall any work of art, until so submitted and approved, be contracted for, placed in or upon or allowed to-
extend over any property belonging to the State. No existing work of art owned by the State shall be removed, relocated or altered in any way without submission to the Governor; provided, that the foregoing provisions shall not apply to any portrait, tablet or work of art portraying, or pertaining to, a member or former member of the Supreme Court of Appeals, presented to, or acquired by, the Court and displayed in that part of any building or buildings under the supervision and jurisdiction of the Court.”

In my opinion the Code section which I have quoted limits the scope of the Art Commission’s powers of approval or rejection of works of art to those which have become the property of the State or which, upon acquisition, will become the property of the State. The Commission has no jurisdiction over works of art merely loaned to the State in which the State has no property interest.

ATHLETIC COMMISSION—Authority over professional wrestling. F-7 (159)

Mr. Joseph Bauers,
Secretary, Virginia Athletic Commission.

This will acknowledge receipt of your letter of November 4, 1954, enclosing the transcript of the record in the proceedings had by your Commission concerning the conduct of professional wrestling in Virginia. The hearing by the Virginia Athletic Commission was held on July 20, 1954. In your letter you ask the following questions:

“Is there evidence, from the hearing, of any monopoly involving the appearance of Wrestlers in Virginia? Are we empowered to deal with the booking of Wrestlers or prevent their appearance in Virginia when such arrangements are contracted through interstate communications assuming they obey our rules and regulations when presenting an exhibition?”

I have examined the testimony taken at the hearing and, based upon such evidence, I am of the opinion that it is not sufficient to support a conclusion that a monopoly exists involving the appearance of wrestlers in this State. Moreover, there appears to be grave doubt whether the promotion of wrestling matches or exhibitions comes within the purview of Chapter 3, Title 59 of the Code of Virginia.

With respect to your second question, I am of the opinion that the Commission does not possess any power to deal with the booking of wrestlers or to prevent them from performing in this State so long as the exhibitions are conducted in accordance with the rules and regulations promulgated by the Commission.

In view of my opinion regarding your first question, I deem it unnecessary to express an opinion regarding your third, or last, question.

ATTACHMENTS—Of ship includes personal property on board. F-136 (97)

Honorable W. L. Carleton,
Attorney for the Commonwealth.

I have your letter of September 21, from which I quote as follows:

“Mr. James E. Gardner, City Sergeant of the City of Newport News is very much concerned about Section 8-524.1 pertaining to attachment of ships, boats and other vessels of more than 20 tons, which section was
amended by the 1954 Acts. This section of course should be read along with Section 8-526.

"I feel certain that this section was amended due to a large number of attachments that have been issued in the past several years against foreign ships.

"Certain maritime attorneys have taken the position with the City Sergeant that if they file attachment proceedings that it is compulsory for him under the present law to attach any personal property that may be upon the ship such as life boats, fuel oil or any number of other items; that if he does not serve the attachment they will proceed against his bond, so, I will very much appreciate a ruling from you as to whether or not the City Sergeant in view of the above sections might be liable upon his failure or refusal to attach personal property upon ships or vessels of more than 20 tons, or, on the other hand, if any and all other property situated or located on the ship is included as a part of the ship."

Your inquiry presents the question as to what is included in the words “ship, boat, or other vessel” as used in Section 8-524.1 of the Code.

I refer you to the case of U. S. v. Dewey, 188 U. S. 254, 47 L. Ed. 463, wherein it is held that the word "ship" or "vessel" is sufficiently comprehensive to embrace not only everything essential to the ship's navigation, but to the purposes of her existence. The effect of the opinion in this case, as I interpret it, is that the word "ship" is sufficiently broad to include lifeboats, fuel and such other items of personal property found thereon as may be essential to the purposes of the ship's existence. I should think, therefore, that an attachment issued against a ship should include such personal property as above described.

BAIL AND RECOGNIZANCE—Refund of bonds when warrant dismissed, or fine less than bond. F-171 (153)

November 19, 1954.

Honorable J. Thompson Wyatt, Commonwealth's Attorney.
City of Petersburg.

This will acknowledge receipt of your letter of November 17, 1954, together with the enclosures relating to Calvin C. Boyd. Your statement of the facts and the proceedings had in connection with this matter is as follows:

"On or about November 1st, 1954, one Calvin C. Boyd, was tried in the Police Court of this City on two warrants: one charging illegal sale of Alcoholic Beverages and the other charging the maintaining of a common nuisance in violation of Section 4-81 of the Code. He was convicted of both violations and appealed his cases to the Hustings Court of this City, which convened on November 19th, 1953.

"The defendant posted cash bond in the sum of $250.00 for his appearance in the Hustings Court on the nuisance violation and posted cash bond for $500.00 for his appearance in the Hustings Court on the illegal sale violation.

"On the first day of the term, November 19th, 1953, the cases were set for trial during that term. There was no appearance on the trial date and I moved the Court for forfeiture of both bonds. Attached hereto is an attested copy of the forfeiture proceedings.

"On January 26th, 1954, the defendant, appeared by counsel and entered a plea of guilty to the warrant charging illegal sale and received a
penalty of Ninety days in jail and a fine of $50.00, a capias having been issued for the arrest of the defendant. At the same time the warrant charging the maintaining of a common nuisance was dismissed. Attested copies of the conviction in the first instance and the dismissal in the other instance are also herewith enclosed.

"The defendant has now filed petition for a refund of the bond of $250.00 in the nuisance case and a refund of the $500.00 bond in the illegal sale case in such amount as is over and above the fine and costs."

I am of the opinion that, under the facts as stated and under the provisions of § 15-108 of the Code, the defendant is entitled to the return of the cash bond posted by him in both cases, less such amount, if any, necessary to pay the fine imposed against him and the costs.

It appears that the defendant has proceeded properly by the filing of the petition which, I presume, was filed under § 19-338 of the Code. The duties of the Commonwealth's Attorney and the court are set forth in Code §§ 19-339 and 19-340, and § 19-341 provides that the proceedings "shall be according to the course of the common law practice, except that no formal pleadings shall be necessary."

I am of the opinion that the Governor is authorized to order the State Treasurer, on the warrant of the Comptroller, to refund the forfeiture or so much thereof as the evidence discloses the defendant to be entitled to, and the procedure for filing the application with the Governor is set forth in § 19-342 of the Code.

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BAIL AND RECOGNIZANCE—Someone other than appellant may be principal on bond. F-27 (187)

HONORABLE JOHN W. SNEAD,
Trial Justice for Chesterfield County.

December 28, 1954.

This is in reply to your recent letter in which you present the following question:

"Section 16-80 of the Code, with reference to removals and appeals from the Trial Justice Court, provides in part that no 'appeal shall be granted unless and until the party applying for the same shall give bond' etc. "In view of Sections 8-4 and 8-544, or any other provisions of the Code, I would appreciate your advice whether or not some other person may become principal in a bond for appeal under Section 16-80 in the place of the appellant himself, or whether it is required that the appellant be the principal in the bond."

The general rule as stated in the texts seems to be that, where an appeal bond is required to be given, it is not necessary that the appellant or plaintiff in error be a party to or sign the bond as principal. For example, see 3 American Jurisprudence, Appeal and Error, Section 496.

Section 8-4 of the Code, to which you refer, provides that "a bond for obtaining any writ or order, in term or vacation, may be executed by any person with sufficient surety, though neither be a party to the case." Section 16-80 of the Code, relating to appeals from a trial justice court, says that "no such appeal shall be granted unless and until the party applying for the same shall give bond, with sufficient surety, to be approved by the trial justice ***." Under Section 8-4 it would appear that appeal bonds can be executed by someone with sufficient surety other than the parties to the litigation unless there is to be found something in the language of Section 16-80 directly in conflict. In order to create such conflict the words "shall give" in Section 16-80 have to be construed as meaning "shall be executed" or "shall be entered into". It is my view that the word "give"
is not synonymous with the words "execute" or "entered into" and, therefore, the two sections are not in conflict. Rather, the words "shall give" should be construed in the sense of "afford" or "furnish". This construction is believed to be more consistent with the intent of the Legislature as manifested by the liberal provisions of Sections 16-15 and 16-32 of the Code aiming at the administration of justice in the determination of small claims by the elimination of harmless irregularities and technicalities. Such construction meets fully the legislative intent and harms no one.

It is my conclusion, therefore, that some person other than the appellant may be principal in an appeal bond given under Section 16-80.

BOARD OF SUPERVISORS—Authority to regulate keeping of animals in certain counties. F-33 (102)

HONORABLE PETER M. AXSON, JR., Commonwealth's Attorney for Norfolk County.

This is in reply to your letter of September 29 in which you request my opinion on the construction of Section 15-20.2 of the Code of Virginia, 1950, as amended. Specifically you raise the question of whether or not this section of the Code empowers the Board of Supervisors of those counties coming within its purview to pass an ordinance prohibiting the keeping of swine in residential areas which shall be applicable to some of the magisterial districts of the county but not to others.

The statute under consideration prescribes:

"Regulating the keeping of animals.—The governing body of any county which adjoins three or more cities, one of which has a population in excess of 200,000 by the last preceding United States Census, shall have the power, whenever in its judgment the same is necessary for the preservation of the public health, to regulate by ordinance the keeping of animals or fowl, other than dogs and cats, within a certain distance of residences or other buildings or wells, springs, streams, creeks or brooks, and to provide that all or certain of such animals shall not be kept within certain areas, and to provide for the punishment of violations of such ordinances as misdemeanors."

I have been unable to discover any decisions relating to the particular question posed in your communication. However, in view of the subject matter of this statutory provision and the broad scope of the regulatory power conferred thereby, it would seem that a possible analogy may be found in those sections of the Code which invest the Board of Supervisors of a county with the authority to promulgate zoning ordinances. In this connection, the Virginia statutes provide that, for the purpose of promoting health, safety and general welfare, the Board of Supervisors may regulate, inter alia, the specific activities which may be conducted within certain areas of the county. In conjunction therewith, the statutes also authorize the Board of Supervisors to divide the county into such districts as it may deem best suited for this purpose, enjoining uniformity with respect to all regulations established within a particular district but specifying that regulations may differ from district to district. See Code of Virginia, Sections 15-844, 15-845.

Under these sections it would appear that the county governing bodies could establish a district which would not be subject to any zoning regulations. This would be especially true in view of the legislative mandate that statutes of this nature shall be liberally construed to the end that health, safety and the general welfare may be furthered. See Code of Virginia, Section 15-834. Moreover, in
County of Fairfax v. Parker, 186 Va. 675; 44 S. E. (2d) 9, the Supreme Court of Virginia expressed the view that whether the entire area of a county or only a portion thereof should be zoned is left to the discretion of the Board of Supervisors, the reasonableness of such restrictions as may be imposed being subject to judicial review.

Admittedly the suggested analogy is not precise; in the zoning statutes the power to district the county for a particular purpose is expressly delegated, while in the instant situation you propose to apply restrictions upon the basis of the magisterial districts already established, as a reasonable method of exercising the fundamental authority granted. However, I am of the opinion that so long as the proposed ordinance is necessary for the public health and so long as there exists a demonstrably rational and practical basis upon which certain magisterial districts may be excluded from its terms, its passage would constitute a valid exercise of the power reposed in the Board of Supervisors.

BOARD OF SUPERVISORS—County Finance Board—Procedure to follow to abolish. F-602”(177) December 17, 1954.

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

This will acknowledge receipt of your letter of December 16, 1954, which reads as follows:

"The Board of Supervisors have requested that I obtain your opinion as to the following:

"Section 58-940, Code of Virginia, dealing with County Finance Boards was amended by the 1954 Legislature by adding the following paragraph:

"The governing body of any County which has a county finance board established under the provisions of this section may by ordinance duly adopted abolish the finance board, whereupon all authority, powers, and duties of the finance board shall vest in the governing body" (Emphasis supplied.)

"Section 15-8 of said Code, as amended, provides, in general, how ordinances may be adopted by governing bodies of the County and, among other provisions, states that publication of the proposed change must be made for the required period.

"It is my opinion that to abolish the County Finance Board, as provided in the amendment to Section 58-940, supra, it is necessary that the ordinance proposing such abolition be published, etc., in accordance with Section 15-8 of the said Code, and that a resolution duly adopted by the governing body of the County, without compliance with said section would not be sufficient."

I am in agreement with your opinion that the ordinance proposing the abolition of the finance board should be published as prescribed by § 15-8 of the Code. I believe the provisions of § 15-8(6) prior to the 1954 amendment would be applicable in this instance.
BOARD OF SUPERVISORS—Health ordinances—may require examination as to communicable disease for food handlers. F-60 a (288)

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

This is in reply to your letter of April 8, in which you present the following situation:

"An ordinance has been proposed for enactment by the Board of Supervisors providing that all persons employed in barber shops, hair-dressing, food, beverage, bakery and grocery establishments be required to have an annual X-ray examination for tuberculosis, and to carry a certificate showing a negative report. Another section provides that no new person shall be employed until such test has been made and a negative certificate issued. Still another section makes this applicable to all school teachers and school personnel in the County.

"The question has arisen in my mind over the power of the Board of Supervisors of this County to pass such an ordinance. If you determine that such a power exists, would you also advise whether such an ordinance could likewise provide for such examinations in respect to syphilis and other venereal diseases."

Particularly pertinent to the resolution of this question is Section 15-8, Code of Virginia (1950), as amended, which, in part, prescribes:

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

* * *

"(2) To adopt the necessary regulations to prevent the spread of contagious diseases among persons or animals.

* * *

"(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.

* * *

I believe that the foregoing provisions of the Virginia Code furnish ample authority for the passing of the ordinance under consideration. The regulation is manifestly designed to prevent the spread of diseases which are highly contagious, and it is limited in application to those engaged in occupations which provide particularly dangerous opportunities for the dissemination of these maladies. Moreover, I do not believe that the authority of the Board of Supervisors in this instance is diminished by the fact that the Legislature has also undertaken to control the communicable diseases in question. See, Code of Virginia, 1950, Sections 32-84 through 32-104. With respect to municipal corporations, this office has repeatedly ruled that an ordinance prescribing additional regulations which are reasonable and consistent with State regulatory law is not void as conflicting with such law. An examination of State legislation in this field discloses no particular in which the provisions of the ordinance are inconsistent with the general law of the Commonwealth on this subject. I am, therefore, of the opinion that the ordinance in question would constitute a valid exercise of the authority reposed in the Board of Supervisors."
BOARD OF SUPERVISORS—Holding closed meetings of special committee.  
F-33 (83)  
September 13, 1954.

HONORABLE ROBERT D. BAUSERMAN,  
Commonwealth’s Attorney for Shenandoah County.

This is in reply to your letter of September 8, 1954 in which you inquire as to whether a committee appointed by the Board of Supervisors, consisting of two members of the Board of Supervisors, two members of the School Board and eight members at large, may conduct a meeting behind closed doors. You point out Section 15-244 of the Code of Virginia, 1950, provides that the Board of Supervisors must sit with open doors.

Inasmuch as the committee in question is an independent body composed of members in addition to members of the Board of Supervisors, I am of the opinion that the provisions of Section 15-244 of the Code are not applicable.

BOARD OF SUPERVISORS—May make temporary loan to Sanitary District out of General Fund. F-213 a (241)  

HONORABLE J. GORDON BENNETT,  
Auditor of Public Accounts.

I have your letter of February 28, enclosing a letter to you from Mr. F. G. Drummond, Treasurer for Amherst County, and a copy of a resolution of the Board of Supervisors of that County, which resolution reads as follows:

"At a regular meeting of the Board of Supervisors of Amherst County, held at the Court House thereof, on Monday, the 7th day of February, 1955.  
"IN RE: Temporary loan of $20,000.00 made to the Madison Heights Sanitary District Water Construction Fund from General County Funds.  
"On motion of James W. Davis, and by unanimous vote of the Board, it is resolved that a temporary loan of $20,000.00 be made to the Madison Heights Sanitary District Construction Fund from General County funds as provided by Virginia Code Section 15-16.4."

Mr. Drummond, in effect, asked for an opinion as to the validity of this resolution.

It appears from Mr. Drummond's letter and from a telephone conversation which you had with him that Madison Heights Sanitary District in September of 1954 issued $560,000 of bonds for the construction of a water system in the District. The project has not yet been completed and so the first interest payment due on these bonds on February 1 of this year was made from the proceeds of the bonds. This, in my opinion, was proper. It further appears that there are not now sufficient funds from the proceeds of the bond issue to pay certain engineering costs and other expenses in connection with the completion of the project, and that this sum of $20,000 mentioned in the resolution is needed to pay these expenses. When the project is completed, I assume that the revenue from the operation of the utility will be sufficient not only to pay the interest on and to create a sinking fund for the retirement of the bonds, but also to reimburse the general fund of the County for this advancement of $20,000 to the Sanitary District.

Section 15-16.4 of the Code as enacted in 1954 (Acts 1954, page 394) provides as follows:

"The board of supervisors of any county in this State may advance funds, not otherwise specifically allocated or obligated, from the general fund to a sanitary district to assist the sanitary district to initiate the project for which it was created."
It is my opinion from the facts as I understand them that the expenses contemplated to be paid by this advancement of $20,000 may be said to be expenses "to initiate the project" as that phrase is used in the above quoted section. Looking at the resolution in this light, it is my opinion that it is a valid one, and that the Treasurer may, out of any general county funds not otherwise specifically allocated or obligated, credit or transfer to the Sanitary District fund the amount indicated in the resolution. As I have indicated, the general fund of the County should be reimbursed for this advancement from the proceeds of the bond issue or from any funds to the credit of the Sanitary District which may be derived from its operation.

BOARD OF SUPERVISORS—Member—May sell material to Highway Department for roads in county. F-33 (261)

Honorable John Paul Causey,
Commonwealth's Attorney for King William County.

March 22, 1955.

I have your letter of March 18, in which you present the following question:

"Section 15-504 of the Virginia Code provides that 'no supervisor ... shall become interested ... in any contract, or in the profits of any contract, made by or with any operator, agent, commissioner, trustee or overseer for working and keeping in repair the public roads in the County.' This provision, I believe, antedates the establishment of the Secondary Highway System whereby the maintenance of the County roads within the Secondary System is a responsibility of the Highway Department rather than the County. The question has arisen whether a contract made by a member of the Board of Supervisors to furnish gravel to the State Highway Department for use on roads within the Supervisor's County would now fall within the prohibition of the statute. It would appear that the statute is designed to prevent officers having a financial interest in contracts with respect to which they would also have authority as to disbursement of funds. Since the expenditure of funds for Secondary roads is now within the domain of the State Highway Department the question has been raised as to whether the statute is operative in the circumstances mentioned. I assume that under no circumstances would it prohibit a Supervisor selling gravel on the highway outside his County. I would appreciate your opinion on this question at your convenience."

Section 15-504 of the Code, to which you refer, relates generally to contracts between county officers and persons, officers, agents and boards representing the county, and this is true of that part of the section which you quote.

Section 33-46 of the Code provides that "the control, supervision, management and jurisdiction over the secondary system of State highways shall be vested in the Department of Highways and the maintenance and improvement, including construction and reconstruction, of such secondary system of State highways shall be by the State under the supervision of the State Highway Commissioner." It is clear, therefore, that a contract between a Supervisor and the State Highway Department for the sale of gravel to the Department for use on roads within the Supervisor's county, constituting a part of the secondary system of State highways, is not a contract with the Supervisor's County or any officer, agent or board representing the County. It follows that such a contract is not prohibited by Section 15-504 of the Code.
BOARD OF SUPERVISORS—Mileage expenses—may be paid 7 cents a mile. F-114 (65)

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


I am in receipt of your letter of August 23, in which you present the following question:

"Section 14-58 of the Code of Virginia provides for the payment of mileage to members of the Boards of Supervisors. Chapter 709, at page 1046, of the 1954 Acts of the Assembly provides for the payment of the members of the Boards of Supervisors and concludes with saying that 'Sections 14-46 and 14-58 of the Code of Virginia, and all acts in conflict with this act are repealed to the extent of such conflict.'"

Section 14-58 of the Code of 1950 provided that each member of the Board of Supervisors "shall be allowed and paid out of the county levy five cents for each mile of travel required in going to and returning from the place of the meeting of the Board * * *" However, this section was repealed by Chapter 709 of the Acts of 1954. This Chapter 709, among other things, added a new section to the Code designated as Section 14-5.2, which section reads as follows:

"Any person traveling on business of any town, city or county wherein no part of the cost is borne by the State may be reimbursed by such city, town or county on a basis not in excess of that provided in § 14-5."

You will observe that this new section, read together with Section 14-5 of the Code, permits any person traveling on county business to be reimbursed for his mileage, if conveyance is by private transportation, at the rate of seven cents per mile. It is, therefore, my opinion that members of the Board of Supervisors traveling to and from meetings of the Board in their own automobile may be paid mileage at the rate of seven cents per mile. To make the new section effective, I should think that a resolution of the Board of Supervisors would be necessary.

BOARD OF SUPERVISORS—Minutes—Not mandatory that they show copy of request for official salary and expenses filed. F-33 (124)

HONORABLE PHILIP P. BURKS,
Treasurer of Bedford County.

October 27, 1954.

This is in reply to your letter of October 25, 1954, in which you present the following situation and request:

"C. B. Form 4 used by the Compensation Board has instructions on the reverse side of said form which state in part as follows:

"Filing of official salary and expense request form:

"'County and city officers required by law to file official salary and expense request forms shall, in addition to filing same with the Compensation Board, concurrently file a copy of the request with the governing body of the county, if the officer be a county officer, or with the governing body of the city if the officer be a city officer.'"

* * * *
"I shall thank you to advise me whether or not the law contemplates that the minutes of the Board of Supervisors show that the county officers affected have complied with the instructions above quoted."

It appears that the italicized and terminal portions of the instructions in question have been transposed verbatim from section 14-62 of the Code of Virginia, which requires certain officers to file requests for the allowance of salaries and expenses with the Chairman of the Compensation Board. However, I have been unable to discover any provision in the related sections of the Code, or those concerning Boards of Supervisors (Title 15, Chapter 10), which directs that the minutes of this latter body shall reflect the compliance of a particular officer with the mandate of the statute and the instruction. On the contrary, section 15-248, relating to the minutes of the boards of supervisors, prescribes only that complete minutes of the "meetings and proceedings" shall be recorded (including certain bids to be let on contract by the boards), and contains no reference to copies of requests for salaries and expenses. Moreover, section 15-237(4)(5), pertaining to the general duties of the clerk to the boards of supervisors, provides that he shall record "in a book provided for the purpose" the reports of the county treasurer of his receipts and disbursements, and that he shall "preserve" and "file" all accounts acted upon by the board with their action thereon. While these clauses do not actually comprehend copies of the specific requests under consideration, they at least suggest that some register other than the official minutes of the board would be an equally appropriate volume for their recordation.

In view of the foregoing, I am of the opinion that the applicable law does not contemplate that the minutes of the Board of Supervisors shall show that the officers affected by the instructions set out above have complied therewith. However, since this procedure would undoubtedly furnish an additional safeguard against possible misplacement, loss or destruction of the documents in question, I do not think that it would be inappropriate for an interested official to request the Board of Supervisors to enter upon their minutes an acknowledgment that a copy of such request has been filed according to statute.

BOARD OF SUPERVISORS—No authority to appropriate funds to repair church.
HONORABLE CHARLES H. WILSON, Commonwealth's Attorney for Nottoway County.

I am in receipt of your letter of November 24, in which you ask if the Board of Supervisors of Nottoway County may appropriate County funds for the restoration of an old Church in the County which was considerably damaged by the recent hurricane Hazel.

In order for the Board of Supervisors to have this authority, it is my opinion that there should be a statute which may be reasonably construed to give to the Board power to make an appropriation of County funds for this private purpose. I can find no such statute and, therefore, I must concur in the opinion that you have given to the Board that "it may not legally make a contribution for this purpose."

BOARD OF SUPERVISORS—No authority to build private road as inducement to new industry. F-33 (287) April 26, 1955.
HONORABLE WM. M. McCLENNY, Commonwealth's Attorney, Amherst County.

This is in reply to your letter of April 22, 1955, which reads as follows:

"Will you please advise me what authority, if any, a Board of Super-
visors has to spend a portion of the general county fund, that is surplus on hand, to construct or partially construct a road to an industrial development for the purpose of inducing industry to settle in one Magisterial District of the county. The industrial development promised would bring in a most substantial real estate and personal property tax to the county, would be an outlet and inlet for farm produce in the county, would provide jobs for the citizens of the county and would cause residential buildings to be developed in that area."

I am assuming that the proposed road would be a private road for the benefit of the industry. If my assumption is correct, I am of the opinion that the Board of Supervisors does not have the right to expend public funds for such purpose.

Section 189 of the Constitution of Virginia contains the only inducement which the public authorities of your county might offer to an industry, and this provision may not be invoked due to the fact that the General Assembly has not enacted a statute granting such authority.

BOARD OF SUPERVISORS—No authority to build public road other than pay right of way cost. F-33 (287).

April 28, 1955.

HONORABLE WM. M. McCLENNY,
Commonwealth's Attorney for Amherst County.

This has further reference to your letter of April 22, 1955, in which you asked to be advised as to the authority of the Board of Supervisors to spend a portion of a surplus of the general county fund to construct or partially construct a road to an industrial development for the purpose of inducing industry to settle in one magisterial district of the county. My response to you under date of April 26, 1955, was based on the assumption that such a proposed road would be a private road for the benefit of the industry. I advised that it was my opinion that the Board was without authority to expend public funds for such purpose.

In your letter of April 27, 1955, you request to be advised if it is my opinion that the proposed road could be constructed from such funds if it is made a public instead of a private road.

By Section 33-138 of the Code of Virginia of 1950, boards of supervisors are forbidden to make any levy or contract any indebtedness for construction, maintenance or improvement of roads. Certain exceptions appear in that section which are not here germane.

By virtue of Section 33-141 of the Code of Virginia of 1950, boards of supervisors continue to have the power to establish new roads for the secondary system of State highways and to change or alter the location of existing roads, and pay the cost of rights of way from the general county levy funds.

In view of the foregoing statutory provisions, I am of the opinion that the Board of Supervisors of Amherst County cannot expend funds for the construction of a new road other than for right of way cost incident to the establishment of a road for the secondary system of State highways.

I may add that a similar view was expressed by the Honorable Abram P. Staples, former Attorney General, in a letter under date of July 23, 1943, addressed to Mr. A. H. Pettigrew, then Right of Way Engineer for the Department of Highways.
BOARD OF SUPERVISORS—No authority to contribute to VFW home and recreation center. F-33 (20)  

HONORABLE DALE W. LARUE,  
Commonwealth's Attorney for Carroll County.  

This is in reply to your letter of July 16, 1954, which reads, in part, as follows:  

"The local chapter of the Veterans of Foreign Wars has commenced the construction of a combination VFW home and a gymnasium and recreation center for the public generally. The VFW will hold title to the property. The Board of Supervisors of Carroll County has expressed a desire to make a contribution to this project.  

"Would you advise me of your opinion on the question: Does the Board of Supervisors of Carroll County have the authority under the law to make such a contribution as above described?"

On previous occasions this office has rendered opinions on subjects closely related to the subject matter of your inquiry. For example, on October 14, 1944, in an opinion to the Honorable W. P. Parsons, Attorney for the Commonwealth, Wytheville, Virginia, the former Attorney General, the late Honorable Abram P. Staples, was reluctantly forced to the conclusion that the Board of Supervisors of Wythe County had no authority to make an appropriation to assist in the purchase of a building to be used as a memorial of the veterans of all wars and to be used as a place of recreation, entertainment and meeting place for the veterans. (See Report of the Attorney General 1944-'45, page 9).  

On October 27, 1949, in an opinion to the Honorable I. R. Dovel, Commonwealth's Attorney for Page County, I discussed a similar request and concluded that such appropriations could only be made for the purpose of a memorial to be located at the county seat. (See Reports of the Attorney General 1949-'50, page 14). I have been unable to find any significant changes in the statutes that would alter the above opinions. I enclose copies for your guidance and, after considering these opinions, if the facts in your particular case are such that you desire further advice, I shall be happy to render any assistance possible for, as Judge Staples said in the letter referred to above, "An enterprise of this character has great sympathetic appeal and I should be happy if I could find any statute, authorizing the Board of Supervisors to make such an appropriation, but I have been unable to do so."

BOARD OF SUPERVISORS—No authority to donate land to VFW. F-33 (181)  

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

This will reply to your letter of December 15, in which you state that the County of Orange, in purchasing the site for the Orange County Airport, acquired property not actually needed for that purpose. You relate that the Veterans of Foreign Wars has requested the Board of Supervisors to donate approximately one acre of this additional land to it for the purpose of building a Post House, and you request an opinion on whether the county may make such a donation, or sell such land to the Veterans of Foreign Wars for less than its fair market value if an outright donation is impermissible.  

It has been firmly established by judicial decisions of this State, to which the rulings of this office have, of course, adhered, that the powers of the various Boards of Supervisors are fixed by statute, and that these governmental bodies have no other powers than those conferred expressly, or by necessary implication. I have been unable to find any statute which may reasonably be construed to
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repose in the Orange County Board of Supervisors the power to donate county lands to an organization such as the Veterans of Foreign Wars. I am, therefore, of the opinion that such a donation may not be made.

Pertinent to the resolution of the second question posed in your communication is Section 15-692 of the Code of Virginia (1950) which prescribes, in part, as follows:

"The board of supervisors shall have power to sell, at public or private sale, or exchange and convey the corporate property of the county, * * *, provided, that no sale or exchange of such property shall be made without the approval and ratification of such sale and exchange by an order of the circuit court of the county or by the judge thereof in vacation, entered of record. * * *"

It appears from the language of the above quoted statute that a private sale of the land in question at less than its fair market value would be permissible only if such sale were approved and ratified by an order of the Circuit Court of Orange County, or the Judge thereof in vacation, entered of record.

BOARD OF SUPERVISORS — No authority to enact set-back ordinance in absence of master zoning plan. F-60 a (91) September 24, 1954.

HONORABLE WILLIAM W. JONES,
Commonwealth’s Attorney for Nansemond County.

This is in reply to your letter of September 10, in which you present the following question:

"The Nansemond County Planning Commission now has under study a proposed ordinance known as a set-back ordinance, which the Commission is considering proposing to the Board of Supervisors of the county for enactment pursuant to Section 15-844 of the Code of Virginia. The ordinance does not attempt to zone the county, but merely provides that no buildings or structures be erected within so many feet of a highway.

"I have advised the Commission that there is a question in my mind as to whether or not, under this section, the Board of Supervisors has the authority to enact such an ordinance. The Commission has requested that I obtain your opinion on this matter. I would therefore greatly appreciate your advising me whether or not, in your opinion, the Board of Supervisors has the authority to enact such an ordinance pursuant to this section."

Sections 15-844 through 15-854 relate to zoning in counties. Section 15-846 gives to the Board of Supervisors authority to enact zoning ordinances from and after the time the County Planning Commission, created in accordance with Section 15-916 of the Code, makes and certifies to the Board a zoning plan for the unincorporated territory of the County, including both the text of a zoning ordinance and zoning maps representing the recommendations of such Planning Commission. You further advise me that the County Planning Commission has not adopted a master plan, as required by Section 15-918 of the Code, and that the proposed set-back ordinance is merely an isolated suggestion of the Planning Commission. Apparently, from what you say, the County Planning Commission has done none of the things specified in Section 15-918 et seq. of the Code relating to the zoning of the county generally. In other words, I gather from your letter that the suggestion of the Planning Commission is in no way a part of any county zoning plan.

In the situation described by you, I question the authority of the Board of Supervisors under Section 15-844 of the Code to adopt the ordinance proposed by the Planning Commission.
BOARD OF SUPERVISORS—No authority to impose license on solicitation of members for an organization. F-33 (323)

May 27, 1955.

HONORABLE MEREDITH C. DORTEH,
Commonwealth's Attorney of Mecklenburg County.

I have examined the proposed ordinance submitted in your letter of May 23, 1955, which reads as follows:

"AN ORDINANCE TO REGULATE THE SOLICITATION OF MEMBERSHIP IN ORGANIZATIONS AMONG THE CITIZENS OF MECKLENBURG COUNTY, STATE OF VIRGINIA: TO PROVIDE FOR PERMITS FOR PERSONS OR AGENTS SOLICITING SUCH MEMBERS: TO PROVIDE FOR LICENSE FEES, AND FOR VIOLATIONS OF THIS ORDINANCE "BE IT AND IT IS HEREBY ORDAINED BY THE BOARD OF SUPERVISORS OF MECKLENBURG COUNTY, VIRGINIA, AS FOLLOWS:

"Section I—Before any person, persons, firms or organization shall solicit membership in said county for any organization, union or society, of any sort which requires from its members the payments of membership fee, dues or is entitled to make assessment against its members, such person or persons shall make application in writing to the Commissioner of Revenue of said county for the issuance of a permit to solicit members in such organization from among the citizens of Mecklenburg County.

"Section II—Such application shall give the name and nature of such organization for which applicant desires to solicit members, whether such organization is incorporated or unincorporated, the location of its principal office and place of business and the names of its officers, along with date of its organization, and its assets and liabilities. Such application shall further contain the age and residence of applicant including places of residence of applicant for past ten years, and as well as business or profession in which such applicant has been engaged during said time, and shall furnish at least three persons as reference to applicant's character. Said application shall also furnish the information as to whether applicant is a salaried employee of the organization for which he is soliciting members, and what compensation, if any, he receives for obtaining members.

"Section III—This application shall be submitted to a regular meeting of the Board of Supervisors of said county, and in event it is desired by said Board to investigate further the information given in the application, or in the event the applicant desires a formal hearing on such application, such hearing shall be set for a time not later than the next regular meeting of said Board. At such hearing the applicant may submit for consideration any evidence that he may desire bearing on the application, and any interested person shall have right of appearing and giving evidence to the contrary.

"Section IV—In passing upon such application the Board of Supervisors shall consider the character of the applicant, the nature of the business of the organization for which members are desired to be solicited, and its effect upon the general welfare of citizens of said county.

"Section V—The granting or refusing to grant of such application for a permit shall be determined by vote of the Board of Supervisors, after consideration, and hearing if same is requested by applicant or said Board of Supervisors, in the same manner as other matters are so granted or denied by the vote of said Board.
"Section VI—In the event that person making application is a salaried employee or officer of the organization for which he desires to seek members among citizens of Mecklenburg County, or persons employed in said county, or receives a fee of any sort from the obtaining of such members, he shall be issued a permit and license for soliciting such members upon the payment of $2000.00 per year, also $500.00 for each member obtained.

"Section VII—Any person, persons, firm, or corporation soliciting members for any organization from among citizens or persons employed in the County of Mecklenburg without first obtaining a permit and license therefor shall be punished as provided by Section 19-265 of the Code of Virginia.

"Section VIII—Should any section or portion of this ordinance be held void, it shall not affect the remaining sections and portions of same.

"Duly adopted by The Board of Supervisors of Mecklenburg County, Virginia, at its regular meeting held on the 6th day of June, 1955."

The power of the Board of Supervisors to enact and enforce such an ordinance depends upon the authority granted to the Board by the General Assembly. As stated in Supervisors v. Powell, 95 Va. 635, 29 S. E. 682, "The powers and duties of the board of supervisors are fixed by statute, and it has no other powers than those conferred expressly or by necessary implication."

The general powers of boards of supervisors are set forth in § 15-8 of the Code of Virginia.

Without discussing the constitutional questions that might be considered in connection with the proposed ordinance, I am of the opinion that the Board of Supervisors does not have the power to impose the license fee provided for in Section VI of the ordinance.

Neither § 15-8 of the Code relating to the general powers of a board of supervisors nor any other statute of which I am aware confers upon a board of supervisors the power to require and enforce the collection of a license tax for the purposes set forth in the proposed ordinance.

BOARD OF SUPERVISORS—No authority to move court house. F-33 (86)

HONORABLE WILLIAM W. JONES,
Commonwealth's Attorney for Nansemond County.

I am in receipt of your letter of September 9, in which you state that the Board of Supervisors of Nansemond County is considering the abandonment of the present court house located in the City of Suffolk and the erection of a new court house at a point in Nansemond County. You desire my opinion on the question of whether the Board of Supervisors has authority by resolution to remove the court house from its present location to a new location.

From my examination of the law I can find no statute which can reasonably be construed to give this power to the Board of Supervisors. Sections 15-43 through 15-54 of the Code provide for a referendum on the question of removal of a court house, and it is my opinion that this is the only method by which a court house can be moved from one point to another in a county.
BOARD OF SUPERVISORS—No authority to purchase and donate land to University for Extension Department. F-33 (139)

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

This will acknowledge receipt of your letter of November 3, 1954, in which you request me to advise you whether or not the Board of Supervisors of your County has the authority to purchase land and donate the same to the University of Virginia for the purpose of establishing thereon by the University an Extension Department of the University of Virginia.

I am unable to find any constitutional or statutory provision which would grant such authority to the Board of Supervisors. None of the powers conferred on the Board with respect to public schools would authorize the expenditure of county funds for the University of Virginia which is established and maintained as a State school.

It is, I think, well settled that a county board may exercise such powers only as are expressly conferred on it by the Constitution or statutes of the State. This has been recognized by our Court on several occasions. In Supervisors v. Powell, 95 Va. 635, the Court stated:

"The powers and duties of the Board of Supervisors are fixed by statute, and it has no other power than those conferred expressly, or by necessary implication."

In my opinion the Board of Supervisors of your county does not have the authority to purchase and donate to the University of Virginia the land in question.

BOARD OF SUPERVISORS—No authority to retain attorney to investigate individual assessments of property. F-33 (120)

HONORABLE HAROLD H. PURCELL,
Member House of Delegates.

This is in reply to your letter of October 21, 1954, in which you request my opinion as to whether the board of supervisors of a county has the authority to retain an attorney to investigate individual assessments of personal property made by the Commissioner of Revenue.

I have made a thorough search of the Code of Virginia and the Constitution of Virginia and I can find no provision which, in my opinion, would give the board of supervisors authority to retain an attorney to investigate individual assessments of personal property. The duty of the board of supervisors is limited to ordering a levy to be laid on all property within a county, and it is my opinion that the board of supervisors has nothing to do with determining the assessed values of real or personal property.

BOARD OF SUPERVISORS—Salary—What code sections govern. F-33 (46)

HONORABLE HUNT M. WHITEHEAD,
Member of House of Delegates.

This refers to our recent correspondence relative to Chapters 243 and 709 of the Acts of Assembly of 1954, both chapters amending Section 14-57 of the
Code relative to salaries of members of Boards of Supervisors. You are particularly interested in Subsection (21) of the section, which applies to Pittsylvania County. This subsection in Chapter 243 increases the annual compensation of each member of the Board of Supervisors from $500.00 to not less than $650.00. Chapter 709 amends Section 14-57 in some other respects not pertinent here, but in so far as Subsection (21) is concerned it does not carry the increased compensation provided by Chapter 243, but fixes it at $500.00, just as it was before the amendment of the sub-section by Chapter 243.

The question is whether or not Chapter 709 in so far as Subsection (21) is concerned, being a subsequent Act, repeals the amendment made by Chapter 243. In my opinion, it does not. The Code revisors, in preparing the 1954 Cumulative Supplement to the Code of 1950, had this to say in a note to Section 14-57:

"The 1954 amendments.—Chapter 243 of the Acts of 1954 made changes in paragraphs (7), (10), (21), (26), and the last unnumbered paragraph of the section. It also inserted paragraphs (33) and (34), and provided that paragraph (33) shall not apply to any member of the board of supervisors on June 29, 1954, during the term of office which he is then serving. Chapter 709 of the Acts of 1954 deleted the mileage provisions from paragraphs (14) and (15). The two chapters have been combined so as to give effect to both amendatory acts."

I think the Code revisors were justified in taking this action and I have so held on principle in a previous opinion. (See Opinions of Attorney General 1950-51, page 1). This is in accordance with the following rule as set forth in Lewis Sutherland's Statutory Construction, 2d Ed., Vol. 1, Section 234:

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

The two Acts amended Section 14-57 in a number of respects, and it is my opinion that, following the rule quoted above, effect can be justifiably given to all of them.

BOARD OF SUPERVISORS — Sewer Lines — May use General Funds for. F-201 (33)


HONORABLE H. W. STARKEY, Chairman,
Board of Supervisors of Roanoke County.

This will acknowledge receipt of your letter of January 13, 1955, which reads as follows:

"Our Board of Supervisors would like to have an opinion from your office as to whether general county funds of Roanoke County can be used for the establishment and operation of a public sewer line and pumping
station. It is not anticipated that any debt be created. Service charges for sewage treatment would be made."

I am of the opinion that, under the provisions of §§ 15-720 and 15-739.1 of the Code, the governing body of your County may use general county funds for the purposes mentioned. However, since § 15-720 does not apply to a pumping station, I am of the opinion that it will be necessary for your Board to obtain the approval of the State Water Control Board, as required by § 15-739.1(1).

BOARD OF SUPERVISORS—Sinking funds of Sanitary District may not be used for new construction. F-213a (339)

HONORABLE ERNEST P. GATES,
Commonwealth's Attorney of Chesterfield County.


This is in reply to your letter of June 13, 1955, which reads as follows:

"The Ettrick Sanitary District of Chesterfield County was created under the authority granted by the Acts of of the Assembly 1926, Chapter 161. This District provides sewage facilities to the residents, which sewage is dumped untreated into the Appomattox River. There is a $25,000.00 bonded indebtedness in this District which bonds become due October 1, 1958. These bonds are not callable and the Board of Supervisors of Chesterfield County has set aside from net revenue derived, in a sinking fund, pursuant to the provisions of the enabling Act, sufficient funds to retire this indebtedness. The money in the sinking fund has been invested in U. S. Government obligations under authority of the Circuit Court of this County.

"The State Water Control Board has under advisement the issuance of a special order requiring the Ettrick Sanitary District to abate the pollution of the Appomattox River. The Board of Supervisors has determined that it is necessary to correct this matter by connecting the Ettrick sewage system with the sewage system of the City of Petersburg. The connecting cost will amount to approximately $33,000.00. This District has on hand approximately $15,000.00 which can be used for making this connection.

"The Board of Supervisors has requested that I obtain your opinion as to whether or not the Ettrick Sanitary District can use the funds in the sinking fund invested in U. S. Government obligations to finance the cost of connecting this system."

Section 11 of Chapter 161, Acts of 1926, provides as follows:

"11. The net revenue derived from the operation of such systems shall be set apart by the said board to pay the interest on the bonds so issued or to be issued, and to create a sinking fund to redeem the principal thereof at maturity. The board of supervisors is hereby authorized and empowered to apply any part or all of said sinking fund to the payment, if redeemable by their terms, or to the purchase of any of said bonds, at any time, and all bonds so paid off or purchased by said board of supervisors shall be immediately cancelled, and shall not be reissued, and the board of supervisors is authorized and empowered to lend out, upon real estate security, the loan not to exceed fifty per centum of the assessed value of such real estate, or deposit in bank at interest all accumulations of money to the credit of said sinking fund and to collect and reinvest the same and the interest accruing thereon from time to time, so often as
may be necessary or expedient, until such bonds become subject to call; provided, that no money to credit of said sinking fund shall be loaned out or deposited or invested by the said board of supervisors, unless said loan, deposit or investment shall be first approved by the circuit court of said county, or the judge thereof in vacation, and the form of the security be examined and approved by the Commonwealth's attorney of said county, which approval shall be entered of record in the order book of said court.

The treasurer shall not be liable for any funds herein provided for that shall be lost while on deposit made by order of the board of supervisors with any bank or banks, or when invested in any real estate security as provided herein, but the board of supervisors may require of any such bank a bond, with corporate or other surety, to secure such deposit.

"The said board of supervisors shall, if necessary for the payment of interest on the said bonds or to increase the sinking fund provided for hereunder, levy an annual tax upon all the property in such sanitary district subject to local taxation to pay such interest and to make payments into the said sinking funds."

While this provision authorizes the Board of Supervisors to invest the money to the credit of the sinking fund, it does not authorize the Board to divert the money, or any part thereof, to any other use than to redeem the bonds. The revenues collected from the operation of the sewage system and set apart for the purposes set forth in § 11 are in the nature of a trust fund for the protection of the holders of the bonds and must, in my opinion, be retained in said fund.

BOARD OF SUPERVISORS—Water systems—Authority to disapprove plans due to inadequate fire mains. F-33 (116)

October 21, 1954.

HONORABLE ROBERT T. ARMISTEAD,
Commonwealth's Attorney for City of Williamsburg and County of James City.

This is in reply to your letter of October 20, 1954, in which you state that Service, Incorporated, has filed an application with the Board of Supervisors of James City County to install a water supply system, subject to the approval of the State Board of Health. The application was filed pursuant to the provisions of Article 5.1, Chapter 22, Title 15 of the Code, and states that the water supply will be furnished through two (2) inch cast iron mains; that the proposed water system would serve fifty houses to be constructed in James City County just east of the corporate limits of the City of Williamsburg; that objection has been made on the grounds that no fire hydrants were provided and that fire underwriters require higher rates unless there is a six (6) inch main capable of supplying 250 gallons per minute.

You ask if, in my opinion, the Board of Supervisors could require a six inch main with 250 gallons per minute water supply on the grounds that this is necessary for fire protection and possible future expansion, even though the two inch main might be sufficient to meet the needs for domestic consumption. Section 15-754.3 of the Code provides, in part, as follows:

"The governing body of any county so notified of the proposed establishment of a water system under Section 15-754.1 of this Article is authorized to disapprove the same, if it finds that such water system does not have an adequate source of supply, or that the system is not capable of serving the proposed number of connections by reason of inadequate pipes, mains, conduits, pumping stations, or otherwise * * *."
While the question may not be entirely free from doubt, it would appear that the Board of Supervisors has the authority to disapprove the application if, in its judgment, the mains proposed to be laid are too small to furnish reasonably adequate and usual service to the community, or section, in which the water service facilities are to be installed. Whether or not a six-inch main would be necessary in order for such adequate service to be furnished would appear to be a matter to be determined by the Board after receiving competent technical advice with respect thereto.

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**BONDS—No release date for bonds posted with treasurer. F-9 (33)**

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

This is in reply to your letter of July 26, 1954, in which you ask to be advised concerning the release date for the bonds posted with the Treasurer of Arlington County as required by chapter 20, Title 54, Code of Virginia, 1950, in connection with auction sales. I am aware of no provision for the release of bonds which have been posted with the County Treasurer as provided in the above mentioned chapter. Such bonds are simply contracts between the licensee and his surety on the bond for the protection of the public and inuring to the benefit of anyone injured by the acts of the licensee. The effective coverage dates are governed by the provisions of the bond itself, but the liabilities arising during the effective period are not released at the expiration of such effective period of the bond. Action may be brought by any party entitled to protection on the bond within ten years from the time the right of action accrues by virtue of section 8-13, Code of Virginia, 1950. To release the surety prior to the expiration of the ten year period would tend to deprive an injured person of his right to bring an action which he is now permitted to pursue. I am, therefore, of the opinion that a treasurer is without authority to release a surety on such bonds deposited with him.

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**BONDS—Performance—Statutes affecting cannot be retroactive. F-181 (316)**

_Honorable Julian H. Rutherfoord, Jr.,_  
Member of the House of Delegates.

This is in reply to your letter of May 21, 1955, in which you request my opinion as to whether § 11-23 of the Code of Virginia is applicable to a performance bond which was entered into in March of 1953. I am of the opinion that, since the performance bond was entered into prior to the enactment of § 11-23 of the Code, this section of the Code can have no effect upon the performance bond referred to by you. If § 11-23 of the Code applied to a performance bond entered into prior to enactment of the section, this would be unconstitutional as it would impair the obligation of a contract under Article 1, § 10 of our Federal Constitution.
CHILDREN—Funeral expenses of parent—not liable for. F-91 (160)

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

This is in reply to your letter of November 27, 1954, in which you request my opinion as to whether an infant of the age of nineteen years is liable for his father’s funeral expenses under § 20-88 of the Code of Virginia.

Section 20-88 provides that an infant over the age of sixteen years is liable for the support and maintenance of his mother or aged or infirm father, the parent being then and there in necessitous circumstances. There is nothing in this section of the Code which makes a child liable for the debts of his parents or of his parents’ estate. In my opinion funeral expenses do not come within the term “support and maintenance” as used in § 20-88 of the Code and, therefore, a child would not be liable for his father’s funeral expenses under this section.

CHURCHES—May not incorporate—may hold property by trustees. F-260 (268)

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

This will reply to your letter of March 30, in which you requested an opinion on the following questions:

1. Can a North Carolina corporation hold title to church property in Virginia?

2. Can a North Carolina corporation hold title to any property in Virginia without actually doing business in Virginia under the North Carolina corporation name?

With respect to your first question, I assume that the term “church property” in your communication refers to property held for one or more of the religious purposes specified in the initial sentence of section 57-7, Code of Virginia (1950), as amended, the transfer of which is therein validated. Concerning the manner in which title to such property shall be held, section 57-8 of the Code prescribes:

“The circuit court of the county or the circuit or corporation court of the city, or the judge thereof in vacation, wherein there is any parcel of such land or the greater part thereof may, on the application of the proper authorities of such religious congregation, church, or religious society or branch or division thereof, from time to time appoint trustees, either where there were, or are, none or in place of former trustees, and change those so appointed whenever it may seem to the court or judge proper to effect and promote the purpose and object of the conveyance, devise, or dedication, and the legal title to such land shall for that purpose and object be vested in the trustees for the time being and their successors.”

Further in this connection, the Constitution of Virginia, section 59, forbids the granting of a charter of incorporation to any church or religious denomination in the Commonwealth. Moreover, in reviewing the legislative history of the statutes mentioned above, the Supreme Court of Appeals of Virginia has had occasion to point out “the tenacity with which applications for permission to take property in a corporate character (even the necessary ground for churches and graveyards) have been refused”. Maguire v. Loyd, 193 Va. 138. In light of these circumstances I am constrained to believe that section 57-8, while not expressly
disqualifying a non-resident corporation from serving as a trustee, contemplates that only individual trustees of a local religious congregation shall hold title to church property.

With respect to the second question presented in your letter, I find no provision in the Virginia law which requires a foreign corporation to be doing business in Virginia under its corporate name in order to hold title to property in Virginia. I am of the opinion that the mere ownership of property in the Commonwealth does not constitute "doing business" within the purview of section 13-211 of the Code, which requires foreign corporations to secure a certificate of authority from the State Corporation Commission before transacting business in the State.

CHURCHES—Power to take and hold real estate devised to them with no trust annexed. F-260 (345)

HONORABLE GEORGE M. COCHRAN, Member House of Delegates.

This is in reply to your letter of June 14, in which you request my views on whether or not the 1954 amendment which you sponsored to Section 57-7 of the Code of Virginia (1950) is sufficiently broad to permit church trustees to retain real estate which is leased for business purposes. You state that, after the effective date of the amendment, a member of the congregation of a local church died, leaving an estate consisting of personal property and real estate rented for business purposes to the church or its trustees, and that the church trustees desire to hold the business real estate as an investment since the return therefrom is superior to that which could be obtained if the properties were sold and the money otherwise invested.

As amended, Section 57-7 of the Virginia Code provides:

"What transfers for religious purposes valid.—Every conveyance, devise, or dedication shall be valid which, since the first day of January, seventeen hundred and seventy-seven, has been made, and every conveyance shall be valid which hereafter shall be made of land for the use or benefit of any religious congregation as a place for public worship, or as a burial place, or as a residence for a minister, or for the use or benefit of any church, or religious society, as a residence for a bishop or other minister or clergyman who, though not in special charge of a congregation, is yet an officer of such church or religious society, and employed under its authority and about its business; and every conveyance shall be valid which may hereafter be made, or has herefore been made, of land as a location for a parish house or house for the meeting of societies or committees of the church or others for the transaction of business connected with the church or of land as a place of residence for the sexton of a church, provided such land lies adjacent to or near by the lot or land on which is situated the church to which it is designed to be appurtenant; and the land shall be held for such uses or benefit and for such purposes, and not otherwise. And no gift, grant, or bequest hereafter made to such church or religious congregation, or the trustee thereof, shall fail or be declared void for insufficient designation of the beneficiaries in, or the objects of, any trust annexed to such gift, grant, or bequest in any case where lawful trustees of such church or congregation are in existence, or the congregation is capable of securing the appointment of such trustees upon application as prescribed in the following section; but such gift, grant, or bequest shall be valid, subject to the limitations of Section 57-12; provided, that whenever the objects of any such trust shall be undefined or so uncertain as not to admit of specific enforcement by the chancery
courts of the Commonwealth, then such gift, grant, or bequest shall inure
and pass to the trustees of the beneficiary congregation, to be by them
held, managed, and the principal or income appropriated for the religious
and benevolent uses of the congregation, as such trustees may determine,
by and with the approval of the vestry, board of deacons, board of stewards,
or other authorities which, under the rules or usages of such church or
congregation, have charge of the administration of the temporalities thereof.

"Provided that any devise of property, for the use or benefit of any
religious congregation, wherein no specific use or purpose is specified shall
be deemed to be for one of the uses or purposes set forth in this section, and
any such devise heretofore made, under color of which the property has been
held since prior to January one, nineteen hundred fifty-three, without any
proceeding to set the same aside, is hereby validated as though such
devise had been made after June 30, 1954." (Italics supplied.)

Particularly pertinent to the problem presented in your communication is
the first clause of the 1954 amendment which has been italicized above. I think
there is no substantial question that a devise of property to church trustees would
constitute a devise "for the use and benefit" of the "religious congregation" repre-
sented by such trustees. I assume from your letter that no specific use or purpose
was specified in the devise in question; in which case, the statute prescribes that
the devise "shall be deemed to be for one of the uses or purposes set forth" in
Section 57-7.

Under the second sentence of the first paragraph of that section, where
there has been a gift, grant or bequest of property to a religious congregation
with a trust annexed, and the objects of such trust are undefined, or so uncertain
as to preclude specific enforcement, such gift, grant or bequest passes to the
trustees of the beneficiary congregation to be held and managed by them, and the
principal or income "appropriated for the religious and benevolent uses of the
congregation" as determined by the trustees and approved by the administrative
authority of the congregation. In light of this language it is manifest that there
is no statutory prohibition against church trustees retaining and managing property
devised to a religious congregation in trust. Indeed, the propriety of church
trustees administering property left to a religious congregation in trust was
implicitly recognized by the Supreme Court of Appeals of Virginia in Maguire v.
Loyd, 193 Va. 138, although in that case the Court expressly held that this
method of administration was not mandatory. Also, I think it may properly be
urged that the management of property left to a church or its trustees and the
appropriation of the principal and income thereof for the religious and benevolent
uses of the beneficiary congregation is one of the "uses or purposes set forth"
in Section 57-7, for which purpose a devise is deemed to have been made when
there is no express provision to the contrary. Where a trust is specifically
annexed to a devise but is uncertain or indefinite, the statute provides that the
property shall be held and managed by the church trustees for such purposes,
and I am aware of no reason why a different situation should obtain where no
trust is specified.

I gather from your letter that the critical consideration in the matter under
discussion is that the property in question was left to the local church with no
trust annexed. Had the property been left in trust, the gift would have been valid
subject to the limitation imposed by Section 57-12 of the Code, Maguire v. Loyd,
supra; and it would not have failed, by virtue of the second sentence of Section
57-7, for want of trustees or insufficient designation of beneficiaries or objects.
With respect to the instant devise, the contention might be made that this
sentence of Section 57-7 applies only to gifts to which a trust is annexed and not
to outright bequests. However, I am constrained to believe that a devise of real
property for which no purpose is specified and to which no trust is annexed
would be deemed, pursuant to the first clause of the 1954 amendment, one to be
held in trust and administered for the use and benefit of the donee congregation.
The problem is, of course, one of interpretation and, as you indicate, not altogether free from doubt. Any uncertainty could readily be removed by legislative amendment expressly empowering church trustees to retain any property, real or personal, for which no provision has been made by the donor and administer the same for the religious and benevolent uses of the beneficiary congregation.

CIRCUIT COURTS—Expense—Mileage for judge. F-114 (27)

HONORABLE BURNETT MILLER, JR., Judge,
Ninth Judicial Circuit.

July 20, 1954.

This is in reply to your letter of July 19, 1954, from which I quote as follows:

"As I have not seen any direct ruling thereon I am writing to ask if you will advise me if you have ruled and beginning July 1 whether the 7½ allowance is applicable to the Circuit Court judges. I just want to be certain as to the correct allowance now in effect."

On May 19, 1954, in answer to a request for an opinion by Sidney C. Day, Jr., Assistant Comptroller, I stated that, in my opinion, the provisions of Chapter 709 of the Acts of Assembly of 1954 which provides seven cents per mile for the use of personally owned automobiles by persons traveling on State business prevail over the provisions of Chapter 706 which permit only six cents per mile for such travel. Chapter 709 amends §§ 14-5 and 14-47 of the Code, among others. Section 14-47 deals with the traveling expenses and hotel bills of circuit judges and, as amended, it reads as follows:

"In determining the reimbursement to which circuit judges are entitled under § 14-5, judges who do not reside in county seats of the counties in which they reside shall be reimbursed for travel between their residences and such county seats."

It appears certain, therefore, that § 14-5 is applicable to travel by judges of the circuit courts, and that the seven cents per mile rate is therefore applicable.

CIRCUIT COURTS—No statutory requirement as to seal. F-4 (256)

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

March 14, 1955.

This is in reply to your letter of March 9, 1955, in which you state that the seal of the Circuit Court of Pittsylvania County has become worn and no longer produces distinct impressions. You inquire whether a new seal, the purchase of which is now contemplated, must be an exact duplicate of the one now in use.

I have been unable to find any provision of the Virginia Code which prescribes seals of any specific character for the various courts of record of the Commonwealth or prohibits the alteration of existing seals at the pleasure of the court. While it would appear that the retention of previously employed designs is customary in situations of this nature, I am of the opinion that the court, in its discretion, may enter an order adopting an altered design as the official seal of the court.
CIRCUIT COURT—Retired judges sitting—Compensation. F-151 (2)

HONORABLE J. R. H. ALEXANDER, Judge, Retired,
Twenty-Sixth Judicial Circuit of Virginia.

July 6, 1954.

This is in reply to your letter of July 1, 1954, in which you ask my opinion as to whether you may continue to accommodate active judges by sitting at their request pursuant to section 17-7(1) of the Code of Virginia of 1950 in view of the 1954 amendment to section 51-7 of the Code of Virginia of 1950 providing for the Supreme Court of Appeals to assign retired judges to perform such judicial duties as may be assigned to them for a period of not exceeding ninety days at any one time.

I am of the opinion that the two Code sections in question are not in conflict inasmuch as section 17-7(1) authorizes both active and retired judges to sit in the absence of a judge of any court of record. This may be done either by procurement by the Judge who is to be absent or by designation by the Chief Justice of the Supreme Court of Appeals. Section 51-7 pertains only to the designation of retired judges by the Supreme Court of Appeals. Therefore, I see no objection to your continuing to accept the duties of the court by request of an active judge pursuant to paragraph (1) of section 17-7 of the Code as well as accepting such duties by designation either under this section or pursuant to section 51-7 of the Code.

With regard to your inquiry as to whether the provision in section 51-7 of the Code, as amended, that retired judges when designated shall have all the powers, duties and privileges of an unretired judge of a court of record for the purpose for which he may be recalled could be interpreted to mean that such judges will receive the pay of an active judge for such time as he may be recalled to active service, I beg to advise that I do not believe that this provision refers to compensation.

CIVIL DEFENSE—No State insurance coverage for members of Mobile Reserve Battalions. F-325 (225 b)

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

June 1, 1955.

This is in reply to your letter of May 20 relating to insurance coverage for persons in Mobile Reserve Battalions who are killed or injured in civil defense work. Pertinent in this connection is section 44-142.1(d): "The State shall reimburse a political subdivision for the compensation paid and actual and necessary travel, subsistence and maintenance expenses of employees of such political subdivision while serving as members of a Mobile Reserve Battalion, and for all payment for death, disability or injury of such employees incurred in the course of such duty, and for all losses of or damage to supplies and equipment of such political subdivision resulting from the operation of such Mobile Reserve Battalion." (Italics supplied).

This section contains the only language in the Civil Defense law which relates to payment for death, disability or injury, and it is to be distinguished from section 44-145.2 of the Code which pertains to public liability and prescribes immunity for the State, political subdivisions, agencies and (except in cases of willful misconduct) the employees or representatives thereof for death or injuries to third persons or damage to property resulting from civil defense activities. As indicated by the portions italicized above, the former section makes provision for the reimbursement of political subdivisions by the State for the expenses...
of "employees of such political subdivision" and for all payment for death, disability or injury "of such employees" incurred in the course of duty. The statute does not provide for any direct payment of compensation by the State to individuals for death, disability or injury, but for the reimbursement of political subdivisions for payments made by them to their employees. I am thus of the opinion that the reimbursement provision of the Civil Defense law in its present form applies only to the employees of political subdivisions.

CIVIL PROCEDURE—Permitting defendant to testify when required affidavit not filed. F-79 (82)

September 13, 1954.

HONORABLE WINSTON MONTAGUE,
Substitute Justice, Civil Justice Court,
Richmond, Virginia.

This is in reply to your letter of September 9, 1954, in which you ask to be advised if the provisions of section 8-511 of the Code of Virginia of 1950, as amended, would authorize the court to permit a defendant to testify when such defendant has not filed an answer and affidavit as required by such section.

Assuming that the proceeding is by motion for judgment, I think the statute is clear that a defendant is precluded from making a plea in bar or defense to the merits unless the required affidavit be filed with the court. However, I am of the opinion that this statute should not be construed to deprive the defendant of his right to testify as to other phases of the case as he may otherwise have a right to do.

CIVIL AND POLICE COURTS—Justice has no authority to issue warrants of arrest—Clerk cannot issue warrant for insane. F-381 (206)

January 24, 1955.

HONORABLE P. O’S. FOSTER, Clerk,
Civil and Police Courts of Portsmouth.

This is in reply to your letter of January 20, 1955, in which you request my opinion as to whether the Civil and Police Justice of Portsmouth, Virginia, has the authority to issue warrants for felons and also whether the Clerk of the Civil and Police Court has the authority to issue warrants for mentally ill persons in cases of emergency. I can find no authority giving a civil and police justice the power to issue warrants for felons or misdemeanants. Section 19-71 of the Code of Virginia reads as follows:

"A judge of a circuit or corporation court, in vacation as well as in term, a trial justice other than a civil and police justice, a clerk of a trial justice other than a clerk of a juvenile and domestic relations court, or a justice of the peace may issue process for the arrest of a person charged with an offense."

As you can see, that section expressly provides that a civil and police justice does not have the authority to issue a warrant for arrest. I can find nothing in Chapter 646 of the Acts of Assembly of 1950, which chapter contains the powers and duties of the Civil and Police Justice for the City of Portsmouth, which would, in my opinion, give him this authority.

In answer to your second question, I should like to refer you to § 37-61 of the Code of Virginia which reads as follows:
"Any circuit or corporation judge, or any trial justice, when any person in his county or city is alleged to be mentally-ill, epileptic, mentally-deficient or inebriate, upon the written complaint and information of any respectable citizen, shall issue his warrant, ordering such person to be brought before him. The judge or justice may issue the warrant on his own motion.

"In any county in which no trial justice resides, the judge of the circuit court may appoint one justice of the peace in such county to assist him in carrying out the duties and powers conferred by this title. Each justice of the peace so appointed by the judge shall serve under the supervision and at the pleasure of the judge making the appointment and shall be vested with all the powers conferred by this title on trial justices."

This section governs the issuance of warrants for the arrest of mentally ill persons. As you can see from reading the above-quoted section, the Clerk of the Civil and Police Justice Court would not have the authority to issue such warrants.

CLERKS—Estate placed in hands of sheriff for administration—To charge tax, but not qualification fee. F-116 (99)

September 29, 1954.

HONORABLE H. B. McLEMORE, JR., Clerk,
Circuit Court of Southampton County.

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

"A person died ten years ago leaving no personal estate, but owned two tracts of real estate, one valued at $1,000.00 and the other at $300.00. There was no qualification at the time of death, and the heirs within six months after the death sold the $1,000.00 tract, leaving the $300.00 tract in the decedent's name.

"The Department of Public Welfare of Southampton County had recorded a lien against the person in the amount of $140.00 for advances made.

"A few days ago, on motion of the Welfare Department, this estate was placed in the hands of the Sheriff for administration under Section 58-69, in order that they could bring suit to recover their advances.

"The Sheriff qualified in accordance with the motion of the Welfare Department and I charged tax under Section 58-66 and a Clerk's fee of $10.00 under Section 14-123(6). * * *

You then ask if it is proper for you to charge the tax and the Clerk's fee.

As to the tax, it is my opinion that it clearly should be charged. Section 58-67 of the Code provides that the real estate shall be included in the value of the estate for the purpose of assessing the tax, and Section 58-69 provides for the payment of the tax when the estate is committed to a sheriff or sergeant.

As to the payment of the Clerk's fee provided by Section 14-123(6), this is a fee to the Clerk "for appointing and qualifying any personal representative * * *

But, when an estate is committed to a sheriff pursuant to Section 64-124 of the Code, the sheriff is really administering the estate as one of the duties of his office. You will observe that under the circumstances stated in the section the Court or Clerk orders the sheriff to take into his possession the estate and to administer the same. Thereupon, "without taking any other oath of office or giving any other bond," the sheriff "shall be the administrator, or administrator de bonis non" and shall from that time be entitled to all the rights and bound to perform all the duties of such administrator. My view is that, when a sheriff is ordered to administer an estate pursuant to Section 64-124 of the Code, he does not qualify as personal representative within the meaning of Section 14-123(6) of the Code. It follows that no fee for qualification should be charged by the Clerk."
CLERKS—Expenses—Circuit Court of City of Richmond to be paid by city.
F-116 (68) August 30, 1954.

Honorável Luther Libby, Jr., Clerk,
Circuit Court City of Richmond.

This is in reply to your recent letter in which you ask for my opinion as to
whether or not the City of Richmond is to bear the expenses of the Clerk's office
of the Circuit Court of the City of Richmond.

You state that the City of Richmond, in refusing to pay the expenses of the
Clerk's office, assigns as its authority for this action Chapter 658 of the Acts of
1954, adding Section 14-155.8 (codified as 15-155.10) to the Code.

The controlling statute, in my opinion, is Section 15-10.1 of the Code, as
amended by Chapter 652 of the Acts of 1954, which reads as follows:

"The board of supervisors or other governing body of each county
shall, at the expense of the county, and the city council of each city shall,
at the expense of the city, provide suitable books and stationery in addition
to supplies furnished by the State, for the use of the clerk of the circuit
court and the clerks of all city courts of record, together with appropriate
cases and other furniture, for the safe and convenient keeping of all the
books, documents, and papers, in the custody of each of such officers and also
official seals for each of such officers, when the same are required by law;
and also such other office equipment and appliances, including typewriters
and adding machines, as in their judgment may be reasonably necessary
for the proper conduct of such offices."

The above quoted section and other pertinent statutes have been construed
by our Supreme Court of Appeals in Saville v. Richmond, 162 Va. 612, 617, to
mean: "Both before and since the adoption of the 1919 Code, the policy of the
State has been to require the cities and counties to furnish at their own expense
offices for the clerks of courts, including the necessary equipment, furniture and
supplies."

It is true that Section 14-155.10 of the Code as adopted in 1954 provides for
a flat salary for the Clerk of the Circuit Court of the City of Richmond in lieu
of the retention by such Clerk of any and all official fees. The section further
provides that the expenses of the office of such Clerk shall be paid out of the
State treasury, and that all of his fees and commissions shall be paid into the
State treasury. However, this Section 14-155.10 never became actually operative
since the Clerk of the Circuit Court of the City of Richmond died before the
section went into effect. This fact made Section 17-118.1 of the Code operative,
which section was amended by Chapter 83 of the Acts of Assembly of 1954. The
1954 amendment to Section 17-118.1 is in the following language:

"Notwithstanding any other provision of law, when a vacancy occurs
in the office of the clerk of the Circuit Court of the City of Richmond the
Clerk of the Law and Equity Court of that city shall also be the Clerk of
the Circuit Court, and shall perform all the duties thereof, receive and
retain all official fees and commissions and receive compensation, all as
provided therefor by law; and thereafter there shall be no election held
for such office. He shall qualify as now prescribed by law and give bond
for the faithful performance of his duties in both courts."

The death of the former Clerk of the Circuit Court of the City of Richmond
created a vacancy in the office, and it is by virtue of the above quoted amendment
to Section 17-118.1 that you are now Clerk of the Circuit Court of the City of
Richmond, and this amendment together with the death of the former Clerk of
the Court made Section 14-155.10 inoperative, which section, as I have above
indicated, is the one that you state the City relies on.
It is obvious, therefore, and it is my conclusion that the law as to the responsibility for the expenses of the Clerk's office of the Circuit Court of the City of Richmond is the same now as it was before Section 14-155.10 was enacted. The law before Section 14-155.10 was enacted, as was the administrative practice, was that the City of Richmond should bear the expense of the operation of the Clerk's office of the Circuit Court of the City of Richmond. And so it is my conclusion that this is the law at the present time. It may be that, on account of the fact that the Circuit Court of the City of Richmond is now a court of limited jurisdiction, such jurisdiction being confined almost entirely to State cases, the next General Assembly will feel that the State should bear the expense of operation of the Clerk's office of this Court, but until the General Assembly acts it is my opinion that the City of Richmond is required to pay the expenses of the operation of this Court.

CLERKS—Expenses of second order of publication—Not to be borne by office.
F-116 (327) June 1, 1955.

HONORABLE L. McCARTHY DOWNS,
Chairman, Compensation Board.

I am in receipt of your letter of May 26, 1955, in which you enclose a letter from the Clerk of the Circuit Court of Spotsylvania County in which he states:

"I am writing this letter to request permission to pay the amount of $28.40 incurred in having to issue and publish an order of publication in the suit of Linthicum vs. Easterday out of the fees of this office.

"The situation is this—the above suit called for an order of publication issued and published which was done, but we failed to include 'the unknown heirs and assigns' also the attorney for the plaintiff failed to pick up as an error. An attorney in checking the title to the property found that this was not done and would not pass the title to the property. Another order of publication was issued including the above words in quotations which necessitated an additional cost of $28.40. The cost of the suit had been paid and the suit closed which meant that the costs would have been borne by this office.

"You will recall that I spoke to you about this last week and that I stated I thought the attorney was as much at fault as I was, but he had refused to pay the costs, putting the blame on me."

The Clerk desires to know if he may pay for the printing of the second order of publication as an expense of his office. If a second order of publication was a necessary part of the proceedings, a question on which I do not pass, it is my opinion that the expense of printing the same should be taxed as a part of the costs. However that may be, the partition suit appears to have been a purely civil matter between private litigants, and I know of no authority for treating the cost of printing the order of publication as an expense of the Clerk's Office.

CLERKS—Fees—Docketing public assistance liens—Entitled to regular one, only.
F-116 (146) November 12, 1954.

HONORABLE H. M. WALKER,
Clerk, Circuit Court of Northumberland, County.

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

"The Local Board of Public Welfare of Northumberland County has questioned my right to charge a fee of 25 cents for the filing away in the
Clerk's office of a notice concerning lien for receiving public assistance pursuant to the provisions of Section 63-127 of the Code of Virginia, as amended by the 1954 Acts of Assembly of Virginia. This fee, of course, to be in addition to the 50 cents fee allowed for docketing and indexing of such notice of lien.

* * * * * * *

"Therefore, kindly inform me whether or not it is lawful for me to charge the above mentioned 25 cents fee for the filing of such a notice in my office."

Section 63-127 of the Code as amended, to which you refer, provides in part as follows:

"Each local board of public welfare shall, for each recipient theretofore or thereafter approved for assistance on and after July one, nineteen hundred fifty-four, who owns real estate, prepare and acknowledge as deeds are acknowledged a notice showing the name of such recipient, the rate of the grant and intervals of payment and the date of the first payment, and shall file the same in the office of the clerk of the court in which deeds are admitted to record in the county or city in which the real estate is located. * * * The clerk of court shall docket this notice as a judgment is docketed, indicating the type of assistance received, in the current judgment lien docket, indexing it in the name of the recipient and in the name of the local board, and shall mark the docket where the previous notice was docketed to indicate that it has been superseded. The clerk of the court shall receive for his services the regular fee allowed for docketing judgments in his office and the Welfare Department is hereby authorized to pay such fee from its administrative fund. * * *"

You will observe that the section expressly stipulates that the clerk "shall receive for his services the regular fee allowed for docketing judgments in his office." It is my view that, since the section expressly provides that the clerk shall receive for his services the docketing fee, this is the only fee that the statute contemplates that he shall receive for the services he renders under the section. So long as the section deals with what fee the clerk is to receive, if it had been the intent of the General Assembly that he was to receive any fee other than the docketing fee, the section would have so provided. My conclusion is, therefore, that the better view is that a filing fee should not be charged.

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**CLERKS—Fees—Flat fee in chancery cases not applicable to suits instituted prior to new act. F-116 (49).**

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

August 12, 1954.

This is in reply to your letter of August 5, 1954, to the Auditor of Public Accounts, which has been forwarded to this office for an opinion. Your letter reads as follows:

"Back in the years 1943 and 1944 Nansemond County employed a Tax Attorney to collect delinquent taxes. He brought several hundred suits, but in view of the fact that the Commonwealth was the Plaintiff I did not require a deposit. When these taxes are paid then the Tax Attorney has been collecting the Clerk's fee on the suits for me. Since the 1954 General Assembly has fixed a flat fee of $15.00 in all Chancery cases, should that be applicable to these old tax suits that I already have?"
Section 14-124 of the Code of Virginia as amended by Chapter 136 of the Acts of Assembly of 1954 provides, in part, as follows:

"(a) For all services rendered in any Chancery Case, to be paid by the plaintiff at the time of instituting the suit, including furnishing a duly certified copy of the final decree................... ... .................. $15.00."

As you can see, the new provision fixing a flat fee provides that the fee is charged at the time the suit is instituted, not at the time it is concluded. Therefore, it is my opinion that the new flat fee of $15.00 in Chancery Cases is not applicable to any suit which was instituted before the effective date of Chapter 136 of the Acts of Assembly of 1954. The date that this Act went into effect was midnight, June 29, 1954.

CLERKS—Fees—For Qualifying Committee to be charged. F-116 (106)

Honorable Arnold Motley,
Clerk, Circuit Court of Essex County.

October 13, 1954.

This is in reply to your letter of October 8, 1954 in which you state that, under § 14-123(6) of the Code, you charged a Committee, appointed by an order of the Circuit Court for an incompetent person, a fee of $10.00 for entering and indexing said order and bond, and for preparing three qualification certificates. You further state that the Committee has challenged the validity of this charge on the ground that the Court appointed the Committee and approved the bond and that the Clerk did not do these acts. You request my opinion as to whether you charged the proper fee in this instance.

Section 14-123(6) of the Code provides as follows:

"§ 14-123. Clerks of circuit and other courts.—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:

"(6) For appointing and qualifying any personal representative, committee, trustee, guardian, or other fiduciary, in addition to any fees for recording allowed by this section, ten dollars, except that for appointing and qualifying any fiduciary when the estate is of a value of one hundred dollars or less no charge shall be made; and when the estate is of a value of over one hundred dollars and does not exceed five hundred dollars, the total fee shall be five dollars."

That section specifically provides that, for appointing and qualifying any committee, the Clerk may charge a fee of $10.00. Since a clerk of court in no instance has the authority to appoint a committee or trustee and fix the amount of the bond for either of these two, I must conclude that the intent of the statute is that this fee of $10.00 is the proper charge to be made by the clerk, even though he does not appoint the committee. To construe this section otherwise would render meaningless the inclusion of the words “committee” and “trustee.”

In answer to your second question concerning the effect of the change of the word “shall” to “may” in § 14-123 of the Code by the 1954 Session of the General Assembly, I can only give you the statutory construction of the two words. In conferring a power or imposing a duty “may” is permissive and “shall” is mandatory. Therefore, there is no longer a mandatory duty upon you to charge the fees prescribed by § 14-123; however, if you do charge any fee, it must be in the amount specified by § 14-123.
HONORABLE H. C. DeJARNETTE,
Clerk, Circuit Court of Orange County.

This is in reply to your letter of July 1, 1954 in which you ask to be advised as to the legality of installing a visible card system for the purpose of recording the list of delinquent real estate in lieu of recording such delinquent real estate in a book as required by Section 58-984 of the Code of Virginia of 1950.

As pointed out in your letter specific legislative authority was granted for the city of Norfolk to install the card system as contemplated by your office. See Section 58-986 of the Code of Virginia of 1950. In the absence of statutory authority to the contrary I see no escape from the conclusion that the list of real estate returned delinquent must be recorded in a book as set forth in Section 58-984 of the Code.

HONORABLE J. M. REVERE,
Clerk, Circuit Court of Middlesex County.

I am in receipt of your letter of August 13, from which I quote as follows:

"When I became Clerk in January of 1952, it had been the custom in this Clerk's Office to paste the original plat or a photostat copy of the plat on the next page, following the deed, when the plat was mentioned in said deed as being recorded along with deed.

"I would like to know in your opinion if this complies with Section 17-68 of the Code of Virginia."

You will observe from reading Section 17-68 of the Code, to which you refer, that it is not mandatory upon the Clerk to record plats and maps in a plat book, it being within his discretion to keep such a book. It is my opinion, therefore, that a Clerk may elect to record a plat in the manner described by you.

I call your attention to the fact, however, that Section 17-69.1 of the Code requires the Clerk to keep a State highway plat book, with which section you are doubtless familiar.

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

This is in reply to your letter of July 6, which I quote below:

"I would appreciate it very much your giving me your opinion on the question of tax and clerk's costs on preparing order, etc., and recording confession judgment.

"We hold here in this office that a confession judgment is law action and should be taxed and clerk's costs collected from the plaintiff as established by the new law effective June 30th, 1954."

Sections 8-355 to 8-364 deal with proceedings for judgments by confession. Section 8-365 specifies the tax and clerk's fees in connection with such proceedings. Inasmuch as the General Assembly has specifically provided in a separate statute for fees and costs in connection with proceedings for judgments by confession, I am of the opinion that Section 8-365 controls in such cases and not Section 14-123 dealing with clerk's fees generally.
REPORT OF THE ATTORNEY GENERAL


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

This is in reply to your letter of March 21, 1955, in which you request my opinion on the following question:

“What legal authority is necessary for the establishment of a branch institution of a State college or university in Virginia?”

Section 31 of Chapter 708 of the Acts of Assembly of 1954 (the Appropriation Act) reads as follows:

“No State institution of higher learning shall hereafter undertake or engage in the operation of any new or additional extension school, day school or junior college, without the approval of the General Assembly being first obtained.”

This is the only restriction placed upon the board of visitors or other governing board of a State college or university in regard to the establishment of branches or extension services. Therefore, it is my opinion that the only legal authority necessary for the establishment of a branch institution of a State college or university would be either an act or a resolution of the General Assembly of Virginia.

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COLLEGES AND UNIVERSITIES—Authority to contract with private concern for food services. F-268 a (320) May 26, 1955.

HONORABLE DABNEY S. LANCASTER, President, Longwood College.

Pursuant to conference with you in this office today, I have given consideration to the proposed agreement to be entered into by and between Longwood College and Slater Corporation. The agreement would provide, in substance, for the Slater Corporation as an independent contractor to take over from Longwood College all food preparation and food service areas on the College campus. The contract would provide in detail with reference to personnel, health, insurance, replacement of expenditures, and other related matters pertaining to the acquisition, preparation, furnishing and serving of meals to the student body and College personnel. Under the contract the College would be relieved of all responsibility relative to purchasing of food supplies.

The only question which gave me pause during our conference was the applicability of Article 3 of Chapter 15 of the Code of Virginia relating to centralized purchasing.

Inasmuch as the contract provides for the rendition of a service to the College, for which service the College is responsible to the student body and its personnel, and absolves the College from the responsibility of making purchases, it is my opinion that the making of such a contract falls within the purview of the authority of the State Board of Education, as defined in Chapter 8, Sections 23-54 to 23-61 of the Code of Virginia.

I have discussed this situation with Mr. Sidney C. Day, Assistant Comptroller, and he concurs in the views herein expressed.
COLLEGES AND UNIVERSITIES—Meaning of word “alumni”—Appointing Board of Visitors. F-268f (234)

February 23, 1955.

HONORABLE THOMAS B. STANLEY,
Governor of Virginia.

This will acknowledge receipt of your letter of February 21, 1955, requesting my construction of the term “alumni” as used in Section 23-70, as amended, Acts of Assembly 1954, page 436. You desire my opinion as to whether this term was intended to include both men and women.

The noun “alumnus” under its antiquated usage denoted a male ward or pupil. The word “alumni” is, as you know, the plural of “alumnus.” The corollary word “alumna,” the plural of which is “alumnae,” denoted in antiquated usage a female graduate of a school or college. However, unless a clear legislative intent is manifest otherwise, the word “alumni” has been accepted as embracing members of both sexes.

Webster’s Unabridged Dictionary gives the modernized definition of “alumnus” as “A person formerly a member of a school or college class that has graduated.” Blackstone’s Law Dictionary, Third Edition, defines alumnus as “A graduate from a school or college, or other institution of learning.”

It is my opinion, therefore, that there would have to be a clear legislative intent manifest in order to apply the word “alumni” in its strict and technical sense. It is my opinion that the term as used in Section 23-70(a) embraces both men and women.

COLLEGES AND UNIVERSITIES—Scholarships—V. M. I. may continue to award the Rorer A. James. F-268h (15)

July 14, 1954.

MAJOR GENERAL WILLIAM H. MILTON, JR.,
Superintendent, Virginia Military Institute.

This is in reply to your letter of July 2, as supplemented by your letter of July 12, 1954, in which you ask to be advised with respect to the authority of the Board of Visitors of the Virginia Military Institute to award scholarships from the fund created for such purpose by Mr. Rorer A. James. Some doubt has been raised in view of the fact that one of the provisions contained in Mr. James’ letter to the Board of Visitors establishing the scholarship fund was his desire that one of his descendants who is a graduate of the Institute be allowed the privilege of nominating to the Board of Visitors prospective recipients of the scholarships created by the fund. It now appears that there is no such descendant as contemplated by Mr. James.

In construing a document such as the letter of Mr. James establishing the scholarship fund the primary concern is to give full meaning to the writer’s intent insofar as possible. In construing the letter of May 25, 1918 addressed to the Board of Visitors from Mr. James it appears obvious that his primary concern was to make available to the Board of Visitors of Virginia Military Institute a fund to be administered for the benefit of deserving boys who are financially unable to bear the full cost of a cadetship at the Institute. It was the desire of Mr. James that one of his male descendants, having certain qualifications, be allowed the privilege of nominating to the Board of Visitors eligibles to fill the vacancies in such cadetships. This latter desire was not made a condition to the continuance of the trust fund but was simply a request of the creator, which, of course, should be given every consideration insofar as possible. However, inasmuch as there exists no qualified descendant of Mr. James to exercise this privilege I believe this provision is now dormant.

In view of the foregoing I am of the opinion that the Board of Visitors of Virginia Military Institute may continue to award scholarships from the Rorer A. James Scholarship Fund.
REPORT OF THE ATTORNEY GENERAL

COLLEGES AND UNIVERSITIES—State teaching scholarships—Applicable law is Appropriations Act. F-264 (136)

November 3, 1954.

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

I am in receipt of your letter of October 26, in which you ask if Section 23-38 of the Code is applicable to “teacher education and teaching scholarships” granted by the State Board of Education under the appropriation for this purpose made by Item 184 of the Appropriation Act of 1954 (Acts of Assembly 1954, page 964).

It is specified in the appropriation for these scholarships that it shall be “apportioned under rules and regulations of the State Board of Education with the approval of the Governor.” Pursuant to this authority the State Board of Education has adopted detailed regulations governing the granting of these scholarships. Among other things, the regulations provide that a scholarship may be granted to a student in a State or private college in Virginia approved under the scholarship plan.

Section 23-38 of the Code is to be found in Chapter 4 of Title 23 of the Code, which relates exclusively to scholarships granted by certain named State-owned or State-supported institutions of higher learning. The Chapter sets out in some detail the terms and conditions under which the scholarships are to be granted by these institutions. These terms and conditions differ in material respects from the terms and conditions of the scholarships granted by the State Board of Education under Item 184 of the Appropriation Act, to which I have referred. It will also be noted that Section 23-38 refers to the contract entered into between the grantee of a scholarship and the State institution awarding it.

It is my conclusion that Section 23-38 is applicable only to scholarships granted by State-owned or State-supported institutions granted under the authority of Chapter 4 of Title 23 of the Code and is not applicable to scholarships granted by the State Board of Education under the authority of Item 184 of the Appropriation Act, to which I have referred. My information is that the State Board of Education has never considered that Section 23-38 was applicable to its scholarships. This administrative construction is entitled to great weight. It might be noted that the Act of Assembly from which Section 23-38 of the Code was taken was passed in 1942, whereas the General Assembly only commenced to make appropriations for teaching scholarships to be granted by the State Board of Education in the Appropriation Act passed in 1948.

COMMISSIONERS OF REVENUE—Salary—§§ 14-68.1, 14-70-14.71.1 govern.

F-219 (143)

November 10, 1954.

Honorable E. Glenn Jordan,
Commissioner of the Revenue.

I am in receipt of your letter of November 3, in which you ask if Chapter 63 of the Acts of 1946, increasing the maximum limits of the salaries for County and City Commissioners of the Revenue, is still in effect.

In my opinion, your question must be answered in the negative. As you know, the Act to which you refer was amendatory of Chapter 364 of the Acts of 1934. This latter Act was quite a lengthy one. It set up the State Compensation Board, provided for the compensation of Attorneys for the Commonwealth and other officers, provided for the disposition of fees collected by such officers, and abolished the State Fee Commission. The Act was codified in many sections of the Code of 1950.
There were two Acts passed in 1948 dealing, among other things, with the salaries of County and City Commissioners of the Revenue, namely, Chapters 388 and 389. These Acts also had the effect of increasing the compensation of these officers. My surmise is that the Commission on Code Recodification considered that these two Acts of 1948 had the effect of repealing the Act of 1946, in which you are interested, and that these two 1948 Acts contained all the law on the subject of compensation of County and City Commissioners of the Revenue. Whether or not my surmise in this respect is correct, the General Assembly has ratified the action of the Code Commission in omitting this 1946 Act by the amendment in 1952 of Section 14-70 of the Code and the enactment of Section 14-68.1 of the Code. See Chapter 479 of the Acts of 1952. As to County Commissioners of the Revenue, it is my view that the maximum salary of these officers is controlled by Sections 14-71 and 14-71.1 of the Code.

My information is that the view I am expressing herein is in accordance with that of the State Compensation Board and that there is nothing in my letter to you of August 27, 1954, which had the effect of altering the opinion of the State Compensation Board as to the maximum salary allowable to County and City Commissioners of the Revenue.

COMMONWEALTH'S ATTORNEYS—Assault cases—Must leave injured person copy of his statement. F-69 (58)

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

This is in reply to your letter of August 17, 1954, in which you request my opinion as to whether the language of section 8-628.2 of the Code of Virginia of 1950, as amended, is inclusive of those statements taken by the Attorney for the Commonwealth from persons involved in assault cases. The section of the Code in question provides as follows:

"Any person who takes a signed written statement from a person who has sustained a personal injury relative to such injury shall leave a copy of such statement with such injured person at the time of taking such statement."

Inasmuch as this section provides "any person", without exceptions of any kind, I cannot escape the conclusion that Attorneys for the Commonwealth are included in the requirement for leaving a copy of any signed statement with the injured person from whom such statement was taken.

COMMONWEALTH'S ATTORNEY—Designation of an attorney to serve until vacancy filled. F-69 (84)


This will acknowledge receipt of your letter of September 10 relative to the situation which will be created in connection with the office of the Commonwealth's Attorney upon your resignation from that office to assume your duties as Judge of the Corporation Court for the City of South Norfolk.

I understand that the criminal term of your court begins October 4, with a heavy docket requiring considerable work on the part of the prosecuting attorney. It is apparent that it will not be possible to hold a special election to
fill the vacancy in the office of Commonwealth's Attorney before the beginning of the next criminal term. I concur in your feeling that the general election in November would be a propitious and convenient time for the holding of the special election.

You desire my opinion as to whether section 19-4 of the Code, as amended, would apply to the situation which would obtain as a result of your resignation and the assumption of your duties as Judge.

The language of the statute is very broad. If for any reason the Commonwealth's Attorney be unable to act or attend to his official duties as such Commonwealth's Attorney, the statute, in my opinion, authorizes the designation of an attorney for the Commonwealth of some other city or county, or an attorney at law, to serve for such time as may be necessary or desirable.

I suggest that, after you have taken the oath of office and assumed your duties as Judge of the Corporation Court for the City of South Norfolk, the clerk of the court certify to you as Judge the vacancy in the office of the Commonwealth's Attorney, or, if you prefer, have the clerk of the court certify the situation to the Attorney General, which fact of certification in either event be entered of record; whereupon the Attorney General, under authority of section 19-4, would make the designation.

Under all of the circumstances, I believe it would be better for the certification to be made by the clerk to the Judge of the court. The Judge would, in my opinion, have authority to make the designation, or the Judge could certify the situation to the Attorney General.

It is my opinion that section 19-4 authorizes the designation to be made as herein suggested.

COMMONWEALTH'S ATTORNEYS—May also be county chairman of political party. F-249 (48) August 11, 1954.

HONORABLE STUART B. CARTER,
Member House of Delegates.

I have your letter of August 9, 1954, in which you ask the following:

"I would like an opinion as to whether the Democratic Chairman of a County Executive Committee can hold the job of Commonwealth Attorney as well as said Chairmanship at the same time.

"In other words, if a Chairman was elected as Commonwealth Attorney, would he have to resign as Chairman?"

Attorneys for the Commonwealth are precluded from holding other offices at the same time, with specific exceptions, by virtue of section 113 of the Constitution of Virginia and section 15-486 of the Code of Virginia of 1950. Without question, such a prohibition is designed to bar one person's holding more than one public office at the same time. Inasmuch as the Chairman of a County Executive Committee serves only the Democratic Party, such office could not be considered a "public office". I am, therefore, of the opinion that the prohibitions mentioned above do not preclude the holding of such office by an Attorney for the Commonwealth.
COMMONWEALTH'S ATTORNEYS—No duty to represent Real Estate Commission in revocation of license cases. F-69 (72)

This is in reply to your letter of August 27, 1954, in which you ask to be advised if there is a duty imposed upon an Attorney for the Commonwealth to represent a complaining party against a broker brought before the Virginia Real Estate Commission pursuant to the provisions of section 54-762 of the Code of Virginia of 1950, as amended.

The Code section referred to authorizes the suspension or revocation of licenses by the Virginia Real Estate Commission for various reasons. This is a regulatory statute and is not criminal in nature. There is no duty imposed upon the Attorney for the Commonwealth to make an appearance before the Commission, nor to represent anyone on an appeal from the decision of the Commission.

COMPENSATION—Board—Sheriffs' Salaries—Minimum provided by new act effective immediately. F-136 (62)

I acknowledge receipt of your letter dated August 17, 1954, enclosing copy of letter dated August 12, 1954, which you received from Mr. Thurman Britts, Attorney, New Castle, Virginia. Mr. Britts' letter is written to you in the capacity of attorney for Sheriff J. T. Mayo of Craig County and relates to the minimum salary allowance as provided for in Chapter 683 of the 1954 Acts of Assembly amending Section 14-86 of the Code of Virginia.

You request my opinion as to this amended section, and I quote your letter, in part, as follows:

"* * * This section, as amended, provides, among other things, that 'The annual salary of the sheriff of each county shall be not less than thirty-six hundred dollars and not more than seven thousand five hundred dollars.' You will note from reading the amendatory act that no effective date was inserted.

"You are aware of the fact that the law in force as of January 1, 1954, governed the fixing of salaries of sheriffs for the calendar year 1954. The specific question therefore is whether or not the act of 1954 above cited must be made applicable to the period June 30th—December 31, 1954, both inclusive, with respect to the minimum annual salary of $3,600.00 set out in the act.

"You will note that the amendatory act speaks of 'The annual salary of sheriff of each county' * * *. You are aware of the fact that the salaries of sheriffs are fixed on an annual basis coinciding with the calendar year. If it be possible to construe the amendatory act with respect to the minimum salary as having taken effect on June 30, 1954, in such manner as to compel a change in the salaries of all sheriffs, whose salaries have been less than $3,600.00 per annum this will affect some forty counties. It is apparent that if this amendatory act must be construed as taking effect on June 30, 1954, no sheriff, whose salary as of January 1, 1954, was less than $3,600.00, can possibly receive a minimum annual salary for 1954 of as much as $3,600.00, unless in addition the amendatory act be construed as relating back to January 1, 1954, the beginning of the annum."
Section 14-86 provides, in so far as here material, as follows:

"The annual salary of the sheriff of each county shall be not less than thirty-six hundred dollars and not more than seven thousand five hundred dollars. * * *"

This legislation does not, in express terms, fix the effective date. In this connection, your attention is called to Section 53 of the Constitution of Virginia and Section 1-12 of the Code of Virginia, which Code section is, in part, as follows:

"Every act of Assembly, except a general appropriation act, shall take effect ninety days after the adjournment of the session of the General Assembly at which it was enacted, unless in case of emergency, which emergency shall be expressed in the body of the act, the General Assembly shall otherwise direct by a vote of four-fifths of the members voting in each house. * * *"

In view of the foregoing, I have heretofore expressed the opinion that the amendment to Section 14-86 of the Code became effective June 30, 1954. The amended section being effective on that date fixed the minimum annual salary of the sheriffs of each county at not less than thirty-six hundred dollars.

In view of the language of this section and especially that portion providing that the annual salary "shall not be less than thirty-six hundred dollars", my opinion is that such language is mandatory and fixes the sheriffs' annual salary at not less than this amount.

My predecessor in office, the late Honorable Abram P. Staples, in an opinion dated April 15, 1941, to Honorable John D. White, said:

"In view of the language of the section and especially that portion of it providing that the compensation 'shall not be less than' a thousand dollars, in my opinion, the language of the section is mandatory and the statute requires the board of supervisors to fix the sheriff's allowance at not less than a thousand dollars. I do not think the new allowance can be paid, however, without the action of the board of supervisors, since the first part of section 2726 provides that the board shall determine what the allowance shall be within the minimum and maximum fixed by the statute." (Report of the Attorney General 1940-1941, page 156.)

I concur in the language of the former opinion, and it is my view that the language of this statute, in so far as the minimum annual salary of the sheriffs is concerned must be made applicable from the effective date of the act, that is, from June 30 to December 31, 1954, both inclusive.

I am aware that the salaries of sheriffs are fixed by your Board on an annual basis coinciding with the calendar year. However, in view of the plain language of the amended section, I cannot conceive that the salary fixed by your Board for the calendar year 1954 should remain unchanged in so far as the minimum salary is concerned. It is true that the sheriffs affected by this amendment cannot receive for the current calendar year a minimum of thirty-six hundred dollars because the act is not retroactive to January 1, 1954; however, such officials are paid on a monthly basis and they could and should receive for the remaining six months of the year the benefit of the minimum increase.

You are familiar with the provisions of Title 14, Article 7 of the Code of Virginia which prescribes the procedure whereby the Compensation Board fixes the annual salary and allowances of sheriffs and other officers under its jurisdiction. Section 1486 of this title contains a schedule of minimum and maximum salaries of sheriffs of the several counties of the State and set forth factors to be considered by the Compensation Board in fixing the annual salaries and allowances. If it were necessary for your Board to reconsider the factors in re-fixing the salaries of the sheriffs affected by this amendment, there would be some doubt because the statute requires this to be done annually. However, the increase
provided for by the amendment, in so far as the minimum salary to sheriffs is concerned, in no way conflicts with the statute requiring the fixing of the annual salary and allowances of sheriffs by the Compensation Board. Since the minimum salary is fixed by statute, there are no factors to be considered by the Compensation Board.

I am cognizant that the new allowance cannot be paid without some action of your Board being taken; however, this does not, in my view, involve the fixing of a salary as contemplated by Title 14, Article 7 of the Code. The minimum salary having been fixed by the Legislature and there being nothing requiring the judgment or discretion of the Compensation Board, I am of the opinion that the minimum salary increase provided for by the 1954 amendment to Section 14-86 of the Code became payable on the effective date of the act.

In order to avoid administrative problems which your Board may have in determining the amount due a sheriff from June 30 to December 31, 1954, I would recommend, from a practical standpoint, that the increase be paid as of July 1, 1954.

COMPENSATION—Maximum Salary—Commissioner of Revenue of Richmond City. F-219 (67)

August 27, 1954.

HONORABLE E. GLENN JORDAN,
Commissioner of the Revenue.

I have your letter of August 20, in which you ask for my opinion as to the maximum salary allowable under the law to you as Commissioner of the Revenue for the City of Richmond.

Section 14-70 of the Code, as amended by Chapter 479 of the Acts of 1952, provides that “The annual salaries of city commissioners of the revenue shall be within the limits prescribed for the several city treasurers by §§ 14-68 and 14-68.1.” Looking to Section 14-68 of the Code, dealing with salaries of city treasurers, I find that it provides:

“In cities of the first class having aggregate levies of more than one million dollars and a population of not more than seventy-five thousand, such salary shall not be less than five thousand dollars nor more than seven thousand dollars, and when such population exceeds seventy-five thousand, not less than six thousand dollars nor more than eighty-five hundred dollars.”

The section further provides that on and after July 1, 1948, the salaries of city treasurers of cities in Richmond’s class shall be increased by ten percentum, but not to exceed $500. The effect of this section 14-68, therefore, is to fix a maximum salary for the Treasurer of the City of Richmond of $9,000.

Since Section 14-70 fixes the same salary for the commissioner of the revenue as that paid the treasurer, it, therefore, follows that under Section 14-68 the maximum salary of the Commissioner of the Revenue of the City of Richmond is $9,000.

Section 14-68.1, which was added to the Code by Chapter 479 of the Acts of 1952, which is referred to in Section 14-70, increases the salaries of city treasurers by ten per centum. This means, of course, that the salaries of commissioners of the revenue are also increased by ten per centum. Ten per centum of $9,000, the maximum salary fixed by Section 14-68, is $900. It is, therefore, my conclusion, and it seems to me inescapable, that the maximum salary allowed by law to the Commissioner of the Revenue for the City of Richmond is now $9,900 per annum.
CONCEALED WEAPONS—Permit to carry—who attainable from. F-71 (130)

HONORABLE GEORGE F. WHITLEY, JR.,
Trial Justice for Isle of Wight County.

This is in reply to your letter of October 27, 1954, in which you request my opinion as to whether permission to carry a concealed weapon by a circuit court of a county in Virginia gives that person authority to carry a concealed weapon in the other counties of the State.

It is my opinion that § 18-146 of the Code of Virginia gives a circuit court the authority to grant permission to a person within its jurisdiction to carry a concealed weapon, which permission shall be recognized by the authorities of all other counties and cities of the State. I do not think it is the intent of § 18-146 of the Code that a person has to obtain separate permission for each county or city in which they are required to go in the course of their business.

CONSERVATION AND DEVELOPMENT—Board may appoint executive committee to act for Board. F-21 (349)

DR. RAYMOND V. LONG, Director,
Department of Conservation and Development.

This is in reply to your letter of June 8, in which you present the following question:

"Does the Board have authority to appoint an Executive Committee with authority to act on any matters that may come up for Board action between meetings of the full Board. It is felt by some members of the Board that such an Executive Committee could be charged with authority to act for the Board on all matters coming up for Board action, provided such action is made subject to confirmation by the full Board."

Section 10-3 of the Code of Virginia (1950), as amended, makes provision for the Board of Conservation and Development in the following language:

"Board of Conservation and Development.—There shall be a Board of Conservation and Development, hereafter in this title sometimes called the Board, which shall consist of thirteen members to be appointed by the Governor, who shall hold office at the pleasure of the Governor for terms as follows: Of the initial appointments, three shall be for terms of one year, three shall be for terms of two years, three shall be for terms of three years, and four shall be for terms of four years each, and thereafter all appointments shall be for terms of four years each. Except as to persons who were in office on June first, nineteen hundred fifty-four, no person shall be eligible to succeed himself as a member of the Board for more than one term. Any vacancy shall be filled by the Governor for the unexpired term. In making appointments, the Governor shall endeavor to select appointees of such qualifications and experience that the membership of the Board shall include persons suitably qualified to consider and act upon the various special interests and problems of importance, which, under the laws of the Commonwealth, the Board may be required to consider and act upon. The Board may appoint subcommittees of not less than three, its members to consider and deal with such special interests and problems, and may delegate to such subcommittees any powers and duties which may be conferred by law upon the Board in relation to such special interests and problems." (Italics supplied).
In view of the broad language contained in the terminal sentence of the above quoted statute, I am of the opinion that the Board may establish an Executive Committee and confer upon it full authority to exercise any powers which the Board itself may possess with respect to any special interest or problems of importance properly cognizable by the Board. However, I am also of the opinion that the particular matter which the subcommittee is to consider and act upon should be specified either in the initial resolution creating the committee or in the various resolutions by which individual problems may thereafter be referred to the committee for action. I seriously question that the Board is authorized to delegate to a subcommittee general powers to deal finally with any problem which might arise between meetings of the full Board and of which the Board's members may be totally unaware.

You will note that the statute set out above enjoins upon the Governor the duty of selecting for membership on the Board persons whose qualifications and experience render them particularly competent to deal with the various matters within the Board's jurisdiction. Furthermore, the Board is required to meet at least once in every three months and on call of the Chairman or the Director of Conservation and Development, and a minimum of seven members constitutes a quorum. Section 10-5, Code of Virginia (1950). In light of these specific cautionary directives, I think it not unwarranted to conclude that the Legislature intended that on most occasions the full Board (or at least a quorum thereof) should be available to consider matters within its cognizance, and that the full authority of the Board should be delegated to a subcommittee only in those instances in which the particular problem upon which the subcommittee is to act is specified. Although as a general rule the Board acts in a capacity advisory to the Director of Conservation and Development, its approval of the latter's actions on certain matters is expressly required by law. It would appear especially necessary in those instances in which this power of approval is delegated to a subcommittee that the action to be approved should be spelled out with particularity.

In conclusion, I might add that I see no reason why an Executive Committee could not be authorized to act for the Board in matters arising between meetings, provided such action is made subject to ratification and confirmation by the full Board at its regular meetings.

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

This is in reply to your letter of October 12, 1954, in which you request my opinion concerning the proper interpretation of Section 10-6 of the Code of Virginia. This section reads in part as follows:

"The members of the Board shall receive no salaries, but shall be paid their necessary traveling and other expenses incurred in attendance upon meetings, or while otherwise engaged in the discharge of their duties, and the sum of ten dollars a day for each day or portion thereof in which they are engaged in the performance of their duties."

You request my advice as to whether this section should be construed to mean that a member of the Board of Conservation and Development is entitled to ten dollars for that portion of the day or night prior to the meeting that he is traveling to attend the meeting and ten dollars for that portion of the day or might after the meeting that he is traveling in returning to his home.
It is my opinion that a Board member is entitled to this per diem of ten dollars if it is necessary for him to travel the day before or the day after in order to attend the meetings of the Board and if this traveling is necessitated solely for the discharge of his duties as such member of the Board.

CONSERVATION AND DEVELOPMENT—Board—No authority to help underwrite expenses of local festivals. F-13 (210)

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

This is in reply to your letter of January 24, 1955, in which you request my opinion as to whether your Department can legally make appropriations from Item 323 of the Appropriations Act for festivals, carnivals, pageants, etc., all of which money is to be used for operating expenses of these festivals, etc. Item 323 of the Appropriations Act reads as follows:

"Out of this appropriation there is hereby appropriated:

"For insertion in newspapers and periodicals of material advertising Virginia's resources and for the preparation and dissemination of such other form of advertising as may be determined by the Department of Conservation and Development, $160,000 each year, which sums shall include any amounts deemed necessary by the Director of the Department and approved by the Governor to undertake analyses of the effectiveness of the advertising expenditures."

I am of the opinion that no portion of this sum of $160,000 may be used to help underwrite the local expenses of festivals, carnivals and pageants, as this does not constitute advertising as contemplated by Item 323 of this Act.

CONSERVATION AND DEVELOPMENT—Method of transferring funds to Breaks Park. F-21 (220)

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

This will acknowledge receipt of your letter of February 9, 1955, which reads, in part, as follows:

"The General Assembly of 1954 entered into a compact with Kentucky for the development of the Breaks Interstate Park and made an appropriation of $25,000 for each year of the biennium for such park development.

"The language appearing in Chapter 37, Article VIII of the Compact, page 38 of the Acts of 1954, states:

"* * * The Department of Conservation and Development is authorized to transfer funds available to it to the Breaks Interstate Park Commission with the same effect as if it were expending funds on State parks. * * *

"The appropriation act appearing as Chapter 444, page 540 of the Acts of 1954, states:

"* * * Expenditures from this appropriation shall be made on vouchers signed by the Director of the Department of Conservation and Development * * *."
"The intent of Article VIII, Section 2 of the compact on page 38, is not clear. Does this mean the Department of Conservation and Development can transfer its share of funds in a lump sum, or monthly or quarterly, or on some other basis, to the treasurer or other official of the Breaks Interstate Park Commission, after the Interstate Park Commission has submitted application and request for such transfer? Or does it mean that each item of expenditure must be handled just as if our Commissioner of Parks were expending funds on one of our State Parks?"

In my opinion, the legislation referred to by you grants authority to your Department to transfer the appropriated funds to the Breaks Interstate Park Commission either in a lump sum or on a periodical basis, such as monthly or quarterly. The legislation contemplates that the Park Commission shall make item expenditures.

CONTRACTORS' REGISTRATION BOARD—To ascertain if contractor has complied with State laws before issuing certificate. F-34 (167)

December 7, 1954.

HONORABLE J. RANDOLPH TUCKER, JR.,
Member House of Delegates.

This is in reply to your letter of December 2, 1954, in which you request my opinion as to the proper interpretation to be given to an amendment to § 54-129 of the Code which was enacted at the last session of the General Assembly. The portion of § 54-129 of the Code which is pertinent to your question reads as follows:

"Before the issuance of a certificate, it shall be the further duty of the Board, or the members thereof, to ascertain from reliable sources whether or not the applicant has complied with the laws of the Commonwealth pertaining to the domestication of foreign corporations and all other laws in any manner affecting persons, firms, association or corporations engaged in the practice of general contracting or subcontracting as set forth in this chapter."

You ask specifically whether the words "as set forth in this chapter" should be interpreted to refer to the term "all other laws" or whether it refers to the term "the practice of general contracting or subcontracting." I am of the opinion that the phrase, "as set forth in this chapter," refers to "the practice of general contracting and subcontracting" and not to the term "all other laws." I have reached this conclusion from the general wording of this last sentence of § 54-129 and from the arrangement of the words. The phrase "as set forth in this chapter" follows immediately the term "the practice of general contracting or subcontracting," and is not set off by commas from that term. Also, if that phrase, "as set forth in this chapter," is taken to refer to all other laws, then the phrase would be meaningless, as § 54-144 of the Code puts upon the Registration Board for contractors the duty of seeing that all the provisions of Chapter 7 of Title 54 are complied with.

In my opinion the phrase, "as set forth in this chapter," means that the Board is not to see that a person, firm or association has complied with laws as they affect them in their personal life, but that the Board is to see that they have complied with those laws which affect the practice of general contracting or subcontracting as defined in Chapter 7 of Title 54. The phrase also makes clear that § 54-129 of the Code does not extend the jurisdiction of the Board to include persons, firms or associations which are not specifically mentioned in Chapter 7 of Title 54 of the Code.
CONTRACTORS' REGISTRATION BOARD—Speculative builders do not have to register with Board. F-34 (222)


MR. EDWARD L. KUSTERER,
Executive Secretary,
State Registration Board of Contractors.

This will reply to your letter of January 18, 1955, in which you request an opinion on whether or not speculative builders, real estate developers, or owners may, in certain instances, come within the provisions of Title 54, chapter 7, Code of Virginia (1950), as amended. This chapter requires the registration of contractors, who are defined in section 54-113(2) as:

"* * * any person, firm, association or corporation that for a fixed price, commission, fee or percentage, undertakes to bid upon, or accepts or offers to accept, orders or contracts for performing or superintending: * * * (specified types of work); and any person, firm, association or corporation who shall bid upon, accept, offer to accept, or engage in the doing or superintending of any work above mentioned in the State, costing $20,000.00 or more, shall be deemed to have engaged in the business of general contracting or subcontracting in this State."

Specifically, you inquire whether the individuals in each of the following situations would fall within the statutory language set out above:

(1) A doctor buys five lots. He builds five houses costing more than $20,000. He sells the houses. He is unregistered to do work of over $20,000. He hires his own labor, and supervises the work himself.

(2) A real estate developer buys a tract of land, hires his own labor, and builds a business building costing in excess of $20,000.

(3) An owner buys a lot, hires his own labor, and builds his own house, (for his own occupancy) costing in excess of $20,000.

In a previous opinion of this office dated April 5, 1939, the Honorable Abram P. Staples rules that this statute (as it then appeared, chapter 431, Acts of Assembly, 1938), did not apply to speculative builders. Report of the Attorney General 1938-1939, page 135. Pointing out that the "manifest purpose of the statute is to regulate the practices and insure the qualifications of those who hold themselves out to the public as professional builders on a large scale, and offer to sell their services as such", Judge Staples laid great stress upon the phrase "for a fixed price, commission, fee, percentage", and concluded that the statutory definition was not applicable to those who do not sell their services but rather build houses and sell nothing but the finished product.

Although the present statute specifies in greater detail the types of work it comprehends, it does not appear to have been amended in any particular which would justify a departure from the previous ruling. The provision still refers to those who bid upon or engage in certain work for a fixed price, commission, fee or percentage, and continues to contemplate the registration of those who represent themselves as professional builders and offer to sell their services as such. Although the terminal sentence of the statute would appear to include anyone who does the specified types of work under any conditions, a similar provision in the former statute was not deemed to be sufficiently broadening to include mere speculative builders.

I am, therefore, of the opinion that, since none of the individuals in the situations you present undertakes to act as a professional builder or to sell his services as such, registration under this provision of the statute is not contemplated.
REPORT OF THE ATTORNEY GENERAL

COUNTIES, CITIES, TOWNS—Authority to pay medical expenses of injured employee. F-83 (107)

October 13, 1954.

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

I am in receipt of your letter of October 11 in which you state that the County of Arlington carries insurance providing for the payment of all medical expenses incurred by county employees due to injuries suffered in line of duty; that the insurance covers such expenses for a period of one year from the date of the injury; that in certain cases the nature of the injury sustained is such that medical treatment is required beyond one year, and that it is the desire of the County Board to pay such necessary medical expenses subsequent to the expiration of the one-year period.

You have requested my opinion with respect to the authority of the County to pay such necessary medical expenses after the insurance protection has been exhausted.

Under the provisions of § 65-6 of the Code, the County of Arlington is an employer subject to the provisions of the Virginia Workmen's Compensation Act, or Title 65 of the Code.

Section 65-85 of the Code provides, in part, as follows:

"For a period not exceeding sixty days after an accident the employer shall furnish or cause to be furnished, free of charge to the injured employee, such necessary medical attention as the nature of the accident may require, and the employee shall accept, and during the whole or any part of the remainder of his disability resulting from the injury, the employer may, at his own option, continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician, unless otherwise ordered by the Industrial Commission, and in addition, such surgical and hospital service and supplies as may be deemed necessary by the attending physician or the Industrial Commission. When, in the judgment of the majority of the Industrial Commission, the facts require a reasonable extension of such medical attention beyond such period of sixty days, such majority of the Commission may, in its discretion, require the employer to furnish free of charge to the injured employee such medical attention for a reasonable time after the termination of the sixty-day period, but not in excess of one year including such period of sixty days."

Under this provision it is mandatory that an employer, subject to the provisions of Title 65, furnish or cause to be furnished, free of charge to the injured employee, necessary medical attention for a period of sixty days from the date of the injury. The employer may, at his own option, continue to furnish or cause to be furnished, free of charge, to the injured employee such necessary medical attention for such period of time as it may be needed. If the employer does not voluntarily furnish such necessary medical attention beyond the period of sixty days, the Industrial Commission, by majority vote of its members, may require the employer to extend such medical attention, free of charge to the injured employee, for a reasonable time beyond the termination of the sixty-day period, but not in excess of one year from the date of the injury.

In my opinion the provisions of § 65-85 of the Code clearly authorize the County Board of your County to provide at County expense for medical attention of an injured employee subsequent to the expiration of one year from the date of the injury of such employee. However, such extension of medical service is not mandatory upon the County.
REPORT OF THE ATTORNEY GENERAL

COUNTIES, CITIES, TOWNS—Authority over private water systems.

F-140 (183)

December 23, 1954.

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

This is in reply to your letter of December 15, 1954 in which you request my opinion on several questions concerning the authority of the County of Henrico over private water systems in the County. Your first question reads as follows:

"(1) Does the County of Henrico have the authority to refuse permission to a private concern to construct or extend a water system in any part of the County, or specifically in any of the streets, avenues, parks, bridges or other public places owned or controlled by such county?"

In my opinion the Board of Supervisors of the County of Henrico, under the powers given it by § 15-10 of the Code of Virginia, has the authority to refuse permission to a private water company to lay water mains in the streets, alleys or public grounds of the County. Section 15-10 of the Code gives the Board of Supervisors of Henrico County the same powers that the councils of cities and towns have. Sections 15-727 through 15-736 and § 15-774 of the Code provide that no water company shall be permitted to use the streets, alleys or public grounds of a city or town without the previous consent of the corporate authorities.

Your second question reads as follows:

"(2) Does the County of Henrico have authority to refuse permission to a private concern to construct or extend a water system in any of its sanitary districts, particularly one that is committed to an over-all water and sewer program by virtue of a bond issue approved by the people therein?"

The County of Henrico does not, in my opinion, have authority to refuse permission to a private concern to construct or extend a water system in any of its sanitary districts formed under Chapter 2 of Title 21 of the Code solely on the ground that the district is committed to an over-all water and sewer program by virtue of a bond issue approved by a referendum of the people. There is no provision in Chapter 2 of Title 21 which gives the county the authority to refuse private concerns the right to construct competing water systems. The Virginia Water and Sewage Authorities Act, Chapter 22.1 of Title 15, gives a county the authority to refuse permission to the construction of competing water systems in the territory covered by an Authority.

Your third question reads as follows:

"(3) If the County of Henrico cannot refuse a permission altogether, does it have authority to disapprove under Section 15-754.5 an extension to be constructed after July 1, 1954, to a system constructed prior to July 1, 1954?"

It is my opinion that § 15-754.5 gives a county the authority to disapprove an extension to a system existing prior to July 1, 1954, if the extension to that system is not capable of serving the proposed number of connections by reason of inadequate pipes, mains, conduits, pumping stations or otherwise.

Your fourth question reads as follows:

"(4) If the answer to question No. 4 is affirmative, does the County of Henrico have the authority to require that the entire system, rather than the extension only, meet the standards set forth in Section 15-754.3 of the Code?"
In my opinion the County does not have the authority to require that the entire system meet the standards set forth by the County under the authority given to it by § 15-754.3 of the Code.

Your fifth question reads as follows:

“(5) If the County of Henrico fails to disapprove a request for construction or extension of a water system within the sixty day period provided in Section 15-754.3, does the applicant have authority to proceed to build the system or extension without complying with the requisites for same set forth therein?”

Section 15-754.3 of the Code provides, in part, as follows:

“If at the expiration of sixty days from the date on which the applicant appeared before the governing body, such governing body has not disapproved the application, the applicant may proceed with the construction and installation of such water system, provided he first gives notice to the chairman or the governing body by registered mail of its intention to proceed.”

In view of the above-quoted provision, I am of the opinion that the applicant does have the right to proceed to build the system or extension without complying with the requisites of the county should the county fail to disapprove the request within the sixty-day period.

COUNTIES, CITIES, TOWNS—Cost of removing indigent non-resident—who born by. F-231 (259)

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

This is in further reply to your letter of December 1, 1954, in which you advised that proceedings under Section 63-332 of the Virginia Code had been initiated to effect the removal from Mathews County of an individual who had failed to establish a legal settlement therein as defined in Section 63-330. You state that the person in question is a resident of Connecticut who had become a public charge on the county, and that the Trial Justice ordered his removal. You request an opinion on whether the expenses of removal should be borne by the Board of Public Welfare or the county.

Section 63-332 provides for the removal of a person within the purview of Article 3 of the Poor Relief Laws to “the county, town or city, or other state wherein he was last legally settled * * *”. However, Section 63-333, relating to the payment of expenses incident to such removal, merely provides that the “governing body of the county or town shall repay all charges incurred” for maintenance, care and removal.

Manifestly these sections contain no specific provision pertaining to the instant situation. However, it is clear that, with respect to the ordinary intra-state removal, the Legislature intended that the expenses should be borne by the county to which an individual was removed. Moreover, Section 63-332 prescribes that if one is so sick or disabled that he cannot be removed without danger to life, he shall be provided for in the first instance “at the charge of the County, town or city wherein he is, and after his recovery shall be removed”. In contrast to these references placing financial obligations upon the various political subdivisions of the Commonwealth, I find no language in the article which purports to impose upon the Board of Welfare any of the costs which might be incurred in situations of this character. Thus, while the law is not perfectly clear, I am constrained to believe that the expense of removing the person in question from Mathews County should be borne by the governing body thereof.
COUNTIES, CITIES, TOWNS — Annexation — Effect upon State institution.  
F-268g (98)  

HONORABLE WALTER S. NEWMAN,  
President, Virginia Polytechnic Institute.  

September 28, 1954.  

This has reference to your letter of July 27, 1954 and the subsequent telephone conversations relative thereto in which you request my opinion with regard to various questions which have been raised in connection with the proposed annexation of the area embodying the campus of Virginia Polytechnic Institute by the town of Blacksburg.  

The questions raised in your letter fall within two general classifications; viz: (1) the effect of annexation on the operations of the institution itself, and (2) the effect of such annexation upon the persons residing or employed on the grounds of the institution.  

With regard to both classifications, it may be generally said that the annexation of territory embracing a State institution has no effect upon any function which will interfere with the sovereign rights and powers of the State. The ordinances of the town become operative within the territory annexed, but only to the extent that the ordinances of the county were operative prior to annexation. This is based on the well recognized principle that the State is not bound by any statute unless the same is in express terms made to extend to the State. Therefore, ordinances relating to building requirements, zoning and other town regulations with respect to which you inquire it may be said that such regulations will not affect the present operations of the institution.  

The highways within the institution will continue to be State highways insomuch as the State has not ceded jurisdiction over such highways to any political subdivision except by express statutory enactment.  

With respect to the second category in which your inquiries fall, it may be said that the persons residing on the campus of the institution are subject to the police power of the town as they would be with respect to the governmental authority exercised prior to annexation. Students and other persons residing on the campus are subject to automobile license taxation and personal property taxation by the town if such persons are brought within the purview of the laws imposing such taxes with respect to residency.  

With regard to your inquiry relating to the distribution of Alcoholic Beverage Control funds after annexation, I am advised of no method by which such distribution may be made except pursuant to Chapter 1 of Title 4 of the Code of Virginia of 1950, which in essence provides for distribution to the several counties, cities and towns to be made on the basis of the population of such political subdivisions according to the last preceding United States census. I am aware of no provision whereby non-resident students may be included as residents in such census.  

COUNTIES, CITIES, TOWNS — Council — May use court room with judge's consent.  
F-60 (37)  

HONORABLE WILLIAM T. LEARY,  
Member of House of Delegates.  
HON. THEODORE G. WALTON,  
Member of House of Delegates.  

August 2, 1954.  

This is in reply to your letter of July 17, in which you ask for my opinion on the following question:  

"Mr. Walton and I have received a resolution from the City Council of South Norfolk to request an opinion from you in regards to the use of the Corporation Courtroom. We would like your opinion as to whether
Your inquiry is not answered in terms by any statutory provision. However, Sections 15-690 and 15-691 of the Code give to the judge of a court considerable control over the court house and court house property. This is in line, as I understand it, with the general rule. Even in the absence of statute, the better view seems to be that the judge of a court has inherent power to control the use of his court room. See 21 C. J. S., Courts, Section 17, and 14 Am. Jur., Courts, Section 42.

It is my conclusion, therefore, that the City Council of South Norfolk may, with the consent of the Judge of the Corporation Court, use the Corporation Court room for its meetings. The opinion I am expressing is upon the assumption that there is nothing in the Charter of the City of South Norfolk, with which I am not familiar, to the contrary.

COUNTIES, CITIES, TOWNS—Council—Member may serve on Planning Commission. F-249 (64)  
August 24, 1954.

HONORABLE WILLIAM B. Spong, JR.,  
Member House of Delegates.

This is in reply to your letter of August 11, 1954. The enclosures with your letter, as well as the Portsmouth Ordinance of April 27, 1954, a copy of which you were kind enough to furnish me, raise the question of the constitutionality of a member of the City Council of Portsmouth holding a position on the Planning Commission of that city.

Section 121 of the Constitution of Virginia provides, in part, as follows:

“No member of the council shall be eligible, during his tenure of office as such members, or for one year thereafter, to any office to be filled by the council by election or appointment.”

The ordinance adopted April 27, 1954 by the Portsmouth City Council pursuant to the provisions of Section 15-901, Code of Virginia, 1950, provides that members of the Planning Commission, including the councilmanic member, are to be appointed by the Mayor of the City. Inasmuch as the inhibition set forth in the constitutional provision above stated is applicable only to those offices elected or appointed by council, I am of the opinion that such provision does not preclude a member of council being appointed to a city planning commission which is appointed by the Mayor.

You understand, of course, this office does not undertake to pass upon the policy of the statute permitting a councilman to hold a position on a city planning commission.

COUNTIES, CITIES, TOWNS—Council—Vacancies on to be filled according to Charter provisions. F-60 (87)  
September 17, 1954.

HONORABLE E. G. SHAFFER,  
Commonwealth’s Attorney for Wythe County.

This is in reply to your letter of September 9, 1954 in which you request my opinion as to whether or not an election may be held in the Town of Wytheville to fill a vacancy on the Town Council. Although § 15-423 of the Code of Virginia permits such vacancies to be filled by an election in a town, the charter of the Town of Wytheville contains the following provision:
"Vacancies in the Council shall be filled for the unexpired term by a majority vote of the remaining members."

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. Therefore, it is my opinion that the charter provision must prevail, and all vacancies on the Council shall be filled by a majority vote of the remaining members of the Council.

COUNTIES, CITIES, TOWNS—Deposit of funds—May not use bank when city official is also bank officer or director. F-107 (148)

*Honorably Haiti J. Foresman,*  
*Commonwealth's Attorney, City of Buena Vista.*

This is in reply to your letter of November 12, 1954 in which you request my opinion relative to the following question:

"Is it a violation of Section 15-508, Code of Virginia, 1950, for the Council of the City of Buena Vista to designate a bank as an official depository for the funds of such City when one, or more, members of the Council of the City of Buena Vista are directors and/or officers of such bank?"

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 in 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—Duties of zoning and planning commissions. F-60a (218)

*Honorably Raymond V. Long,*  
*Director, Department of Conservation and Development.*

This is in reply to your letter of February 3, 1955 in which you request my opinion concerning Article 1 of Chapter 24 of Title 15 of the Code and Article 2 of Chapter 25, Title 15 of the Code relating to zoning and planning commissions for incorporated towns. You ask the following two questions:

"(1) When a zoning commission is appointed under Section 15-824 and makes final report to the council, is it automatically disbanded?"
"(2) When a zoning commission has been appointed and a planning commission is subsequently appointed is the zoning commission automatically disbanded? In either case, is it necessary to have an order from the appointing court to dismiss the zoning commission?"

In answer to your first question, I am of the opinion that the zoning commission is not automatically disbanded upon making its final report to the council, as there are certain duties which the zoning commission could still perform if the council so desired.

In answer to your second question, I am of the opinion that the appointing of a planning commission does not automatically disband a zoning commission which was already in existence. By comparing §§ 15-819 and 15-906 of the Code it will be observed that the duties and powers of zoning and planning commissions are different in scope, and once the planning commission had been designated to also act as a zoning commission, the zoning commission would continue in existence. I am of the conclusion, therefore, that it would be necessary to have an order from the appointing court to disband the zoning commission before that commission would cease to exist.

COUNTIES, CITIES, TOWNS—Expenses—Board of Supervisor members get 7 cents per mile. F-114 (186)

December 28, 1954.

HONORABLE ROBERT H. OLDHAM,
Clerk, Circuit Court for Accomack County.

This will reply to your letter of December 20, 1954, in which you request an opinion on whether or not section 14-5.2 of the Code of Virginia applies to members of the boards of supervisors, thus entitling them to an allowance of seven cents per mile under Section 14-5.

Prior to 1954, the rate and conditions with respect to mileage allowed and paid to members of the various boards of supervisors were prescribed by Section 14-58, Code of Virginia (1950). In 1954 this section was amended (Chapter 316, Acts of Assembly, 1954, approved March 17) to provide for the payment of seven cents per mile in certain cases; and was subsequently repealed (Chapter 709, Acts of Assembly, 1954, approved April 9,) in the same year. In addition to repealing Section 14-58, Chapter 709 also amended Section 14-5 of the Code and added Section 14-5.2. As amended, the former section declares that any person traveling on State business shall be reimbursed at the rate of seven cents per mile if conveyance is by private transportation; while the latter section provides:

"Any person traveling on business of any town, city or county wherein no part of the cost is borne by the State may be reimbursed by such city, town or county on a basis not in excess of that provided in Section 14-5."

Since the repeal of Section 14-58 and the addition of Section 14-5.2 were accomplished by the same enactment, it seems evident that the Legislature intended that the general provisions of the latter should supplant the more specific provisions which were repealed. Moreover, it is clear that the language of Section 14-5.2 is sufficiently broad to comprehend a member of the board of supervisors. I am, therefore, of the opinion that when a member of one of these county governmental bodies is traveling on business of the county by private transportation, he may be reimbursed on a basis not in excess of that prescribed in Section 14-5.
This is in reply to your letter of June 3, 1955, which I quote below:

“A village in the County of Augusta has a sanitary district formed pursuant to an Act of the Legislature in 1936, the sanitary district at the present time providing an adequate water system for several hundreds of residents. This sanitary district water system was financed by a bond issue authorized by the County with a sinking fund which is now approximately equal to the balance of the indebtedness. The bonds are not subject to anticipation and some of them do not mature until 1965. The village is contemplating incorporation as a town under the Virginia Statutes.

"Please advise whether in the event of incorporation of the village as a town it could take over the water system, including all assets and liabilities; also whether if the village is incorporated as a town it would share in the funds from the sale of alcoholic beverages under the Alcoholic Beverage Control laws."

I assume from your letter that the sanitary district to which you refer was created and the bonds were issued pursuant to the provisions of Chapter 2 of Title 21 of the Code of 1950. You have also advised me that the corporate limits of the proposed town will embrace all of the area now included in the sanitary district.

In this situation it seems to me that your first inquiry is answered by Section 21-119.1 of the Code as amended. This section reads as follows:

"§ 21-119.1. Transfer of certain sanitary districts to towns.—(1) The governing body of any county in which a sanitary district has been established and subsequent thereto a town has been created, the boundaries of such town being the same as those of the sanitary district, is authorized to transfer all jurisdiction and control over such district to such town.

“(2) Such transfer shall be subject to approval by the bondholders.

“(3) Upon the transfer of such district to the town all power and authority of the county over the affairs of such district shall terminate and all such power and authority shall be transferred to and vest in the governing body of the town and all obligations and indebtedness of such district shall be and become an obligation of the town. Such transfer shall not be made, unless, in addition to the other conditions herein set forth, the governing body of such town assents thereto."

If there are any further questions that occur to you in this connection, I shall be glad if you will write me.

As to your second inquiry, that is, whether, if the town is incorporated, it would share in the net profits of the Alcoholic Beverage Control Board, the section of the Code (4-22) does not seem to precisely cover the case of a new town. It is unquestionably the intent of the section that incorporated towns shall receive their proportionate part of the net profits, but the section itself does not cover the case of a new town, since it has no "last preceding United States census." However, I have conferred with the State Comptroller as to his practice in the case of a new town and he advised me that, where the Board of Supervisors of the County in which the new town is located adopts a resolution authorizing him to distribute to the new town its share of these funds in accordance with its population, he has honored the same. For your information I enclose a copy of
the resolution of the Board of Supervisors of Scott County authorizing him to take such action in the case of a town (Weber City) chartered at the last session of the General Assembly. I imagine that the Board of Supervisors of Augusta County would be willing to pass a similar resolution if the town to which you refer is incorporated.

COUNTIES, CITIES, TOWNS—Legality of lease—Purchase contracts for property. F-83 (81)

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

This is in reply to your letter of August 30, 1954 in which you request my opinion as to whether the County may lease land and buildings for public purposes and include in the lease an option that the County may renew the lease at the end of each year, and also an option that the County may purchase property at any time and all rental payments would be credited on the purchase price. You also request my opinion as to whether the County may purchase a building, subject to the present encumbrances thereon. Under this proposal the County would pay the owner his equity in the property and receive title to the property, subject to the encumbrances, and the County would then proceed to make the payments on the trust on the property without the County itself expressly assuming the outstanding encumbrances. You ask if either or both of these plans would be legal in the light of § 115(a) of our Constitution and § 15-249 of the Code of Virginia.

In answer to your first question, it is my opinion that the County could enter into an annual lease for property, paying therefor an annual rent, payable from current revenues. The lease may contain an option to renew for successive one-year periods, and I am also of the opinion that a provision to the effect that after a certain number of successive renewals of the lease, the lessor would convey fee simple title to the County would not violate § 115(a) of the Constitution so long as there is no obligation on the County to renew the lease each year. Section 115(a) of the Constitution provides, in part, as follows:

"No debt shall be contracted by any County ** except in pursuance of authority conferred by the General Assembly by general law; and the General Assembly shall not authorize any county, ** to contract any debt except to meet casual deficits in the revenue, a debt created in anticipation of the revenue of said county, board or district for the then current year, or to redeem a previous liability, unless in general law authorizing the same provision be made for the submission to the qualified voters of the proper county ** the question of contracting such debt; **."

Section 15-249 of the Code of Virginia reads as follows:

"The board of supervisors may direct the raising, by levy, of such sums as may be necessary to defray the county charges and expenses and all necessary charges incident to or arising from the execution of their lawful authority."

After an examination of the reported cases on the legality of so-called lease-purchase agreements, I have come to the conclusion that there is no indebtedness as contemplated by § 115(a) of our Constitution if there is no obligation or promise, express or implied, on the part of the county to renew the lease each year. The term "indebtedness" imports an obligation to pay. Without an obligation to pay, I do not see how there could be an indebtedness in any meaning of
the word. The County unquestionably has the authority to rent office space to house officers and employees while performing their official duties. The inclusion in an annual lease for office space of an option to renew the lease, and an option to purchase the property does not make it an indebtedness.

In answer to your second question, if the County takes title to the property, and although it does not expressly obligate itself to pay off the encumbrance on the property, it is my opinion that there is either a moral or implied obligation upon the County to make the required payments on the outstanding encumbrances on the property. Although I can find no reported cases in the Commonwealth of Virginia on this type of transaction, the majority of cases of other jurisdictions hold an arrangement, such as this, to be an indebtedness, and as such, counties, cities and towns are prohibited from contracting such an indebtedness without first submitting it to a referendum of the people. I am forced to concur with the decisions from other jurisdictions that this would be an indebtedness under § 115(a) of our Constitution, too.

COUNTIES, CITIES, TOWNS—Officers and employees must submit account of actual expenses. F-114 (155)

HONORABLE J. GORDON BENNETT,  
Auditor of Public Accounts.

This is in reply to your letter of November 19, 1954 in which you request my opinion concerning the proper interpretation to be given to § 14-5.2 of the Code of Virginia. This section reads as follows:

"Any person traveling on business of any town, city or county wherein no part of the cost is borne by the State may be reimbursed by such city, town or county on a basis not in excess of that provided in § 14-5."

Section 14-5 provides, in part, as follows:

"Any person traveling on State business shall be entitled to reimbursement for such of his actual expenses as are necessary and ordinarily incidental to such travel. **.*"  

In view of these two sections of the Code, I am of the opinion that a town, city or county of this State may reimburse a person traveling on business for it only for his actual expenses. I cannot see how these two sections can be effectively complied with unless an itemized account of actual expenses is submitted to the town, city or county. These two sections, in my opinion, prohibit the allowance of lump-sum amounts to persons for travel expenses by any town, city or county within the State.

COUNTIES, CITIES, TOWNS—Off-street parking regulations—Violators may be fined. F-60a (92)

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

This is in reply to your letter of September 15, 1954 in which you request my opinion as to whether or not a town in Virginia can enforce off-street parking regulations by making a violation of such regulations unlawful as a violation of the Criminal Code.

Section 15-6 of the Code of Virginia contains the following provision:
"Every city and town may:

(2) Provide off-street automobile parking facilities and open the same to the public, with or without charge; * * *"

Section 15-5 of the Code reads as follows:

"Councils of cities and towns, for the purpose of carrying into effect the enumerated powers conferred upon them may make ordinances and by-laws and prescribe fines or other punishment for violation thereof, keep a city or town guard, appoint a collector of its taxes and levies, and such other officers as they may deem proper, define their powers, prescribe their duties and compensation, and take from any of them a bond, with sureties, in such penalty as to the council may seem fit, payable to the city or town by its corporate name and with condition for the faithful discharge of such duties."

In view of these two sections of the Code I am of the opinion that a town or city in Virginia can enact ordinances and by-laws in prescribing fines or other punishments for violations of off-street parking regulations.

COUNTIES, CITIES, TOWNS—Ordinances—Adopting provisions of State code by reference. F-353 (89)

September 22, 1954.

THE HONORABLE MEREDITH C. DORTCH, Commonwealth's Attorney of Mecklenburg County.

This is to acknowledge receipt of your letter of September 15 in which you state:

"Question has arisen in several of the towns in my county with respect to the legality of town ordinances adopting portions of the Motor Vehicle Code by reference. It seems that the towns have from time to time passed an ordinance incorporating and embodying the chapter of the Motor Vehicle Code pertaining to the regulation of traffic, the ordinance reading that the law was adopted 'just as though said statutes were copied herein in full'.

"I would like your opinion as to whether or not the entire chapter of the code should be passed and copied into the town's minute book or whether or not the law might be adopted merely by reference in the town ordinance. In other words, whether certain portions of the code may be adopted by reference or whether they must be copied verbatim in order effectively to become the law of the town."

Your attention is invited to the following:

McQuillen Municipal Corporation, 3rd Edition, Section 16.12:

"An ordinance may by appropriate language adopt by reference the provisions of existing statutes or ordinances, or an existing ordinance may be incorporated in, and carried forward by appropriate language of, a subsequent ordinance, and such provisions adopted by reference need not be set out in totidem verbis, and entered upon the minutes of the enacting body. * * *"

62 Corpus Juris Secundum, page 790:

"In the enactment of an ordinance, an existing statute, ordinance, or other public document, or a portion thereof, may be adopted by reference so as to become a part of the adopting ordinance. Where a municipal
ordinance incorporates a general statute by reference, the statute in its entirety need not be set out in the ordinance, or, as discussed infra § 426, entered on the minutes of the corporation. A general or reference ordinance has been held valid."

I cannot find any general statute that either permits or prohibits such a practice, nor can I find where our Supreme Court of Appeals has passed on this question. An examination of the charter of the municipality would have to be made in every instance to determine whether there is any prohibition against the adoption of ordinances by reference. My conclusion, therefore, is that, unless prohibited by the charter, an ordinance could be adopted by a municipality incorporating the provisions of Chapter 4, Title 46, Code of Virginia, and, thereupon, the provisions of that chapter would become the municipal ordinance.

Be that as it may, I strongly recommend that the municipalities not follow this practice. Some of the verbiage of the provisions of Chapter 4, Title 46, is not appropriate to towns or cities; furthermore, it would be somewhat difficult to properly identify sections of the ordinance by numerical designation, and I think that this may lead to confusion when persons are charged with the violation thereof. Then, too, good administration would dictate that the copy of the ordinance enacted be recorded in the ledger or book where all other ordinances are recorded. It would be far better, in my opinion, that the towns adopt the ordinance in the entirety rather than to incorporate the provisions of the Motor Vehicle Code by reference.

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COUNTIES, CITIES, TOWNS — Population of — Norfolk County — Use 1950 census. F-381 (221)


HONORABLE RALPH H. RICARDO,
Trial Justice for Norfolk County.

This is in reply to your letter of February 8, 1955, which reads as follows:

"I respectfully refer you to Chapter 284, Acts of Assembly of 1952 entitled, 'An Act to amend and reenact § 16-62 of the Code of Virginia, relating to the issuance of warrants by clerks only in certain counties,' which Act applies to Norfolk County.

"It will be noted that this Act, as amended above, provides that a County adjoining a city of a population of 225,000 or more would be affected by this Act. The official United States Census for 1950 shows a population of the City of Norfolk at 213,513. On January 1, 1955, certain area of Norfolk County known as Tanners Creek Magisterial District became a part of the City of Norfolk by reason of annexation. The population of the section so annexed is estimated to be in excess of 50,000, which would make the present population of the City of Norfolk greater than 225,000.

"In view of the above, what construction should be placed upon § 16-62 of the Code of Virginia, insofar as Norfolk County is concerned?"

The question raised by you requires consideration of §§ 1-13 and 1-13.22 of the Code relating to rules of construction. Section 1-13 provides as follows:

"In the construction of this Code and of all statutes, the rules shall be observed as set forth in the following sections, unless the construction would be inconsistent with the manifest intention of the General Assembly."

Section 1-13.22 provides as follows:

"The word 'population' used in any act of the General Assembly with reference to any county, city or town, unless the context clearly indicates
some other meaning, shall be construed to mean the population of such county, city or town as shown by the United States census latest preceding the time at which any provision dependent upon population is being applied, or the time as of which it is being construed, to the end that there will be such flexibility as will constitute the word of general and variable, instead of special and invariable, significance.”

In construing § 16-62 pursuant to the rules of construction contained in the foregoing sections, I am of the opinion that the population of Norfolk City for such purpose is the population as shown by the 1950 United States Census. In arriving at this opinion, I have considered Code § 1-13.35.

COUNTIES, CITIES, TOWNS—Qualification of town officers, place for.
F-246 (75)

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

I have your letter of August 31, inquiring “as to the proper place of the qualification of town officers; that is, the qualification of the mayor, councilmen, and other appointed officers such as the clerk, treasurer, etc.”

As to the mayor and councilmen of a town, Section 15-422 of the Code provides that they shall qualify by taking and subscribing the proper oath. Such oath may be taken before any officer authorized by law to administer oaths and when so taken and subscribed shall be returned to the clerk of the council of the town, who shall enter the same on record of the minute book of the council. Pursuant to this section, the mayor and councilmen may take the oath before the clerk of the circuit court, but in such case the clerk would not be acting in his official capacity as clerk, but only as an officer authorized by law to administer oaths. If the oath is taken and subscribed before the clerk, he should return it to the clerk of the council of the town.

As to all other town officers, they should qualify in the manner set out in Section 15-475 of the Code, that is to say, they may qualify by taking the oath prescribed by Section 49-1 of the Code and giving the necessary bond before the circuit court of the county, or before the judge or the clerk of said court. If the oath is taken before the clerk of the circuit court, such clerk is acting in his official capacity and he should make the qualification a matter of record in his office.

COUNTIES, CITIES, TOWNS—Zoning—May zone portions of political subdivision. F-60a (350)

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

This is in reply to your letter of June 21, 1955, to which is attached a memorandum from Mr. W. H. Caldwell, Commissioner of the Division of Planning and Economic Development. In this memorandum it is stated:

“The problem that has arisen requiring an opinion on this matter comes from a desire of the political subdivisions of Williamsburg, James City County, and York County to zone a portion of these political subdivisions as a historical area in which they would prevent a development of uses that would be detrimental to the historical significance of the area. The question has arisen as to whether this historical area can
be zoned without zoning the whole of the political subdivisions and, therefore, our question is: In the opinion of the Attorney General does Section 15-845 require the whole of a political subdivision to be zoned or can the governing body zone only that portion of it that they deem necessary?"

Mr. Caldwell's memorandum refers to the case of Fairfax County v. Parker, 186 Va. 675, in which our Supreme Court of Appeals expressed the view that whether the entire area of a county should be zoned is left to the discretion of the Board of Supervisors. The Court did state in that case that the reasonableness of restrictions imposed by zoning ordinances is subject to judicial review.

On December 20, 1950 (Report of Attorney General, 1950-51, page 26), in response to a similar question, I stated as follows:

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

The purpose for which the political jurisdictions contemplate zoning certain areas appears to be a reasonable exercise of the powers conferred under the appropriate statutes applicable to zoning in cities and in counties generally.

COUNTIES, CITIES, TOWNS—Zoning—Ordinance, amount of notice required. F-60a (166)

Mr. A. G. Lacy, Clerk
Circuit Court of Halifax County.

This is in reply to your letter of December 4, 1954, in which you request an opinion concerning the publication of notices setting forth the time and place of public hearings on proposed zoning regulations in cities and towns as required by section 15-822 of the Code of Virginia. The statute in question provides:

"Manner of effecting regulations.—The council of such city or town shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established and enforced and from time to time amended, supplemented or changed. However, no such regulation, restriction or boundary shall become effective until after a public hearing in relation thereto at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen days' notice of the time and place of such hearing shall be published in an official paper, or a paper of general circulation, in such city or town; provided, however, that in any city or town in which each proposed change in, or amendment or supplement to, any such regulation, restriction or boundary shall be first referred by the council to the board of zoning appeals or planning commission for a report and recommendation and in which such board or commission makes such report and recommendation to the council after a public hearing in relation thereto held by the board or commission pursuant to prior notice published five days in an official paper, or paper of general circulation, in such city or town, the public hearing by the council in relation to such change, amendment or supplement may be held after at least ten days' notice of the time and place of such hearing published in an official paper, or a paper of general circulation, in such city or town."
Specifically, your communication presents the following situation:

“When a zoning proposal has been or will be referred by the town council to the town planning commission, will the five days' publication plus the ten days' notice mentioned in the said section following the words 'provided, however' be sufficient, or will it be necessary also to comply with the fifteen days' notice requirement mentioned in the section preceding the words 'provided, however'?”

The proviso contained in the terminal portion of the concluding sentence of the statute set out above was added by chapter 243, Acts of Assembly, 1946. Prior to that date fifteen days' notice was required in every instance by the initial clause of that sentence. In view of the subject matter of the proviso and its position in the statute as a clause qualifying the fifteen-day notice provision, it is manifest that its effect is to authorize a permissive alternative means of giving notice of public hearings in those cities and towns which refer proposed changes, amendments or supplements to a board of zoning appeals or planning commission for report prior to action by the council.

I am thus of the opinion that if the proposal you mention is in the nature of a change, amendment or supplement to an existing zoning regulation, compliance with the requirements of the proviso will be sufficient.

CRIMINAL LAW—Alcoholic content of blood. No privilege communications between physician and patient. F-6 (42)

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

This is in reply to your letter of August 3, 1954, in which you request my opinion as to whether or not the report of the alcoholic content of a defendant's blood is admissible in evidence in a criminal prosecution over the defendant's objection that the information is a confidential communication between physician and patient. You state that the physician is a private physician obtained by the defendant at his expense who takes a sample of the defendant's blood and forwards it to the State Anatomical Laboratory for analysis.

In 58 Am. Jur., p. 232, under Witnesses, § 401, the following statement of law is made:

“At common law a physician called as a witness had no right to a decline or refuse to disclose any information on the ground that such information had been communicated to him confidentially in the course of his attendance upon or treatment of his patient in a professional capacity. Nor could the patient, in case the physician proved a willing witness, by objection exclude that information, or, as a witness himself, refuse to disclose any communication made to him by the physician. In other words, no privilege existed as to communication between physician and patient. This is the rule in the absence of a contrary statute.”

I can find no statute in the Code of Virginia which provides that information communicated to a physician by a patient in the course of the physician's attendance or treatment of the patient in a professional capacity is a privileged communication. Therefore, it is my opinion that the toxicologist's report of the alcoholic content of the defendant's blood is admissible under § 18-75.1 of the Code of Virginia over the objections of the defendant.
CRIMINAL LAW—Bad check given in exchange for previous bad check, keeping material witnesses in jail—Use of misdemeanor summons—Fleeing custody of arresting officers. F-129 (123)

October 26, 1954.

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

This is in reply to your letter of October 29, 1954, in which you ask the following questions and request my opinion with respect thereto:

"1. A merchant within a day or two accepts two checks for $50.00 each and in return furnishes groceries and cash. Both checks were returned 'not sufficient funds.' Later, at the request of the drawer and person who previously presented the checks the merchant exchanged the two refused checks for one for $100.00. This check was presented to the bank and when advised that there were not sufficient funds, it was left for collection. Later, when the account was closed, it was returned to the merchant."

"2. Recently, I read in the newspaper that in a nearby County a material witness was kept in jail for failure to give bond for appearance."

"3. I have been unable to find statutory authority for the use of so-called misdemeanor summons. I am aware of the specific provision for summons in the Motor Vehicle Code, the Game and Fish Law, etc."

"4. For sometime I have been trying to locate the proper statute under which a charge for fleeing from the custody of an officer can be brought. Specifically, the proper charge for a person who has been stopped by an officer and flees before arrest—or—who having been arrested flees on the way to the Justice of the Peace—or—who flees after arrest but before signing motor vehicle or other proper summons."

I will answer these questions in the order in which they appear above.

1. I am in accord with your conclusion that the issuance of the check for $100.00 as a replacement for the two $50.00 checks is not a violation of § 6-129 of the Code. While under § 6-130 the issuance of a bad check is prima facie evidence of intent to defraud, the circumstances under which the check was given would tend to rebut such a presumption.

2. Under § 19-104 a recognizance may be taken of a witness. Section 19-105 authorizes the requirement of a bond from the witness for his appearance in court. Section 19-111 provides as follows:

"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."

I am of the opinion that, under these provisions, bonds may be required of witnesses for their appearances in court and, for failure to furnish such bond with proper surety, the witness may be committed to jail subject to being discharged when his evidence has been given or his discharge is otherwise directed by the court.

3. I know of no authority for the use of the so-called misdemeanor summons, except under the specific provisions to which you refer. In this connection I call attention to the case of Montgomery Ward & Co. v. Wickline, 188 Va. 485, 50 S. E. 2d 387, in which the Supreme Court of Virginia made this statement:
"It is firmly settled that a peace officer may legally arrest, without a warrant, for a misdemeanor committed in his presence, but that a warrant is necessary where the offense is not committed in his presence. Crosswhite v. Barnes, 139 Va. 471, 478, 124 S. E. 242, 40 A. L. R. 54; Williams v. Commonwealth, 142 Va. 667, 671, 128 S. E. 572.

"Moreover, to justify the arrest for a misdemeanor not committed in his presence, the officer must have the warrant with him at the time. Crosswhite v. Barnes, supra, 139 Va. at page 478, 124 S. E. at page 244."

4. We have been unable to find any statute applicable to the situation stated by you. There is not, so far as we can determine, any statute specifically making fleeing from an officer an offense separate from the alleged offense for which the person has been arrested or for which an attempt has been made to arrest him.

-CRIMINAL PROCEDURE—Authority of town officer to make arrest outside of town. F-129 (178)

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

This is in reply to your letter of December 16, 1954, which reads, in part, as follows:

"Section 19-73 of the Code provides that the authority of any officer of any county, city or town to make arrest of a person who has committed a misdemeanor in the presence and in the jurisdiction of such officer, extends throughout the 'adjoining court, city or town in which it may be necessary to go' without a warrant when actually in close pursuit. Section 15-560 provides that the jurisdiction of the corporate authorities of any town or city in criminal matters shall extend one mile beyond limits of such town or city.

"Does an officer of the town of Orange, observing a misdemeanor committed in his presence in the town and who thereafter pursues the man without a warrant, have authority to pursue the offender into the county of Madison or may he only pursue him into the county of Orange?

"Does an officer of the town of Orange, who observes a misdemeanor committed in his presence while in the one mile area beyond the corporate limits of the town of Orange, have authority to pursue the offender, without a warrant, into the county of Madison or can he pursue him only into the county of Orange?"

It is my opinion that the authority of the town officer to pursue the person who committed the misdemeanor is restricted to the County of Orange in both instances. The adjoining county, in my judgment, means the county that adjoins the town limits, that is, the county, in most instances, that surrounds the town.

With respect to your second question, you are aware, I am sure, of the fact that the town officer's authority in such cases would be limited to violations of State law, and that he would have no authority to make an arrest for a violation of a town ordinance committed within the one-mile area.

-CRIMINAL PROCEDURE—Cannot obtain sample of blood for alcohol test without written consent. F-6 (101)

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

This is in reply to your letter of September 29, 1954, in which you request my opinion as to whether or not a doctor has the right to take a sample of blood
for the purpose of having its alcoholic content determined by the Chief Medical Examiner of the State in each of the following cases:

"1. From an unconscious person.

"2. From a person who is conscious, but neither expressly consents nor objects.

"3. From a person who expressly objects."

Section 18-75.1 of the Code of Virginia reads as follows:

"In any criminal prosecution under § 18-75, no person shall be required to submit to determination of the amount of alcohol in his blood at the time of the alleged offense as shown by chemical analysis of his blood, breath, or other bodily substance, but should the accused request in writing such a determination the arresting authorities shall render full assistance in obtaining such a determination. There shall be no formal requirements for the writing, but the writing may be in a prepared form submitted to the accused for his signature if he so requests.

"Other than as expressly provided herein, the provisions of this section shall not otherwise limit the introduction of any competent evidence bearing upon any question at issue before the court. The results of a determination which are properly obtained shall be admissible as other evidence relating to the intoxication of the accused. The failure of the accused to request such determination is not evidence and shall not be subject to comment in the trial of the case."

In view of the above quoted section of the Code, it is my opinion that a doctor does not have the authority to take blood from any of the persons mentioned in your letter if the purpose of obtaining the blood is to secure evidence for a criminal prosecution of any of these persons.

CRIMINAL PROCEDURE—Costs—Defendant taxed for first trial when hung jury. F-116 (196)

January 10, 1955.

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

This will acknowledge receipt of your letter of January 7 in which you request my opinion with respect to the following question:

"When a defendant is tried either on an indictment or misdemeanor, by jury, resulting in Hung Jury, and later is tried again by jury and convicted, does the Clerk have authority to charge as a part of the costs, the costs of jury in original trial?"

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

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

This office has heretofore expressed the view that our courts have consistently held that it is the purpose of this statute to exact from the wrongdoer full reimbursement of the expense which he has caused the State.
On a previous occasion we expressed the view that where the first jury was dismissed due to the postponement of the trial on motion of the Commonwealth's Attorney, due to the absence in court of the prosecuting witness, the expense incurred in assembling the jury on both occasions should be taxed against the accused.

Following the principle as set forth above, I am of the opinion that, under the circumstances outlined in your letter, the clerk should tax, as a part of the costs recoverable from the accused, the expense incident to the impaneling of both juries.

CRIMINAL PROCEDURE—Sentences—Court may not suspend for felony after prisoner committed. F-84 (207)

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

This will acknowledge receipt of your letter of January 22, 1955, which reads as follows:

"Please be kind enough to advise the undersigned whether or not in the case of a man who, by reason of plea of guilty, sentence and punishment in the local Circuit Court, is, at the present time, serving the sentence at the penitentiary but who has not served a sufficient portion of the sentence for consideration of parole by the Parole Board, the local court may, under the provisions of Section 53-272 of the Code of Virginia, upon a showing of circumstances in mitigation of the offense and that the public interest will be promoted thereby, suspend the remainder of the prisoner's term and place the prisoner on probation under the supervision of a probation officer for such time and under such conditions of probation as the court may determine."

Section 53-272 of the Code, as amended by Chapter 141, Acts of 1954, reads as follows:

"After a plea, a verdict or a judgment of guilty in any court having jurisdiction to hear and determine the offense, with which the prisoner at the bar is charged, if there are circumstances in mitigation of the offense, or if it appears compatible with the public interest, and in any case after a child has been declared delinquent or dependent, the court may suspend the execution of sentence, in whole or in part, or the imposition of sentence, or commitment, and may also place the defendant on probation under the supervision of a probation officer, during good behavior, for such time and under such conditions of probation as the court shall determine. In case the prisoner has been sentenced for a misdemeanor and committed, the court, or judge of such court in vacation may at any time before the sentence has been completely served, suspend the unserved portion of any such sentence.

"In case the prisoner has been sentenced and committed for a felony and the sentence is partially suspended, for purposes of good behavior credit and for parole eligibility, the term of imprisonment shall be that portion of the sentence which was not suspended."

This section, except in the case of a misdemeanor, authorizes a court merely to suspend or postpone the execution or imposition of a sentence. As stated by Judge Prentis in the case of Richardson v. Commonwealth, 131 Va. 802, construing the section as it read prior to the amendment of 1938 (Acts of 1938, page 189):
“Possibly the idea that such statutes constitute an invasion of the pardoning power of the Governor is based upon an erroneous view of the true effect of suspending execution of a sentence. By the very term used it is not a pardon, excuse, immunity, or relief from punishment, but a mere suspension, or postponement, of its execution.”

At another place in the same case, Judge Prentis stated:

“When the execution of a sentence is thus suspended under the Virginia statute, the case remains pending and the court does not thereby lose its control over the accused or his case.” (Emphasis added.)

The 1938 amendment referred to herein expressly provided for the suspension at anytime by adding this language:

“In case the prisoner has been sentenced for a misdemeanor and committed, the court, or the judge of such court in vacation may at anytime before the sentence has been completely served, suspend the unserved portion of any sentence.”

The 1954 amendment did not enlarge the power of the courts with respect to suspension of a sentence after the judgment of the court has become final.

In view of the interpretation of the statute as contained in the case of Richardson v. Commonwealth, supra, I am of the opinion that, where execution of a judgment is not suspended while the case is still in the court's control, the judgment of the court becomes irrevocable.

The prisoner to whom you refer was convicted of a felony and sentence actually imposed. For the reasons herein stated, I am of the opinion that the Court does not have the power to suspend the unserved portion of his term.

CRIMINAL PROCEDURE—State courts have jurisdiction to try person for larceny committed in post office. F-79 (93) September 24, 1954.

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

This is in reply to your letter of September 18, 1954, in which you request my opinion as to whether a state court has jurisdiction to try a person for the crime of stealing a check out of a Post Office lock box, the Post Office building being locally owned and rented to the United States government.

Section 32-31 of Title 18 of the United States Code provides as follows:

"The district courts of the United States shall have original jurisdiction, exclusive of the courts of the state, of all offenses against the laws of the United States.

"Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof."

Although taking money from a United States Post Office with the intention to steal the same is an offense against the federal law, such fact does not deprive a state court of jurisdiction in the prosecution of a charge of larceny under the State law, the jurisdiction not being conflicting. People v. Burke, 161 Mich. 397, 126 N. W. 446; State v. Stevens, 60 Mont. 390, 199 P. 256; In Re: Noah, N. Y. 1918, 3 City H. Rec. 13; State v. Wells, S. C. 1835, 2 Hill 587.

In view of the above-quoted section of the United States Code and the annotated opinions thereunder, I am of the opinion that a state court has jurisdiction to try a person for the offense of larceny for stealing a check out of a Post Office lock box.
CRIMINAL PROCEDURE—Two warrants in same county for one speeding offense constitutes double jeopardy. F-353 (275)

April 8, 1955.

HONORABLE G. GARLAND WILSON,
Commonwealth’s Attorney, City of Radford.

This is in reply to your letter of April 6, 1955, in which you request my opinion on the following:

"Defendant is chased in close pursuit in one continuous act at a very high and excessive rate of speed by state police officers all through Giles County and Pulaski County, the officers being unable to stop or overtake the defendant until they reached the city limits at Radford, Virginia. The defendant is stopped at the city limits, however, a warrant was issued at the time of his arrest by the Civil and Police Justice of Radford charging him with reckless driving and speeding within one mile of the City of Radford which was in Pulaski County. Thereafter another warrant is issued in Pulaski County charging the same offense of reckless driving and speeding throughout Pulaski County, and the defendant is tried first on the Pulaski warrant. On trial for the Radford warrant, can the defendant plead as a bar that he was convicted in Pulaski County for reckless driving and speeding? The language in the two warrants being identical."

I am of the opinion that the two warrants are for one and the same offense and that if the defendant is tried on one warrant, when he comes up for trial on the second warrant he can plead as a bar that he has already been convicted of this offense, and that a second conviction would constitute double jeopardy.

In answer to your second question as to which court would have jurisdiction to try him, both the Trial Justice Court of Pulaski County and the Civil and Police Court of the City of Radford would have jurisdiction to try the defendant for this offense. After he was tried and convicted in either one of the courts, then, and only then, could the defendant object to being tried in the other court. Therefore, it is my conclusion that whichever court first holds a trial and renders a judgment is the court having proper jurisdiction over the offense.

CRIMINAL PROCEDURE — Mandatory jail sentence may be suspended. F-75b (236)

February 25, 1955.

HONORABLE BASIL C. BURKE, JR.,
Commonwealth’s Attorney of Madison County.

This is in reply to your letter of February 24, 1955, which reads as follows:

"In your opinion is the ten days minimum jail sentence for conviction under Section 46-347.1, 'Driving while license suspended or revoked' subject to suspension by a trial justice under Section 53-272?"

Section 46-347.1 does not contain any language which would deny to a court the power to suspend the imposition or execution of sentence under § 53-272. The word shall which appears in the second sentence of this section is contained in a great many criminal statutes. I have heretofore held that the use of such word, in the absence of express language to the contrary, does not take away from the court the right to invoke the suspension provisions of § 53-272 of the Code.
DENTISTS—Board of Examiners—Authority to enjoin practice. F-198 (192)


DR. JOHN M. HUGHES, Secretary-Treasurer, Virginia State Board of Dental Examiners.

This is in reply to your letter of December 30, 1954, in which you request my opinion as to whether or not the courts are empowered to enjoin anyone under sections 54-322 and 54-325 from unlawfully practicing dentistry. Section 54-324 provides, in part, as follows: "If upon final hearing it is shown that the defendant has been unlawfully practicing medicine, homeopathy, osteopathy, chiropractic, naturopathy or chiropody the court shall perpetually enjoin such unlawful practice."

As you may see, the unlawful practice of dentistry is not included in the above quoted list. Therefore, I am of the opinion that your board cannot get an injunction under sections 54-322 through 54-325 against anyone unlawfully practicing dentistry. The practice of dentistry is governed by chapter 8 and chapter 8.1 of Title 54 of the Code of Virginia.

DOG LAWS—Certificate of vaccination required before issuing kennel license.

TAXATION—Payment on Monday when deadline falls on Sunday. F-95 (126)

October 27, 1954.

HONORABLE B. G. JAMES, City Treasurer, Newport News, Virginia.

This is in reply to your letter of October 25, 1954, in which you call attention to the fact that December 5th falls on Sunday of this year, and request my opinion as to whether you may accept payment of taxes on December 6th without penalty.

This office has previously ruled that, when December 5 falls on Sunday, taxes may be paid on December 6th without the imposition of penalty.

You state that there has been in effect for several years an ordinance of the City of Newport News requiring dogs to be inoculated or vaccinated for rabies; that pursuant to § 29-188.1 "no license tag shall be issued for any dog without presentation of a certificate showing the dog has been vaccinated or inoculated," and that the problem with which you are now confronted is what evidence you should require before issuing a kennel license.

It appears that the license requirements of § 29-188 apply to kennel dogs. Section 29-188 of the Code provides, in part, that:

"* * * upon receipt of proper application and certificate of vaccination if any be required under chapter 9.1 of this title the treasurer or other officer charged with the duty of issuing dog licenses shall issue a license receipt for the amount on which he shall record the name and address of the owner or custodian, the date of payment, the year for which issued, the serial number of the tag, whether male, unsexed female, female or kennel, and deliver the metal license tags or plates herein provided for."

If the State Health Commissioner under Chapter 9.1 of Title 29 has not required an inoculation or vaccination, but the City has such an ordinance, as appears to be the case in Newport News, § 29-188.1 applies. This section does not require the certificate of vaccination mentioned in § 29-188, but provides that:

"* * * no license tag shall be issued for any dog unless there is presented, to the treasurer or other officer of the city charged by law with the duty of issuing license tags for dogs at the time application for
license is made, *evidence satisfactory to him* showing that such dog has
been, within the time and as prescribed by such ordinance, inoculated or
vaccinated against rabies." (Italics added.)

Assuming that the ordinance referred to meets the requirements of § 29-188.1,
I am of the opinion that it is discretionary with the Treasurer as to what
evidence he shall require as to inoculation or vaccination. Since § 29-188
requires a "certificate of vaccination" where the State Health Commissioner has
acted under Chapter 9.1 of Title 29, it would seem that the same requirement
would be reasonable when acting under a proper ordinance.

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**DOG LAWS — No compensation for dog destroyed by Health Department. F-95 (276)**

*April 8, 1955.*

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

This is in reply to your letter of April 5, in which you inquire if a Board
of Supervisors may compensate an owner for the loss of a vaccinated dog, which
animal was bitten by a rabid dog and thereafter destroyed at the direction of
the Health Department.

While section 29-202, Code of Virginia (1950), as amended, prescribes the
payment of compensation for loss of or injury to livestock or poultry occasioned
by dogs, this office has previously ruled that the term "livestock", as defined in
section 29-183 of the Code, does not include dogs. See Report of the Attorney
General, 1950-1951, page 140. The fact that a particular dog was destroyed at
the direction of the Health Department does not warrant a different conclusion.
I am, therefore, of the opinion that there is no statutory provision for payment
of compensation in the situation you present.

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**DOG LAWS — Payment for bull killed by rabies. F-50 (171)**

*December 13, 1954.*

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

I am in receipt of your letter of December 7, 1954, in which you state that
a resident of Alleghany County has filed a claim before the Board of Supervisors
of that county for the loss of a bull which died as a result of rabies. You request
an opinion concerning the propriety of the board's paying compensation for a
livestock loss occasioned by this circumstance.

Particularly pertinent in this connection are sections 29-202 and 29-209
of the Dog Laws of this State, Code of Virginia (1950), as amended, Title 29,
chapter 9. The former section concerns the payment of compensation for live-
stock killed by dogs and, in part, prescribes:

"Any person who has any livestock or poultry killed or injured by any
dog not his own shall be entitled to receive as compensation therefor a
reasonable value of such livestock or poultry; * * * ."

The latter section relates to the disposition of the dog fund and provides—after
specified primary uses—that "if the remainder is sufficient," it shall be utilized
to pay "all damages to livestock or poultry, * * * ."

When these statutes are read together it is manifest that they contemplate
the payment of compensation for livestock only when such losses are caused by
dogs. Thus, in the situation you present, the appropriateness of an award would depend upon whether or not the rabies which caused the loss was inflicted in this manner.

I am informed by the office of the State Veterinarian that rabies may be contracted either from the bite of a dog or the bite of other animals called "predators", principally foxes. In instances of livestock loss, and in the absence of evidence to the contrary, the presumption is that the rabies in a given case was induced by the bite of a dog. Although your communication does not set out the circumstances under which the rabies in question was contracted, I am of the opinion that, in the absence of evidence tending to establish that the rabies in question was otherwise contracted, the Board of Supervisors may, in its discretion, rely upon the strong presumption mentioned above and award compensation for the loss under consideration.

DOG LAWS—Requiring inoculation before issuing tag. F-95 (232)

HONORABLE R. PAGE MORTON,
Commonwealth's Attorney for Charlotte County.

This is in reply to your letter of February 18, 1955, which is as follows:

"The County of Charlotte has an ordinance which requires the owner of a dog to have said dog vaccinated for rabies before purchasing a dog license, and that the certificate of vaccination be shown to the County Treasurer at the time of the purchase of the license. Please advise me if the Charlotte County Treasurer has the authority to refuse to sell a dog license to the owner of the dog who has not had such dog vaccinated for rabies, or is he required to sell the license and then report such sale as a violation of the law."

Section 29-188.1 of the 1954 Supplement to the Code is as follows:

"In any county, city or town the governing body of which has adopted an ordinance requiring dogs to be inoculated or vaccinated for rabies, no license tag shall be issued for any dog unless there is presented, to the treasurer or other officer of the city charged by law with the duty of issuing license tags for dogs at the time application for license is made, evidence satisfactory to him showing that such dog has been, within the time and as prescribed by such ordinance, inoculated or vaccinated against rabies."

I am of the opinion that under the above section the Treasurer, under such circumstances, is not permitted to issue a license tag until the applicant has furnished satisfactory evidence showing that such dog has been, within the time and as prescribed by the county ordinance, vaccinated against rabies.

I enclose herewith copy of an opinion issued on October 27, 1954, to the Honorable B. G. James, Treasurer of Newport News, which relates to the same question and in which the type of evidence the Treasurer may require is discussed.

DOG LAWS—Right of owner of livestock to payment from fund when loss covered by insurance. F-95 (66)

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

This is in reply to your letter of August 19, 1954, which reads, in part, as follows:
"A bill was presented to the Board of Supervisors of Montgomery County, for a claim of two sheep assessed at the value of $25.00 each, or a total of $50.00, being killed by dogs. The owner thereof had insurance coverage on the sheep and received $30.00 each, or a total of $50.00 collected from the insurance company. It is claimed that the reasonable value of said sheep was $35.00 each.

"I would like to be advised what obligation, if any, is placed upon the Board of Supervisors to pay any matters of this kind when the livestock or sheep are covered by insurance."

Section 29-202 of the Code of Virginia provides that any person who has any livestock killed by any dog, not his own, shall be entitled to receive as compensation therefor a reasonable value of such livestock. That section further provides that, when compensation is paid to the owner of the livestock, the county or city shall be subrogated to the extent of compensation paid to the right of action to the owner of such livestock against the owner of the dog and may enforce the same in an appropriate action at law.

The owner in the instant situation has had sheep killed by dogs and he is entitled to compensation out of the dog fund, regardless of whether his losses were covered by insurance carried by him. I feel that it is significant that § 29-202 gives the county the right of subrogation to bring action against the owner of the dogs, but makes no mention of the right of subrogation to insurance coverage carried by the owner of the sheep.

Since the question of subrogation of the insurance company to the claim the owner has upon the dog fund is solely dependent upon the provisions of the insurance policy, this opinion does not cover that point.

EDUCATION—State Board—No duty to evaluate education of applicant for professional examination. F-228 (129)

Dr. John M. Hughes,
Secretary, Virginia State Board of Dental Examiners.

This is in reply to your letter of October 21, 1954, in which you request an opinion concerning the duties of the Virginia State Board of Education with respect to the screening of candidates applying to the various State Boards such as Medicine, Dentistry and Pharmacy for examination. You state that for a good many years it has been customary for the State Board of Education to evaluate the preliminary education of such applicants and inquire whether this performance by the State Board of Education is a "courtesy" or "custom" in aid of the several professional boards, or is an obligation imposed upon the Board of Education by statute.

After careful investigation I have been unable to discover any provision of the Code of Virginia, relating to the State Board of Education or the individual professional boards, which makes it obligatory upon the former to assess the preliminary educational qualifications of applicants for the various examinations in question. In this connection, I note that, prior to 1954, Sections 54-305 and 54-306 of the Code (relating to the requirements for admission to the separate parts of the examination of the State Board of Medical Examiners) provided that certain schools must be registered with the State Board of Education and that certain courses must meet the minimum requirements prescribed by that body. I think it not without significance that, at the last session of the General Assembly, these sections were amended to delete all reference to the State Board of Education. Moreover, Section 54-277 of the Code, which formerly prescribed that no medical degree should be awarded until the prospective recipient thereof had filed with the conferring institution a qualifying certificate of the State
Board of Education, was wholly repealed. This action of the General Assembly certainly suggests an intention to lessen the degree of participation by the Board of Education with respect to establishing the criteria for admission to examinations.

In view of the foregoing, I am of the opinion that no duty devolves upon the State Board of Education to evaluate the preliminary education of applicants for the various professional examinations.

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ELECTIONS—Abolishment of precinct—number of voters there. F-100 (172)

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

December 13, 1954.

This is in reply to your letter of December 6, 1954, which reads as follows:

“Kindly advise the undersigned whether or not, in your opinion, under the terms of Section 24-46 of the Code of Virginia, the governing body of the County may petition the Circuit Court to abolish a voting place or precinct regardless of the number of registered voters at such place.”

Section 24-46 of the Code of Virginia provides as follows:

“Upon petition of twenty qualified voters of a magisterial district of a county, or upon petition of the governing body of any county, the circuit court of the county may, in term time or in vacation, in its discretion, change the name of any election district therein, alter the boundaries of any election district therein, and rearrange, increase or diminish the number thereof, or abandon or abolish any election district or voting place therein and it may change the voting places, or establish others therein. No election district shall be established, or boundaries altered, rearranged, or changed in any magisterial district of a county upon the petition of such qualified voters, unless each of the twenty qualified petitioning voters actually reside and separately and individually hold in fee simple real estate situated within the boundaries of the election district sought to be established, altered, rearranged, changed, increased, decreased, abandoned or abolished.”

This section specifically provides that the governing body of the county may petition the circuit court of the county to abandon or abolish an election district or voting place therein and may change the voting places or establish others. Section 24-48 provides, however, that the court may abolish the election district or the voting place therein only if there are not more than thirty qualified voters as shown on the books of the registrar in said district or voting place. I wish to call your attention to § 24-49 of the Code wherein it is provided that when an order is entered by the court under the provisions of Chapter 5 of Title 24 of the Code, it shall be the duty of the court in its order to designate the new election district or districts by proper and well defined boundaries.

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ELECTIONS—Absent Voters Law—No provision for blind absent voter to have assistance in marking ballot. F-100a (337)

HONORABLE JAMES M. SETTLE,
Clerk of Rappahannock County.

June 14, 1955.

I am in receipt of your letter of June 9, which I quote below:

“A question has been presented as to whether or not assistance may be rendered a blind absentee voter who is physically unable to be present
at the polls on election day. Section 24-251 provides for assistance at
the voting place.

"In your opinion, would a blind absentee voter be entitled to assistance
by a Notary or other person who may be designated, provided assistance is
requested by said blind person?"

As you point out, Section 24-251 of the Code provides, among other things,
for assistance to a blind person in the preparation of his ballot, but this section
is clearly applicable only to a person who goes to the polls to cast his ballot.
I can find no corresponding provision in the absent voters statutes. Indeed, Sec-
tion 24-332 of the Code requires the absent voter to state that he marked his
ballot "without assistance or knowledge on the part of anyone as to the manner
in which same was prepared." And Section 24-333 of the Code requires the
Notary or other person in whose presence the ballot is marked to state that "I have
no knowledge whatever of the marking, erasure, or intent of the ballot enclosed."
Manifestly, these two sections contemplate that the absent voter shall receive no
assistance in marking his ballot; and, as I have stated, I can find no other section
of the absent voters law providing for assistance to a blind person in marking
his ballot.

Whether this matter has ever been considered by the General Assembly,
I do not know, but so far as I can find it has made no provision to take care of
the situation you present. The only suggestion I can make by which a blind
person may receive assistance in marking his ballot is for such a person to
be driven to the polls and then he can be assisted under the authority of Section 24-251.

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ELECTIONS—Absentee Ballots—List of all applicants and persons ballots received
from to be posted at polling places. F-100a (145)

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

This is in reply to your letter of November 9, 1954 in which you request my
I agree with your conclusion that these sections require that, on the morning
of the election, a list of all applicants for absentee ballots and a list of all absentee
ballots received from the voters shall be posted at the polling place of each
precinct in the County.
I am returning the letter from Mr. William G. Smith, Secretary of the
Russell County Electoral Board, which you enclosed in your letter.

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ELECTIONS—Absentee Ballots—Members of Electoral Board have right to
examine applications. F-100a (108)

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

This will acknowledge receipt of your letter of October 11. You desire my
opinion as to whether or not a member of a local electoral board has authority
to examine and pass judgment on applications for absentee ballots coming into
the possession of the secretary of the electoral board pursuant to Chapter 13 of
the Virginia Election Laws. You state that it has been represented to you by
a member of a local electoral board that his request to the secretary of such
board to allow him to examine such applications for absentee ballots has been
denied by the secretary.
Section 24-327 of the Code is as follows:

"The registrar, upon receipt of the application for a ballot, if the applicant is duly registered in his precinct, shall enroll the name and address of the applicant on the list to be kept by him for the purpose, and shall forward the application with the required statement attached, to the secretary of the electoral board, noting thereon that the applicant is a registered voter of his precinct, or the registrar may approve the application and return it to the applicant for delivery to the secretary of the electoral board. If it then appear to the electoral board that the applicant is a registered voter of the precinct in which he offers to vote, the electoral board shall send to the applicant by registered mail, or deliver in person to him the following:

* * * * * * *

It is to be seen that the law makes it the duty of the registrar, upon receipt of the application, to ascertain if the applicant is duly registered in the precinct; whereupon, if duly registered, the registrar shall enroll the name and address of the applicant on the list which the registrar is required to keep for that purpose. The registrar shall then forward the application, stating the fact of registration, to the secretary of the electoral board. The registrar may approve the application and return it to the applicant for delivery to the secretary.

The secretary is designated by law as the responsible agent of the electoral board to receive applications for absentee ballots. In so doing, he is the representative of the electoral board, but he does not constitute the board nor can he supplant the board in the discharge of the functions of that body. The law is clear that it must appear to the electoral board that the applicant is a registered voter of the precinct in which he offers to vote as a condition precedent to the board sending him the ballot in the manner prescribed by Section 24-327. The secretary has no right to prevent or deny any member of the electoral board, in the exercise of the duty and responsibility of such member, in the determination of whether or not any applicant is a registered voter of the precinct in which he offers to vote. This determination and the sending of the ballot as prescribed by law is the responsibility of the board.

Under date of September 23, 1947, the Honorable Abram P. Staples, then Attorney General, in an opinion addressed to you relative to the delegation of the authority vested in the electoral board under Section 24-327 to a clerical assistant stated:

"The duty of determining whether an applicant is a registered voter and entitled to receive the ballot is a duty imposed upon the electoral board itself."

While the situation before Judge Staples was not identical to the situation presented to you in this instance, yet, I am of the opinion that the above quoted statement is declaratory of the law on the subject. I am, therefore, of the opinion that it is the right of the member of the electoral board in question to examine, in his official capacity, the application of the applicant and to participate as such member in the decision as to whether or not the applicant has complied with the law entitling him to receive an absentee ballot.
ELECTIONS—Ballots—Conditions under which printer may print sample ballots.

F-100a (50)

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

This is in reply to your letter of August 11, 1954, in which you request an opinion on the right of a printer to print informative ballots under Section 24-240 of the Code of Virginia if he has previously subscribed to the oath contained in Section 24-218 of the Code. These two sections read as follows:

"§ 24-218. Oath of the printer.—The printer with whom the board shall contract for the printing of the ballots shall, before the work is commenced, take an oath before the secretary of the board, who is hereby empowered to administer such oath, to the following effect, 'I, ..........................................................., solemnly swear that I will print (here insert number) ballots according to the instructions of the electoral board of the county (or city) of ................................................ ; that I will print, and permit to be printed, directly, or indirectly, no more than the above number; that I will at once destroy all imperfect and perfect impressions other than those required to be delivered to the electoral board; that as soon as such number of ballots is printed I will distribute the type used for such work, and that I will not communicate to any one whomsoever, in any manner whatsoever, the size, style, or contents of such ballots.'

"This oath shall be reduced to writing and signed by the person taking it, and also a similar affidavit shall be required of any employees or other person engaged upon the work, or who shall have access to it; and any intentional violation of such oath shall constitute the crime of perjury."

"§ 24-240. Sample or informative ballots.—Nothing contained in the preceding section shall be construed to prohibit: (a) The printing and circulation of 'informative ballots', provided such 'informative ballots' are not printed on white paper, and (b) the publication in newspapers of 'informative ballots'.'"

It is my opinion that Section 24-221 of the Code is also pertinent to your inquiry. That section provides:

"§ 24-221. Electoral board may disclose contents, style and size.—Nothing contained in §§ 24-218 and 24-220.1 shall be construed to prohibit any electoral board from publishing or otherwise disclosing the contents, style and size of ballots, which information electoral boards are authorized to publish or otherwise disclose."

The printer of the official ballots takes an oath that he will distribute the type used for the printing of the official ballots and that he will not communicate to anyone the size, style or contents of such ballots. However, if the electoral board should disclose the contents, style and size of ballots, as it is permitted to do under Section 24-221, then it is my opinion that the printer of the official ballots may publish sample ballots or informative ballots in a newspaper, as permitted under Section 24-240, so long as he relies solely upon the description of the official ballots released by the electoral board in printing the samples. If the electoral board does not, in its description of the ballots, state the size or style of types used, then the printer should not use the size or style of types used on the official ballots, the knowledge of which he has only due to the fact that he printed the official ballots.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—Board of Supervisors—Petition of candidates should be signed by voters of district. F-100b (255)

March 11, 1955.

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

This is in reply to your letter of March 9, in which you seek my opinion on the following question:

"There has been a question raised in this County about the petition that a candidate for Supervisor must file with the Chairman of his party in order to have his name on the official ballot in a primary.

"Prior to the amendment of 1952 to Section 24-373 of the Code of Virginia a candidate for Supervisor had anyone from the County, not necessarily from his district, sign, but since the 1952 amendment inserted the word district in the last sentence of the Section, does this now mean that a candidate must have the petition signed by fifty qualified voters from his district?"

That portion of Section 24-373 of the Code to which you refer reads as follows:

"* * * The name of any candidate for the General Assembly, or for any city or county office shall not be printed upon any official ballot used at any primary unless he file along with his declaration of candidacy a petition therefor signed by fifty qualified voters of his district, city or county witnessed as aforesaid and with like affidavit attached thereto."

As you point out, the word "district" appearing in the quoted portion of the section was added thereto by the General Assembly in 1952 (Acts 1952, page 819). While a member of the Board of Supervisors of a County is undoubtedly a county officer, he is elected by the voters of his magisterial district and not by the voters of the County at large. And so, now that the word "district" appears in the section in connection with the petition, it is my opinion that the better view is that the petition should be signed by the voters of the magisterial district of the County. This would certainly appear to be logical since the voters of the rest of the County have no vote in choosing the candidate from any particular district.

I realize that it might be argued that by the insertion of the word "district" in 1952 the General Assembly may have had in mind a legislative district, but it is my view that the language is broad enough to place upon it the interpretation I have outlined above. Indeed, in construing this section before the amendment of 1952, former Attorney General Abram P. Staples held that in the case of a candidate for the Board of Supervisors it was not necessary that all of the signers of the petition reside in the magisterial district of the County; yet he stated "that this point is not entirely free from doubt and it was [is] recommended as the better practice that the candidate obtain the signatures of qualified voters in the magisterial district in which he is running."

ELECTIONS—Candidates—Duty of clerks to check petitions. F-100b (286)

April 25, 1955.

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

This is in reply to your letter of April 22, 1955, to which is attached a letter to you from Honorable C. M. Gibson, Clerk of the Circuit Court of the City of Hampton. Mr. Gibson's letter dated April 18, 1955, reads, in part, as follows:
"On June 14th, 1955, the City of Hampton will have a nonpartisan councilmanic election. Since there was no primary and the election is nonpartisan, the petitions and declarations of candidacy of each candidate has been filed with the Clerk of the Circuit Court in compliance with statute. The petitions and declarations of candidacy will then be certified by the Clerk to the secretary of the Electoral Board of the City of Hampton.

"The question has arisen as to whose responsibility it is to check the petitions to see if they contain qualified voters. It is my contention that it should be a job for the Electoral Board. I would appreciate your opinion on this matter."

You refer to an opinion issued by this office on September 10, 1951, to the Clerk of Pittsylvania County. In that opinion we held that the requirements of § 24-135 of the Code are mandatory upon the clerks. The duties placed upon the clerks are to certify "the name of each and every candidate which has been duly filed," and to send copies of the original notices of candidacy to the Secretary of the Electoral Board. Whether or not the notices of candidacy have been "duly filed," that is, whether they are in accordance with the requirements of §§ 24-130 through 24-133, is, in my opinion, a matter to be determined by the clerks from an examination of the papers that have been filed. Therefore, it is my opinion that the clerk is required to determine whether the petition accompanying the notice is signed by the required number of qualified voters.

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**ELECTIONS—Candidates—Electoral Board to determine if qualified to have name on ballot. F-100b (298)**


**HONORABLE LEVIN NOCK DAVIS,**

Secretary, State Board of Elections.

This is in reply to your letter of April 29, 1955, enclosing a letter to you from Mr. T. Newton Sparks, Secretary of the Orange County Electoral Board, in which it is stated that two persons, one from the town of Gordonsville and one from the town of Orange, filed their declarations of candidacy with the Clerk of the Circuit Court for town council for the town elections to be held on June 14, 1955. The Clerk certified the filing of such declarations to the County Electoral Board. The Secretary of the Board states that informal information has been received that the persons in question did not pay the required three years' poll tax six months prior to June 14, 1955. The Secretary wishes to know whose duty it is to determine whether the declaring candidates are eligible voters in the election in which they offer themselves as candidates.

Under § 24-213 of the Code the duty falls upon the electoral boards to cause the official ballots to be printed. Section 24-132 provides that "no person * * * who is not qualified in the election in which he offers as a candidate, shall have his name printed on the ballots provided for the election. * * * ."

This latter section, in my opinion, makes it mandatory upon the electoral boards to refuse to have printed on an official ballot the name of any candidate who is not qualified to vote in the election in which he offers as a candidate. It follows, therefore, that it is the duty of the electoral boards to determine whether the persons whose names have been certified to them are entitled to have their names printed on the official ballots.
REPORT OF THE ATTORNEY GENERAL

Elections—Candidates—Filing requirements for Senate of Virginia. F-100b (265)

March 31, 1955.

HONORABLE CURRY CARTER,
Member of State Senate.

I have your letter of March 29 in connection with your declaration of candidacy for the State Senate in the coming Primary. Your Senatorial District (the 23rd) is composed of Augusta, Bath and Highland Counties and the Cities of Staunton and Waynesboro. You ask the following questions:

"(1) What is the minimum number of petitioners that I must have on my petition or petitions?

"(2) Is it necessary that my petition be filed with all of the committees in all of the political subdivisions in my district and with the Democratic Senatorial Committee for the Twenty-third Senatorial District?

"(3) Is it permissible under the statute to file the original petition or petitions with one Democratic Committee and certified copies thereof with the other committees?"

As you point out in your letter, Section 24-373 of the Code has been amended by the addition of the word "district" and in interpreting this amendment I have heretofore expressed the view that a candidate for the General Assembly may qualify, insofar as his petition is concerned, by filing a petition signed by fifty qualified voters of his (Senatorial) District, regardless of the number of political subdivisions included in the District.

As to the person with whom your declaration of candidacy should be filed, Section 24-374 of the Code provides that such declaration should be filed "with the chairman or chairmen of the several committees of the respective parties." Pursuant to this section, it is my opinion that your declaration of candidacy should be filed with the Chairman of the Democratic Senatorial District Committee of your District. That person will then do the things required by Section 24-375 of the Code.

My reply to your second question makes it unnecessary to answer the third question.

ELECTIONS—Candidates—Must be eligible to vote in election which he runs in. F-100a (274)

April 7, 1955.

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

I am in receipt of your letter of April 5, from which I quote below:

"In February, when our former Treasurer died, Senator Mills Godwin called you from my office to find out whether or not the Deputy Treasurer, who was a resident and voter in the City of Suffolk, where the Courthouse is, could be appointed to fill the unexpired term of the former Treasurer. Your opinion, without going into the matter, was to the effect that the Deputy Treasurer could be appointed, according to Section 15-487. That interim appointment was satisfactory to everyone, apparently.

"My question, now, is: In view of Section 15-487, can the Deputy Treasurer who was appointed Treasurer, but who is not a voter in the County, be a candidate for Treasurer in the Primary to be held July 12th, when you take into consideration Section 24-369 which reads as follows:

"The name of a candidate shall not be printed upon any official ballot used at any primary unless such person is legally qualified to hold
the office for which he is a candidate, and unless he is eligible to vote in the primary in which he seeks to be a candidate."

You refer, of course, to the office of Treasurer of Nansemond County, and I note that you state that the present Treasurer is a resident and voter in the City of Suffolk, "but who is not a voter in the County." It follows that this person is not eligible to vote in the Primary to be held in the County for the nomination of a candidate for County Treasurer.

It is my opinion, therefore, in view of the provision of Section 24-369 of the Code which you quote, that the name of this person as a candidate for nomination to the office of County Treasurer may not be printed on the ballot.

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ELECTIONS — Candidates in Primary — Filing fee for House of Delegates.

F-100f (227)

February 16, 1955.

HONORABLE NILLA B. TREDWAY,
Treasurer, Pittsylvania County.

This will acknowledge receipt of your letter of February 14, 1955, which reads as follows:

"Title 24 Section 398 prescribes a primary fee for a prospective candidate equal to two percentum of one year's salary. It is my information that members of the House of Delegates receive $1080 for each regular session, every other year. What would be a proper primary fee for candidates for House of Delegates?

"What is the last day on which declaration of candidacy may be filed with the party chairman in order to qualify as a candidate in the primary of July 12, 1955?"

Section 14-28.1 of the Code provides that the member of the General Assembly "shall receive the sum of one thousand and eighty dollars, for attendance and services at each regular session of the General Assembly." Compensation for attendance and service at an extra session, if any, is also provided.

A regular session begins and ends during one calendar year and, therefore, the compensation for such session is, in my opinion, "one year's salary attached to the office," which is $1080.00. The amount of the filing fee for a candidate for the House of Delegates in the primary to be held on July 12, 1955 is 2% of $1080.00.

Under the provisions of § 24-345.3 of the Virginia Code (Supplement Chapter 13.1) the declaration of candidacy is required to be filed at least ninety days before the primary. Since the primary this year will be held on July 12, it follows that the last day for filing such a declaration is April 13, 1955, which is ninety days prior to July 12, 1955.

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ELECTIONS — Candidates in Primary — Party committee may not charge a fee for filing. F-100f (240)

March 2, 1955.

HONORABLE HARRISON MANN,
Member, House of Delegates.

This is in reply to your letter of March 1, 1955, which reads as follows:

"I would appreciate having the opinion of your office on the following:
“May a party committee legally assess any candidate in the party primary a percentage of his salary in addition to 2% as a condition precedent to a legal filing in the primary?”

The procedure by which candidates may be nominated in a primary are purely statutory, and, in my opinion, may not be construed so as to place any greater financial burden on a person who desires to be a candidate than the statute prescribes. Section 24-398 of the Code provides:

“Every candidate for any office at any primary shall, before he files his declaration of candidacy pay a fee equal to two percentum of one year’s salary attached to the office for which he is candidate.”

Section 24-401 provides in sub-section (6) that “A receipt for the payment of such fee must accompany and be attached to the declaration of candidacy; otherwise the same shall not be received and filed * * *.”

Under these provisions the maximum filing fee that may be required of a candidate for any office in order for such candidate to have his declaration of candidacy received is 2% of one year’s salary. Therefore, in my opinion, the Party Committee may not require candidates to pay any greater filing fee as a prerequisite to filing his declaration of candidacy.

ELECTIONS — Candidates in Primary — When filing fee not refundable.

MRS. NILLA B. TREDWAY,
Treasurer, Pittsylvania County.

This is in reply to your letter of April 9, in which you request my opinion on the following situation:

“A announces his candidacy for one of the four county elective offices, pays his filing fee and files the required credentials with the county chairman, all on or before the deadline, April 13th. The County Chairman certified the list of candidates to the local Electoral Board and to the State Board of Elections. April 25th A decides to withdraw as a candidate. Is he entitled to a refund of his filing fee?

“A portion of Title 24, Section 401 of the Code is to this effect:

“'In the event a prospective candidate pays the fee to a county or city treasurer and does not become a candidate, the treasurer shall pay back the fee; ***.'

“It would seem to me that when the deadline passes and A is then a candidate he would not be entitled to any refund. ***”

Section 24-398 of the Code requires every candidate for any office at any primary “before he files his declaration of candidacy [to] pay a fee equal to two per centum of one year’s salary attached to the office for which he is candidate.” As you point out, Section 24-401 of the Code provides in part that:

“In the event a prospective candidate pays the fee to a county or city treasurer and does not become a candidate, the treasurer shall pay back the fee; ***.”

You will note that the refund is authorized to be paid to a prospective candidate. The mere payment of the fee required by Section 24-398 does not make a person a candidate for office, inasmuch as the fee has to be paid before
he files his declaration of candidacy. However, after a person has done all the things necessary to qualify him as a candidate, as seems to be the case in the situation you present, such a person is no longer a prospective candidate, but a candidate. I must, therefore, agree with your conclusion that the statute authorizing the refund of the fee is not applicable.

ELECTIONS—Candidates in Primary—Where filing fees to be paid. F-100b (215)


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

This is in reply to your letter of February 1, 1955 in which you request my opinion as to what portion of the candidates' filing fees for the primary for the offices of Sheriff, Commonwealth's Attorney, House of Delegates and State Senate should be paid to the Treasurer of the City of Virginia Beach and what portion should be paid to the Treasurer of Princess Anne County. Section 24-401 of the Code of Virginia provides, in part, as follows:

"Candidates for the Senate of Virginia or the House of Delegates of Virginia shall pay the primary fee to the treasurer of the candidate's county or city, and where the candidate's district is composed of more than one county or city the fee must be equally divided among the counties and cities in the district, and paid to the respective treasurers by the candidate.

* * * *"

"(b) All other candidates shall pay the fee to the treasurer of the city or county in which they reside. * * *.*"

I am of the opinion that candidates for the House of Delegates should pay one-half of their primary fees to the Treasurer of Princess Anne County and one-half to the Treasurer of the City of Virginia Beach. Candidates for the State Senate should pay one-fourth of their primary fees to each of the Treasurers of Accomack, Northumberland and Princess Anne Counties and the City of Virginia Beach.

Section 15-94 of the Code of Virginia reads as follows:

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

I am of the opinion that, since the candidates for the three offices mentioned in that section are candidates for county offices, they should pay all of their primary fees to the Treasurer of Princess Anne County as, for election purposes for these offices, the City of Virginia Beach is still considered to be a part of Princess Anne County.
ELECTIONS—Expenses of Primary—For committee men to be paid by party. F-100a (248)

March 8, 1955.

HONORABLE HARRISON MANN,
Member House of Delegates.

This is in reply to your letter of March 1, 1955, which reads as follows:

"When a local Democratic committee elects its members in a Democratic primary, are the expenses of printing the ballots and other expenses incident thereto paid by the Electoral Board or by the local committee?

"Heretofore the local committee has paid these expenses. Sections 24-346 and Sections 24-396 of the Code have been called to the attention of the Electoral Board and of the Democratic committee and all concerned would like to have an interpretation from your office."

Section 24-396 provides that the necessary expenses incident to holding and conducting primaries shall be paid as expenses of elections are paid. This section, in my opinion, relates to primaries held for the nomination of candidates for the offices mentioned in § 24-248.

I am unable to find any statute authorizing the printing of ballots at public expense for use in an election of members of party committees. I am of the opinion that specific statutory authority would be necessary.

ELECTIONS—Judges—Appointed for all elections in year, not automatically judges for primaries. F-100d (312)

May 19, 1955.

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

This is in reply to your letter of May 17, 1955, which reads as follows:

"I am in receipt of an inquiry from the Electoral Board of Clarke County for advice concerning what appears to them to be an ambiguity between Sections 24-193 and 24-353 of the election laws. You will note that Section 24-193 apparently makes it mandatory for the Electoral Board to appoint, at their regular meeting in the month of May of each year, three competent citizens—who shall constitute the judges of Election for all elections to be held in their respective election districts for the term of one year or until their successors are appointed.

"Section 24-353 provides 'the primaries provided for in this chapter shall be held by three judges appointed for each party participating from members of that party by the electoral boards of the respective cities and counties in the state, upon application made by the duly constituted authorities of the party—in such manner as may be provided by the party plan of such party or parties—'.

"The Electoral Board is concerned about what happens to the judges appointed for all elections' under section 24-193 at a primary where the judges are designated by the duly constituted authorities of the parties under the party plan as provided for by section 24-353.'"

Section 24-193 of the Code is applicable only to general and special elections provided for in Chapter 9 of Title 124 of the Code. The judges appointed under this section are subject to service in all such elections for a term of one year or until their successors are appointed.
The primaries held pursuant to Chapter 14 of Title 24 of the Code, while designated as "primary elections" are, in fact, distinguishable from all other elections because through the process of the primary candidates are merely nominated for an election to be held thereafter. This is clear from §§ 24-348 and 24-349 of the Code.

The judges appointed for general and special elections are chosen from persons known to belong to the two political parties pursuant to Code § 24-195. The judges for a primary are required to be selected from the members of the party holding a primary for the purpose of nominating candidates. Thus, if the two dominant political parties should hold a primary on the same day, it would be necessary for the electoral board to appoint two sets of judges, one set composed of three Democrats and another set composed of three Republicans.

ELECTIONS—Judges—No prohibition against keeping separate list of persons voting. F-100d (144)

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

November 10, 1954.

This will acknowledge receipt of your letter of November 8, 1954, enclosing letter from Mrs. Gladys M. Isdell, General Registrar of Fairfax County, pertaining to judges of election, and especially whether or not there is any prohibition against a judge checking the names of voters on a private list and furnishing this information to party workers stationed outside the polls.

A judge of election is a constitutional officer, holding a quasi judicial position, and, as such, is required to subscribe to the oath prescribed in § 24-199 of the Code which reads as follows:

"Before any judge or clerk of election shall enter upon the performance of the duties imposed upon him by law he shall take and subscribe an oath in the following form, to wit: 'I, A. B. judge (or clerk) of the election (as the case may be), do solemnly swear (or affirm) that I will perform the duties of judge (or clerk) of the election (as the case may be) according to law and the best of my ability, and that I will studiously endeavor to prevent fraud, deceit, and abuse in conducting this election. So help me God'. If there is no one present authorized to administer oaths, the judges of election may administer to each other and to the clerks the oaths above provided."

In my opinion the oath set forth above does not contain any express prohibition against a judge of an election indulging in the activity mentioned in Mrs. Isdell's letter, so long as it does not interfere with his official duties.

I am unable to find any statute prohibiting such practice.

ELECTIONS—Judges—Who is a deputy or employee of candidate, under statute. F-100d (152)

HONORABLE JOHN C. WEBB, Member House of Delegates.

November 19, 1954.

This will acknowledge receipt of your letter of November 17, 1954, in which you refer to your letter of November 12 and to my opinion under date of November 15 with respect thereto.
You raise the question as to whether or not a judge of an election who checks on a private list in his possession in the polls the name of each voter and passes this list out to party workers, is a deputy of a candidate who is represented by the workers outside the polls who receive the checked list.

You call attention to § 24-198 of the Code which reads as follows:

"Persons disqualified to act as clerk or judge.—No person shall act as a judge or clerk of any election who is a candidate for, or the deputy or employee of any person who is a candidate for any office to be filled at such election, or who is the deputy of any persons holding any office or post or profit or emolument under the United States government, or who is in the employment of such government, or holding any elective office or profit or trust in the State, or in any county, city or town thereof."

Frequently a candidate for office is offering for re-election and in the discharge of his official duties has one or more deputies who have been appointed by him. I think the word "deputy" as used in this section applies to such a situation and is intended to disqualify such deputy from acting as an election official. The mere voluntary act of an election official, such as you have described in your letters, would not, in my opinion, make the election official a deputy as that term is commonly used. The purpose of the section is to prohibit all candidates, all Federal, State and local government employees and all persons whose compensation, either as an employee of a candidate in the usual sense, or a deputy of such candidate in the official sense, from acting as election officials.

As I indicated in my previous opinion, it will, in my judgment, require legislative action to prohibit election officials of either political party from doing the particular acts which you have described.

ELECTIONS—Justice of the Peace—Candidates subject to same primary laws as other candidates. F-100b (348)

HONORABLE EDWARD M. HUDGINS,
Member of House of Delegates.

June 27, 1955.

I have your letter of June 22, 1955, which I quote below:

"It has been the practice in Chesterfield County for sometime for candidates for the office of Justice of Peace to have a few of their friends write in their names on the official ballot. This is not a healthy practice and I have been requested to investigate the matter.

"Mr. Levin Nock Davis, Secretary of the State Electoral Board, advises me that in a large majority of our counties candidates for Justice of Peace secure signatures of fifty qualified voters as required by Section 24-373, and file written declaration of candidacy as required by Section 24-370. There does not seem to be any specific reference to the amount of the filing fee, although Paragraph (b) of Section 24-401 refers to 'All other candidates.' I understand that in many counties an arbitrary fee of $5.00 is required.

"I think it desirable for the names of candidates for Justice of Peace to appear on the official ballot, but it seems to me that if the requirements that apply to other candidates apply to candidates for Justice of Peace many good men will be discouraged from offering for this office. I would appreciate your advice as to what is required of a candidate for Justice of Peace to enable him to get his name on the ballot for nomi-
nation in the primary. Also if it is possible under the present law to set up any requirements less demanding than those applicable to candidates for other county and State offices."

It is my opinion that Section 24-370 of the Code, providing that the name of a candidate shall not be printed on any official primary ballot unless he files a declaration of candidacy, is applicable to candidates for the office of Justice of the Peace.

Section 24-373, providing that "The name of any candidate * * * for any city or county office cannot be printed upon any official ballot used at any primary unless he file along with his declaration of candidacy a petition therefor signed by fifty qualified voters of his district, city or county * * *" is also, in my opinion, applicable to candidates for the office of Justice of the Peace.

I know of no way under existing law by which a candidate for the office of Justice of the Peace in a primary may be relieved of complying with the mandatory provisions of the two sections to which I have referred.

As to the fee to be paid by a candidate for the office of Justice of the Peace, I direct your attention to Section 24-399 of the Code, which provides that, in case of a candidate for an office for which compensation is paid in whole or in part by fees, the amount to be paid shall be fixed by the proper committee of the respective parties. Since a Justice of the Peace is paid by fees, I am of opinion that the fee of a candidate for this office shall be fixed by the proper party committee.

ELECTIONS—Justice of Peace—Ineligible to serve as judge of election. F-249 (252)

HONORABLE T. C. TALLEY,
Justice of the Peace, Clarksville, Virginia.

In reply to your letter of March 8, 1955, in which you ask if a Justice of the Peace may serve as Judge of an election, your attention is directed to § 24-198 of the Code of Virginia, which reads as follows:

"No person shall act as a judge or clerk of any election who is a candidate for, or the deputy or employee of any person who is a candidate for, any office to be filled at such election, or who is the deputy of any person holding any office or post or profit or emolument under the United States government, or who is in the employment of such government, or holding any elective office or profit or trust in the State, or in any county, city, or town thereof."

The office of Justice of the Peace is an elective office and, therefore, a person holding such office is not eligible to serve as a judge of any election.

ELECTIONS—Party Committeemen—Must be printed on ballot even if no opposition. F-100b (296)

HONORABLE HARRISON MANN,
Member of the House of Delegates.

I have received your letter of April 29, 1955, regarding the election of Democratic Committeemen in your county. You stated that you were enclosing a copy of the resolution, but it must have been inadvertently omitted, since I did not receive it.
You have requested my opinion as to whether or not, in an election for committeemen to be held along with the primary on July 12, it is necessary that the names of the candidates be placed on the voting machines for the purpose of election in precincts where there are no contests. Since this is an election for the purpose of choosing committeemen rather than a primary for the purpose of making nominations of candidates to be voted on at a general election, the candidates, in my opinion, may not be declared as elected, even though they are without declared opposition.

The voters, in my opinion, should be given the opportunity to vote for the declared candidates or to cast independent ballots as provided for in § 24-307 of the Code.

It does not appear that a valid election of committeemen can be had unless official ballots are provided.

ELECTIONS—Party Committeemen—Paper ballot may be used for although county has voting machines. F-100b (300)


HONORABLE J. MAYNARD MAGRUDER,
Member of the House of Delegates.

This is in reply to your letter of May 5, 1955, regarding the election of Democratic Committeemen in your county. A similar letter was received by me from Honorable Harrison Mann, and I am enclosing a copy for your information.

With respect to your question:

"Can the Electoral Board permit a paper ballot to be used for the committeemen (this would be less expense) when a voting machine is used for all offices?"

Section 24-364 of the Code provides that:

"Each party shall have the power to provide in any way it sees fit for the nomination of its candidates, and the nomination and election of its candidates for office in case of any vacancy, and the nomination and election of its State, county or city committees."

Although the county has adopted voting machines for use in primary and general elections, I do not believe that such method is exclusive to the extent that the Democratic Committee, or other party committee, would be prohibited from prescribing by proper resolution that members of the committee shall be elected at the primary election by the use of ballots prepared pursuant to Code § 24-376, and § 24-213. These ballots, along with ballot boxes, could be furnished to the judges of election by the Electoral Board in addition to the ballots provided for the voting machines.

The election of committeemen is a separate election being held at the same time as the primary and for a separate purpose. One is for the purpose of electing committeemen and the other is for the purpose of nominating candidates to be voted upon at a general election to be held in November. I am of the opinion that, although both types of election take place on the same day, the method of preparing the ballots for each may be different.
ELECTIONS—Persons physically unable to go to poll—ballot may not be taken to. F-100a (330)

June 6, 1955.

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

This is in reply to your letter of June 3, 1955, which reads as follows:

"The following question has been raised by one of the election judges. I will very much appreciate it if you will give me the opinion on this matter.

"If a voter is able to ride in a car to a point near the election polls, but is unable to walk is it lawful for the Judges to permit the voter to vote in the car? In other words, can one or more of the elected officials carry a ballot from the poll booth out to a car if the voter is unable to get into the voting booth?"

Under the provisions of § 24-319 of the Code any voter "who may be physically unable to go in person to the polls on the day of election, may vote in any primary, second primary, special or general election" by casting his vote in accordance with Chapter 13, Title 24 of the Code which is the absent voters statute. I am unable to find any statute authorizing the casting of a vote in the manner suggested in your letter. Section 24-245 of the Code requires a voter who goes to the polls to "retire to the voting booth" when marking his ballot. Obviously a person who remains in his automobile while in the vicinity of the polls would not be able to meet this requirement.

I am of the opinion that, under present statutes, the only method by which a person may cast a ballot outside the voting booth at the polls is in accordance with Code § 24-319.

ELECTIONS—Petition of candidacy—who may witness signature. F-100b (253)

March 10, 1955.

HONORABLE J. E. COX, Treasurer,
County of Fauquier.

I have your letter of March 9, in which you present the following question:

"I have a question with respect to a candidate for a City or County office filing his petition of 50 qualified voters with his declaration of candidacy. My question is: May a candidate witness the signatures on his own petition and make affidavit to that effect before the proper certifying officer?"

Section 24-373 of the Code requires a candidate for nomination for an office in a primary to file with his declaration of candidacy a petition therefor signed by a number of voters (the number depending upon the office). The section also contains a provision that "each signature to the petition shall have been witnessed by a person whose affidavit to that effect shall be attached to the petition."

I find that this office under date of September 12, 1939, in an opinion rendered by Justice Staples, then Attorney General, has this to say in connection with the question:

"The statute provides that the notice of candidacy in such a case shall be accompanied by a petition therefor, signed by fifty qualified voters of the county, 'each signature to which has been witnessed by a person whose affidavit to that effect is attached to such petition.' The practice of the candidate himself witnessing the signatures of the persons
signing the petition is an unusual one, and, in my opinion, for obvious reasons, should be discouraged. However, from a careful examination of the section, I am unable to say that there is anything therein which prohibits this action and, in my opinion, if the other requirements of the section are complied with, you should certify the name of such a candidate to the electoral board. In the last analysis the only tribunal which can finally pass on the validity of such a petition is a court of competent jurisdiction. As above stated, I do not feel that this office can express the official opinion that this practice is prohibitive in any and every case."

I concur in this opinion. Such a practice should certainly be discouraged, and it is my view that the safe procedure is to have the signatures to the petition witnessed by a "person" other than the candidate himself.

ELECTIONS—Poll Books—Disposition of in town elections. F-100 (29)

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

This is in reply to your letter of July 12, 1954, in which you request my opinion as to the proper disposition of poll books used in town elections. The Code of Virginia is not clear on this question, however, § 24-173 of the Code, which is found in Article 5, titled "Town Elections" of Chapter 10 of Title 24, provides as follows:

"The election in towns shall open and close on the day the same is held, at the time fixed by the general law of this Commonwealth for the opening and closing of elections, and the judges shall count the ballots and make duplicate returns of the result. One of the returns, with the ballots sealed up, shall be returned to the clerk's office of the county; the other shall be returned to the council and recorded in the record book of the council."

In my opinion the word "returns" as used in the above-quoted section is referring to the poll books. I know of no form of returns other than the poll books which are compiled by the judges of an election. Therefore, I must conclude that one of the poll books of a town election, with the ballots thereof, is to be returned to the clerk's office of the county. The other poll book is to be returned to the town council.

ELECTIONS—Poll Taxes List—Treasurer is not bound by certified lists for prior years. F-100c (318)

HONORABLE SAM L. HARDY,
Commonwealth's Attorney for Bland County.

This is in reply to your letters of May 19, and 23, 1955, in which you state that the former County Treasurer, prior to his death in August, 1954, filed, pursuant to § 24-120 of the Virginia Code, a list covering the payments of poll taxes for the next three preceding years, and on said list the names of five or six persons were certified as having paid for each of said years, while, in fact, the tax tickets for the year 1953 against these five or six persons are in the Treasurer's Office with no evidence of payment. You desire an opinion as to whether the
present Treasurer in certifying the list of those who have paid for the years 1952, 1953 and 1954 should show that these particular persons have paid poll taxes for the year 1953.

Under § 24-124 of the Code, and § 38 of the Constitution of Virginia, the list certified by the former treasurer was conclusive for the purpose of voting in the elections for which such list was certified. However, in my opinion, the present Treasurer in making up the list to be certified by him for the years 1952, 1953, and 1954 is not bound by the prior certification but should make his list and certification from the records in his office at this time. These records, according to your letter, show that the 1953 poll taxes for the persons in question have not been paid.

ELECTIONS — Poll Taxes — Effect when name left from certified list. F-100c (272) April 5, 1955.

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

This is in reply to your letter of March 31, 1955, in which you request my opinion as to whether or not a voter who claims to have paid his capitation taxes but whose name is omitted from the certified list may make an affidavit that he has paid his taxes and on this be allowed to vote rather than present tax receipts for the same.

Section 24-128 which you quoted in your letter, as you are aware, applies only in a case where a voter has been transferred from one city or county to another city or county, or from one ward to another ward in any city, then he may present either a certificate or tax receipt of the treasurer of the city or county wherein the taxes were paid, and such certificate or receipt shall be conclusive evidence of the facts therein stated for the purposes of voting. There is no mention made in this section of the acceptance of an affidavit of the voter as being conclusive evidence of his having paid the poll tax. Therefore, I am of the opinion that in the case of transfer voters, they must present either a certificate or tax receipt from the treasurer. In the case of voters who are not transferring from one city or county or ward of a city to another, § 24-128 of the Code is inapplicable. Section 24-124 of the Code governs the qualifications of these voters, and that section provides that a certified copy of the poll tax list shall be conclusive evidence of the facts therein stated. There is no provision, to my knowledge, in the Code for the acceptance of tax receipts or certificates of treasurer for purposes of voting for this latter group of voters.


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

This is in reply to your letter of January 13, which I quote below.

"Please advise me as to when the Treasurer should file with me the list of all persons in this city who have paid their state capitation taxes. The constitution provides one time, section 38; and the legislature has attempted to change this time in two instances. I was of the opinion
that the provisions in the constitution could not be changed other than by constitutional amendment. However, your advice in this matter will be greatly appreciated."

Section 38 of the Constitution provides that the treasurer of each county and city shall "at least five months before each regular election" file with the clerk a list of persons who have paid the State capitation taxes for the year prescribed in the section. Section 24-120 of the Code, as amended, provides that the treasurer of each county and city shall at least five months before the June election and "at least one hundred fifty-eight days" before the November election file with the clerk a list of persons who have paid the capitation taxes prescribed by the section.

I presume that the requirement in the statute that the list shall be filed "at least one hundred fifty-eight days" before the November election is the conflict between the Constitution and the statute to which you refer. However, in my opinion, no conflict exists. The constitutional provision that the list shall be filed "at least" five months before each regular election does not mean that the list may not be required to be filed more than five months before the election. Thus, the requirement in the statute that the list shall be filed one hundred fifty-eight days before the election, while more than five months prior to the election, meets the constitutional requirement that it shall be filed at least five months before the election. In other words, one hundred fifty-eight days is certainly "at least five months."

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ELECTIONS—Poll Taxes—When person on becoming 21 years old has to pay in order to register and vote. F-100c (239)

March 1, 1955.

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

I acknowledge receipt of your letter of February 26, 1955, which reads, in part, as follows:

"If a person becomes 21 years of age after January 1, of any year, it is my opinion that he is not assessable for poll tax for the year in which he became 21. However, as of January 2, of the following year he is assessable for tax of that year.

"It is my opinion that to be eligible to vote at an election held the year after he became 21 he must pay poll tax for that year because assessable even though he has received no tax bill—that is, is not assessed.

"Specifically, a person becoming 21 on January 2, 1953, is not assessable for poll tax for the year 1953. He is, however in my opinion assessable in 1954, and must pay the 1954 poll tax to vote in an election held in 1954 even though he has received no tax bill—he must have himself assessed and pay the 1954 tax.

"I am aware of your opinions published in 1953-54 volume at page 72 and in 1952-53 volume at page 83, and feel they support my views, however, my interpretation of those opinions is questioned."

Consistent with the view stated in my opinion dated July 1, 1952, to Honorable Hugh H. Kerr, and reported in our published opinions for 1952-53, at page 83, the person who became twenty-one on January 2, 1953 was entitled to register and vote in the 1953 elections without the payment of any poll tax. If the person did register during the year 1953, he was entitled to vote without the payment of any poll tax during the years 1953 and 1954.

Section 21 of the Constitution provides, in part, as follows:
"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."

There were no poll taxes assessed or assessable against this person during the three years preceding 1954.

However, if the person to whom you refer failed to register in 1953 and offered to register in 1954, in order to comply with the requirements of Section 20 of the Constitution, he was required to pay the poll tax assessable against him as of January 1, 1954, in order to be qualified to register.

This section is, in part, as follows:

"* * * if he come of age at such time that no poll tax shall have been assessable against him for the year preceding the year in which he offers to register, has paid one dollar and fifty cents, in satisfaction of the first year's poll tax assessable against him. * * *"

There was a poll tax assessable against this person on January 1, 1954, so, therefore, upon offering to register in 1954, if that was the case, he could not register until he had paid (in advance) the 1954 poll tax, and could not vote in the 1954 election without the payment of a poll tax.

It will be observed, therefore, that the person's entitlement to vote in elections held in 1954, with or without the payment of a poll tax, depends upon the year in which he was registered.

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ELECTIONS—Poll Taxes—When required before registering—New residents and persons becoming of age to vote. F-100c (302)  
May 10, 1955,

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

This is in reply to your letter of May 9, 1955, in which you request my opinion with respect to the following questions:

"(1) Is a resident of our county with all of the other necessary qualifications who becomes twenty one years of age after January 1, 1954, entitled to register and vote in the Democratic Primary to be held on July 12, 1955, without the payment of any capitation tax?"

If the person became twenty-one (21) years of age after January 1, 1954, and prior to January 2, 1955, he must pay his poll tax for 1955 in order to register. This poll tax does not have to be paid six months prior to the November election, but may be paid on or before the day he offers to register. The last day for registration for the July 12, 1955, primary is June 11th.

If, however, the person became twenty-one (21) years of age on or after January 2, 1955, or will become of age on or before the regular November election in 1955, such person may register and vote in the primary election and the general election for 1955 without the payment of any poll tax.

"(2) Is a nonresident who has moved into Appomattox County since January 1, 1954, and who would have been in our county twelve months prior to the General Election in November entitled to register and vote in the aforesaid Primary without the payment of any poll tax provided he possesses the other necessary qualifications?"

The answer to this question depends upon several factors.
(1) If the party came into Appomattox County from another State after January 1, 1954, so that he will have been a resident of the State of Virginia one year next preceding the November, 1955, election, he may register for the primary to be held on July 12, 1955, without the payment of any poll tax.

(2) If, however, the person moved to Appomattox County from another county or city in Virginia, then the question would arise as to whether he has paid poll taxes assessed or assessable against him in the jurisdiction in Virginia where he formerly resided. In other words, § 21 of the Constitution would apply.

It is quite probable that, in your question (2), you had in mind persons moving to your county from another State.

ELECTIONS—Registration—Books not closed for town elections. F-100d (309)

Honorable Stanley A. Owens,
Commonwealth's Attorney of Prince William County.

This is in reply to your letter of May 13, 1955, with respect to registration in your county.

You are correct in your conclusion that the county registration books will not close until June 11, which is thirty days prior to the primary to be held on July 12, 1955.

With respect to the town, I wish to call attention to the provisions of § 24-56 which prescribe the method by which it may be determined who is registered for any town election. Unless there is an election fixed by the town charter for June 14, no problem is presented that distinguishes the town from the rest of the county in so far as this year's primary is concerned.

However, if there is a town in your county that has a charter provision fixing the town election to be held on June 14, 1955, then the provisions of § 24-56 should, in my opinion, be taken into consideration.

This provision, you will note, provides that, not less than fifteen days before any town election, the electoral board of the county shall appoint one registrar and three judges of election for each voting precinct in the town. The registrar so appointed shall thereupon, prior to the election date, place on the town precinct registration book (which is separate from the county precinct registration book) the names of all persons appearing on the county, or precinct registration book, who have resided in the town for six months (Code § 24-77) prior to such election and who have registered on the county registration book thirty days prior to the date of the town election. This list so made by the town registrar shall be delivered by him to the judges of the town election and shall be the only registration book, or list, from which the town election judges may determine who is registered for said town election.

In my opinion, the regular precinct registrar of the territory which includes citizens of the town and citizens living without the corporate limits of the town may continue to register persons residing both within and without the corporate limits of the town during the period from May 14 through June 11. However, care must be taken to see to it that no person who is registered on the county precinct registration books subsequent to May 14 is placed on the town precinct list until after the election to be held on June 14.
ELECTIONS—Registration—Books when closed for city elections. F-100d (307)

HONORABLE L. WAVERLEY HUDGINS,
General Registrar, City of Portsmouth.

This will acknowledge receipt of your letter of May 10, 1955, in which you refer to an opinion issued by me to the General Registrar of Norfolk City with respect to the date registration books should be closed. As pointed out by you, the regular date fixed by law for election of city officials in Norfolk falls on June 14th of this year. We, therefore advised the Norfolk General Registrar that, under the provisions of §§ 24-74 and 24-82, the registration books for the City of Norfolk should be closed on May 14th.

You state that the City of Portsmouth will not elect its city officers on June 14 of this year and, under the City Charter, no city election is fixed by law for the second Tuesday in June of this year.

Under this state of facts you will not be required to close your registration books on May 14, 1955. The closing time will be June 11, 1955, and the books should not thereafter be reopened for the purpose of registration until after the primary to be held on July 12, 1955.

This ruling is applicable to Norfolk County, and I am sending a copy of this letter to Honorable Hugh W. Johnston, Commissioner of the Revenue for that county, who has inquired about the matter.

ELECTIONS—Registration—Duty of General Registrar to register voters. F-100d (74)

MR. JAMES E. PRICE,
Registrar, Norton, Virginia.

I have your letter of August 25, 1954 in which you ask to be advised relative to certain problems raised in conjunction with your appointment as Registrar for the city of Norton, Virginia.

Although you do not so state in your letter, I assume you were appointed as general registrar for the city of Norton pursuant to the provisions of Section 24-64 of the Code of Virginia. You will note that such section provides that the registrar shall be paid either the fees allowed to registrars by existing law or a monthly salary to be fixed by the council of the city.

Section 24-74 of the Code fixes the regular registration day at thirty days before the day fixed for the primary or general election to be held in the city. However, it is to be noted that Section 24-76 provides for registration of voters at any time previous to the regular day for registration except as limited by Section 24-82 of the Code. Hence it is the duty of a registrar to register voters not only on the regular registration day but also other days except as limited by the last mentioned section of the Code.

ELECTIONS—Registration—Records destroyed by fire—Deadline for closing books inapplicable. F-100d (73)

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

This is in reply to your letter of August 24, 1954 in which you request my opinion as to the steps to be taken to obtain new records of registration in Powhatan County where a general registrar has been appointed and all of the old
registration books and the new registration files have been destroyed by fire. You point out that § 24-91 of the Code provides for a new registration of voters where the records have been destroyed by fire or otherwise, but which provides that the electoral board shall give at least thirty days' notice before the day of registration, and that the registrar shall sit three days for the purpose of such registration. The problem concerning you is the fact that, since the general election falls on November 2, 1954, the registration books must be closed on October 2, 1954.

In my opinion the electoral board and the registrar should comply in all respects with the provisions of § 24-91 for the purpose of providing for a new registration of voters. I do not believe that the registration books must be closed on October 2, 1954 for the purpose of re-registering voters who have previously registered and whose registration has become lost due to fire. I feel that the October second deadline is applicable only to new registrations in this instance.

In view of the foregoing paragraph I do not feel that the local authorities will encounter any difficulty in complying with the specific provisions made for new registration where the records have been destroyed.

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ELECTIONS—Registrar—Must be at least 21 years old and eligible to vote.
F-100d (137)

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

This will acknowledge receipt of your letter of November 2, 1954 in which you state that the General Registrar of the City of Harrisonburg is resigning and that the applicant for the position is under twenty-one (21) years of age and therefore, not a registered voter.

You request an opinion from this office concerning the eligibility of the applicant for the position.

A registrar, before assuming his official duties, is required under § 24-65 of the Code to take and subscribe to the oath required of officers as prescribed in § 34 of the Constitution of Virginia. Since a registrar is an officer, he must meet the requirements of § 32 of the Constitution of Virginia, which reads 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.

"Persons eighteen years of age shall be eligible to the office of notary public and qualified to execute the bonds required of them in that capacity."

In addition to the provisions of § 24-52 of the Code with respect to the qualification of a person for appointment to the office of registrar, such person must, under the above section of the Constitution, be qualified to vote in order to be eligible for such office.

I am of the opinion, therefore, that the applicant referred to in your letter is not eligible for the position of General Registrar due to the fact that she has not attained voting age.
REPORT OF THE ATTORNEY GENERAL 101

ELECTIONS — Registrar — Vacates office when move from their precinct. F-100d (61)  
August 23, 1954.

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

This is in reply to your letter of August 19, 1954 in which you ask to be advised if a registrar may continue to serve in the precinct for which he has been appointed if he subsequently moves to another precinct, but within the same Magisterial District.

Section 24-52 provides that each registrar shall be a discreet citizen and a resident of the election district in and for which he is appointed. It appears clear that the residence requirement pertains to the election district and not magisterial district of a county. Section 24-44 of the Code provides that each magisterial district of a county shall constitute an election district, unless such magisterial district has been divided into more districts than one.

Whether removal from an election district following appointment as registrar vacates such office is not entirely free from doubt. Section 15-487 of the Code provides that every district officer shall at the time of appointment have resided in the district for which he is appointed thirty days next preceding such appointment. Section 15-488 of the Code provides that removal from such a district vacates the office of such district officer. While it is not perfectly clear that registrars are "district officers" as contemplated in the aforementioned statutes, I am of the opinion that better statutory construction compels me to so hold. I, therefore, conclude that the removal of a registrar from the election district for which he is appointed vacates such office.

ELECTIONS—Residence—Effect of changing from one district to another in same county. F-100e (317)  
May 23, 1955.

HONORABLE W. R. MOORE,  
Commissioner of the Revenue of Lunenburg County.

This is in reply to your letter of May 19, 1955, in which you request my opinion as to whether a voter who moves from one district in a county to another district within the same county can still legally vote in the district in which he formerly resided.

This question is one which must be determined upon the facts in each case. The word "resident" as used in the election laws has always been construed to mean "domiciliary." If a person moves from the district with the intention of never returning to that district and the intention of establishing his domicile at some place outside of that district, he, of course, is no longer a resident of the district for the purpose of voting. However, if he moves from a district with the intention of some day returning to that district so that in effect he is only temporarily residing outside of the district, he is still considered to be domiciled in the district and is still a resident of the district for the purpose of voting.

ELECTIONS—Residence—For purposes of voting. F-100e (88)  
September 22, 1954.

HONORABLE R. C. SULLIVAN,  
City Treasurer, Alexandria, Virginia.

I have your letter of September 17, in which you present the following question:
"A number of residents of Alexandria have moved to Fairfax and Arlington Counties, across our city borderline. Many of these citizens have places of business and own property in our city; they have voted in Alexandria for a number of years and desire to retain their legal voting residence in our city.

"It has been my practice to tell this group that when moving into the county it is necessary for them to transfer their voting residence to the county where they now reside. Several of these citizens have come to me asking for information as to how they can continue to vote in Alexandria, and as this question comes up so often, I am writing you requesting that you kindly give me a legal opinion in this matter so that I may be in position to advise them.

"Can a person who has lived and voted in Alexandria City and still owns property and has business in our city, but now owns or rents a house in Arlington or Fairfax County, continue to vote in our city?"

The right to vote in any particular county or city is determined by legal residence or domicile and depends, therefore, upon the facts in each particular case. If the persons you mention, in moving to Fairfax and Arlington Counties, do so with the intent of establishing their legal residence in such counties, then they should transfer their voting places to such counties. If, however, these persons, in moving to Fairfax and Arlington Counties, do not intend to establish their permanent residence there, but are only temporarily living in those counties with the intention of ultimately resuming their residence in Alexandria, they may continue to keep their legal residence in Alexandria and vote there. A legal residence, once established, is not abandoned unless it is the intention of the particular individual involved so to do. A person may temporarily live at some other place than his legal residence, even for an indefinite period, so long as it is his intention to ultimately resume his place of abode at his legal residence.

The above principles may be applied to the facts existing in each particular case.

ELECTIONS — Residence — Requirements — Persons moving into the State.
F-100d (282) April 20, 1955.

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

This is in reply to your letter of April 14, 1955, in which you request my opinion as to whether a person who moves into Virginia from another state and who will have resided here in this State for one year prior to November 1, 1955, is eligible to register and vote in the primary election to be held on July 12, 1955.

Section 26 of the Constitution of Virginia provides "any person who, in respect to age or residence, would be qualified to vote at the next election, shall be admitted to registration, notwithstanding that at the time thereof he is not so qualified, and shall be entitled to vote at said election then qualified under the provisions of this Constitution."

A person, such as the one to whom you refer in your letter, would be qualified from a State residence requirement as imposed by § 18 of the Constitution of Virginia to vote in the general election to be held this November. Under § 26 of the Constitution he would be eligible to register prior to the time he had resided here for one year.

Section 24-367 of the Code of Virginia provides, in part, as follows:

"All persons qualified to vote at the election for which the primary is held, and not disqualified by reason of other requirements in the law of the party to which he belongs, may vote at the primary; * * *"
In view of the above quoted provision found in § 24-367 of the Code, and in view of the provision that the Constitution when it uses the term election is referring to a general election, rather than a primary election, I am of the opinion that a person, such as the one you refer to, is eligible to vote in the primary election this July in so far as residence within the State is concerned.

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**ELECTIONS—Residence—Requirements—Persons moving into State—Poll tax requirements.** F-100e (292)

*May 2, 1955.*

**HONORABLE CHARLES A. REID,**
Treasurer of Greensville County.

This is in reply to your letter of April 30, 1955, which reads as follows:

"Will you please advise me whether a person who moved his residence to Virginia in August 1954 is eligible to vote in the July, 1955 primary election since he will have completed the one year's residence requirement prior to the November general election? Would this person be liable for the payment of a capitation tax before he would be eligible to register and vote in either the primary or general elections?"

The person referred to will be eligible to vote in the July, 1955, primary, provided he registers prior to the date the registration books are closed as provided in § 24-74 of the Code of Virginia. The last day the registrar can accept his application for registration in order to vote in the July 12, 1955, primary is June 11, 1955, since June 12 will fall on Sunday.

If the person offers to register as indicated above, he will not be required to pay the capitation tax, since no poll or capitation tax has been assessable against him during any of the three years next preceding that in which he offers to vote.

This person by registering, as set forth above, becomes qualified to vote in the general election to be held in November of this year and, hence, he will be entitled to vote in the primary, even though he will not have been a resident of this State for one year at the time the primary is held. Under § 24-367 of the Code any person may vote in the primary who is qualified to vote in the election for which the primary is held.

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**ELECTIONS—Retired military personnel may hold office.** F-100b (235)

*February 24, 1955.*

**HONORABLE EBNER R. DUNCAN,**
Chairman, Fairfax County Electoral Board.

This will acknowledge receipt of your letter of February 21, 1955, which reads as follows:

"The Electoral Board of Fairfax County has been asked to track down a rumor that there is an old law still in existence in Virginia concerning the eligibility of retired service people to hold political office in Virginia.

"The question has been asked if there is such a law and does it affect town, city, county or state offices. In Fairfax County there are several retired service people who are interested in becoming candidates for county offices and the House of Delegates. Is there any law affecting their eligibility in this respect?"
The answer to your question is found in § 2-30 of the Code of Virginia, which reads as follows:

"No person shall, by reason of being a member of the United States military or naval reserve force, or by reason of being a retired officer of the United States army, navy or marine corps and receiving pay therefor, be disqualified from holding any office under the government of the Commonwealth, or under any county, city, town, magisterial district or school district thereof."

You will note that this statute expressly provides that a retired service person may not be disqualified for that reason alone from being a candidate for any public office in this State.

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**ELECTIONS—Run-off primaries for local offices—when may be held. F-100b o (306)**

May 11, 1955.

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

This is in reply to your letter of May 9, 1955, in which you request my opinion as to whether a second run-off primary could be requested by either of the two candidates receiving the most votes in a contest for a county office in the event that no candidate receives a majority of the votes cast for that office.

Section 24-359 of the Code provides for a run-off primary in the event no candidate for the office of United States Senator or member of the Congress of the United States, the Governor or Lieutenant Governor or Attorney General receives a majority of the votes cast in the primary for the office for which he is a candidate. That section further provides as follows:

"Any candidate for party nomination to any other office who receives a plurality of the votes cast by his party shall be the nominee of his party for such office and his name shall be printed on the official ballots used in the election for which the primary was held. But nothing in this section shall prohibit the county or city committee of any political party from holding a primary which requires a majority of the votes cast in the primary to nominate."

As you can see from the above quoted portion of § 24-359 the candidate receiving a plurality of the votes cast in a primary for a county office shall be the nominee unless the county party committee has at some time prior to the primary declared that it will be necessary for a candidate to receive a majority of the votes cast for his office in the primary in order to be declared the party nominee. Therefore, I am of the opinion that the candidates, themselves, cannot request a run-off primary unless the party committee has at some time prior to the primary declared that a majority of the votes will be necessary for nomination. I am returning the letter enclosed in your letter.

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**ELECTIONS—Town offices—No petitions required of candidates for. F-100b (254)**

March 11, 1955.

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

This is in reply to your letter of March 11, 1955, in which you state as follows:
"The question has been presented to this office as to whether candidates for Mayor and Council in towns are required to file petitions along with their notices of candidacy."

Article 5, Chapter 10 of Title 24 of the Code contains the general law with respect to town elections, which applies in all cases unless there are charter provisions to the contrary. Section 24-170 prescribes the procedure to be followed by a candidate in a town election in order for his name to be placed on the official ballot. This section reads as follows:

"Where the election is held in an incorporated town for town officers it shall be the duty of all persons who intend to be candidates for office in the town to give notice of their candidacy to the county clerk of the county in which the town is, as provided by § 24-131 and the clerk shall notify the electoral board, and the tickets shall be printed and delivered and the election held and conducted in the manner provided by this title."

Section 24-345.3, as you point out in your letter, was amended at the 1954 session of the General Assembly so as to include towns. This section prescribes that "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 first Tuesday in April * * * with the Board, and also with the clerk or other officer when same is required by law."

By reference to Chapter 8 of Title 24, and especially to § 24-133 of said chapter, you will find that the petitions therein referred to are required to be filed by candidates for United States Senate, House of Representatives, any State office, General Assembly, city, county or district office. I can find nothing in this chapter that requires a candidate for Mayor or Member of the Council of the town to accompany his notice of candidacy with a petition.

I am of the opinion, therefore, that candidates for town offices are not required to file petitions along with their notices of candidacy.

ELECTIONS—Vacancies in State Senate—Filled for old district. F-100 (343)

Honorable Thomas B. Stanley,
Governor of Virginia.


This will acknowledge receipt of your letter of June 21 relative to the "two vacancies existing in the Senate as presently constituted, namely, the 3rd and one Senator from the 35th."

You desire my opinion on whether or not such vacancies should be filled from the districts as constituted at the time of the election of the incumbent whose office is now vacated, or whether such senators would have to be chosen by special election for the new districts created by the senatorial redistricting act of 1952 appearing in the Code of Virginia as section 24-14. You point out that this act became effective January 1, 1955.

This situation is controlled by section 24-16 of the Code of Virginia. In so far as material here, this section provides:

"* * * whenever any district is changed after the election of a delegate or senator, and the delegate or senator shall die, resign, or his office be otherwise vacated, the election to fill the vacancy shall be held in the district as constituted when the delegate or senator was elected."

It is, therefore, my opinion that a special election to fill a vacancy in a senatorial district would be held in and for the district as constituted at the time when the senator was elected for the term commencing in January, 1952.
MR. FRANK A. BLILEY,
Secretary, State Board of Embalmers and Funeral Directors.

This is in reply to your letter of June 9, 1955, which reads as follows:

"The State Board of Embalmers and Funeral Directors having received complaints that embalming was being done at the University of Virginia Hospital by an unlicensed man, directed me to write Dr. Cash, asking to be advised as to who is doing this work.

"The enclosed copy of letter from Dr. Cash states that Mr. Raymond Bibb, an unlicensed man, is doing the embalming.

"It is our understanding that 'no person shall hold himself out as an embalmer or discharge any duty or function connected with the embalming of dead human bodies unless such person has been duly licensed as an embalmer by the Board under the provisions of this chapter.'"

The letter from Dr. Cash to you, copy of which you enclosed, states that:

"Mr. Raymond Bibb now embalms all bodies upon which autopsies are done at the University of Virginia Hospital under my direction."

Dr. Cash is Professor of Pathology at the University of Virginia School of Medicine and, as such, is charged with the responsibility of supervising autopsies and embalming autopsied bodies. I am of the opinion that, in the performance of these duties, Dr. Cash is not required to obtain a license pursuant to the provisions of § 54-248 of the Code of Virginia. This section is contained in Chapter 10, Title 54 of the Code, and it is provided in § 54-218 in said chapter that "* * * nothing in this chapter shall apply to or in any manner interfere with the duties of any officer of local or State institutions." The University of Virginia Hospital is a State institution.

In this conclusion I am in accord with a similar opinion rendered on October 6, 1932, by the late Honorable John R. Saunders, Attorney General at that time.

I made inquiry of Dr. Cash with respect to this matter and he has replied, in part, as follows:

"Mr. Bibb has had a number of years of experience in this work, for which he is now well qualified. * * * It would be a great inconvenience to us and would interfere seriously with the work at the University Hospital if we cannot retain Mr. Bibb in this position. I also wish to make you aware of the fact that training in the schools of embalming does not qualify a man to make the necessary repairs on a body after a complete autopsy is performed in the manner in which this procedure is carried out in our department. Mr. Bibb is now thoroughly trained and we should hate very much to lose him."

In carrying out his responsibility with respect to embalming Dr. Cash may exercise his professional discretion and judgment in selecting an employee to perform this duty under his supervision. The General Assembly, it seems, expressly excluded State institutions from the force of the statute. The statute manifestly applies to persons engaged in the profession or business of embalming for the public generally. As pointed out herein, § 54-218 of the Code provides that "nothing in this chapter shall * * * in any manner interfere with the duties of any officer of * * * State institutions." To prohibit Dr. Cash from employing a person to do such work under his supervision would, in my opinion, be an interference with his duties.
So long as Mr. Bibb restricts his embalming services to the Hospital and under the supervision of a member of the hospital staff charged with the responsibility under consideration here, I am of the opinion that his services come within the exceptions contained in § 54-218 of the Code.

EXPENSES—Bonds of deputy treasurers should be paid by State and County.
F-130 (242)


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

This is in reply to your letter of March 1, 1955, which reads as follows:

"The Treasurer of Scott County, Virginia, is bonded with an insurance company and so are his Deputies. The Board of Supervisors has paid the premium on the principal or Treasurer's bond but refuses to pay the premium on the bonds of the Deputies. Section 15-480 is clear as to the premium on the Treasurer's bond, but does not mention the premium on the bonds of the Deputies, all of whom are bonded with an insurance company.

"The State Compensation Board set up expenses for this year for the Treasurer's office and among the expenses approved by the Compensation Board was the premium on the bond of the Treasurer and also the bonds of his Deputies.

"Inasmuch as the Board of Supervisors has refused to pay the premium on the bonds of the Treasurer's Deputies, I would appreciate your opinion as to the legality of the action of the Board of Supervisors in refusing to pay the premium on the bonds of the Deputies of the Treasurer.

"I might say that the State and County have been paying the premium on the bonds of the Deputy Treasurers and Deputy Sheriffs for several years."

Section 58-918 of the Code provides that "the treasurer may take from any deputy such bond with surety as he shall deem necessary for his indemnity." The section prescribes certain penalties for failure to make proper accounting of funds collected. This provision was formerly § 854 of the Code of 1887, and the Supreme Court of this State in the case of Powers v. Hamilton, 117 Va. 810, said:

"Deputy treasurers are public officers and the statute (§ 854) was enacted for the express purpose of holding them to strict account, not for the benefit of the treasurer, but for the benefit of the public service, just as similar penalties are provided for and imposed upon the treasurer himself by sections 863 and 865."

Although § 15-480 of the Code expressly provides that the premium on the treasurer's bond shall be paid in the proportion of one-third by the State and two-thirds by the county, and makes no specific provision with respect to the payment of the premiums on the bonds of deputies taken under § 58-918, I am of the opinion that the premiums on bonds are, nevertheless, proper expenses of the treasurer's office.

Under §§ 14-62, 14-63 and 14-64, the Compensation Board shall fix the expenses of the offices named therein, including that of the treasurer. These expenses are fixed after a request with respect thereto has been filed by the respective officers on forms prescribed by said Board. When the expenses have been fixed by the Board, notice thereof is given to the governing body of the
county and such governing body, under §14-65, may, if it desires, appeal therefrom within forty-five days. If no appeal is taken the action of the Compensation Board becomes final.

It is provided in §14-77 of the Code that:

"The salaries and expenses of treasurers * * * in counties * * * shall be paid in the proportion of two-thirds by the respective counties * * * and one-third by the Commonwealth."

Since it is my view that the bond premiums for deputy treasurers are proper expenses of the treasurer's office, and such expenses have been determined and fixed by the Compensation Board, from which the governing body of the county did not appeal, it is my opinion that such premium expenses are proper and valid obligations of the county and payment of the county's proportion should be authorized by the Board of Supervisors.

FEES—Adoption cases—Clerks entitled to. F-175 (1)

Honorable Charles R. Purdy,
Clerk, Hustings Court of Richmond, Part II.

This is in reply to your letter of July 2, 1954, in which you ask to be advised as to whether in my opinion the provisions of section 14-124 of the Code of Virginia of 1950, as amended, pertaining to clerk's fees in chancery cases are inclusive of adoption cases.

Inasmuch as the General Assembly has confined the jurisdiction for adoption proceedings to courts of record having chancery jurisdiction, I am of the opinion that such proceedings should be brought on the chancery side of such courts. I entertain very little doubt that adoption proceedings are to be classified as cases. I am, therefore, of the opinion that the clerk is entitled to the fee as prescribed in section 14-124 of the Code of Virginia applicable to chancery cases.

FEES—Attorney acting in place of Commonwealth's Attorney—Allowance in forfeiture case. F-89 (7)

Honorable Charles S. Smith, Jr.,
Commonwealth's Attorney for Middlesex County.

This is in reply to your letter of July 6, 1954, in which you request my opinion as to whether the Circuit Court of Middlesex County may allow a reasonable fee to be paid to the attorney designated by the court to act in your place in a case in which an Information was filed against a certain motor boat for the purpose of forfeiting the said vessel for violation of one of the sections of our oyster laws.

In my opinion §§19-4 and 19-5 of the Code are broad enough to include such payments.

FEES—Law and chancery actions — Clerk to charge flat fee, no alternative. F-116 (285)

Honorable J. Gordon Bennett,
Auditor of Public Accounts.

This is in reply to your letter of April 18, which I quote below:
Under dates of August 17, 1948, and September 30, 1948, you gave opinions to the clerks of the circuit court of Pittsylvania and Spotsylvania Counties respectively (pages 49 and 99 of your 1948-49 report), specifically stating that a clerk was required to charge a flat fee of $8.50 in divorce cases. You referred to old Section 3485, which is now 14-124 of the Code of Virginia. The General Assembly of 1954 amended Section 14-124 to raise the fee for all services rendered in any chancery case to $15.00.

In 1948 the General Assembly amended the same section (3485) to provide for a clerk's fee of $8.50 in all actions at law chargeable to the plaintiff except in actions involving not more than $500.00 under which circumstances the fee was to be $5.00 in lieu of any other fee. The provision for this latter fee is now set forth in Section 14-123 of the Code of Virginia. In 1954 the General Assembly amended Section 14-124, changing the amount of the fee in chancery cases from $8.50 to $15.00, and also amended Section 14-123 to raise the maximum fee in all actions at law from $8.50 to $10.00. I should appreciate it if you would review Sections 14-123 and 14-124 and advise me whether you feel that it is mandatory that the clerks charge the flat fees above referred to in all actions of law and chancery causes, respectively. Most clerks have considered that these flat fees and no others must be charged as provided by the two aforementioned sections, whereas a few clerks have interpreted these two sections to authorize them to charge either the flat fee or specific fees allowed by law in the several types of services which they may render in these cases.

The two sections to which you refer, as amended in 1954, fix the fees which clerks of circuit and other courts may charge for services performed, Section 14-123 dealing with clerks' fees generally and Section 14-124 dealing with his fees in chancery cases. Subsection (59) of Section 14-123 provides that:

"(59) In all actions at law the clerk's fee chargeable to the plaintiff shall be ten dollars to be paid by the plaintiff at the time of instituting the action; this fee to be in lieu of any other fee allowed by this section, except in actions involving not more than five hundred dollars the fee shall be five dollars in lieu of any other fee."

And Section 14-124, after setting out certain specific fees, provides that:

"(a) For all services rendered in any chancery case, to be paid by the plaintiff at the time of instituting the suit, including furnishing a duly certified copy of the final decree....................................................$15.00

"(b) In divorce cases, where there is a merger of a decree of separation from bed and board into a decree of divorce a vinculo, the fee prescribed by (a) above shall include the furnishing of duly certified copies of both such decrees."

It is my opinion that it was the intent of the General Assembly that in actions at law the plaintiff should pay at the time of instituting the action a fee of ten dollars except where the amount involved is not more than five hundred dollars, in which case the fee would be five dollars; these fees to cover all services rendered by the clerk for the plaintiff, and that in chancery cases the fee to be paid by the plaintiff at the time of instituting the suit is fifteen dollars, these fees to be in lieu of specific fees allowed by the sections for services by the clerk for the plaintiff. I do not think that the sections contemplate that the clerk shall have the option of charging the flat fee or calculating his fee by the allowance provided for the specific service rendered.
REPORT OF THE ATTORNEY GENERAL

FEES—Sheriff not to collect for serving criminal process of a city. F-136 (326)

June 1, 1955.

HONORABLE W. O. PILLOW,
Sheriff of Charlotte County.

I am in receipt of your recent letter in which you state:

"Will you please advise whether or not my deputy and I are required to serve summons in criminal cases for cities of this state free of fees.

"My deputy was sent a summons from the City of Richmond against a resident of Charlotte County for a traffic violation which happened in Richmond, the style of the case being City of Richmond vs. the defendant. I have been informed by some of the officials of Charlotte County that the City of Richmond should pay the fee of $35 for serving these summons, but Judge Carleton E. Jewett of your city wrote me that no fee should be collected by us.

"Please advise me about this, as I do not later want to be audited and found that the proper fees were not collected by us."

It is my opinion that the first sentence of § 14-82 of the Code does not contemplate that the sheriff of the county shall collect in advance from a city any fee for the service of process in connection with a criminal matter. This section seems to be plain on this point.

HONORABLE ERNEST W. GOODRICH,
Commonwealth’s Attorney for Surry County.

I regret that my reply to your recent communication has been unavoidably delayed. You present the following question:

"A question has arisen here in my county with regard to the proper interpretation of Sections 14-82 and 14-85 in the Code of Virginia 1950 as amended.

"You will notice that Section 14-82 provides that all fees collected by the sheriffs and other officers, shall be paid into the Treasury. Section 14-85, however, states 'Notwithstanding the provisions of Section 14-82, there shall be paid out of the State Treasury to sheriffs and sergeants . . . .' . . . '(for attendance at court) . . . '$2.00 for each days attendance.' I think this section was amended this past session to provide $3.00.

"The question, therefore, is whether or not the sheriff and other officers are entitled to this fee in addition to his salary. Will you please advise me with regard to this matter and also if they are so entitled, the retroactive date to which they may claim compensation."

Section 14-82 of the Code is taken from Chapter 386 of the Acts of Assembly of 1942 abolishing the fee system of compensating sheriffs of counties and sergeants of cities and placing such officers on a salary basis. The section reads as follows:

"Every sheriff and sergeant, and every deputy of either, shall, however, continue to collect all fees and mileage allowances provided by law for the services of such officer, other than such as he would have been entitled to receive from the Commonwealth or from the county or city for which he is elected or appointed and fees and mileage allowances provided for services in connection with the prosecution of any criminal matter. Such fees and mileage allowances accruing in connection with any criminal
matter shall be collected by the clerk of the court in which the prosecution is had. Such fees as are collected by the clerk of the court shall be paid by him into the treasury of the county or city for which the sheriff or sergeant, on account of whose services such fees are collected, is elected or appointed. All fees collected by or for every sheriff, sergeant and deputy of either shall be paid into the treasury of the county or city for which he is elected or appointed, on or before the tenth day of the month next succeeding that in which the same are collected. The treasurer of each county and city shall credit one-third of such amounts to the general fund of his county or city and credit two-thirds thereof to the account of the Commonwealth to be remitted to the State Treasurer along with other funds due to the Commonwealth."

Section 14-85 of the Code was formerly §3503 of the Code of 1919. As it appears in the Code of 1950 it reads as follows:

"Notwithstanding the provisions of § 14-82 there shall be paid out of the State treasury to sheriffs and sergeants, after the same are duly certified to the Comptroller, the following fees: For attending any circuit court engaged in the trial of civil or criminal cases, or both, or for attending the Law and Equity Court of the city of Richmond, the Chancery Court of the city of Richmond, the Circuit Court of the city of Richmond, the Law and Equity Court of the City of Richmond, Part Two, the Law and Chancery Court of the city of Norfolk or the Law and Chancery Court of the city of Roanoke, two dollars for each day's attendance. And the judge of any such court may allow any deputy, whose attendance he deems advisable and requires as an assistant to the principal officer, such compensation as he may deem proper and just, not exceeding two dollars a day. The Chancery Court, Law and Equity Court, the Law and Equity Court of the city of Richmond, Part Two, and the Circuit Court of the city of Richmond, however, shall make the allowance authorized by this section for one deputy in attendance upon the court as well as to the sheriff."

This Section 3503 of the Code of 1919 was last amended in 1944. Acts of 1944, page 120. The language "notwithstanding the provisions of § 14-82 * * * "was added when § 3503 of the Code of 1919 was codified by the recent Commission Code Recodification as § 14-85. I presume that this language was inserted in the section by the Code Commission in an effort to carry out what it considered was the intention of the General Assembly since, as I have indicated, § 3503 of the Code of 1919 was amended in 1944 subsequent to the Act of 1942 placing sheriffs and sergeants on a salary basis. However that may be, the Code of 1950 was adopted as an Act of the General Assembly and when it uses the language "notwithstanding the provisions of § 14-82" we must assume that the fee provided for sheriffs and sergeants for attendance upon courts constitutes an exception to the provision in § 14-82 that sheriffs and sergeants shall no longer be entitled to receive fees from the Commonwealth, and also an exception to the requirement of the section that all fees collected by sheriffs and sergeants shall be paid into the treasury of the county or city.

It is my conclusion, therefore, that, literally construing §§ 14-82 and 14-85 together, the fee allowed by § 14-85 shall be paid to the officers named upon proper certification and may be retained by these officers. Such a construction certainly represents a radical departure from the system of compensating sheriffs and sergeants solely by salaries, and must be reluctantly reached. It is a result of language inserted in § 14-85 by the Code Commission, the full effect of which may not have been fully appreciated by the General Assembly when the Code of 1950 was enacted.

I must further advise you, however, that the opinion I am expressing herein, in so far as practical results are concerned, is more or less academic. It is fundamental that no money can be paid out of the State Treasury except in
pursuance of an appropriation made by the General Assembly. Whatever the proper construction of § 14-85 is, there has been no appropriation made by the General Assembly to pay the attendance fees provided therein. This statement is subject to two small exceptions. There is an appropriation in Item 12 of the Appropriation Act of 1954 (Acts of 1954, page 937) for compensation of sheriffs and sergeants of circuit courts as authorized by § 14-85 of the Code. This is an appropriation of $1,000.00 and has been uniformly construed to apply to the Sheriff of the City of Richmond, who is the only fee sheriff in the State. There is also a similar appropriation under Item 14 of the Appropriation Act of 1954 of $4600.00 to compensate sheriffs and sergeants for attendance upon city courts. I am advised by the State Comptroller that this small appropriation has been construed to apply to a few sergeants of small cities who are not on a salary basis. Thus you will see that, whatever the proper construction of § 14-85 is, there has been no appropriation made by the General Assembly to pay this attendance fee to sheriffs and sergeants who are on a salary basis, and my opinion is, therefore, that it cannot be paid to them.

In view of the nature of my reply to your first inquiry, it is unnecessary to reply to your second.

FINES AND COSTS—No action for after 20 years from date of judgment.
F-216 (14)

HONORABLE W. CARY CRISMOND,
Clerk, Circuit Court of Spotsylvania County.

This is in reply to your letter of July 13, 1954 in which you ask to be advised as to the applicability of a statute of limitations in the case of a judgment in favor of the Commonwealth against an individual for fine and costs in June, 1927.

The general rule is that no statute of limitations which shall not in express terms apply to the Commonwealth shall be deemed a bar to any proceeding by or on behalf of the same by virtue of Section 8-35 of the Code of Virginia, 1950. Section 19-299 of the Code of Virginia, 1950, provides, in part, as follows:

"No action, suit or proceeding of any nature, however, shall be brought or had for the recovery of a fine or costs due the Commonwealth or any political subdivision thereof, unless within twenty years from the date of the judgment imposing the fine."

In view of the foregoing I am of the opinion that action on a 1927 judgment for fine and costs is now barred.

FIRE LAWS—Brush Burning—Fire may continue to burn after midnight.
F-220 (97)

HONORABLE ARTHUR B. CRUSH, JR.,
Commonwealth's Attorney for Craig County.

This is in reply to your letter of September 23, 1954 in which you request my opinion as to whether a person would be guilty of violating § 10-62(b) of the Code if he started a fire between the hours of 4:00 p.m., and twelve o'clock midnight, and allowed the fire to continue to burn after midnight.

Section 10-62(b) reads as follows:

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

"Set fire to" means "to communicate fire to." Therefore, I must concur in your conclusion that, if a person starts the fire between the hours of 4:00 p.m. and midnight, he does not violate the statute if the fire continues to burn after midnight, if he has complied with § 10-62(a) prior to starting the fire and if the fire is not left untended as is prohibited by § 10-63. However, I am also of the opinion no brush, leaves, grass or debris may be added to the fire after midnight, as this would constitute setting fire to prohibited articles outside of the permissible hours.

FIRE LAWS—Burning trash in outdoor fireplace. F-61 (297)

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

You desire my opinion on whether or not Section 10-62(b) of the Code of Virginia is susceptible to a construction making it applicable to the burning of trash in an outdoor fireplace. The fireplace is built with rock or nonflammable blocks, with a top covering the fireplace. You ask me to assume that the trash was burned at 10:00 a.m. in the morning during the month of April.

In construing this section, we should be mindful that it is remedial in character, and that its object and purpose is the prevention of the spread of destructive fires.

The law prohibits the setting of fire to any "inflammable material capable of spreading fire." Paragraph (a) of Section 10-62 vests a broader discretion in the trial court than does paragraph (b), in that it is designed to prevent the spread of fire to lands other than those owned or leased by the person igniting such fire, and its application is conditioned upon the person igniting having previously taken all reasonable care and precaution. The conditions or reasonable care and precaution are eliminated in the application of paragraph (b).

It would appear, therefore, in the instant case that the inflammable material was capable of spreading fire. The precautions prescribed by paragraph (a) require cutting and piling, or careful clearing around the area embracing the actual fire. These are the precautions eliminated from Section (b).

If it appears to the court from the evidence and the surrounding facts and circumstances that the inflammable material ignited in the instant case was so guarded and protected as to render the material when ignited incapable of spreading fire, the court would be warranted in finding the defendant not guilty. This places a very high degree of care on the defendant and a high degree of caution on the part of the court for the effectuation of the object and purposes of this remedial statute.

FISHERIES—Penalties for certain use of seines. F-233 (266)

HONORABLE FERDINAND F. CHANDLER, Commonwealth's Attorney for Westmoreland County.

This will acknowledge receipt of your recent letter in which you ask my opinion with respect to the following question:
REPORT OF THE ATTORNEY GENERAL

"Can a person who has been found guilty of violating the provisions of Section 28-51 of the Code of Virginia be convicted in a criminal proceeding therefor, and if so what penalty may be imposed?"

Section 28-51 of the Code apparently does not prescribe any penalty for the violation of the provisions of said section. Under the provisions of § 18-1 of the Code, it is my opinion that the violation of this section would be a misdemeanor, and the punishment in such cases would be governed by § 19-265 of the Code. The jurisdiction for the prosecution of persons apprehended for violation of § 28-51 is governed by § 28-56 of the Code.

GAMBLING—Charitable organizations may not conduct bingo games. F-123 (211)

February 2, 1955.

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

I have received your letter of January 24, 1955, in which you inquire whether there are any legitimate grounds on which charitable organizations can be given any sort of official approval to conduct bingo games. You state that you are unable to find any sanction for such procedure under the laws of Virginia.

No exception for charitable organizations is specified in the Virginia laws relating to lotteries. I am, therefore, of the opinion that you have properly refused to give official approbation to the conducting of bingo games by civic groups or other charitable organizations.

GAMBLING—Lotteries—Merchandising by punch board, or drawing chances to determine price illegal. F-123 (305)

May 11, 1955.

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

This will reply to your letter of April 29, in which you inquire whether or not a certain device, known as a "Trade Stimulator", which is employed to promote the sale of certain articles, constitutes a lottery. As stated in your communication, the procedure utilized in operating this device is as follows:

"The wholesaler sells to a retailer at a certain cost a box containing sundry articles; all of these articles are claimed to be worth at least a dollar. There are chances on a card ranging from one cent to ninety-nine cents. A proposed purchaser picks one of the chances which are unknown, and he will pay from one cent to ninety-nine cents for the chance. He wants a certain article in the box and pays therefor the amount of the drawing. The last chance or drawing entitles the purchaser to a $10.00 pen and pencil set."

In conformity with the opinion of the Supreme Court of Appeals of Virginia, in Maughs v. Porter, 157 Va. 415, this office has frequently ruled that a particular activity constitutes a lottery when the elements of prize, chance and consideration combine. Moreover, the Court has pointed out that the anti-lottery laws are remedial in character and should be liberally construed. Abdella v. Commonwealth, 174 Va. 450. Viewed in the light of these principles, the particular scheme in question would in my opinion constitute a lottery. In each case a participant pays a monetary consideration, the exact amount of which is determined solely by chance, and receives an article or prize, the identity and value of which is also determined by chance. Thus, all the constituent elements of a lottery would concur to bring this device within the condemnation of the anti-lottery laws of the Commonwealth.
REPORT OF THE ATTORNEY GENERAL

GAMBLING—Lotteries—Slogan contest not prohibited. F-123 (41)

HONORABLE C. E. Cuddy,
Commonwealth's Attorney, City of Roanoke.

August 6, 1954.

This is in reply to your letter of August 4, 1954, in which you request my opinion as to whether a certain proposed contest is in violation of the lottery laws of this State. As I understand the details of the contest, the company sponsoring the contest desires to obtain and use a slogan for its products. The contestants will be asked to submit slogans containing a limited number of words. After entries have been eliminated for violation of technical rules of the contest, such as the use of excessive words, they will be passed through three stages of elimination judging, with emphasis being placed on the usefulness of the slogan in advertising, the applicability of the slogan to the company's line of products and originality of the slogan.

On the facts submitted, one of the essential elements of a lottery is not present. I see no element of chance in the proposed contest, but conclude rather that it is one the outcome of which will depend upon the ingenuity and originality of the contestants.

I, therefore, am of the opinion that the proposed contest is not in violation of our lottery laws.

GAME AND INLAND FISHERIES—Coon and dog fights illegal. F-123 (105)

HONORABLE DALE W. LARUE,
Commonwealth's Attorney for Carroll County.

October 13, 1954.

This is in reply to your letter of October 9, 1954, in which you inquire concerning the legality of certain proposed activities which are described by you as follows:

"A sportsmen's club here in the county has in the past conducted what is commonly known as a 'coon-on-the-log' contest at which an admission is charged. The contest was conducted or operated by placing a 'coon on a log or other object in the middle of some pond or lake, and permitting one or more dogs at a time to swim to the 'coon from the bank. The dog or dogs attempt to get the 'coon off the log, and the 'coon attempts to prevent the dog or dogs from succeeding."

In addition, you state that heretofore these contests have been conducted under the auspices of a permit issued by the Game and Inland Fisheries Commission pursuant to section 29-210 of the Code, permitting field trials during the closed season for game. You request an opinion concerning the legality of this activity in light of section 18-119 of the Code, which provides:

"If any person engage in the fighting of cocks, dogs or other animals, for money, prize or anything of value, or upon the result of which any money or other thing of value is bet or wagered, or to which an admission fee is charged, directly or indirectly, or for any championship, he shall be fined not less than one hundred dollars nor more than five hundred dollars for each offense."

It appears that in granting permits to bona fide field trial clubs and associations to conduct field trials during the closed season for game, the Commission takes no position upon the propriety of any particular activity transpiring at such an event. In effect, such licenses merely declare that the trials to which they relate may be conducted without contravening any of the game laws of
this State, and they do not purport to authorize or condone any activity which
may otherwise be proscribed by law. It would certainly seem that inclusion of the
phrase "other animals" in the statute set out above renders it sufficiently broad
to comprehend a fight between a dog and a coon under the circumstances you
describe. I am thus of the opinion that since the enterprise under consideration
contemplates as its climax an actual encounter between these two animals it
falls within the ambit of the statutory prohibition.

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GAME AND INLAND FISHERIES — Game Wardens — Payment of Extra
Compensation by county. F-233 (199)

HONORABLE JAMES H. BROWN, JR.,
Commonwealth’s Attorney for Grayson County.

This will reply to your letter of January 6, 1955, in which you request an
opinion upon the interpretation of the provisions of chapter 180, Acts of Assembly
1954. This chapter amended and reenacted chapter 197 (Acts of Assembly 1950),
as amended by chapter 195 (Acts of Assembly 1952), and provides:

"The governing body of any county having a population of not less
than twenty-three thousand three hundred seventy-five and not more than
twenty-four thousand four hundred fifty and in any county having a
population of more than thirty-five thousand and less than
thirty-six thousand and in any county having a population of not less
than twenty-one thousand three hundred and not more than twenty-one
thousand five hundred shall pay the game warden of such county for
services rendered to the county a salary of not less than seventy-five dollars
nor more than one hundred and fifty dollars a month."

The above quoted provision was incorporated by reference into the Code
of Virginia by section 29-36.1 (Cumulative Supplement 1954) and amplifies
section 29-36 of the Code. This latter section relates to the compensation of
game wardens and prescribes:

"Sec. 29-36. Compensation.—Game wardens shall not be entitled
to receive arrest or witness fees or fees of any other kind for prosecuting
violations of the hunting, trapping, inland fish and dog laws. They shall
be employed for such time and receive such salary, allowances, wages
and expenses as may be provided in accordance with law."

You state that at the present time the Game Warden of Grayson County
does not receive additional compensation from the Board of Supervisors and
consequently draws only his salary from the State; you inquire in what instances
the Board of Supervisors would legally be required to pay the prescribed salary.

As suggested in your communication, the critical language of the statute
with respect to the matter under consideration is contained in the phrase "for
services rendered to the county". While the statute is mandatory in character
and imposes upon the governing bodies of various counties the duty of making
payment in a proper case, it is clear that this obligation is conditioned upon
the rendition by the game warden of services to the county. Game wardens are
State officials, and it is difficult to conceive of a situation in which the per-
formance of the duties of their office would not result in some incidental benefit
to the county. However, I am constrained to believe that the statute in question
contemplates the remuneration of a game warden by the Board of Supervisors
only in those cases in which he renders a service to the county which is separate
and distinct from those which he is ordinarily required to perform in the discharge
of his office. It would certainly seem that the inclusion of the phrase "for
services rendered to the county" would negate any contention that the Legislature intended to place upon the county the burden of providing compensation to a game warden for services rendered in enforcing or administering the State game laws. However, as you also suggest, a different situation would obtain if a game warden should assist in administering a local county ordinance or regulation.

I am, therefore, of the opinion that no duty devolves upon the Board of Supervisors to make payment in accordance with the provisions of chapter 180 unless the warden in question has rendered some independent service to the county.

GAME AND INLAND FISHERIES—Wardens—Authority to appoint persons as special. F-233 (90)

HONORABLE I. T. QUINN,
Executive Director, Commission of Game and Inland Fisheries.

In response to your inquiry of September 21, 1954, concerning the validity of section 29-37.1 of the Code of Virginia, kindly be advised that upon full consideration of that section and the fundamental principles of statutory construction it appears that the section in question must be presumed to be valid. Statutes must be construed as being effective if at all possible and their provisions resolved to be operative and reconciled with other statutes bearing upon the same matter. In my view section 29-37.1, permitting the Commission to appoint persons employed by owners of forest lands in excess of one thousand acres as special game wardens whose jurisdiction is limited to their employer's lands, does not take away from the authority possessed by regular game wardens, but was merely intended to be a supplement to the game warden system which the Commission is not required to employ as the term "may" is used. In other words, it would be in the Commission's discretion as to whether or not it determined to appoint persons in such circumstances as special game wardens, and the Commission may have reasons of its own as to why it should or should not make such appointments.

GAME AND INLAND FISHERIES—Jurisdiction over non-tidal portion of Potomac River. F-233 (231)

HONORABLE I. T. QUINN,
Executive Director, Commission of Game and Inland Fisheries.

This is in reply to your letter of February 28, 1955, in which you request my opinion on the following two questions:

"The question has been raised as to the rights of sport fishermen, residents of Virginia, to fish from the Virginia shores in that portion of the Potomac lying between the boundary line of the District of Columbia and the West Virginia line. So long as a fisherman, resident of Virginia, fishes from the Virginia shore in the waters of the Potomac, is a Maryland non-resident fishing license required?"

"Virginia has no closed season for taking bass in any of the Potomac waters. Maryland has a closed season on bass except from June 1 to November 30. Is a resident of Virginia required to observe the Maryland bass season if he fishes in the Potomac from the shores of Virginia?"

I am of the opinion that the answer to the questions raised by you are found in the Compact of 1785. Articles 7 and 8 of that Compact read as follows:
"7. Citizens of each state shall have full property in the shores of the Potomac River adjoining their lands, with all emoluments and advantages belonging thereto, and with the privilege of building wharves and other improvements if the navigation of the river is not injured thereby; the right of fishing is to be common to and equally enjoyed by the citizens of both states, though citizens of one state may not hinder or disturb the fisheries on the shores of the other state, nor shall the citizens of one state have a right to fish with nets or seines on the shores of the other.

"8. All laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine, in the river Potowmack, or for preserving and keeping open the channel and navigation thereof, or of the river Pocomoke within the limits of Virginia, by preventing the throwing out ballast, or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both states."

Although there are two decisions of the Supreme Court of Maryland (Binney's Case, 2 Bland 95, and Middlekauf v. LeCompte, 149 Md. 621), holding that the Compact of 1785 does not apply to that portion of the Potomac River above the fall line of the river, the Supreme Court of the United States in the case of Marine Railway Company v. United States, 257 U. S. 47, construed the Compact as applying to the entire length of the Potomac River between Maryland and Virginia and not just the tidal portion of the river. I am of the opinion that the Compact is not restricted to that portion of the river which is tidal, but that it applies to the entire length of the river between the two states. Therefore, I am of the opinion that, under the provisions of Article 7 of the Compact, citizens of Virginia have the right to fish in that portion of the Potomac River lying between the boundary line of the District of Columbia and the boundary line of West Virginia without having a Maryland non-resident fishing license.

I am of the further opinion that, in view of Article 8 of the Compact, the States of Virginia and Maryland should take appropriate steps to adopt the same laws and regulations concerning the preservation of fish in that portion of the river; that either Virginia should have a closed season on bass which coincides with that of Maryland, or that Maryland should abolish its closed season on bass.

GAME AND INLAND FISHERIES—Jurisdiction over violations in Camp Pickett questionable. F-233 (313)

Honorable Charles H. Wilson,
Commonwealth's Attorney for Nottoway County.

This is in response to your letter of May 18, inquiring if Virginia game laws are applicable in the Camp Pickett area and if Nottoway County game wardens can investigate suspected violations of Virginia game laws in the Camp Pickett area.

Kindly be advised that the United States Government has received a deed, recorded in Deed Book 122, page 449 et seq., in the Circuit Court Clerk's Office of Nottoway County, ceding exclusive jurisdiction over the Camp Pickett military area, with certain exceptions thereto. These exceptions provide "the Commonwealth shall retain concurrent jurisdiction with the United States over crimes and offenses committed within the above described area", and that "the Commonwealth shall have jurisdiction to serve civil and criminal process within the limits of the above described area in any proceedings properly instituted in any of the courts of the Commonwealth".
As concurrent jurisdiction has been retained over crimes and offenses, it is my view that Virginia game laws are applicable in the Camp Pickett area. However, it is questionable, and it does not appear to be advisable at this time, without conference with military authorities, to give a ruling if Nottoway game wardens can go upon the area, without the permission of the United States Government, to investigate suspected violations. As set forth above, the Commonwealth has jurisdiction to serve criminal process in proceedings properly instituted in courts, but no mention is made of authorization to investigate suspected violations. It might be that an interpretation of the retention of concurrent jurisdiction over crimes and offenses would infer the right of investigation. However, as previously stated, and in view of the fact that this is a military area, it would not appear advisable for this office to render a ruling on the aspect of investigation without consultation with the military authorities.


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

This will acknowledge receipt of your letter of April 4, 1955, in which you request an interpretation of the first sentence of § 29-76 of the Code, which reads as follows:

"It shall be unlawful for any person to make a false statement in order to secure a license or to alter, change, borrow, or lend or attempt to use, borrow or lend a license."

The section referred to is a part of Chapter 5, Title 29 of the Code, relating to licenses for hunting, fishing and trapping.

Your specific question is whether or not if a Virginia resident purchases from the clerk of the court a license for a North Carolina resident and makes a false statement that the man he is purchasing the license for is a Virginia resident, is the purchase made in violation of this section and is the Virginia resident who made such false representation in order to obtain a license for a nonresident of Virginia subject to prosecution, despite the fact that the license purchased was not for the personal use of the party who made the false statement?

The gravity of the offense is the making of the false statement in order to secure a license. The fee prescribed for the issuance of a license to a nonresident is greater than the fee required where a license is issued to a resident of this State. By the making of such false statement the State is defrauded. A false statement made by a person for the purpose of inducing the clerk to issue a license to any other person is, in my opinion, a violation of the statute to the same extent as if the person who made the statement had done so in order to obtain a license for himself.

GAME AND INLAND FISHERIES—Public impounded waters—Definition, Back Bay is not. F-233 (3) July 6, 1954.

Honorable I. T. Quinn, Executive Director, Commission of Game and Inland Fisheries.

This is in response to your letter of June 29, 1954, inquiring if Back Bay is included within the term "public impounded waters" as contained in section 29-55.1 of the Code of Virginia, as amended. The act is as follows:
"Nonresident Trip Fishing License.—There is hereby provided a trip fishing license for nonresidents of the State to fish in the public impounded waters of this State during the open season for game fish. Provided, however, such license shall not entitle the owner thereof to fish for trout in any of the trout streams nor in any waters in which trout have been planted. The fee for such license shall be one dollar and fifty cents, and said license shall be effective for three successive days, which days shall be set forth on the face of the license. The clerk or agent issuing the license provided herein shall be paid ten cents for each license so issued.

You further state that "impounded" is not defined by the statutes and that Back Bay is the result of formation by natural barriers as distinguished from a body of water impounded by man. It is also noted that section 29-153.1,2 uses the term "impounded" and refers to those interstate bodies of water such as the lakes formed by the damming of rivers in Southern Virginia.

It is our view that Back Bay was not intended to be included within the term "public impounded waters" as contained in section 29-55.1, and that the term refers to bodies of water impounded by man. Had the Legislature intended the statute to include all lakes and bodies of water, the terms could have been used that would have clearly embraced lakes and bodies of water in general.


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

This is in reply to your letter of October 22, 1954, inquiring if, in view of section 29-169, Code of Virginia, a person could be deemed guilty of trespassing on uninclosed mountain land not being used for cultivation in Giles County east of New River which has been leased to the State for a game sanctuary and posted as such.

Certain pertinent statutes are hereinafter set forth.

Section 29-169, as amended, provides as follows:

"No person shall be deemed guilty of trespass hereunder upon uninclosed mountain lands not used for cultivation, except in the counties of 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 sections 29-165 and 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."

Section 29-171 provides:

"Violation of sanctuaries, refuges, preserves and water used for propagation.—It shall be unlawful for any person, including the owner, to trespass or hunt upon a privately owned State game sanctuary or permit his dog to do so; to violate any regulation of the Commission concerning refuges, sanctuaries and public shooting or fishing preserves in impounded waters or in forest and watershed areas owned by the United States government or to damage the boundary enclosure of or enter a
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game refuge owned, leased, or operated by the Commission for the purpose of molesting any bird or animal, or permit his dog or live stock to go thereon, or fish or trespass with intent to fish upon any waters or lands being utilized for fish propagation, or damage or destroy any pond, pool, flume, dam, pipeline, property or appliance belonging to or being utilized by the Commission, or interfere with, obstruct, pollute, or diminish the natural flow of water into or through a fish hatchery. Any person convicted of any offense hereunder shall be deemed guilty of a misdemeanor and he shall be punished by a fine of not less than twenty-five nor more than one hundred dollars or be sentenced to jail not exceeding sixty days, either, or both, and shall be responsible for all damage; provided, however, that the minimum fine for permitting a dog to go on a sanctuary or refuge shall be five dollars.”

It is my opinion that section 29-171 rather than section 29-169 would be the section applicable to the situation which you present. The offense set forth in section 29-171 is that of “violation of sanctuaries”, and any act in violation of the provisions of that section would constitute such an offense. Section 29-169 pertains to the offense of trespass but does not appear to apply to the offense set forth in section 29-171.

GENERAL ASSEMBLY—Effect of Redistricting Act prior to regular election.
F-29 (157)

November 23, 1954.

HONORABLE JOSEPH E. BLACKBURN,
Member House of Delegates.

This is in reply to your letter of November 22, 1954, which reads as follows:

“By acts passed at the extra session of the Legislature in 1952, the senatorial districts were changed and, as I understand it, this redistricting becomes effective the 31st of December, 1954. Will you please give me your opinion on the following:

1. If a special session of the Legislature is called after December 31, 1954, would the presently elected senators continue to represent the districts as they are now constituted?
2. Would a senator, whose present district will then be divided among other existing districts, be eligible for appointment as a circuit judge on January 1, 1955?”

It is provided in the State Senatorial Redistricting Act of 1952, Extra Session, that the Act, as amended and reenacted, shall be in force on and after January 1, 1955. All elections for State Senators for the four-year term commencing on the second Wednesday in January, 1956, shall be from the senatorial districts as reapportioned in this Act.

Members of the Virginia Senate are elected to represent their respective districts for a term of four years—Constitution of Virginia — § 41, Code of Virginia, § 24-13. As far as representation is concerned, the senatorial districts as constituted prior to the effective date of the amendment continue for the full term of four years, unaffected by the Redistricting Act of 1952.

In this connection, I call your attention to the provisions of § 24-16 of the Code relating to the filling of vacancies in the General Assembly. It is there provided, in substance, that the changing of a district after the election of a senator or delegate and the office becomes vacant, an election to fill the vacancy shall be held in the district as constituted when the senator or delegate was elected. In my judgment, the same principle enunciated in § 24-16 applies in the instant matter. Those senators now in office will continue to represent those
districts as constituted prior to the 1952 Senatorial Redistricting Act of 1952.

With respect to your second question, I have heretofore expressed the opinion that a member of the General Assembly is not eligible for appointment as a judge of a circuit court during the term for which he was elected. This opinion is printed in the Reports of the Attorney General, 1952-'53, at page 116. For your convenience, I am enclosing a copy of this opinion.

HEALTH—Department of—Authority to participate in hospital survey and construction under Federal Act. F-224 (193)

HONORABLE MACK I. SHANHOLTZ,
State Health Commissioner.

This will acknowledge receipt of your letter of December 31, 1954, in which you state that Public Law 482 of the 83rd Congress amended the Hospital Survey and Construction Act to provide for federal funds in the nature of grants for the construction of (1) public and other nonprofit hospitals for the chronically ill and impaired; (2) public and other nonprofit diagnostic or treatment centers; (3) public and other nonprofit rehabilitation facilities; and (4) public and other nonprofit nursing homes.

You further state that:

"A sum of $20,000,000 has been appropriated for construction grants to states for the fiscal year beginning July 1, 1954. Of this money, Virginia's share is $468,468. In addition, Congress appropriated $2,000,000 to be used on a matching basis for survey and planning activities in relation to the above types of facilities. This money remains available until expended. The allocation to Virginia is $34,935.

"To secure the construction allotment it will be necessary for the State Department of Health, as the official State agency, to make a detailed survey of existing facilities in each of the four categories covered by the amendments. A State Plan, based upon the findings of the survey as applied to certain criteria established in the Federal regulations, must then be developed for approval by the Surgeon General of the Public Health Service. Upon approval of the Surgeon General the grant-in-aid funds will then be certified as available to the Commonwealth for distribution in accordance with established procedures.

"To qualify for the Federal aid available to make the survey and inventory of existing facilities and as a requirement for receiving construction grants, the Public Health Service is requiring that each State submit an opinion that it has the necessary legal authority to participate in both the survey and construction grant. Mr. Ronald B. Almack, Director of our Bureau of Hospital and Nursing Home Services, which has the administrative responsibility for this program has discussed this matter in some detail with Mr. Kenneth C. Patty.

"Please advise as to whether existing State legislation gives us sufficient authority to participate in the survey and construction grants available under the amendments to the Hospital Survey and Construction Act (Hill-Burton Act)."

Chapter 12 of Title 32 of the Code, in my judgment, grants your Department the necessary legal authority to participate in both the survey and construction grant as set forth in your letter. This chapter contains definitions with respect to "Hospital," "Public Health Center" and "Nonprofit Hospital" which are sufficiently broad, it would seem, to include the four categories designated by you. The Chapter is of a remedial type and should be construed liberally so as to
achieve its obvious purposes. It authorizes and directs the State Health Commissioner to "provide such methods of administration, appoint a director and other personnel of the division and take such other action as may be necessary to comply with the requirements of the Federal Act and the regulations thereunder." The Appropriation Act of 1954, Item 369, contains an appropriation for the biennium 1954-56 of $2,388,590 for "hospital survey planning and construction." Section 32-198, under which a division of hospital survey and construction is established, clearly indicates the broad scope of the Act, stating the purposes of the division to be:

"(1) Making an inventory of existing hospitals, surveying the need for the construction of hospitals, and developing a program of hospital construction as provided in this chapter; and

"(2) Developing and administering a State plan for the construction of public and other nonprofit hospitals in this chapter."

I am of the opinion that, under Chapter 12, Title 32 of the Code and the provisions of Item 369 of the Appropriation Act of 1954, the State Health Commissioner is authorized to participate in the survey and construction grants available under the amendments (Public Law 482 of the 83rd Congress) to the Hospital Survey and Construction Act.

HEALTH—State Board—a member of from Richmond is from tidewater.
F-224 (19)

July 19, 1954.

Senator V. Alfred Etheridge.
Oceana, Va.

I am in receipt of your letter of July 8 inquiring on behalf of a constituent if "the State Board of Health is legally constituted."

Section 32-1 of the Code, prescribing the composition of the State Board of Health, provides, among other things, that one member of the Board shall be chosen from each of the grand divisions of the State, namely, Tidewater, Middle Virginia, Piedmont, the Valley and Southwest Virginia. The point is made that Tidewater Virginia is not represented on the Board. I cannot agree with this contention, since the Board has at least one member from Richmond and, in my opinion, Richmond is in Tidewater Virginia. There is no question about the fact that the tide ebbs and flows in the James River at Richmond. The only place in the Code where I can find Tidewater Virginia defined is in Title 28, dealing with fish, oysters and shell fish.

Section 2 of the Title places the counties of Henrico and Chesterfield in Tidewater Virginia. Richmond as you know, is within the geographical boundaries of Henrico and Chesterfield. While this is not controlling, it is quite persuasive. It is my opinion that the requirement of the statute that there shall be a member of the State Board of Health from Tidewater Virginia is met by having a representative thereon from the City of Richmond.

HIGHWAYS—Allowing cattle to graze along side of—No criminal violations.
F-192 (322)

May 27, 1955.

Honorable Mark D. Woodward,
Commonwealth's Attorney for Page County.

This is in reply to your letter of May 24, 1955, which I quote:

"Your opinion is requested as to the penalty for violation of Section 33-125 Code of Virginia, 1950, prohibiting the grazing or pasturing of
livestock on any road in the State Highway System unless tied to prevent obstruction on the traveled portion of the highway.

"I feel sure that an appropriate penalty is provided, however, I am unable to determine the appropriate one.

"Also, I would appreciate your opinion as to whether numbers of cattle—20 or 30 pastured on or about an unfenced secondary road on numerous occasions would be a violation of Section 33-279 (c) making it a misdemeanor to obstruct any road."

Under date of November 27, 1953, I had occasion to address a letter to the Honorable Fred L. Rush, Commonwealth's Attorney for Buchanan County, in which I expressed the opinion that Section 33-125 of the Code of Virginia (1950) is not a penal statute because the violation thereof is not declared to be unlawful. I am taking the liberty of enclosing a copy of that letter.

As to your second inquiry, I entertain serious doubt as to whether a crime has been committed in obstructing a road as contemplated in Section 33-279 (c) based on the facts as stated in your letter. I presume that the cattle mentioned in your letter are allowed to graze on private property and wander upon the highway. In such event I do not feel that a hindrance to traffic resulting from such cattle movement could be classified as an obstruction warranting criminal prosecution.

HIGHWAYS — Chesapeake Bay Ferries — Condemnation procedure — No funds available. F-98 (30)

MR. LUCIUS J. KELLAM,
Chairman, Chesapeake Bay Ferry Commission.

Receipt is acknowledged of your letter dated July 20, 1954 requesting my opinion on the following:

"I am writing you as Chairman of the Chesapeake Bay Ferry Commission, which Commission was established under the 1954 Acts of the Assembly, with authority to acquire the ferries operating on the Chesapeake Bay from the Eastern Shore to the Norfolk side by condemnation or otherwise. No appropriation is contained in the Bill and the Commission has no funds available.

"Any ferry operations undertaken by the Commission will obviously have to be financed by the sale of revenue bonds. Numerous bonding companies have evidenced an interest in the handling of these bonds.

"We have discussed with the Virginia Ferry Corporation the possibility of acquiring their properties, but the price they have in mind is so far in excess of the figure the Commission has in mind we feel that there is no possibility of arriving at a voluntary sale of their properties.

"The Commission has given some thought to the possible condemnation of these properties, and the purpose of this letter is to request an opinion from you as to whether or not we can proceed with condemnation proceedings without funds available to pay the award. You can readily appreciate the fact that we could not make any progress in selling revenue bonds until the cost of the project as well as a detailed history of operations, etc. is determined. On the other hand, if it is necessary for us to have funds available to pay the award when the proper amount is determined, we would not be in a position to do this until the bonds could be sold.

"We will therefore appreciate it very much if you will let us have your opinion as to whether or not we can proceed with the condemnation proceedings without having the funds available to pay the award as soon as the amount is determined."
The act to which you refer is Chapter 693 of the 1954 Acts of Assembly and is cited as the “Chesapeake Bay Revenue Bond Act.” Section 3(b) of this act empowers the Commission to condemn any ferry within the boundaries of the Chesapeake Bay Ferry District which forms a connecting link in the system of State Highways, and Section 7(g) authorizes and empowers the Commission to acquire any such property “by condemnation in accordance with and subject to the provisions of Article 5 of Chapter 1, Title 33, and of Section 25-233 of the Code of Virginia, * *.” Section 25-233 of the Code provides that no corporation can take by condemnation proceedings the property of another corporation having the power of eminent domain without obtaining the permission of the State Corporation Commission.

When this permission has been obtained the proceedings would be conducted pursuant to the provisions of Article 5, Chapter 1, Title 33 of the Code. The pertinent provisions of Section 58 of the Constitution of Virginia are as follows: “It (the Legislature) shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation, * *.”

Section 33-67 of Article 5, hereinafter referred to, provides in substance that upon payment of the amount of the award of the Commissioners to the owner or into court for his benefit title to the property shall vest in the condemnor. It is apparent from this section and the Constitutional provision, above referred to, that the property cannot be taken until the compensation is paid. I am of the opinion, however, that this would not affect the institution of the proceedings and that you could proceed with condemnation without having the funds available to pay the award, but that title to the property would not vest in the Commission until the amount of the award ascertained by the Commissioners has been paid to the owner or into court for his benefit.

HIGHWAYS—Item 350 of Appropriations Act—Markers of route of Lee’s Retreat. F-192 (237)

February 18, 1955.

GENERAL J. A. ANDERSON,
Commissioner, State Department of Highways.

This is in reply to your letter of February 15, 1955, in which you state the following:

“I am attaching herewith a file on the above captioned matter with a request that your office render an opinion as to the proper construction of Item 350 of the Appropriation Act of 1954.

“I have been advised by a member of the General Assembly that the original intent of the drafters of this section was to provide historical markers for the route of General Robert E. Lee’s Retreat from Richmond to Appomattox, Virginia. It appears that sufficient funds were appropriated to provide for markers along this route. However, as is seen when this section was finally drafted, it provided for these markers to be placed on the route of General Robert E. Lee’s Retreat from Petersburg to Appomattox.

“In light of the foregoing, will you please render an opinion as to how this section should be construed.”

Perhaps the most common rule of statutory interpretation is the rule that a statute clear and unambiguous on its face need not and cannot be subject to the process of statutory interpretation. While there is a well recognized rule of construction that a literal interpretation of a statute is to be avoided when possible if it is plainly counter to the legislative purpose and leads to unreasonable or absurd consequences, this rule cannot be brought into play until it appears that the statute is ambiguous and subject to interpretation.
Item 350 of the Appropriation Act of 1954 (Chapter 708) provides in part as follows:

"It is further provided that out of this appropriation of $21,427,015 the first year, there is hereby appropriated for placing directional markers along the route followed by General Robert E. Lee in his retreat from Petersburg to Appomattox............................................ $2,000."

In view of the language expressly providing for the markers to be placed along the route of retreat from Petersburg to Appomattox, it is my opinion that the statute is clear on its face and is not subject to a construction which would change the route from Richmond to Appomattox.

HIGHWAYS—Putting abandoned primary into secondary system—Procedure for.
F-192 (17)
July 16, 1954.

Honorble R. Page Morton,
Commonwealth’s Attorney, Charlotte County.

I am advised by the Department of Highways that Route 360 (previously recorded as Route 15) was relocated and constructed in 1935. The portion of the old location lying between Route 715 and Route 47 is the 1.2 miles to which you refer.

On November 27, 1935 the State Highway Commission abandoned this section of Route 360 as a primary highway.

We have no record of any action taken by the County authorities at that time. The interest of the Department of Highways in this section of road appears to have been a thirty-foot easement for road purposes.

The abandonment of this section of road was made under authority of Section 1, Chapter 212, Acts of Assembly of 1926. This section was repealed in 1950. You will note that abandonment pursuant to this section did not abandon the road as a public way but simply deleted it from the primary system of State Highways.

If the road is still used as a public way, and the easement still exists, then I am of the opinion that all that would be necessary to add this road to the secondary system would be the acceptance and approval by the State Highway Commission of a resolution from the Board of Supervisors requesting that this road be accepted for maintenance as a part of the secondary system.

HIGHWAYS—Recording deeds and plats for in cities. F-116 (347)
June 24, 1955.

Honorble J. A. Anderson,
Commissioner, State Highway Commission.

This is in reply to your letter of June 23, 1955 in which you inquire as to whether the clerks of the courts of record in the cities of Hampton and Norfolk may accept deeds and plats in conjunction with the Hampton Roads Crossing project within the respective cities for recordation in a State Highway Plat Book as provided in § 17-69.1 of the Code of Virginia of 1950, as amended.

As stated in your letter, §17-69.1 of the Code, providing for recordation of such plats in State Highway Plat Books, does not include a provision inclusive of courts of record in cities. However, your attention is invited to § 17-68 of the Code of Virginia which provides as follows:
"§ 17-68. Recordation of maps.—All plats and maps may in the discretion of the clerks of the several circuit, corporation or hustings courts be recorded in a book to be known as the plat book. And in case of such recordation of any plat or map which is attached to or made a part of any deed, deed of trust or writing which is recorded in the deed book, an appropriate note shall be made on the deed book where such deed, deed of trust or other writing is recorded, referring to the plat book and page where the plat or map is recorded and the clerk shall endorse on the plat and plat book the date of the recordation and a reference by book and page to the recorded instrument of which it is a part and shall sign the certificate. No clerk, however, shall be required to spread upon the records of his office any such plat or map if it be larger than the sheets of the deed book or plat book kept in his office."

As may be seen from the foregoing quoted statute, clerks of all courts of record are authorized to put the record all plats and maps in a book to be known as the Plat Book. I am of the opinion that the clerks of courts of record of cities may accept a State Highway Plat Book and record therein the plats prepared in conjunction with the Hampton Roads Crossing project.

As to the question of fees to be charged by the clerks for this service, I am of the opinion that the general statutory provisions fixing the fees to be charged by clerks must obtain rather than the fee provision in § 17-69.1 of the Code. For your information § 14-123 of the Code is herein quoted insofar as here germane.

"§ 14-123. Clerks of circuit and other courts.—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:

* * *

(2) For recording a plat of not more than six courses or lines, or for a copy thereof, one dollar.

* * *

(3) For each other distinct line or course above six, five cents.

* * *

HIGHWAYS—Revenue bond projects—Collection of toll from students. F-201 (321)

Honorable Burton Marve, Jr.,
Deputy Commissioner, Department of Highways.

May 26, 1955.

This is in reply to your letter of May 12, 1955, which I quote in full:

"I am attaching herewith a copy of a letter under date of May 2, 1955 from the firm of Mitchell, Pershing, Shetterly & Mitchell, bond counsel for the Revenue Bond projects, to the Department of Highways wherein such firm states that in its opinion § 22-277 of the Code of Virginia of 1950, as amended, is inapplicable to the State Highway Commission and therefore under § 33-173.1 of the Code it is improper for the Commission to issue students free passage over projects secured through the issuance of revenue bonds.

"Inasmuch as this opinion would require the Department to discontinue its present practice of issuing passes to students over the Revenue Bond projects, an opinion is requested of your office as to whether the Highway Commission may properly continue such practice."

The conclusion of Bond Counsel that it is improper to allow free student passage over toll facilities secured by Toll Revenue Bonds is based on the premise
that no exception is provided therefor in § 502 of the Trust Indenture of 1954 or in § 33-173.1 of the Code of Virginia (1950), and that § 22-277 of the Code, providing free passage over toll facilities for students, is inapplicable to the State.

At the outset it should be pointed out that the Trust Indenture Securing the Virginia Toll Revenue Bonds (Series 1954) was executed subject to the existing laws of the Commonwealth, and, therefore, any conflict therein with any statutory provision must necessarily be resolved to give effect to the statute.

With all deference to learned Bond Counsel, I cannot agree that § 22-277 of the Code of Virginia of 1950 is by its terms inapplicable to the State. That section provides, in so far as here germane, as follows:

"It shall be unlawful for any county, road district, municipality, corporation, public or private, or any person to collect toll for the use of any of the roads or highways or bridges in this State by any pedestrian or any horse or horse-drawn vehicle, or motor vehicle, when such pedestrian is a pupil using the facilities for daily use in going to or returning from immediate attendance upon any school, college or educational institution in this State, or when such horse is being ridden by, or such vehicle is carrying any pupil or student using the facilities daily for going to or from immediate attendance upon any school, college, or other educational institution in this State."

It is well established that in common usage the word "person" does not include the sovereign, and statutes embodying the word are generally construed to exclude the sovereign. However, when the Legislature has provided any express definition to be used, unless the context of the statute would dictate otherwise, such definition must be given effect. § 1-13.19 of the Code of Virginia of 1950, as amended, provides: "The word 'person' may extend and be applied to bodies politic and corporate as well as individuals." Undoubtedly, the State is a "body politic" and, therefore, a "person" under this definition.

Such a construction is reasonable when the purpose of a statute can be clarified by such construction. At the time of the original enactment of § 22-277 of the Code the State owned no highway toll facilities. That section was amended and reenacted by the 1950 session of the General Assembly. There is little question that the Legislature knew of the construction which had been placed on § 22-277 of the Code, both by this office and the administrative body responsible for the collection of tolls on highway toll facilities. Since the entry of the State into the field of highway toll facilities in 1949 the administrative practice of the Department of Highways has been to exempt students from the payment of tolls when such students come within the purview of § 22-277 of the Code.

Therefore, I conclude that § 22-277 of the Code was intended by the General Assembly to be applicable to State owned toll facilities, and it remains only to determine if the construction placed on that statute was superseded by the passage of § 33-173.1 of the Code of 1950.

By enactment of Chapter 278, Acts of Assembly of 1950, the Legislature made unlawful the granting of free passage over highway toll facilities secured by State Revenue Toll Bonds, except in specified cases. That Act was approved on April 4, 1950, and was codified as § 33-173.1. By enactment of Chapter 379 of the Acts of Assembly of 1950, the Legislature amended and reenacted § 22-277 of the Code, which makes unlawful the charging of tolls for passage of students over highway toll facilities under specified circumstances. This Act was approved on April 5, 1950. Thus, the same session of the General Assembly enacted two statutes on the same subject, which are in apparent conflict.

This ostensible conflict raises the question of legislative intent at the time of the enactment of the two statutes. It is a well established rule of statutory construction that statutes in pari materia—relating to the same subject—although in apparent conflict, are, so far as reasonably possible, construed to be in harmony with each other. This is especially true where the statutes are passed at the same session of the Legislature. It is to be noted that § 22-277 was amended and
reenacted only one day after the enactment of § 33-173.1, and both relate to the collection of tolls on highway toll facilities. In light of the knowledge that § 22-277 had been construed to be applicable to the State, the General Assembly could have made express exception for the State when reenacting § 22-277, if such had been the intent. The General Assembly has convened for two sessions subsequent to such enactments. Had there been any misconstruction placed on the applicability of either statute, there has been ample opportunity for corrective measures to be taken.

Our Courts have always given great weight to the practice and interpretive regulations by officers, administrative agencies, departmental heads and others officially charged with the duty of administering and enforcing a statute when determining the applicability of a statute. Where a statute has received a practical interpretation and the statute as interpreted is reenacted, the practical application is regarded as presumptively the correct interpretation of the law. In this case § 22-277 of the Code has been interpreted both before and subsequent to the enactment of § 33-173.1 as being applicable to State operated toll facilities. Until such interpretation is superseded by legislative enactment or judicial determination I see no necessity in changing that interpretation simply because a different construction may logically be applied.

In view of the foregoing, I am of the opinion that the present practice of the State Highway Commission in allowing free passage to students coming within the purview of § 22-277 of the Code over highway toll facilities should be continued.

HIGHWAYS  Toll Revenue Bonds—Removal of tolls before bonds paid. F-192a (141)

HONORABLE GEORGE H. HILL,
Member, House of Delegates.

This will acknowledge receipt of your letter of November 1, 1954.

The questions which you ask are of a nature which we can answer only in a limited way. You, of course, realize that the bonds of the above issue have been sold to the purchasers thereof after public advertisement requesting bids. The Trust Indenture securing the bonds was authorized by resolution of the State Highway Commission at a regular meeting on October 19, 1954. Any interpretation which we might place upon provisions of the Trust Indenture would not, of course, be binding upon the purchasers of the bonds.

We believe a careful reading of the paragraph on page 58 of the Trust Indenture, to which your letter refers, will answer your first three questions.

Your first inquiry is as follows:

"Does 'and if then permitted by law' mean that the law would have to be changed to permit discontinuance of toll collections on the Nansemond and Chuckatuck Bridges?"

It has been our understanding that the expression "and if then permitted by law" is simply a recognition of the fact that the State Revenue Bond Act, in its present form, may not permit the discontinuance of the collection of tolls for the use of the Nansemond and Chuckatuck Bridges. If the Legislature, in the future, permits such discontinuance, the bond holders under the Trust Indenture dated September 1, 1954, have given their consent to such discontinuance upon compliance with the conditions stated in the paragraph to which you refer.

Your next inquire:

"Does 'the gross revenues from the Projects' refer to existing projects, not including the bridge-tunnel, or does 'the Projects' necessarily involve, 

and for proper interpretation would have to await completion of the Hampton Roads bridge-tunnel?

In connection with this question, we call your attention to the definition on page 23 of the Trust Indenture as follows:

"The word 'Projects' shall mean, collectively, the James River Bridges, the York River Bridge, the Rappahannock River Bridge, the Hampton Roads Crossing and, until the Hampton Roads Crossing shall been opened for traffic, the Chesapeake Ferries."

You ask for our opinion as to which "two complete fiscal years" are meant by the reference on page 58 of the Trust Indenture to which you refer. We believe the section answers your question; it provides that

"** the Commission may ** discontinue the collection of tolls ** in the event ** the gross revenues from the Projects for two consecutive complete fiscal years immediately preceding **

that is, preceding the date of discontinuance, shall have exceeded the amount stipulated. But the tolls may not be discontinued until after the opening for traffic of the Hampton Roads Crossing.

You will appreciate that an answer to your question 4 involves engineering conclusions upon which we are not qualified to express an opinion.

You further inquire if the fact that the State Highway Commission proposes to abandon collection of tolls for local traffic across the Chuckatuck or Crittenden Bridge about January 1, 1955, violates the terms of the Trust Indenture.

Since the bonds of the above issue have been sold on the basis of representa-
tions contained in the report of the Commission's Traffic Engineers, we do not see how any action of the Commission in line with the recommendations of the Traffic Engineers could violate the terms of the Indenture.

Your last inquiry again involves engineering and financial matters upon which this office is not qualified to speak. I am certain that you will agree with me that the extremely advantageous interest rate at which the bonds of the above issue were sold reflects the public confidence in the character and integrity of the Commonwealth of Virginia, and the knowledge of the manner in which the State Highway Commission meticulously meets its responsibilities.

HONORABLE JESSE W. DILLON,
Treasurer of Virginia.

This is in reply to your letter of March 7, 1955, in which you request my opinion as to whether the State of Virginia Toll Revenue Bonds come within the definition of State bonds as used in § 2-181 of the Code of Virginia.

These State of Virginia Toll Revenue Bonds contain on their face the statement that the State of Virginia promises to pay, and while this promise is a restricted one in the sense that the State promises to pay solely from the toll revenue and not from the general funds of the State, I am of the opinion that these bonds constitute State bonds as contemplated by §2-181 of the Code of Virginia.

I feel that § 33-240 supports my opinion that these State of Virginia Toll Revenue Bonds are to be considered State bonds, for that section makes these State of Virginia Toll Revenue Bonds "securities in which all public officers and bodies of this State and all political subdivisions thereof ** may properly and legally invest funds within their control."
HIGHWAYS—Who entitled to toll free passage over facilities. F-42 (216)


HONORABLE THOS. B. STANLEY,
Governor of Virginia.

This has reference to your letter of January 28, 1955, in which you ask my opinion with respect to the contents of an enclosed letter addressed to you from Whiting-Turner Contracting Company under date of January 27, 1955. That letter raises a question as to the applicability of the toll requirements for the passage of workmen and equipment of a contractor employed by the Department of Highways for the repairs of bridges constituting a part of toll facilities under the State Revenue Bond Act.

Section 33-11, Code of Virginia, 1950, as amended, provides for free passage over toll bridges and toll ferries for persons specified therein and under the circumstances mentioned therein. Insofar as here germane, that section provides as follows:

"The State Highway Commissioner, the Commissioner of the Division of Motor Vehicles, the Superintendent of State Police, members of the State Highway Commission and all officers, agents and employees of the Department of Highways, the Division of Motor Vehicles and the Department of State Police when actually engaged in the performance of their duties as such and having and exhibiting the certificates hereinafter mentioned, may use all toll bridges and toll ferries in this State without the payment of toll."

It appears that one working on a toll facility by virtue of a contract with the Department of Highways would be classified as an agent of the Highway Commission, and as such the Commissioner would be at liberty to issue a certificate to such agent for free passage while actually engaged in the performance of his contract. It is my considered opinion, however, that this privilege could not be extended to the vehicles of the individual employees of the contractor without violating the provisions of Section 33-11 of the Code and the terms of the Trust Indenture securing the bonds on the toll facilities. It follows that free passage over toll projects could be permitted to vehicles owned by the contractor, whether carrying workmen or equipment, if a certificate has been issued to such contractor by the State Highway Commissioner.

HOTELS AND RESTAURANTS—What establishments are under food regulations. F-88 (47)

August 10, 1954.

HONORABLE ALTON I. CROWELL,
Commonwealth's Attorney for Pulaski County.

This is in reply to your letter of August 3, 1954 in which you ask to be advised whether the provisions of Chapter 3, Title 35, Code of Virginia, 1950, are applicable to the following:

1. Boarding houses, the operators of which furnish meals and dining accommodations for compensation by the meal, day, week or month;

2. Church kitchens and dining accommodations where groups are served for compensation.

Unless otherwise expressly exempted the Rules and Regulations Governing Food Establishments Adopted by the State Board of Health are applicable to all restaurants as defined in Section 35-25 of the Code as follows:
"Restaurant" includes restaurant, coffee shop, cafeteria, short order cafe, luncheonette, hotel dining room, tavern, sandwich shop, soda fountain, and all other public eating and drinking establishments by whatever name called, including the dining accommodations of clubs, all State institutions, and schools and colleges both public and private; provided, however, this chapter shall not be construed to include facilities of public service corporations under the jurisdiction of the State Corporation Commission; * * *.

Section 35-38 makes the following exemptions:

"This chapter shall not apply to boarding-houses that do not accommodate transient guests or to cafeterias operated by industrial plants for employees only."

Although you do not state specifically that the boarding houses in question accommodate transient guests, it would appear that such is the case inasmuch as such services are furnished to guests for one meal, a day or any other length of time. I am, therefore, of the opinion that the exemption as set forth in Section 35-38 of the Code is not applicable. Therefore, such boarding houses would be subject to the regulations of the State Board of Health.

With regard to your second inquiry I entertain serious doubt as to whether church kitchens fall within the definition of "restaurants" as defined in Section 35-25 of the Code. It is my understanding, as a general rule, such facilities are operated by the church for its membership only and would thus be excluded from the term "public eating establishment". It would appear that the extent to which dining accommodations are furnished the public would determine the applicability of the above mentioned definition in the individual case.

Housing Authorities — Regional — are perpetual political subdivisions.

Mr. George H. Hill,
Member of House of Delegates.

This is in reply to your letter of May 6, 1955, a portion of which I quote herein:

"The United States Government is negotiating with the Cities of Warwick and Hampton for the sale of certain Defense Housing Projects located within the two cities. It is anticipated that the said Defense Housing Projects will be transferred from the United States Government to the Regional Housing Authority for Warwick and Elizabeth City Counties, Virginia. The United States Government has raised the following questions as to the legal status and powers of the said Regional Housing Authority. As a member of the House of Delegates representing the City of Warwick, I respectfully request your opinion as to these questions and further request your opinion as to whether any additional legislation to effectuate this authority is needed.

1. The present legal status of the Regional Housing Authority for the Counties of Elizabeth City and Warwick, Virginia, established in 1942?

2. The effect of the transition from counties to first class cities, upon the powers and functions of the Regional Housing Authority as organized in 1942?"

Your questions numbered 1 and 2 will be answered together inasmuch as any conclusion reached as to the legal status of the Regional Housing Authority
for the Counties of Elizabeth City and Warwick, Virginia, must necessarily take into consideration the transition of such counties to cities of the first class.

Chapter 224 of the Acts of Assembly of 1942, the Act of the General Assembly authorizing the creation of Regional Housing Authorities, provides in part as follows:

"Section 4a. Creation of Regional Housing Authority. If the board of supervisors of each of two or more contiguous counties by resolution declares that there is a need for one housing authority to be created for all of such counties to exercise in such counties powers and other functions prescribed for a regional housing authority, a political subdivision of the Commonwealth to be known as a regional housing authority shall thereupon exist for all of such counties and exercise its public and corporate powers and other functions in such counties; * * * ."

By virtue of this Act a political subdivision of the Commonwealth was authorized, and when all necessary precedent action had been concluded by the affected counties, a new political subdivision came into being. In your letter you stated that both counties took all necessary action in 1942 in compliance with the statutory requirements. Therefore, the Regional Housing Authority for the Counties of Elizabeth City and Warwick assumed the cloak of a political subdivision of the Commonwealth empowered with all authority conferred by the General Assembly to Regional Housing Authorities.

There is no provision in the Act of 1942 or in the Virginia Housing Law, Title 36, Code of Virginia, 1950, for the dissolution of such a political subdivision once it is created. No change in the governmental nature of the counties which created the Housing Authority would affect the legal status of the Authority unless the legislative authority providing for the change in such counties made express provision to such effect. It is to be noted that the charters of both the City of Hampton and the City of Warwick are silent as to Regional Housing Authorities previously created, but contain provisions for the continuation of all county laws, ordinances or resolutions adopted by the Boards of Supervisors for such counties.

In view of the foregoing, I am of the opinion that the Regional Housing Authority of Warwick and Elizabeth City Counties created in 1942 continues as a valid political subdivision of the Commonwealth. This conclusion renders unnecessary the answering of your inquiry relative to the necessity for additional legislation.

HOUSING AUTHORITIES — Regional — Area of operation — Same as when Authority created. F-156 (310)

HONORABLE GEORGE H. HILL,
Member of the House of Delegates.

This is in reply to your letter of May 16, 1955, in which you request my opinion on the following two questions:

"1. Does the Regional Housing Authority as created for the Counties of Warwick and Elizabeth City, Virginia, have the right to exercise its powers within the corporate limits of the Cities of Warwick and Hampton, Virginia?

"2. If your opinion to the above question is in the negative, then does the Regional Housing Authority as created for the Counties of Warwick and Elizabeth City, Virginia, have the right to exercise its powers within the boundaries of the former Counties of Warwick and Elizabeth City, Virginia?"
In my opinion, the Regional Housing Authority, as created for the Counties of Warwick and Elizabeth City in 1942, has the authority to exercise its powers within the same geographical territory today that it had at the time of its creation in 1942.

It is my understanding that at the time the Regional Housing Authority was created in 1942, the area of its operation was for the entire County of Warwick and the entire unincorporated area of Elizabeth City County. Therefore, at present, the Regional Housing Authority would have authority to exercise its powers within the entire area comprising the City of Warwick and so much of that area of the present City of Hampton which in 1942 was the unincorporated area of the then County of Elizabeth City.

**INSANE AND MENTALLY ILL—Duty of sheriff when committed. Expense of transportation. F-148 (76)**

**September 8, 1954.**

**Honorable Charles J. Ross,**
Clerk, Circuit Court of Madison County.

I have your letter of September 1, 1954 in which you state as follows:

"The Board of Supervisors of Madison County would be pleased if you would answer the following questions:

1. When a mentally ill, but not violent, person has been committed to a mental institution and placed in the hands of the Sheriff, should the Sheriff

(a) immediately transport him to a mental institution without any authority from the institution?

(b) place him in jail?

(c) let him stay at large until called for by the institution?

2. When the Sheriff transports the person to an institution who is responsible for the expenses incurred thereby?

"There seems to be some misunderstanding between the Sheriff of this County and the institutions as to what should be done with a person when committed to the hands of the Sheriff, and who should pay the expenses."

Section 37-71 of the Code of Virginia of 1950 provides as follows:

"If the commission decides that the person shows sufficient evidence of being mentally-ill, mentally-deficient, epileptic or inebriate and should be confined in a hospital or colony, and ascertains that he is a legal resident of this State, then the judge or justice shall order such person to be delivered to the care of the sheriff of the county or sergeant of the city or town to be kept and cared for by him in the nearest State Hospital or colony or special ward or room in the Medical College of Virginia or University of Virginia hospitals, or in a general hospital approved by the State Hospital Board for such purpose, or in some other convenient institution likewise to be approved by the State Hospital Board, until such person is conveyed to a hospital or colony, or otherwise discharged. The cost of care before removal to the State hospital or colony to which the patient is committed is to be paid from the State treasury from the same funds as for care in jail."

In the event none of the aforementioned institutions are available, or the person committed is violent or dangerous, such person may be confined in a separate cell in jail as provided in Sections 37-78 through 37-81 of the Code."
In answer to your second inquiry, the cost of transporting a person committed to a hospital or colony is borne by the county or city of the person committed to the station designated by the Superintendent of the hospital or colony as provided in Section 37-84 of the Code. Section 37-89 of the Code provides for transportation costs from such designated station to be borne as follows:

"The cost of conveying persons committed to any hospital or colony, except those committed to the department for the criminal mentally-ill, from the station designated by the superintendent of such hospital or colony shall be paid from funds appropriated for the support of the hospital or colony."

INSANE AND MENTALLY ILL—Person signing furlough agreement does not assume financial responsibility for patient. F-231 (142)

November 9, 1954.

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

This is in reply to your letter of November 1, 1954, in which you request an opinion on the following situation:

"A patient who is on furlough from the Western State Hospital at Staunton, Virginia, recently applied to a local department of public welfare for old age assistance. Her application was denied and she appealed to the State Board of Welfare and Institutions in accordance with the provisions of Section 63-131 of the Code. The question has been raised as to whether a person who signs the usual agreement under which a patient is furloughed from a State hospital thereby becomes responsible for the patient's support while he or she is on furlough, there being no other legal responsibility on the signer for the support of the patient."

Under the terms of the Furlough Conditions and Agreement generally used in such situations, the person into whose charge a patient is committed agrees to "take charge during furlough of [the patient]; to report to the Superintendent immediately in case of death or of adverse changes in the patient's mental condition and whenever a report is requested by the Superintendent; to exercise proper care over him/her and to deliver him/her safely to the Hospital or Colony when required to do so by the Superintendent, without expense to the hospital or colony."

Initially, I might state that I believe the phrases "without expense to the hospital or colony" and "without expense to the State", which appear in the statute and the Agreement respectively, refer solely to the covenant to deliver the patient safely to the Hospital at the direction of the Superintendent and have no bearing upon the precise problem under consideration. Moreover, I think that the phrases "take charge" and "exercise proper care" should be accorded no special or technical meaning, but should be interpreted as they are generally employed and customarily understood in every-day usage. Construed in this
manner, these phrases are not synonymous with the terms "support" and "maintenance"; consequently, I am constrained to believe that one who signs the usual Furlough Agreement undertakes merely to exercise a benign custodial vigilance over the patient placed in his charge, and does not thereby assume the financial responsibility for the patient's support.

This conclusion would appear to be consonant with the provisions of the Code relating to old age assistance, and particularly those which deny eligibility for such assistance only to one who is an inmate of or being maintained by an institution or who is a patient in an institution. Section 63-115 (d), (f). Where a patient is on furlough he is not an inmate of an institution nor is he maintained by an institution during the furlough period. Moreover, Section 37-135 is clearly remedial in nature and should be construed, so far as possible, to subserve the benevolent policy manifest therein. It would seem that, in agreeing to take charge of a patient on furlough, a person renders a particularly beneficial service during a period of possible readjustment which may well culminate in the patient's release from confinement. In this connection, Section 37-135.1 of the Code provides that a patient who has remained on furlough for one year shall be discharged. Any interpretation of the statute authorizing trial visits—or the Furlough Agreement drafted in accordance with the statutory provisions—which would impose upon one the obligation of assuming the financial support of a patient eligible for furlough, would seriously affect this critical phase of any rehabilitation program, impede the return of patients to normal life, and thus subvert the manifest humanitarian purpose of the statute.

In view of the foregoing, I am of the opinion that a person who signs the usual Furlough Agreement does not thereby become responsible for the patient's financial support during the furlough period.

INSURANCE—Company must be licensed in this State before insuring a State agency. F-162 (233)

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

February 23, 1955.

I have your letter of February 17, from which I quote below:

"A committee of the Virginia State Bar is investigating a blanket liability insurance policy for its members. This business is now being written by several companies on an individual basis, but the Bar feels that there might be some considerable savings if we could get the blanket coverage for the entire membership.

"The only insurance company that is known to write any such policy is not licensed to do business in Virginia. I am writing to inquire as to whether or not the Virginia State Bar, a State Agency, would be permitted to place this insurance with a company not licensed and qualified to do business in Virginia."

Section 38.1-85 of the Code provides that no insurance company "shall engage in any insurance transaction or do any insurance business in this State until it has obtained a license" from the State Corporation Commission so to do. If an insurance company writes a blanket liability insurance policy covering the members of the Virginia State Bar, it is doing an insurance business in this State. The fact that the Virginia State Bar is a State agency, in my opinion, would not relieve the insurance company from complying with the requirements of the statute to which I have referred.
REPORT OF THE ATTORNEY GENERAL

JAILS AND PRISONERS—No credit for time unless actually in jail. F-75 (134)

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

This is to acknowledge your letter of October 28, 1954. You state that, on June 15, 1954, a man was convicted by a Trial Justice Court of your County and sentenced to serve twelve months in jail, on which date he was committed to jail; that on June 19, 1954, the jailer released the prisoner for some reason not known; that the release of the prisoner was overlooked by the Sheriff and other officers, as well as the Trial Justice.

You further state:

"I would like to know if the prisoner is entitled to full credit beginning with June 15th and running through the present day for this period of time. In other words, is he to be treated as though he were a trusty and given full credit for the time from June 15th, or is he to be given credit only for the days actually in jail?

"I might state that the records do not show that this man was released. The records only show that he was committed to jail and as far as the records go he is still there."

This office has previously held that, where a jailer discharges or releases a prisoner prior to the expiration of the prisoner’s service of the sentence imposed upon him, such discharge or release constitutes a species of escape by the prisoner who may be re-arrested and brought back to serve the remainder of his sentence. Section 6, C.J.S. § 21, page 627.

In my opinion the prisoner may not be treated as serving any part of his sentence during the time he was not confined in jail due to the reason stated by you and, consequently, he would not be entitled to any credits during such period of time. He would not be treated as a trusty during such time.

JAILS AND PRISONERS—Felon may not be transferred to road force to serve non-support sentence. F-383 (69)

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

This is in reply to your letter of August 18, 1954, in which you request my opinion as to whether a person serving a sentence for a felony at the State Farm may be transferred to the State Convict Road Force to serve a sentence of twelve months for the misdemeanor of non-support imposed by a juvenile and domestic relations court subsequent to his commitment to the State Penitentiary, which sentence of the juvenile and domestic relations court was ordered to run concurrently with the previous sentence given on the felony conviction.

It is my opinion that the only way this convict could be transferred to the State Convict Road Force would be for the Department of Welfare and Institutions to voluntarily transfer him. The placement of a convicted felon sentenced to the penitentiary is completely within the discretion of the Department of Welfare and Institutions. The Judge of the trial court does not have the authority to request that he be placed on the State Convict Road Force as he does in the case of a misdemeanant.

Should the convict be transferred to the State Convict Road Force by the Department of Welfare and Institutions, it is my opinion that his family still could not receive the support payments provided by § 20-63 of the Code until after he had completed the sentence for the felony. They could receive payments for that portion of the sentence for non-support which extended beyond the sentence for the felony.
JUDGMENTS — Proper official to issue execution upon — Person in another county. F-145 (264)  

March 25, 1955.

HONORABLE CHARLES E. REAMS, JR.,  
Trial Justice for Culpeper County.

This is in reply to your letter of March 22, 1955, which reads as follows:

"I would appreciate your opinion and answer to the questions set out below, based on the following facts:

"FACTS: A secures a judgment against B in Trial Justice Court of Warren County. Judgment is docketed in Warren County. B leaves Warren County and takes up residence in Culpeper County where he is employed. A secures an abstract of the above judgment and docketed same in Culpeper County.

"QUESTIONS:

1. Can the Clerk of the Circuit Court of Culpeper County issue a valid execution based on the abstract recorded in his county?

2. Can an action in garnishment be instituted in Culpeper County, based on an execution issued in Warren County and placed in the hands of the Sheriff of Culpeper County?

3. Can a garnishment based on the above judgment be legally instituted and executed in any county other than the county where the judgment was obtained?"

With respect to question No. 1, it is provided in § 16-79 of the Code that the clerk of the circuit court of the county in which the judgment was entered may issue executions on an abstract of such judgment docketed in his office. I am unable to find any statutory provision authorizing the clerk of another county to issue an execution upon an abstract of such judgment filed in such county. In the absence of any such statutory authority, it is my opinion that the Clerk of Culpeper County does not have the power to issue an execution upon an abstract of a judgment obtained in the Trial Justice Court of Warren County.

With respect to question No. 2, I am of the opinion that a garnishee summons may be issued only by the officer who issued the execution. The issuance of garnishments is controlled by the provisions of § 8-441 of the Code, and when and where the garnishee summons is returnable is prescribed by § 8-442 of the Code. I am of the opinion, therefore, that a garnishment may not be instituted in Culpeper County upon an execution issued by the Clerk of the Trial Justice of Warren County, even though such execution may be directed to and placed in the hands of an officer of Culpeper County.

With respect to question No. 3, consistent with my answer to question No. 2, I am of the opinion that the garnishment could be instituted only in Warren County. It may, however, be directed to the sheriff of another county, but it must be returnable to the trial justice court or the circuit court of the county in which the judgment was obtained.

JUSTICE OF THE PEACE—Method of appointing when minimum number fail to qualify. F-136b (295)  


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

I am in receipt of your letter of April 29, which I quote below:
“Reference is made to Sections 24-157 and 24-158 of the Code of Virginia dealing with the election and appointment of Justices of the Peace. My question is this: In the event that three persons do not offer for election for Justice of the Peace from each of the magisterial districts, does the Judge of the Circuit Court have the power to appoint Justices in such a case?

"Of course, Section 24-158 gives the Court the right to appoint a greater number of Justices than those specified in the preceding section, if it is the Judge's opinion that the public service requires a greater number of Justices. In many instances there are persons who apply for the appointment of a Justice of the Peace during a term when actually there are not three Justices from the magisterial district who were elected at the preceding general election. In such a case does the Judge have the power to appoint?"

Section 24-157 of the Code provides for the election of three Justices of the Peace in each magisterial district of a county.

Section 24-158 of the Code provides in part as follows:

"Whenever a circuit court shall be of opinion that the public service requires a greater number of justices of the peace in any district than those specified in the preceding section, and shall so enter of record and designate the number of such additional officers, notice thereof shall be published in such district, and at the next succeeding general election for district officers, such additional officers shall be elected in the mode prescribed for the election of district officers, and continue to be elected at each succeeding general election of district officers until otherwise ordered by the court. And it shall be lawful for the court to appoint officers to serve until such additional officers are elected and qualified. * * *"

In my opinion, the latter section is not applicable to the situation presented by you. It is only applicable where the Circuit Court is of the opinion that a greater number than three Justices of the Peace is deemed to be necessary for a magisterial district. The language of the section, it seems to me, admits of no other interpretation.

I direct your attention to Section 24-145 of the Code, dealing with the filling of vacancies in office, which reads in part as follows:

"When a vacancy occurs in any county, city, town or district office, and no other provision is made for filling the same, it shall be filled by the circuit court of the county or corporation court of the city in which it occurs, or the judge thereof in vacation; * * *.

It is my view that, if less than three persons were elected as Justices of the Peace in a magisterial district, there would be a vacancy or vacancies to that extent, and that Section 24-145 is broad enough to authorize the Judge of the Circuit Court of the County to fill such vacancies.

JUSTICE OF THE PEACE—Requirements as to being bonded. F-136b (197)

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

This is in reply to your letter of January 10, 1955, in which you state, in part, "I would appreciate your opinion as to whether Justices of the Peace must
give two separate bonds or whether one will suffice." You refer in your letter to § 15-478 of the Code relating to bonds of certain officers. This section states, in part, that:

"Every county treasurer, sheriff of a county, sergeant of a city, county clerk, clerk of a city court, clerk of a circuit court, commissioner of the revenue, superintendent of the poor, county surveyor and supervisor shall, at the time he qualifies, give such bond as is required by § 49-12."

This section, it will be noted, does not apply to a justice of the peace. Section 19-107 provides that:

"No justice of the peace shall receive any such cash deposit unless and until he shall have given bond before the clerk of the circuit court of his county in the penalty of five hundred dollars, with approved security, and conditioned for the faithful performance of his duties and the proper accounting for all money that may come into his hands."

We are unable to find where there is any requirement for a justice of the peace to execute a bond except as provided in the above section. A justice of the peace must, of course, qualify on or before the day on which his term of office begins pursuant to the provisions of § 15-475 of the Code, but he is not required to give bond except in order to meet the requirements of § 19-107 of the Code.

JUVENILE AND DOMESTIC RELATIONS COURT—Authority to suspend driving permit for non-traffic offense. F-149 (231)

February 18, 1955.

Honorable Ferdinand F. Chandler,
Commonwealth’s Attorney of Westmoreland County.

This is in reply to your letter of February 15, 1955 in which you request my opinion as to whether the Court may suspend the driving permit of a juvenile offender for the violation of a non-traffic offense under the provisions of paragraph 9 of § 16-172.44 of the Code. That paragraph reads as follows:

"As disciplinary measure the court may impose a fine not exceeding fifty dollars upon a child or minor of working age or suspend his driving permit when such child or minor is found by the court to have violated the traffic laws of this State or a State or Federal law or local ordinance. All sums so ordered to be paid may be paid by the child or minor in monthly or weekly installments; such child or minor may also be required to make restitution or reparation for damages resulting from his wrongful conduct."

Paragraph 8 of § 16-172.44 provides that, in the case of traffic violations, the court may suspend the operator's license; therefore, I am of the opinion that, under paragraph 9, the Court may suspend the operator's license for any offense committed by the juvenile, even though it is not one of violation of the traffic laws. The provision concerning the suspension of a driver's permit found in paragraph 9 was not incorporated in that section as originally enacted in 1950, but was added to that section by the 1952 session of the Legislature. If in paragraph 9 the suspension of driver's permits were limited to those cases involving traffic violations, the amendment by the 1952 session of the General Assembly would have been but a mere repetition of the provisions which were already in the Act.
REPORT OF THE ATTORNEY GENERAL

JUVENILE AND DOMESTIC RELATIONS COURT—Clerks may not be delegated judicial powers of court. F-239 (333)

June 9, 1955.

HONORABLE J. LUTHER GLASS,
Consultant, Juvenile Court Law Procedure.
Department of Welfare and Institutions.

This is in reply to your letter of June 8, 1955, enclosing a letter from Honorable Robert B. Davis, Judge of Juvenile and Domestic Relations Court, Bristol, Virginia. Judge Davis raises the question as to whether a clerk of a juvenile and domestic relations court may direct the investigation provided for in § 16-172.30 of the Code and the further investigation permitted under § 16-172.32.

I am of the opinion that the Clerk is not vested with such power. Section 16-172.11 gives the Judge of such court the power to appoint a clerk who shall "keep the court docket and accounts and shall perform such other duties as the judge of the court may prescribe." I do not construe this provision as authorizing the Judge to delegate to the Clerk any of the judicial powers of the Juvenile Court. The Judge, when exercising his judicial functions, is the court established pursuant to § 16-172.4 of the Code, and his qualifications are prescribed by § 16-172.5 of the Code. He alone has the power, subject to the appeal provisions of Article 6, Chapter 7, Title 16 of the Code, to enforce the provisions of said chapter.

JUVENILE AND DOMESTIC RELATIONS COURT—Furniture and supplies—County to furnish. F-239 (289)

April 29, 1955.

HONORABLE S. C. DAY, JR.,
Assistant State Comptroller.

I have your letter of April 27, which I quote below:

"Section 16-77 of the 1950 Code as amended provides that the State shall provide Trial Justices with necessary books, stationery and supplies.

"In most of the counties the Trial Justice is also Judge of the Juvenile and Domestic Relations Court; however, Henrico County appears to have separate courts and we have been presented with a bill for stationery for the Juvenile Court of that County. Should such items, as well as juvenile and domestic relations forms furnished Trial Justices, be paid by the State?"

While the Trial Justice of a County may be appointed as Judge of the Juvenile and Domestic Relations Court of the County, nevertheless, the latter court is a separate court and established as such. See Section 16-172.4 of the Code as amended.

Section 16-172.19 of the Code as amended reads as follows:

"Each city and county shall provide in a manner to be determined by the governing body of the locality a suitable courtroom and offices for the court, and shall furnish all necessary furniture, filing cabinets, dockets, books, stationery, et cetera. The judge, after consultation with the Director shall have the power to determine the form and character of his records and to determine and publish the rules to regulate the proceedings in all cases coming within the provisions of this law when not otherwise provided, and for the conduct of all officers of the court and such rules shall be enforced and construed liberally for the remedial purposes embraced therein. In so far as practicable all such records and rules shall be uniform throughout the State."
In view of the above quoted section, I am of the opinion that a county is required to furnish "all necessary furniture, filing cabinets, docket, books, stationery, et cetera" for the Juvenile and Domestic Relations Court, and that Section 16-77 of the Code as amended, relating to Trial Justice Courts, is not applicable.

JUVENILE AND DOMESTIC RELATIONS COURT—Jurisdiction to grant temporary custody of child to separated parent where no divorce suit is instituted. F-239 (121)

Honorable Lewis F. Jordan,
Judge, Juvenile and Domestic Relations Court.

This is in reply to your letter of October 22, 1954 in which you request my opinion as to whether § 31-15 of the Code of Virginia enables the judge of the juvenile court to act on the petition by either parent for temporary custody, as between the two, of their minor child or children when the parents are living in a state of separation and where no divorce has been instituted. Section 31-15 of the Code provides, in part, as follows:

"When any husband and wife live in a state of separation, without being divorced, and have a minor child of the marriage, any court of record having equity jurisdiction in, or the juvenile and domestic relations court of, the city or county in which the child is, or the judge in vacation, may, in the discretion of the court or judge, upon the petition of the mother or father, award to the petitioner the custody and control of the child for such time, under such regulations and restrictions, and with such provisions and directions, as the case requires and as will best promote the welfare of the child. * * *."

It is my opinion that this section gives the judge of the juvenile court jurisdiction to act on such a petition, and I am also of the opinion that the new Juvenile Act, enacted by the General Assembly in 1950, does not repeal § 31-15 of the Code. In fact, § 16-172.23 of the new Juvenile Act provides, in part, as follows:

"* * * Except as hereinafter limited, they shall have * * * exclusive original jurisdiction * * * over all actions, matters and proceedings involving:
"1. The custody, support, control or disposition of a child:

* * * *

"(c) Whose custody or support is a subject of controversy, provided, however, that in such cases jurisdiction shall be concurrent with and not exclusive of courts for equity jurisdiction, as provided in § 16-172.26 hereof;

* * * *

"(j) Whose condition or situation is alleged to be that his welfare demands adjudication as to his disposition, control and custody, provided that jurisdiction in such cases shall be concurrent with and not exclusive of that courts having equity jurisdiction, as provided in § 16-172.26 hereof."

In my opinion the above-quoted provision of the new Juvenile Act reiterates the jurisdiction of the juvenile and domestic relations court to grant temporary custody of a child to either parent when the parents are living in a state of separation and where no divorce has been instituted.
REPORT OF THE ATTORNEY GENERAL

JUVENILE AND DOMESTIC RELATIONS COURT—When child comes under
guardianship of State. F-239a (258)

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

March 16, 1955.

This is in reply to your letter of March 3, in which you advise that the City of Richmond has been permitted to charge the State on a per diem basis for State wards quartered in the city detention home. You state that in many instances several days elapse between the date of commitment and the date upon which the State Board of Welfare and Institutions removes a child from the detention home, and you inquire at what time "a child becomes a ward of the State".

A review of previous legislation on this subject reveals that children committed to various agencies or homes pursuant to the Juvenile and Domestic Relations Court Law (Code of Virginia (1950), as amended, Title 16, chapter 7) are no longer deemed "wards of the State". Formerly, under the provisions of sections 63-258 and 63-260, Code of Virginia (1950), all delinquent, dependent or neglected children as defined in Title 63, chapter 12, were so considered, and the Juvenile and Domestic Relations Courts were authorized to declare such children wards of the State and enter orders providing for their custody, care and supervision. These sections were subsequently repealed by Chapter 383, Acts of Assembly, 1950. However, the terminal paragraph of section 1 of this chapter provides:

"A child coming within the purview of this law, whose custody the court assumes, shall be considered a 'ward of the State'; and for his or her minority shall be subject to such watchful care, custody, discipline, supervision, guardianship and control as may be conducive to the welfare of the child and the best interests of the State."

By amendment in 1952 the phrase "shall be considered a ward of the State" was deleted from the above quoted paragraph. It is thus apparent that children committed by the Juvenile and Domestic Relations Courts are no longer denominated wards of the State by law.

Although existing legislation makes no specific provision for a declaration by the court that a child is a ward of the State, section 16-172.44, Code of Virginia (1950), as amended, does prescribe:

"If the court shall find that the child or minor is within the purview of this law it shall so decree and by order duly entered proceed as follows:

* * * *

"Take custody and commit the child or minor to the guardianship and custody of the State Board of Welfare and Institutions if the child's or minor's behavior or condition is such that the court deems it cannot be satisfactorily or adequately dealt with in his own locality or with its resources. All children intended to be placed in one of the industrial schools of the State shall be committed to the State Board of Welfare and Institutions, it being the purpose of this law that the Director shall determine which children or minors shall be so placed."

Clearly, in view of the italicized language, it is by virtue of the order ancillary to its decree that a court takes custody of and commits a child or minor to the care of the State Board of Welfare and Institutions. I am, therefore, of the opinion that, while not having the technical status of a "ward of the State", such child or minor is under the guardianship of the State from the date of the entry of such order.
REPORT OF THE ATTORNEY GENERAL

LABOR LAWS—Children under 16 may not sell soft drinks at football games. F-56 (100) September 30, 1954.

HONORABLE DOWNING L. SMITH, Commonwealth's Attorney for Albemarle County,

I regret that my reply to your letter of September 14 has been unavoidably delayed.

You ask whether children may be employed "for the purpose of distributing and selling soft drinks and other innocuous articles at the home football games at the University of Virginia." You state that the children vary in age from about thirteen up to seventeen years.

Section 40-109 of the Code, prohibiting certain employment of children, provides, among other things, that:

"No boy under sixteen and no girl under eighteen years of age shall be employed, permitted or suffered to work * * * in any theatre, concert hall, cabaret, carnival, floor show, pool hall, bowling alley or place of amusement, * * *." I see no escape from the conclusion that a stadium where football games are played for the entertainment of the public is a place of amusement, and it, therefore, follows that the prohibition contained in the section is applicable.

Section 40-114 of the Code allows under certain circumstances any boy between twelve and sixteen years of age to be engaged in the occupation of boot-blackening, selling newspapers, magazines, etc., running errands or delivering parcels, or caddying "or other outdoor employment." I see no escape from the conclusion that a stadium where football games are played for the entertainment of the public is a place of amusement, and, therefore, follows that the prohibition contained in the section is applicable.

It has been suggested that, inasmuch as the selling of soft drinks at a football game is done outdoors, a boy between twelve and sixteen years of age may engage in this occupation, and that this construction is the only way that the two sections can be reconciled. I cannot agree with this contention. As I have said, a place where football games are played for the entertainment of the public is unquestionably a place of amusement and, therefore, it is specifically covered by Section 40-109. You will observe that none of the occupations mentioned in Section 40-114 necessarily have any connection with a place of amusement, but relate purely to outdoor occupations as such. If Section 40-109 is to be construed as applicable only to indoor places of amusement (though the section itself makes no such distinction), then boys between twelve and sixteen years of age could be employed at race tracks, professional baseball games and outdoor wrestling matches. I feel sure that, when it is considered that the child labor laws were enacted for the protection of the children of the Commonwealth and when the objectives sought to be accomplished by these laws are considered, you will agree with me that Section 40-109 makes no distinction between indoor and outdoor places of amusement. Indeed, this office has previously expressed the opinion that an outdoor swimming pool, operated on a commercial basis and open to the public, is a place of amusement within the meaning of Section 40-109. See Opinions of Attorney General 1952-53, page 33.

My conclusion is that no boy under sixteen and no girl under eighteen years of age may be allowed to distribute and sell soft drinks at the football games mentioned by you.

LABOR LAWS—Dry cleaning establishment is workshop. F-120 (80) September 10, 1954.

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

I am in receipt of your letter of September 7, in which you ask if a dry cleaning establishment may be classified as a "workshop" within the meaning of Section 40-34 of the Code, regulating the hours of work of women.
REPORT OF THE ATTORNEY GENERAL

It is my opinion that such a classification is proper. As I understand this business, a good deal of machinery is used and most of the work involved is manual labor. I note that a number of courts in the State over the past few years have classified a dry cleaning establishment as a workshop.

You further ask if a woman employed in a dry cleaning establishment, upon whom is imposed the duty of "receiving goods for processing, marking and matching garments, and bagging and dispensing finished goods," is a workshop employee and subject to the regulation of hours of work of women as provided in the section of the Code mentioned above. In my opinion, she is.

Section 40-35 of the Code contains certain exceptions to Section 40-34 and it is contended, you advise me, that a woman engaged in the above described duties comes within exception number one. This exception includes women whose full time is employed as "bookkeepers, stenographers, cashiers or office assistants, buyers, managers or assistant managers and office executives."

The full time of the woman you describe is not devoted to such work as is classified in the exceptions. While she may do some clerical work, she also performs some manual labor, and it is my conclusion that she does not come within the exceptions.

LABOR LAWS—Mines—What constitutes a mine under the law. F-226 (329)

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

This has reference to conference held in my office on this date with you and Mr. C. P. Kelly, Chief, Division of Mines, Department of Labor and Industry.
The facts submitted are substantially as follows:
There is located in Virginia a mining operation, the object and purpose of which is the processing and washing of material located at and taken from a now dormant mine. There is evidence that this operation is at and upon property immediately contiguous to an open pit or underground mine from which the material was taken. It is further stated that the same or similar machinery is used in this operation as in other active open pit or underground workings from which minerals are produced. It also appears that the work being done is a recognized part of the process of mining in order to render merchantable the produce taken from a mine.

Section 45-0.2, paragraph (p), is as follows:

"'Mine' means any open pit or any underground workings from which coal or other minerals are produced for sale, exchange, or commercial use, and all shafts, slopes, drifts, or inclines leading thereto, and includes all buildings and equipment, above or below the surface of the ground, used in connection with such mine. Mines that are adjacent to each other and under the same management and which are administered as distinct units shall be considered as separate mines."

You desire my opinion as to whether or not this operation is embraced within the quoted provisions of section 45-0.2 of the Code of Virginia relating to mines and mining.

It is clear that the substance or commodity which is being worked over and processed at this operation embraces minerals produced from a mine for commercial purposes. The processing of this material, under the factual situation submitted, is an integral part of a mining operation for commercial use. The technique and mechanical devices used are directly related to the usual and customary mining operation.
REPORT OF THE ATTORNEY GENERAL

It further seems clear that the equipment above the surface of the ground is being used in connection with a mine, and in my opinion this operation is embraced within the statutory definition of a "mine." Certainly, it is embraced by the purpose, and is within the spirit and meaning, of Title 45.

LAND SUBDIVISION ACT—Disposition of streets when subdivision vacated.

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

This will acknowledge your letter of December 31, 1954, in which you state that a subdivision in the town of Abingdon is proposed to be vacated, and wish to know how this may be done and who would receive title to the streets shown on the plat of such subdivision when the vacation has been completed.

We are without benefit of the provisions contained in the articles by which the subdivision was dedicated, and the opinion expressed herein is predicated upon the assumption that the dedication was made in accordance with the provisions of Article 5, Chapter 23, Title 15 of the Code of 1950 (sections 5222y through 5222cc, Michie’s Code, 1942).

Based on the foregoing assumption, the plat cannot be vacated except in strict compliance with the provisions of section 15-814 of the Code. All the owners of lots in the land shown on the plat and all the officers who were required under Code section 15-810 to approve the plat must be parties to the vacation instrument.

Upon the vacation of the plat after strict compliance with section 15-814, in my opinion, the title to the streets and alleys laid out or described in the plat will vest in the abutting property owners.

MEDICINE—Employment of radiologists by hospitals—When permitted.

HONORABLE ROBERT F. BALDWIN, JR.,
Member, Senate of Virginia.

This is in reply to your recent letter in which you request my opinion as to whether a hospital corporation is illegally practicing medicine if it employs a licensed physician to do its radiological work, pays him a fixed salary or percentage of fees therefor, bills the patient in its own name at the usual rate charged by radiologists.

Prior to 1948 Chapter 68 of the Code of Virginia, titled “Practice of the Healing Arts,” contained the following provision:

“§ 1621(b) Nothing in this chapter shall be construed to affect or interfere with the operation of any hospital now established in this State, nor with any person while engaged in conducting any such hospital, if there be a licensed practitioner resident or practicing therein; * * *.”

In the case of Stuart Circle Hospital Corp. v. Curry, 173 Va. 136, our Supreme Court held that hospitals were by statute exempted from the provisions of Chapter 68 of the Code. It held, in part, as follows:

“The exemption of hospitals from the prohibition that no one except a licensed physician may practice medicine must have some meaning. Its obvious purpose is to permit them to render a special service to the sick,.
weak and infirm, such a service as hospitals already established have been rendering. This cannot be done merely by the furnishing of suitable and comfortable rooms and food for the special necessities of the patient, but must include the trained care of nurses, and medical attention from qualified persons whenever required by the patient's condition. This is made clearer by the provision for a licensed practitioner resident or practicing in the hospital. The presence of such physician would be useless unless his professional skill and service were to be employed.

"[2,3] The peculiar nature of a corporation prevents it as such from practicing medicine, but there is no ban against the performance of duties by its qualified agents, servants and employees, which they are qualified to perform, and which they are held out by the hospital as being able to perform. The effect of the exemption in the statute is to authorize hospitals to render necessary routine medical care and attention to its patients such as is customarily engaged in by hospitals. So, while a hospital may not be licensed to practice medicine, within the intent of the broad statutory definition thereof, it may actually engage in so much of said practice as is customary and necessary in the proper conduct of its business, without being required to comply with the regulations provided for an individual."
(173 Va. p. 146)

Chapter 68 of the Acts of Assembly of 1948 rewrote § 1621 of the Code and that chapter deleted from the Code the above-quoted subsection (b) and the Code of Virginia at present contains no provision exempting hospitals from the prohibition that no one except a licensed physician may practice medicine. The case of Stuart Circle Hospital Corp. v. Curry, supra, held that the exemption in the statute permitted a hospital to practice medicine. This exemption has been removed from the statute; therefore, I must conclude that today a hospital is prohibited from practicing medicine in Virginia.

The next question to be answered is "What constitutes the practice of medicine in Virginia?" Section 54-273(3) of the Code of Virginia reads as follows:

"Practice of Medicine' means the treatment of human ailments, diseases, or infirmities by any means or method."

Section 54-273 of the Code sets out what constitutes the practice and provides, in part, as follows:

"Any person shall be regarded as practicing the healing arts and in some school or branch thereof within the meaning of this chapter who opens an office for such purpose, or advertises or announces to the public in any way a readiness to practice in any county or city of the State, or diagnoses the condition of, prescribes for, gives surgical assistance to, treats, heals, cures or relieves persons suffering from injury or deformity or disease of mind or body."

The answer to the question "is a person practicing medicine" would depend upon the facts in each case. If a radiologist examines a patient, then treats the patient or prescribes treatment for the patient, he is, of course, practicing medicine. Here the relationship of doctor-patient exists, and the radiologist should bill the patient for the radiologist's fees. The hospital could, of course, still make charge to the patient for the use of the equipment and facilities furnished by the hospital. Under this situation the relationship between the radiologist and the hospital should be that of an independent contractor and not that of employer-employee.

If a patient were sent to the X-ray Department of a hospital by his attending physician for X-rays; the X-rays taken; the X-rays then studied by the radiologist; and returned to the attending physician with different comments or observations that the radiologist deems appropriate, it does not appear to me that the radiologist is practicing medicine under the definitions found in Chapter 12 of Title 54 of the Code of Virginia. In this situation, the X-ray Department and the
radiologist are merely furnishing the attending physician with diagnostic aids, which aids the attending physician considers along with all other information he has obtained in order to diagnose the condition of the patient. The attending physician, not the radiologist, under these circumstances, is actually diagnosing the condition of the patient. In my opinion the relationship of doctor and patient has never existed between the radiologist and the patient in this latter situation. Therefore, I am of the conclusion that a hospital would not be practicing medicine if it employed a radiologist to operate its X-ray Department in order to furnish these diagnostic aids to the attending physician practicing in the hospital.

MENTAL HYGIENE AND HOSPITALS—Appropriations Act—Transfer of funds for renovation. F-248b (6)

Dr. Joseph E. Barrett,
Commissioner, Department of Mental Hygiene and Hospitals.

This will acknowledge receipt of your letter of July 8. You state that the hospital local building committee and the State Hospital Board have approved the awarding of a contract for the demolition of the Brower and Taylor Buildings at the Eastern State Hospital; that this demolition has been approved by the Governor's Engineering Office and the Engineering staff of the Department of Mental Hygiene and Hospitals, and that the buildings to be demolished have been condemned as unsafe and unfit for patient use.

You further state that the Hospital Board has authorized the transfer of $18,336 from Care and Maintenance Funds to a capital outlay project, which is Item 736 in the 1954 Appropriation Act. The amount of this Item was reappropriated to be used for renovating old buildings at Dunbar Farm. You desire my opinion as to whether or not this transfer might be effected within the provisions of the Appropriation Act.

It appears to me that care and maintenance funds are related to renovation, and that demolition of condemned buildings is equally related to maintenance and renovation.

It is my opinion that, under the provisions of section 49 of the Appropriation Act, the governing board of your department would be authorized to transfer the sum named from care and maintenance funds to capital outlay for renovating old buildings at Dunbar, as Item 736 is definitely and closely related to the object of the appropriation which is sought to be transferred. This transfer can only be made with the prior written consent of the Governor, if in the opinion of the Governor and the head of the department later developments make such transfer appropriate to carry out the original intention of the General Assembly in making this appropriation.

MENTAL HYGIENE AND HOSPITALS—Authority to furlough patient—Person other than guardian. F-248 (31)

Dr. Joseph E. Barrett,
Commissioner, Department of Mental Hygiene and Hospitals.

This has reference to your letter of July 15, 1954 in which you discuss the problem confronting the Superintendent of a Mental Institution in those instances in which plans for the continued treatment of a patient outside the institution itself do not meet with the approval of such patient's guardian, committee or relatives. You particularly ask to be advised as to whether such persons may veto the plan designed for the patient's interest where the patient is to be released to the care and custody of some person unapproved by the patient's guardian, committee or relative.
By virtue of statutory provisions persons committed to mental institutions may be confined in a State hospital or colony, a private sanitarium or hospital, private homes or furloughed under the care of a committee, relative, friend or other responsible or proper person. See Chapter 3, Title 37, of the Code of Virginia of 1950. When a patient is discharged from the control and custody of the institution it appears clear that the guardian or committee is entitled to the custody of the person of his ward. Section 37-146 of the Code states this general rule as follows:

"The committee appointed under the provisions of this chapter shall be entitled to the custody and control of the person of his ward when he resides in the State, and is not confined in a hospital or serving a term of penal servitude."

So long as one of the aforementioned dispositions has been made in connection with any patient it appears obvious that such patient is still under the control and supervision of the State even though not actually confined in a State institution. Therefore, where the plan for the continued treatment of a patient, prior to the time of actual discharge, conflicts with the desires of the guardian or committee, the institution must place the patient's interests before the wishes of the guardian. In answer to your inquiry I am of the opinion that the guardian or committee of a person committed to an institution has no authority to veto a plan worked out by the hospital staff for the continued treatment of the patient, even though such plan entails furloughing the patient to the care and custody of a person other than the guardian.

You can fully appreciate the various problems and dangers which may arise from committing a patient to the care and custody of a person other than the guardian or committee. For that reason I suggest a policy be adopted consistent with the various laws to insure full disclosure of all interested parties of the disposition being made of a patient. In such a procedure the Superintendent of any institution would have the maximum assurance that the person to whom the patient is released prior to discharge is actually the proper person for the best interest of the patient.

MILK COMMISSION—Prices to be paid to producers—May fix the minimum price only. F-23 (341) June 17, 1955.

STATE MILK COMMISSION.

This is in reply to your letter of June 15, 1955, inquiring if, in situations where prices to be paid producers are fixed, one price may be set, or if a maximum and minimum price must be set. It is stated that in all past matters only a minimum price has been fixed to be paid producers. It is further stated that there would be no economic purpose under the producer-distributor business relationship in fixing any price other than one price or a "minimum" price.

Section 3-359 of the Code of Virginia provides as follows:

"The Commission, after public hearing and investigation, may fix the prices to be paid producers or associations of producers by distributors in any market or markets, may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market, and may also fix different prices for different grades of milk. In determining the reasonableness of prices to be paid or charged in any market or markets for any grade, quantity, or class of milk, the Commission shall be guided by the cost of production and distribution, including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public." (Emphasis supplied).
The first sentence of the foregoing section, containing the pertinent portions, provides that the Commission "may fix the prices to be paid producers or associations of producers by distributors in any market or markets", and "may fix the maximum and minimum wholesale and retail prices to be charged for milk in any market". It is noted that the first portion of the sentence, which expresses a complete statement, allows the fixing of prices to be paid producers by distributors, but does not contain the qualification that a maximum and minimum price may be fixed. The permission contained in the second portion of the sentence to fix a maximum and minimum price qualifies and pertains to wholesale and retail prices as distinguished from the prices to be paid producers by distributors. The recent decision in Safeway Stores, Inc. v. Milk Commission of Virginia, Record No. 4344, did not involve the matter of prices to be paid producers by distributors. Moreover, it is stated that there would be no purpose in fixing more than one price as there could be no economic reason for doing so.

In accordance with the foregoing, it is the view of this office that, in accordance with law, the Commission may fix one price to be paid producers by distributors. It does not appear to be material whether or not the price is termed a minimum or single price.

MOTOR VEHICLES — Accident Reports — Filed with local police — May be inspected by interested parties. F-353 (135) November 3, 1954.

THE HONORABLE LINWOOD B. TABB,
Commonwealth's Attorney for the City of Norfolk.

This is to acknowledge receipt of your letter of October 28 in which you state in part:

"In the absence of any municipal ordinance requiring motorists to file duplicate copies, is it mandatory that these reports which are held by the Police Department be open for inspection to persons involved and their attorneys, or can the local Police Department, in treating them as purely statistical data, deny inspection, leaving as a recourse to the persons and their attorneys, the right to request a copy of said report from the Commissioner."

I find that Section 46-413 authorizes a municipality to require by ordinance that the driver of a vehicle involved in an accident file with the designated department a report of the accident or a copy of the report which is required to be filed with the Division. We find the following language in that section:

"All such reports shall be for the confidential use of the department and subject to the provisions of this chapter."

From this, it would seem that the city could use the reports for not only statistical purposes but for other purposes. However, this use is subject to the provisions of the chapter. Section 46-410, which is included in said chapter, has this language:

"But any report of an accident made pursuant to Section 46-398 to 46-401, 46-404, 46-407 and 46-408 shall be open to the inspection of any person involved or injured in the accident, or as a result thereof, or his attorney; * * *" (Emphasis supplied.)

The report of the accident made by the driver is done pursuant to Section 46-398. It is pertinent to note that Section 46-413 does not set forth the exact use to be made of these reports by the cities as is done in Sections 46-410 and 46-411, which prescribes the duties of the Department of State Police in reference thereto. I believe that, had the Legislature intended that the report of these accidents should be used by the city solely for the purpose of compiling statistical data and
accident prevention purposes, the statute would have so stated and would not have subjected that section to the other provisions of the chapter. It may be that the Legislature intended that the cities afford to their citizens the convenience of securing information from these reports rather than burdening the citizens with coming to Richmond and examining the records held by the Division of Motor Vehicles, or it may be that one purpose of the section may have been to lessen the burden of the Division of Motor Vehicles in supplying information which can be supplied locally. Even without the statutory provisions and restrictions, the accident report so filed is nonetheless a public record. Under the general provisions of law, public records are accessible to persons interested therein.

I think the same reasoning would apply to those instances where the accident reports are filed with a city department without the sanction of an ordinance. What the Police Department is doing without the authorization of ordinance can rise no higher than what it can under ordinance or statute. As far as the motorist is concerned, the report is made by statute, and, therefore, the limitations and restrictions thereto must be observed. However, I do not see anything that would make it obligatory on the part of the city to furnish copies of these reports, the only requirement being that they be held subject to inspection by persons entitled thereto.

Therefore, it is my opinion that, even in the absence of a municipal ordinance, the duplicate copies of accident reports required to be filed with the Division of Motor Vehicles and are, in fact, filed with the local police department, are subject to the inspection of the person involved or injured in the accident or of his attorney, but there is no duty on the local police department to furnish copies of said reports.

MOTOR VEHICLES—Accident Reports—Open to inspection when kept by local Police Department. F-353 (113)

October 18, 1954.

THE HONORABLE LINWOOD B. TABB,
Commonwealth's Attorney for the City of Norfolk.

This is to acknowledge receipt of your letter of October 12 in which you state in part:

"We would appreciate it very much if you would render us an opinion concerning Sections 46-410 and 46-409 as amended, based on the following questions:

Are reports of accidents, made pursuant to Sections 46-398 to 46-401, 46-404, 46-407 and 46-408, open to the inspection of the persons involved or injured in the accident and their attorneys at the local Police Headquarters?

Or are such reports available only from the Commissioner, when requested by said persons involved or their said attorneys?"

Such reports that are required to be made under the provisions of Article 2 of Chapter 6, Title 46, of the Code are filed with the Division of Motor Vehicles. I understand that the various cities of the Commonwealth have passed ordinances that are very similar to these statutes which require the filing of the accident report with some department of the city government. From what you state, it would appear that the motorists are filing duplicate copies of these accident reports with the Police Department of the City of Norfolk. According to Section 46-409 these reports shall be for the confidential use of the Division (of Motor Vehicles) and other state agencies for accident prevention purposes. To interpret the term "state agencies" used therein to apply solely to the departments of state government as defined in the Code would preclude the use of these reports by cities
which are component parts of the state itself. I take it, therefore, that the City of Norfolk is in lawful use of these accident reports when copies thereof are retained by the Police Department thereof.

Section 46-410 of the Code provides that any report of an accident made pursuant to the above article of Chapter 6, Title 46, Code of Virginia, shall be open to inspection to any person involved or injured in an accident or his attorney. This includes reports made by drivers of vehicles as well as by investigating officers. I am of the opinion that these reports which are held by the Police Department of the City of Norfolk are open to inspection of persons who are involved or injured in an accident or their attorneys.

MOTOR VEHICLES—Chauffeur's License—Not required of person hauling own farm produce. F-149 (303)

May 6, 1955.

The Honorable G. H. Parker, Jr., Commonwealth's Attorney of Southampton County.

This is to acknowledge receipt of your letter of May 3 in which you inquire whether a person is required to have a chauffeur's license while operating his own truck in hauling farm produce of his own. Section 46-343 of the Code of Virginia of 1950 defines the term "chauffeur" as follows:

"Every person employed for the principal purpose of operating a motor vehicle and every person who drives a motor vehicle while in use as a public or common carrier of persons or property."

Obviously, a person who drives his own truck carrying his own produce to market could not be classified as a chauffeur under this definition. The driving of the vehicle must be the principal employment and not merely incidental to his other employment.

I am enclosing a copy of an opinion rendered on this subject on September 28, 1942, by the Honorable Abram P. Staples, who was Attorney General at that time. I hope that this information will be helpful to you.

MOTOR VEHICLES—Commissioners—No authority to issue free licenses to certain foreign government representatives. F-149 (127)

October 27, 1954.

The Honorable C. H. Lamb, Commissioner, Division of Motor Vehicles.

This is to acknowledge receipt of your letter of October 22 in which you ask whether or not you have the authority under Section 46-48.1 of the Code to issue license plates free of cost to certain foreign government representatives other than diplomatic officers.

Your attention is invited to Section 46-48.1, which reads as follows:

"All motor vehicles owned and used for personal or official purposes by accredited consular or diplomatic officers of foreign governments, who are nationals of the state by which they are appointed and are not citizens of the United States, are hereby exempted from the provisions of this title requiring the payment of registration fees, but all such vehicles shall display license plates or identification markers approved by the Commissioner of Motor Vehicles. Every application for license plates or identification markers hereunder shall be accompanied by the certificate of the
Secretary of State of the United States or his agent that the applicant
is entitled thereto under the provisions of this section." (Emphasis
supplied.)

I am of the opinion that your authority under that section only extends to
the issuance of such licenses to accredited consular or diplomatic officers of foreign
governments who are not citizens of the United States. I see nothing that would
prohibit you from issuing license plates bearing distinguishing prefixes which
could be issued only to the foreign personnel designated by the State Department.
However, you would have to charge the usual license fees upon the issuance thereof.

MOTOR VEHICLES—Dealers—Must secure new license when location moved to
new political subdivision. F-353 (114)

THE HONORABLE HOWARD H. ADAMS,
Member of the House of Delegates.

This is to acknowledge receipt of your letter of October 6 in which you ask
for a construction of Sections 46-514 and 46-517 of the Code of 1950. The
specific question raised by you is whether or not an automobile dealer who is duly
licensed as a dealer and is operating in an incorporated town will have to secure
a new license if he wishes to carry on a business as a dealer in the county outside
the corporate limits of the town. I refer to Section 46-517 which reads as follows:

"The licenses of new motor vehicle dealers, used motor vehicle dealers,
manufacturers, factory branches, distributors and distributor branches shall
specify the location of each place of business or branch or other location
occupied or to be occupied by the licensee in conducting his business as
such and the license or supplemental license issued therefor shall be con-
spicuously displayed on each of such premises. In the event any such loca-
tion is changed, the Commissioner shall endorse the change of location
on the license, without charge if the new location is within the same
political subdivision. A change in location to another political subdivision
shall require a new license."

I think this question turns on the point of what is meant by a political
subdivision. Chapter 7, Title 46, known as the Virginia Motor Vehicle Dealer
Licensing Act, does not define the term "political subdivision". I am unable
to find that term defined in the Code for general application purposes. I do find,
however, that in the Constitution, although the term is not used, the counties,
cities and towns are recognized to be political subdivisions (Articles VII and
VIII, Virginia Constitution). I am of the opinion that it was the intention
of the Legislature in using the term "political subdivision" to mean counties,
cities and towns. I understand that the Division of Motor Vehicles, who adminis-
ters this law, has always construed the definition to include incorporated towns,
and this practical construction has been in operation for the past ten years since
the act was first adopted. The Legislature has not seen fit to amend the same.
As you know, the courts have held that, where an administrative interpretation
has been followed over the course of years and the Legislature has not seen fit to
amend the act, the administrative construction or practice is decisive. Anglin v.
Joyner, 181 Va. 660.

I do not think that the language of the act is ambiguous, and I concur in the
construction placed upon it by the Commissioner of the Division of Motor Vehicles.

In the third paragraph of your letter, you point out that you believe that the
way in which the law is now construed would lead to a discrimination between a
dealer resident of a town and one resident of the county. I do not see anything
discriminatory, as both the town resident and the county resident would be treated
alike in that if either one desires to sell automobiles at a location beyond the
political subdivision in which he lives, he must secure a new license.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Definition of "Rated Carrying Capacity". F-119 (198)


HONORABLE GEORGE D. CONRAD,
Commonwealth's Attorney, City of Harrisonburg.

This is to acknowledge receipt of your letter of October 18, in which you state:

"Under the provisions of Section 46-212 of the Code of Virginia as amended in 1954, it is provided under paragraph (3) that it is unlawful to drive 'any truck in excess of 45 miles an hour except a pick-up or panel truck with a rated carrying capacity not exceeding one ton.' Your opinion is requested as to whether the word 'rated' in that section relates to the carrying capacity as rated by the manufacturer of the motor vehicle or whether it relates to the rated carrying capacity set out in the license issued by the state for the motor vehicle in question."

The term "rated carrying capacity" would imply that the vehicle has been rated for a certain load capacity. The question is raised by whom is this capacity determined, whether by the manufacturer of the vehicle or by the owner who makes a declaration to the Division of Motor Vehicles indicating the extent to which he desires to have the vehicle licensed. The license fees are determined by the gross weight of the vehicle when it is loaded, and, according to Section 46-162, the minimum fee which entitles the registration up to 10,000 pounds is $12.00. Hence, as far as the license is concerned, an owner of any truck can operate the same lawfully when the gross weight does not exceed 10,000 pounds. Formerly, the licensing of trucks was determined by the capacity of the truck which was set by the manufacturer. This is no longer true, as indicated above. The 1954 act which you refer to does not mention the term "license," nor did the Legislature at that session amend Section 46-162 of the Code.

I am, therefore, of the opinion that the term "rated carrying capacity" as used in the above statute means the rated carrying capacity placed on the truck by the manufacturer.

MOTOR VEHICLES—Farm Equipment—Exceeding forty-five feet may be moved upon a highway. F-192 (122)

October 26, 1954.

Mr. T. H. Lillard,
Sheriff of Madison County.

This is in reply to your letter of October 25, 1954, in which you ask to be advised whether wagons or pieces of farm equipment exceeding forty-five feet in length may be drawn along a highway.

Section 46-328 of the Code of Virginia of 1950 provides that the actual length of any combination of vehicles coupled together shall not exceed a total of forty-five feet, exclusive of coupling, but this limitation does not apply to implements of husbandry temporarily propelled or moved upon a highway due to the exception embracing such equipment as provided in Section 46-326 of the Code.

MOTOR VEHICLES—General misdemeanor punishment statute may only be used where no other punishment provided. F-85 (245)

March 7, 1955.

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

This is in reply to your letter of March 4, 1955, addressed to this office, in which you state as follows:
REPORT OF THE ATTORNEY GENERAL

"Recently we received an inquiry as to whether or not a violation of Section 46-322.1 of the Code should be punished under the provisions of Section 46-18 or the general statute providing for the punishment of misdemeanors.

"Since this question has been raised, I shall appreciate an opinion from you."

Section 46-18 of the Code of Virginia, 1950, provides, insofar as here germane, as follows:

"It shall be unlawful and constitute a misdemeanor for any person to violate any of the provisions of chapters 1 to 4 of this title, unless such violation is by any of such provisions declared to be a felony.

"Every person convicted of a misdemeanor for a violation of any of the provisions of such chapters for which no other penalty is provided shall, for a first conviction thereof, be punished by * * * *.

Section 46-322.1 of the Code is a portion of Article 11 Chapter 4 of Title 46. Section 46-322, also codified as a portion of Article 11, provides as follows:

"Any person, firm, or corporation violating this article shall, except as herein otherwise provided, be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars, for the first offense, and not less than one hundred dollars nor more than one thousand dollars for each subsequent offense and, if the violation is by an official inspection station, in addition to such fine, the Superintendent shall revoke the authority and cancel the appointment and designation of such official inspection station if, in his opinion, after a hearing, the facts warrant such action, irrespective of whether or not the violation is a first offense against this article."

In view of the fact that the punishment prescribed in Section 46-18 of the Code is not applicable where penalty for violation of the provisions of Chapters 1 to 4 of Title 46 is otherwise provided, and other penalty is provided for violation of Article 11, I am of the opinion that violations of Section 46-322.1 of the Code should be punished under the provisions of Section 46-322 of the Code rather than under the provisions of Section 46-18 or the general statute providing for the punishment of misdemeanors.

MOTOR VEHICLES—Licenses—When service personnel required to have State and local licenses. F-149 (277)

April 13, 1955.

The Honorable Julian S. Cornick,
Commonwealth's Attorney for York County.

This is to acknowledge receipt of your letter of April 8 in which you state in part:

"There are many Federal servicemen temporarily residing in York County, on and off of the several Federal military establishments herein, who have been sent here pursuant to their military orders. Some of these servicemen, while not domiciled in the State of Virginia, have voluntarily registered their automobiles herein and have purchased Virginia license tags therefor. As a result of their action, an important question has been presented to our county government, which is: Can the County of York legally force such non-domiliary Federal servicemen to purchase its county motor vehicle license tags, merely because they have voluntarily
registered their automobiles in Virginia, voluntarily purchased Virginia license plates, and operate such motor vehicles on the public highways of York County?"

The following provisions of the Soldiers' and Sailors' Relief Act, 50 USCA App. 574, are pertinent:

"(1) For purposes of taxation in respect of any person, or his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence of domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, or political subdivision, or District: Provided, That nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942. "(2) When used in this section (a) the term 'personal property' shall include tangible and intangible property (including motor vehicles), and (b) the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: Provided, That the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid."

The case of Dameron v. Brodhead, 345 U. S. 322, which you mentioned in your letter, is not altogether pertinent to the question you raise. In that case, the serviceman was assessed taxes on his personal belongings by the city of Denver, Colorado. He had not listed this personal property for taxation in his domiciliary state. The court held that, whether the property was taxed by the domiciliary state made no difference; that under the provisions of the Soldiers' and Sailors' Relief Act the property was not deemed to be located in the city of Denver, and, therefore, not taxable by the said city.

The Judge Advocate General of the Army expressed an opinion on this subject in 1943 which is found in the Bulletin of the Judge Advocate General, Volume II, page 41, as follows:

"A statute of the State of South Dakota imposes an annual registration fee for the privilege of operating a motor vehicle on the highways of that state and requires as a prerequisite to the first annual registration of a motor vehicle the payment of a license fee in lieu of sales and use taxes. The statute provides that it shall not apply to vehicles owned by non-residents, which it defines as persons who have not resided within the state for ninety days. Held: Owners of motor vehicles whose permanent homes
are not in South Dakota, who have complied with the motor vehicle requirements of their home states, and who remain in South Dakota more than ninety days solely in compliance with military orders, need not pay the described fees. Sec. 514 added to the Soldiers' and Sailors' Civil Relief Act of 1940 by sec. 17, act of October 6, 1942, expressly provides that, for the purposes of State taxation in respect to their property, such persons shall not be deemed to acquire a residence in the state in which they serve under military orders. While the South Dakota statute imposes fees which are excise taxes rather than property taxes, they are taxes in respect to property and are based upon residence within the state. SPJGT 1943/1159, Jan. 22, 1943." (First emphasis supplied.)

Your attention is directed to the above-quoted provisions of the Soldiers' and Sailors' Relief Act and particularly to the proviso therein.

I believe that, in order to avoid the payment of a license fee on his automobile in the state where the serviceman is stationed, he must show that his car is registered and he has paid the license fee in the state of his permanent home. This office has heretofore held that a serviceman, where he has licensed his car in the state of his domicile or residence, cannot be required by the state or the local authorities to purchase license plates. See Attorney General's opinions, 1948-49, page 166, and 1951-52, page 131.

I am, therefore, of the opinion that, inasmuch as the servicemen that are temporarily residing in York county have not registered their vehicles in the state of their domicile (residence) but have voluntarily registered them in Virginia, they are amenable to the license tax imposed by York County.

MOTOR VEHICLES—Loss of right to drive—Applies to all vehicles including farm tractors. F-353 (59)

HONORABLE CURTIS A. SUMPTER,
Attorney for the Commonwealth of Floyd County.

I have your letter of August 17, 1954 in which you ask to be advised as to whether the language of Section 18-75 of the Code of Virginia, 1950, is inclusive of those vehicles exempt from licensure and registration in Sections 46-45 and 46-348 of the Code, and if so, may a person convicted for operating such vehicle while under the influence of alcohol, etc., be prosecuted under Section 18-78 of the Code for driving a motor vehicle so exempted during the period prescribed in Section 18-77 of the Code of Virginia.

Section 46-45 of the Code exempts certain types of vehicles from registration and licensure in this State. Section 46-348 of the Code provides that a person need not obtain an operator's license for the purpose of operating certain types of motor vehicles.

On former occasions I expressed the view that a person may continue to operate a vehicle exempted from licensure and registration after such person's license to drive has been revoked or suspended. I have also expressed the opinion that farm tractors come within the purview of Section 18-75 of the Code. (See Opinions of Attorney General, 1952-53, page 148).

Section 18-75 of the Code is designed to prohibit the driving of any motor vehicle while under the influence of alcohol, etc., irrespective of the fact that such motor vehicle may be in a classification which is exempt from licensure under the licensing and registration laws. I am convinced that a person convicted for violation of Section 18-75 of the Code loses his privilege to operate a motor vehicle of any kind by virtue of Section 18-77 of the Code. This loss of privilege applies to persons so convicted whether or not such persons are required to obtain a license to drive the particular type vehicle being driven at the time of the offense.
The deprivation of privilege is directed against the person convicted, not against the license itself. You will note that Sections 18-77 and 18-78 refer to the "deprivation of the right to drive", not merely a revocation of a driver's license. Therefore, I am of the opinion that a person driving any type motor vehicle during the time for which he is deprived of his right to so do is guilty of a misdemeanor as provided in Section 18-78 of the Code.

My former opinion relative to the right to drive a farm tractor on the highways after license revocation should not be confused with the right to drive such a vehicle after a person has been deprived not only of his license, but of his right, to operate a motor vehicle.

MOTOR VEHICLES—Offenses—Crossing solid line—Line governs violation not visability. F-353 (184)

December 23, 1954.

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

This will reply to your letter of December 16, 1954, in which you present the following situation:

"One of the highways in Virginia which runs North and South has been marked by the Engineering Department; at one point on this highway the Engineering Department has marked the said highway coming up a gradual grade for a distance of about 225 yards; the last 50 yards of this approximate 225 yards covers a space from which looking South (a white line being on the side of the road governing and controlling south bound traffic) all of a vehicle from the top down below its entire lighting system including the head lights and the tail lights on the lowest made vehicle are in full view of the driver and occupants of a South bound vehicle. I want to know if a person attempts to pass or does pass another vehicle heading South at any point covered by this 50 yards above mentioned from which the driver can actually see all other traffic in front of him for a distance of 300 yards has violated any traffic law."

"In brief, if the driver can in fact see traffic in front of him for a distance of at least 300 yards (that is can see all of a vehicle above 18 inches from the ground) and under the circumstances passing a vehicle going in the same direction at a point where there is a solid white line controlling traffic going the direction he preceding, (sic) has he violated a traffic law."

The special regulations of the Virginia law applicable on streets and highways which have been laned for traffic are enunciated in Section 46-222 of the Code of Virginia (1950), as amended, and, in pertinent part, prescribe:

"Whenever any highway has been divided into clearly marked lanes for traffic, drivers of vehicles shall obey the following regulations:

* * *

"(5) Wherever a highway is marked with double traffic lines consisting of a solid line immediately adjacent to a broken line, no vehicle shall be driven to the left of such line if the solid line is on the right of the broken line, except that it shall be lawful to make a left turn for the purpose of entering or leaving a public, private or commercial road or entrance;

"(6) Wherever a highway is marked with double traffic lines consisting of two immediately adjacent solid lines, no vehicle shall be driven to the
left of such lines, except that it shall be lawful to make a left turn for the purpose of entering or leaving a public, private or commercial road or entrance."

Section 46-180 of the Code provides that it shall be unlawful for any person "to refuse, fail or neglect to comply with any of the provisions of this chapter."

It appears from the portion of your communication set out above that there was a solid line controlling South bound traffic at the point of the passage or attempted passage in question. Although the quoted statute does not prohibit an overtaking vehicle from passing another proceeding in the same direction at such a point, it does forbid the operator of the overtaking vehicle to drive to the left of the solid line to perfect this maneuver. It is thus apparent that whether or not a violation of the traffic law has occurred in the situation under discussion depends upon particular facts with respect to the crossing of the solid line.

Since it is clear that the operator of the vehicle in this instance does not fall within the ambit of the exceptions specified in the statute, I am of the opinion that he has violated the above mentioned special regulation if, in passing or attempting to do so, he drove to the left of the solid line, but not otherwise.

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MOTOR VEHICLES — Offenses — Operating without a permit and operating while permit revoked constitute but one offense. F-149 (79)

HONORABLE HENRY D. GARNETT,
Commonwealth’s Attorney, City of Warwick.

This is to acknowledge receipt of your letter of September 2, in which you state in part:

"An officer will arrest an operator of a motor vehicle and charge him with operating a motor vehicle without an operator's permit. Subsequently it will develop that the operator's permit to drive had been previously revoked or suspended by the Division of Motor Vehicles and that the revocation or suspension order was still in full force and effect. The question then arises as to whether or not the operator can be tried for two separate offenses, to-wit: 1. Operating a motor vehicle without an operator's permit, and 2. Operating a motor vehicle while his operator's permit has been revoked or suspended, or whether a prosecution and conviction under one charge would bar prosecution for the other."

Operating a motor vehicle without a license is a violation of Section 46-347 of the Code of Virginia of 1950, and is a misdemeanor and punishable as such (Section 46-385). Driving a motor vehicle while the operator's license has been suspended or revoked is in violation of Section 46-347.1 of the Code of Virginia, as amended by the Acts of 1952. This is a misdemeanor and is punishable by a mandatory jail sentence; hence, this offense is the greater of the two.

The offense of driving a motor vehicle without an operator's license, in violation of Section 46-347, is necessarily included in the greater offense of driving during the period in which the license is suspended or revoked. Conviction of a higher offense bars the prosecution for the lower offense. Likewise, the conviction of a lesser offense bars the prosecution for a higher offense (see case of Mundsville vs. Fountain, 27 W. Va. 182). (Also see the authorities contained in Section 19 under the topic of Criminal Law, Michie's Digest of Virginia and West Virginia Reports, Volume 5, pages 243 and 244; and the authorities cited in the same work under the topic of Autrefois, Acquit and Conviction, pages 919 and 920, Volume 1.)
I am, therefore, of the opinion that the prosecution under the provisions of Section 46-347 would be a bar to a prosecution under Section 46-347.1, and that a prosecution under Section 46-347.1 would be a bar to a prosecution under Section 46-347.

Under the circumstances, I would suggest that where a person is arrested and charged initially by the arresting officer for the violation of Section 46-347 (driving without a permit), and it later develops that the driving permit of the accused has been revoked, that the warrant be amended before the trial, charging the accused with the violation of Section 46-347.1. Should it develop during the trial that the evidence is not sufficient to sustain the charge of operating a motor vehicle during the period of revocation, then the court could find the accused guilty of the lesser offense of driving without an operator's license, in violation of Section 46-347.

MOTOR VEHICLES—Offenses—Procedure for trying violator in his absence.

F-173 (94)

The Honorable L. Brooks Smith,
Trial Justice of Accomack County.

This is to acknowledge receipt of your letter of September 16 in which you state that you have adopted the policy of requiring the accused, if a resident, to appear in person or by counsel and, after the court hears the evidence and renders judgment, accepting the payment of the fine and costs from an attorney. If the payment is not forthcoming, a capias is issued. You ask me whether this procedure should be continued or whether you should adopt a practice of accepting an amount tendered by the accused before trial to cover a fine and costs, and whether this would constitute a conviction within the provisions of the Safety Responsibility Act (Chapter 6, Title 46).

I call your attention to the language in Section 19-158, the last sentence thereof, which indicates that, where an accused is tried in his absence by a trial justice, he should be tried as if a plea of not guilty has been entered. This statute would seem to me to preclude the trial of an accused in his absence on a plea of guilty. I also call your attention to the provisions of Sections 19-106 and 19-107. In traffic offenses, it would be the better practice, where an accused, after having been issued a summons under the provisions of Section 46-193, desires to obviate the necessity of attending trial, if the justice of the peace or the trial justice issued a warrant and recognized the accused to appear on a certain date, at the same time issuing to the accused a receipt for the cash collateral deposited pursuant to Section 19-107. A copy of the official receipt, together with the summons, should be attached to the warrant and forthwith sent to the clerk of the trial justice court. If the accused fails to appear on the date he is recognized, then the court can forfeit the collateral without trial or proceed to try the individual and apply the amount forfeited to the payment of the fine and costs.

This office handled a series of cases recently involving the question of what constituted a conviction within the meaning of Section 46-387(4) (Safety Responsibility Act, of which Section 46-414.1 is a part). In the case of Lamb v. Lanzarone, 195 Va. 1038, the court held that the payment by an individual to a clerk of a city police court of an amount to cover a fine, the amount being applied by the court to the payment of a fine and subjugated to the use by the city, constituted a conviction within the meaning of the Safety Responsibility Act. However, the court felt that the procedure was irregular. Your attention is also invited to the case of Tate v. Lamb, 195 Va. 1005, which was a case in which the procedure before a trial justice court was attacked. The court held that, where the amount was deposited at the instance of the accused and was subjugated to the use of the state and, therefore, forfeited, it was immaterial that the forfeiture was called a fine or that the appellant was found guilty without testimony taken;
that there was no lack of due process, and, therefore, the accused was duly convicted within the meaning of Section 46-387(4) of the Code.

My conclusion is that it would be wise for you to follow the policy that you have adopted and that the ends of justice would be better attained and misunderstanding avoided, in these cases where the accused did not appear, for the court to hear testimony of the Commonwealth and pronounce judgment. After the judgment is pronounced, it is entirely proper for any person to pay the fine and costs on behalf of the accused.

MOTOR VEHICLES—Operators' Licenses—Chauffeurs' Licenses—Notice of expiration by Division. F-149 (52)

HONORABLE CHESTER H. LAMB,
Commissioner, Division of Motor Vehicles.

This is in reply to your letter of August 12, 1954 in which you request my opinion regarding the amendment made at the 1954 session of the General Assembly to § 46-376 of the Code. The amendment consisted of the addition of the following language to the section dealing with the expiration and renewal of driving license:

"* * * Thirty days after the expiration of any operator's license expiring on or after July one, nineteen hundred fifty-five, the Division shall mail notice to the holder thereof that such license has expired on a date related therein. After mailing such notice, the fee charged by the Division shall be one dollar for the renewal of each operator's license and three dollars for the renewal of each chauffeur's license. The fees thus received by the Commissioner shall be used to defray the expenses of the Division incurred by reason of the mailing of such notices and shall be in addition to the regular appropriation made by the General Assembly."

You request my opinion as to whether you are required to mail notices to the holders of chauffeur's license thirty days after the expiration thereof. In my opinion such mailing is required since the statute provides for a $3.00 fee for the renewal of the chauffeur's license "after mailing such notice."

You further request my opinion as to whether you should notify persons as to the expiration of their license when they have applied for a renewal of their license prior to the end of the thirty-day period. In my opinion such notification would be entirely useless and does not appear to be contemplated by the statute. In arriving at this latter conclusion I have assumed that the Division will have either renewed the license as applied for or, if for some reason a renewal is not granted, will have notified the person to that effect.

MOTOR VEHICLES—Operators' Licenses—May not be suspended by United States Commissioner. F-353 (332)

HONORABLE C. H. LAMB,
Commissioner, Division of Motor Vehicles.

This will acknowledge receipt of your letter of June 1, 1955, in which you request my opinion with respect to the question raised by Honorable Stanley King, United States Commissioner, in a letter to you, dated May 23, 1955, which reads as follows:
"At present the undersigned is cooperating with your office in filing Abstracts of Conviction of certain traffic offenses, such as speeding, reckless driving, etc., in your office.

"At times persons are convicted by the undersigned for an aggravated case of reckless driving and speeding where it would be advisable to suspend the operator's license as provided by Section 46-210 of the Virginia Code. I have some doubt, however, as to my legal right to order such suspension in view of the statement in the section that such right is confined to 'any trial justice or court.'

"I would appreciate any opinion you may give in the above regard or any opinion you may secure from the Attorney General should you desire to submit this question to that office."

The provisions of § 46-210 with respect to suspension of operators' licenses may be invoked against persons who have been convicted of reckless driving under §§ 46-208 or 46-209 of the Virginia Code. Such convictions may be had only in courts of the State, and the United States Commissioner does not have jurisdiction in such cases, since his powers are derived solely from Federal statutes.

Commissioner King states that he is cooperating with your office by filing with you abstracts of conviction of 'certain traffic offenses, such as speeding, reckless driving, etc.' These convictions, of course, are made under Federal statutes, and I can readily understand that information with respect to such convictions would be valuable to your office. Operating licenses issued by your office may not, however, be suspended under § 46-210 except by a court established under State statutes.

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MOTOR VEHICLES — Operators' Licenses — Revocation by judge or jury.

F-149 (45)  
August 9, 1954.

Mr. John H. Powell,  
Clerk, Circuit Court of Nansemond County.

This is to acknowledge receipt of your letter of July 30 in which you ask whether a jury can suspend the permit of a motorist when he has been convicted of violating the speed limit more than five miles per hour, or whether the suspension has to be done by the court.

Your attention is invited to Section 46-215.1 of the Code, as amended by the Acts of 1952, which reads in part 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. * * *

In prosecutions under this section, the better practice would require that the warrant charge that the maximum speed limit had been exceeded by the defendant by more than five miles per hour in excess of the prescribed speed limit. On a finding of guilty predicated upon such allegation, it would be the province of the jury to fix the punishment within the range prescribed by law. The suspension of the permit for a period of ten days would then become a matter for the court in the exercise of its discretion under all of the circumstances. The permissive suspension for a first offense is not a part of the penalty to be fixed by the jury.
In the event that the warrant did not embrace the allegation as indicated above, it would be the function of the court to instruct the jury that, in event of a verdict of guilty, they should then determine whether or not the prescribed speed limit had been exceeded by the defendant by more than five miles per hour; whereupon, armed with this finding, the judge would be in a position to exercise his discretion relative to invoking the suspension. In either event, the exercise of the discretion is a prerogative of the judge and not of the jury. Therefore, in a second and subsequent conviction within the period of one year, the procedure would be the same except that it would become mandatory upon the judge to suspend the operator's permit for a period of sixty days.

I am, therefore, of the opinion that, in such a case, it is the duty of the court to impose the ten days' suspension of a driving permit after the jury has found the individual guilty of exceeding the speed limit by more than five miles per hour.


MR. C. H. LAMB, Commissioner, Division of Motor Vehicles.

This is to acknowledge receipt of your letter of July 14 in which you state:

"Reference is made to the provisions of Section 46-416.2 of the Code of Virginia which reads as follows:

'The Commissioner shall forthwith revoke and not thereafter reissue during a period of sixty days the license of any person, resident or nonresident, upon receipt of a record of his conviction of reckless driving and of any provision of law establishing the lawful rates of speed of motor vehicles when the offenses upon which the convictions are based were committed within a period of twelve consecutive months. The provisions of §§ 46-59 and 46-425 shall not apply to any person whose license is revoked under the provisions of this section.'

Will you kindly advise me if this enactment is retroactive with respect to offenses resultant in convictions prior to June 30, 1954? That is, in the event this Division should receive on or after June 30, 1954 a record of conviction of reckless driving or speeding resultant from an offense occurring prior to June 30, 1954, and this being a second offense within the purview of the Section, both offenses occurring prior to June 30, 1954, shall we revoke in accordance with the Section?

Again, assume that on or after June 30, 1954, we receive a record of conviction for an offense of reckless driving or speeding committed on or after June 30, 1954, and this being a second offense within the purview of the Section, the first offense having occurred prior to June 30, 1954, shall we revoke in accordance with the provisions of the Section?"

Apparently, Section 46-416.2 of the Code was enacted to remedy a situation brought about by the enforcement of Section 46-416.1. This section, as you know, provides for the revocation of a driving license upon conviction on two separate and distinct offenses of speeding. In order to avoid the consequences of this law, motorists were deliberately committing acts of reckless driving so that they could be found guilty thereof rather than on a charge of speeding. The section which you quote simply prevents such a condition to continue. It is my opinion that the provisions of the Safety Responsibility Act, including, of course, Sections 46-416.2 and 46-416.1, are remedial. The Court, in the case of Joyner v.
Matthews, 193 Va. 10, held that the provisions of the Motor Vehicle Code regulating weight limits are remedial. Where the act seeks to remedy a situation for the general welfare, the act is considered remedial and should be liberally construed so that the existing evils condemned can be suppressed. The question of highway safety is one which has baffled modern society, and the legislative bodies throughout the country have sought, through various and sundry means, to set up systems of traffic control which would render the travel on highways safer. Clearly, the legislation is remedial.

It has been held by our Court of Appeals, in the case of Law v. Commonwealth, 174 Va. 449, and in the more recent case of Lamb v. Parsons, 195 Va. 353, that the right of a party to drive on the public highways is not a property right but a conditional privilege which may be withdrawn if abused. The question presented here is whether the Commissioner can consider as a basis of revocation, under the provisions of this act, offenses which were committed prior to the effective date of the act, or whether his power is limited solely to acting where the offenses are committed after the effective date of this said act. The general rule that legislation should be considered prospective and not retrospective seems to be limited to statutes which affect property rights in the constitutional sense and, of course, criminal statutes. In the case of Norfolk Bar Association v. Drewry, 161 Va. 833, the Association sought to have Drewry disbarred. The statute under which the trial court was empowered to hear and determine disbarment proceedings before the enactment of 1932 limited the court's jurisdiction to instances of malpractice which occurred in the presence of the court (Section 3424 of the Code of 1919). The 1932 Act enlarged the jurisdiction of the Court to try and determine disbarment proceedings where the charges were based on acts or practices of the attorney committed outside of the court. Drewry's alleged derelictions were committed prior to the effective date of the 1932 amendment. The petition against Drewry was filed before the 1932 Act became effective, but the charges against him were not tried until after the act went into effect. The Court held the statute to be remedial. It also held that statutes which are remedial would be given retrospective effect unless they direct to the contrary. Attention is invited to the court's opinion (page 842):

"(10) If the act of March 10, 1932, is in force, that ends this case. The petition was filed after it was enacted, but before it took effect. Judgment on the motion to dismiss was entered on November 10, 1932, at which time that statute was in operation. As we have seen, this is not a criminal proceeding and in no constitutional sense is the statute ex post facto in its operation.

In Ex parte Wall, 107 U. S. 273, 2 S. Ct. 569, 576, 27 L. Ed. 552, it appears that the license of a practicing physician was revoked. It was held that ex post facto punishment had not been inflicted. The court, quoting from Lord Mansfield, said: "'The question is whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion. * * * It is not by way of punishment; but the courts in such cases exercise their discretion, whether a man whom they have formerly admitted is a proper person to be continued on the roll or not.'"

Since this statute is remedial, it applies to pending cases:

(11) 'Statutes which are remedial will be given a retrospective effect, unless they direct to the contrary. Where, therefore, an act of Congress enlarges the jurisdiction of the circuit court, it will be construed to apply to cases pending and undetermined at the passage of the act, unless excluded by its terms or necessary implication from the language of the act.' Headnote Larkin v. Saffrans (C.C.), 15 Fed. 147. See, also, Black on Interpretation of Laws, p. 264."

In many respects, the Drewry case and the question here involved are similar. The right to practice law is a privilege, just as the right to operate a motor
vehicle on the highway is a privilege. The privilege to practice law can be withdrawn by the sovereign if the privilege is abused, just as the privilege to drive a motor vehicle can be withdrawn. Neither is a property right.

Considering the wording of Section 46-416.2, I do not see where there is any restriction upon the Commission. His duty is to revoke upon the receipt of a conviction of reckless driving and speeding, providing the two offenses occur within a twelve-month period. Of course, the Commissioner would have no duty or right to revoke prior to the effective date of this act, but he certainly has that duty now.

It follows, therefore, that it is my opinion that both questions propounded by you should be answered in the affirmative.

MOTOR VEHICLES—Over-length passenger buses—Cities have no authority to authorize. F-119 (301)

HONORABLE C. H. LAMB,
Commissioner, Division of Motor Vehicles.


Please accept my apologies for this belated reply to your letter of March 4, 1955, in which you make inquiry as to whether the Cities of Richmond and Norfolk can lawfully enact ordinances to authorize a length up to forty (40) feet for passenger buses operating within those Cities. You wish to be advised if the Division of Motor Vehicles has authority to license such buses in the event such ordinances may be legally enacted.

By virtue of Section 46-198 of the Code of Virginia of 1950 cities and towns are vested with authority to adopt ordinances to regulate the operation of vehicles on the highways therein, not in conflict with the provisions of Title 46 of the Code of Virginia.

The lawful maximum sizes for motor vehicles throughout the State are set forth in Article 11 of Chapter 4, Title 46, Code of Virginia of 1950. Section 46-325 of the Code, a portion of Article 11, provides the general rule as follows:

"The maximum size and weight of vehicles herein specified shall be lawful throughout the State and local authorities shall have no power or authority to alter such limitations, except as express authority may be granted in this Title."

Subsequent sections specify the maximum width, height and length for motor vehicles. In Section 46-326 of the Code, which specifies the maximum width, there is the following proviso:

"* * * provided, however, passenger buses not exceeding a total outside width of one hundred and two inches may be operated on the streets of incorporated cities and towns when authorized thereby pursuant to § 46-198. The Commissioner of the Division of Motor Vehicles is hereby authorized to register and license such buses."

It is significant that no such proviso was enacted as a part of Section 46-328 of the Code specifying the maximum length for motor vehicles. That section provides, insofar as here germane, as follows:

"No passenger bus shall exceed a length of thirty-five feet and no other vehicle a length of thirty-five feet; provided, however, the State Highway Commission may, by general or special order, which may be amended or rescinded from time to time, increase the length of passenger buses permitted on certain highways, or parts thereof, designated by the Commission, to forty feet. * * *"
You will note that only the State Highway Commission has been authorized by this section to increase the length of passenger buses to forty (40) feet, and: then on certain highways designated by the Commission. By definition, the term "highway", when used in Title 46 of the Code, includes the streets and alleys in towns and cities. Section 46-1(8).

While Section 46-339 of the Code empowers the State Highway Commission and local authorities of cities and towns to issue a special permit authorizing the applicant to operate or move a vehicle upon the highway of a size or weight exceeding the maximum specified in Title 46 of the Code, I am constrained to the belief that such authority was intended for special circumstances and could not: be extended to include the licensure of legally operated passenger buses.

The foregoing leads to the conclusion that the Cities of Richmond and Norfolk are without legislative authority to enact ordinances which would permit the operation of passenger buses in excess of the maximum length specified in Section 46-328 of the Code of Virginia. This conclusion naturally renders unnecessary the answering of your second inquiry as to the authority of the Division of Motor Vehicles to license buses of a length in excess of such statutory limits.

MOTOR VEHICLES—Revocation of Permit—Appeal is law action—No writ tax.

November 30, 1954.

Honorable Richard F. George,
Clerk, Circuit Court of Fluvanna County.

This is in reply to your letter of November 18, 1954, which reads as follows:

"I am writing to know how an appeal of the Commissioner of Motor Vehicles revocation of a driving permit to the Judge of the Circuit Court is classified. In other words, is this a law action with clerk's fee and no: writ tax, or $1.00 writ tax, or just how should it be classified, and taxed for costs?"

I am of the opinion that proceedings under § 46-424 are law actions and not chancery suits.

Section 58-71 of the Code reads as follows:

"When any original suit, whether commenced by writ or notice, ejectment or attachment, other than a summons to answer a suggestion, or other action, except a suit in chancery, is commenced in a court of record and in every case of removal or appeal from the decision of a trial justice's court to a court of record, or upon any appeal from the decision of the board of supervisors or other governing body of a county, or of an attachment issued by a justice and returnable to a court of record, there shall be a tax thereon, if the amount of the debt or demand for damages shall not exceed one thousand dollars, of one dollar; when the debt or demand for damages exceeds one thousand dollars but does not exceed five thousand dollars, the tax shall be two dollars; and when the debt or demand for damages exceeds five thousand dollars, the tax shall be five dollars."

You can see from the above-quoted section of the Code that writ taxes are to be paid when any original suit is commenced in a court of record. In my opinion proceedings under § 46-424 of the Code are not original suits but are in fact an appeal from the action of the Commissioner of Motor Vehicles. The appeal is not heard de novo in the court of record, but the transcript of the testimony of the hearing by the Division of Motor Vehicles and the exhibits filed in that hearing go to the court of record and the court, sitting without a jury, hears the appeal on the record transmitted by the Commissioner and on such additional evidence as the court may deem desirable. Therefore, it is my opinion that this is a law action in which a clerk's fee is charged, but in which no writ tax is chargeable.
MOTOR VEHICLES—Revocation of Permits—Conviction operates to revoke automatically—Blood test of deceased operator. F-149 (185)

December 28, 1954.

HONORABLE DANIEL W. McNEIL,
Commonwealth's Attorney, Rockbridge County.

This is in reply to your letter of December 17, 1954, in which you request my opinion concerning the following matters:

"1. Under Section 18-76 of the Code of Virginia, Acts of the General Assembly of 1954, chapter 406, it is provided 'That the court may, in its discretion suspend the sentence during the good behavior of the person convicted.' If the sentence is suspended does the driving license of the convicted person have to be revoked under Section 18-77 of the Code? In construing the word 'Sentence' used in Section 18-76 of the Code, does this mean that a fine can be imposed on a person found guilty, and the payment of the fine suspended pending the good behavior of the accused?

"2. Does a county medical examiner have the right to take a blood sample from the body of a deceased person who has been killed in an automobile wreck on a highway, such deceased person having been the driver of one of the vehicles involved in the wreck, and this blood sample being taken in order to determine the alcoholic content, if any, of the blood of such deceased driver? And then reporting the alcoholic content of the blood of such deceased driver on the medical examiner's report?"

In reply to your first inquiry, if the sentence is suspended under the provisions of § 18-76 of the Code of Virginia, the driving license of the convicted person is still revoked by § 18-77 of the Code. Section 18-77 of the Code of Virginia provides, in part, as follows:

"The judgment of conviction if for a first offence under § 18-75, or for a similar offense under any city or town ordinance, shall of itself operate to deprive the person convicted of the right to drive or operate any such vehicle, conveyance, engine or train in this State for a period of one year from the date of such judgment, and if for a second or other subsequent offense within ten years thereof for a period of three years from the date of judgment of conviction thereof. * * *" (Emphasis added)

As you can see from the above-quoted provision, it is the judgment of conviction which deprives the person convicted of the right to drive or operate any such vehicle. The provisions of this section are self-executing and need no order by the court or anyone else to put into effect the revocation of the license. Therefore, it is my opinion that, regardless of whether the sentence is suspended or not, the convicted person's right to operate a vehicle in this State is revoked immediately upon a judgment of conviction.

In answer to your second inquiry, I am of the opinion that the word "sentence" as used in § 18-76 of the Code includes any fine which might be imposed. It has long been the view of the courts of this State and of this office that the word "sentence" includes both imprisonment and fine. Therefore, the court can suspend the payment of the fine pending the good behavior of the accused.

It is my opinion that a county medical examiner, under the powers and authority granted him by the Code of Virginia, has the right to take a blood sample from the body of a deceased person who has been killed in an automobile accident for the purpose of determining the alcoholic content of the blood of the deceased person, and that the report of the findings concerning the alcoholic content of the blood of the deceased person may be placed upon the medical examiner's report.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Safety Responsibility—Waiver of proof when vehicle under warrant of Corporation Commission. F-149a (176)

HONORABLE C. H. LAMB,
Commissioner, Division of Motor Vehicles.

This is to acknowledge receipt of your letter of December 7. In that letter you raise certain questions as to your duty enforcing the provisions of the Safety Responsibility Act. I shall answer the questions seriatim.

(1) "Will you kindly advise me if the administrative duty imposed on me by the provisions of Sections 46-390 and 46-436 of the Code has been met if I am advised by the State Corporation Commission that a permit is in force and that a warrant for a particular vehicle has been issued indicating that at the time of the issuance of the warrant insurance was in force, or am I administratively required to determine if at the occurrence of an accident the vehicle was in fact being operated under the regulatory authority of the State Corporation Commission thereby making the insurance represented by the certificate of insurance on file with the State Corporation Commission applicable to a possible liability?"

Section 46-390 of the Code of Virginia provides, in part, as follows:

"This chapter * * * does not apply to any motor vehicle: (1) Operated under a permit or certificate of convenience and necessity issued by the State Corporation Commission if public liability and property damage insurance for the protection of the public is required to be carried upon it, or (2) * * * ."

If you find that the State Corporation Commission has issued to the owner or operator of a particular vehicle a warrant or permit pursuant to § 56-304 of the Code, and the same has not expired, this, it would appear, would be sufficient to satisfy your department that the requirements of § 56-299 of the Code have been met.

With respect to your suggestion that the certificate, a copy of which was attached to your letter, indicate that the policy of insurance is limited to providing protection only when the vehicle is actually being operated in the transportation of passengers or property for compensation, I shall not express an opinion. In this connection you might wish to refer to §§ 38.1-381 and 56-302 of the Code, and to the case of Liberty Mutual Ins. Co. v. Tiller, 189 Va. 544.

(2) "Again, may I under the provisions of Section 46-390 waive the requirement of proof of financial responsibility when I am advised that a certificate or permit has been issued and a warrant is outstanding on the basis that insurance was in effect on the date of the issuance of the warrant, regardless of the possibility that the vehicle may at times be used in an operation not under the regulatory authority of the State Corporation Commission, without thereafter making a continued determination as to whether the certificate of insurance on file with the State Corporation Commission is effective at all times?"

For the reasons expressed above, I am of the opinion that you may waive the requirement of proof of financial responsibility under such circumstances provided you are convinced that a warrant covering the vehicle is valid at the time of the accident.

(3) "Further, inasmuch as the requirement of obtaining warrants for non-self-propelled vehicles has been eliminated from the provisions of Section 56-304 of the Code, am I required by the applicable provisions of Title 46 to require persons subject to the provisions of filing proof of

December 16, 1954.

HoNORABLE C. H. LAMB,
Commissioner, Division of Motor Vehicles.
financial responsibility to file such proof before they license a non-self-propelled vehicle, regardless as to whether the person holds a certificate or permit issued by the State Corporation Commission?"

Section 56-304 of the Code was amended in 1954 to include only self-propelled motor vehicles. Therefore, the insurance required by the Corporation Commission does not cover trailers. The term "motor vehicle" as used in the Safety Responsibility Act (46-387, paragraph 8) includes a vehicle drawn by or designated to be drawn by a motor vehicle, which, of course, is a trailer. I am, therefore, of the opinion that, inasmuch as the trailer is not required by the State Corporation Commission to be covered by insurance, the exclusion in 46-390 does not apply; and you are required by the applicable provisions of Title 46 to require a person subject to the provisions of filing proof of financial responsibility to furnish proof they can license a trailer.

MOTOR VEHICLES—Trial Justice—Not entitled to fee for forwarding abstract of conviction. F-136a (140)  
November 9, 1954.

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

This is in reply to your letter of November 5, 1954, in which you request my opinion as to whether or not a trial justice is entitled to a fee of 50¢ for each abstract of conviction which he or his clerk forwards to the Division of Motor Vehicles, as required by § 46-414 of the Code of Virginia.

Section 46-414 contains the provision that the clerk of a court of record shall receive a fee of 50¢ for each report of a conviction forwarded by him to the Commissioner of Motor Vehicles, which fee is to be paid by the State Treasurer from funds appropriated for criminal charges. However, if a person is convicted in the Trial Justice Court and no appeal is taken to a court of record, the Trial Justice is not entitled to a fee of 50¢ for the certification of such a conviction, since the Trial Justice is not a fee officer. The reason for providing for a 50¢ fee to a clerk of a court of record for the certification of a conviction is due to the fact that clerks of courts of record in Virginia are still fee officers. If the Trial Justice, because of the work placed on his office by the requirements of § 46-414, has to employ an additional clerk to handle the certification of these convictions to the Commissioner of Motor Vehicles, he should present a request for additional expenses for his office to the City Council.

MOTOR VEHICLES—Violations—Operating when license revoked for no financial responsibility. F-149 (278)  
April 15, 1955.

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

This is in reply to your letter of April 8, 1955, in which you present the following situation:

"A man has his operator's permit suspended for one year by a Court in this State. After the expiration of the one year, the revocation is continued by the Division of Motor Vehicles for three years unless the operator furnishes proof of financial responsibility under the Safety Responsibility Act, during which time the gentleman is arrested for driving..."
without a permit. The one year Court revocation has expired, but he has failed to prove Financial Responsibility as required by the Division of Motor Vehicles.

You inquire whether or not the individual in question is guilty of violating either sections 46-347.1 or 46-347.2 of the Code of Virginia (1950), as amended. These sections of the Code provide:

"Driving while license suspended or revoked.—No person whose operator's or chauffeur's license has been suspended or revoked by any court or by the Commissioner shall thereafter drive any motor vehicle in this State unless and until such suspension or revocation shall have terminated. Any person violating the provisions of this section shall for the first offense be confined in jail not less than ten days nor more than six months, and for the second or any subsequent offense be confined in jail not less than two months nor more than one year; and may in addition be punished by a fine of not less than one hundred nor more than one thousand dollars."

"Driving before suspended or revoked license has been reinstated or new license issued.—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."

Considering these statutes in the inverse order of their presentation, it is manifest that the latter defines an offense occurring "after such suspension or revocation shall have terminated ** *.* Since the revocation in the situation under consideration is still in effect, I am of the opinion that no violation of this section has taken place.

Furthermore, I believe that section 46-347.1 is also inapplicable in the present setting. While the language of this provision is sufficiently comprehensive to include the situation in question, I believe that its effect is circumscribed in this instance by the terms of section 46-484 of the Code, which provides:

"Penalty for operation of motor vehicle in violation of chapter.—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 non-resident 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."

As the italicized language indicates, this statute is limited in scope to those instances in which a license has been suspended or revoked for an indefinite period contingent upon the furnishing of proof of financial responsibility. This statute defines a specific offense and prescribes a particular penalty to be imposed.
upon one driving a motor vehicle under the stated circumstances. Since it appears from your letter that the revocation in the situation under discussion is in effect solely because of a failure to furnish necessary proof of financial responsibility, I am of the opinion that this section rather than section 46-347.1 would be applicable.

MOTOR VEHICLES—Violations—Towing car in excess of 40 m.p.h.—Definition of “driver”. F-353 (17)

MR. T. H. LILLARD
Sheriff of Madison County.

Receipt is acknowledged of your letter of July 13, 1954.

You asked:

1. Under the provisions of § 46-212 of the Code of Virginia of 1950, as amended, can a vehicle, designed for self-propulsion, be towed at a speed of 55 miles per hour if a person is riding in the towed vehicle?

Section 46-212, Subsection 2 (e) makes it a misdemeanor for any person to “Drive upon any highway in this State any motor vehicle at a speed in excess of forty miles per hour when towing a motor vehicle which is self-propelled or designed for self-propulsion in which there is no driver.”

It is my opinion that the mere presence of a person in the towed vehicle would not alter the 40 mile per hour limit. A driver is a person who propels and controls the motion and direction of a vehicle. Unless the person in the towed vehicle actually has and exercises this control he is not a driver but merely an occupant.

MOTOR VEHICLES—Weight Laws—Violation of is misdemeanor. F-27 (35)

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

This is in reply to your letter of July 28, 1954, which reads, in part, as follows:

"On July 7, 1954, an individual was arrested in Washington County, Virginia, for violation of the Motor Vehicle Weight Law, Section 46-334 of the Code of Virginia. When the truck which he was driving was weighed, it was found to weigh 5,800 over the axle limit. The defendant posted a cash bond for his later appearance in the Trial Justice Court. The amount of the bond posted was $296.25, which represented 5¢ per pound for each pound of excess gross weight, plus $6.25 court costs. The defendant is a resident of Tennessee and the truck which he was operating and which was owned by him is registered in Tennessee.

"The defendant appeared with counsel on the day set for trial and a 'not guilty' plea was entered. After hearing the case, the Trial Justice found the defendant guilty and fixed his fine at $290.00 and court costs in the amount of $6.25, or the amount of the cash bond which had previously been posted.

"The defendant then requested the Clerk of the Trial Justice court to return the sum of $296.25 which he had deposited in lieu of a recognizance, on the ground that he had appeared on the date of trial and
there had been no default in the conditions of the recognizance. The defendant, through counsel, also advised the Clerk and the Trial Justice at that time that the fine would not be paid. In discussing the matter, it was the position of the defendant that Sections 46-334 and 46-338.1 were not penal statutes and that the defendant had a right not to pay the fine, and could not be committed to jail for failure to pay it. It was contended that the only remedy which the Commonwealth had was that provided in Section 46-338.1 whereby the defendant could be denied the use of the highways of this State. This defendant, so far as I have been able to ascertain, is a one-truck operator and hauls gravel on the contract basis. The job on which he was employed at the time of his violation is now terminated and it would not appear probable that the defendant would, in the foreseeable future, have occasion to re-enter the State of Virginia, since his home is a considerable distance away."

Section 46-338.1, as amended in 1950, expressly provides that any violation of § 46-334 shall constitute a misdemeanor. For that reason I can see no merit to the defendant's contention that § 46-334 is not a penal statute and, therefore, it is my opinion that the money deposited should be disposed of as provided in § 19-108 and should not be returned to the defendant.

MUSEUM OF FINE ARTS—Maintenance of grounds of—No duty on Division of Budget. F-40 (230)

February 17, 1955.

Mr. D. V. Chapman, Jr.,
Superintendent, Grounds and Buildings.

This is in reply to your letter of February 15, 1955, which reads, in part, as follows:

"The Virginia Museum of Fine Arts, through Mr. George D. Gibson, Chairman of its Local Building and Grounds Committee, has asked that we pay 25% of the total cost of repair work on trees situated in that portion of the Robert Edward Lee Camp Soldiers Home Grounds (now referred to as the R. E. Lee Camp Confederate Memorial Park) described in Chapter 61 of the 1954 Acts of the General Assembly."

"It appears the request has been made on the basis of such proportion representing the cost of ordinary maintenance and the remaining sum of 75% of the total cost resulting from capital changes made in connection with the additions to the Museum Building."

"In checking the various Acts of Assembly relating to use of portions of these grounds or the Park as described in the several Acts, it occurs to us that all expenditures for the care and maintenance of such areas, after the effective date of the Acts of Assembly, should be paid by the Virginia Museum of Fine Arts. We shall, therefore, thank you to advise responsibility, if any, the Division of the Budget may have with respect to any or all of the area, the use of which has been granted to the Virginia Museum of Fine Arts by the General Assembly of Virginia."

In addition to the statements made in your letter, you conferred with a member of my staff with reference to the matter. During this discussion you stated that the officials of the Virginia Museum of Fine Arts apparently were of the opinion that their obligation with respect to the real estate described in Chapter 61 of the Acts of 1954 is not the same as exists with respect to the other real estate being used by the Museum.

By reference to Chapter 170, Acts of the General Assembly of 1932, authority was vested in the Governor and the Art Commission to erect the Museum "on the property belonging to the Commonwealth in the City of Richmond and
known as the soldiers home property.” This authority having been exercised, by Chapter 184, Acts of 1934, the management and control of the Museum was vested in a board of directors, subject to certain rights of the Robert Edward Lee Camp Number One Confederate Veterans, as set forth in Chapter 454, Acts of 1926. The Act of 1934 states:

“There is hereby set apart and dedicated to the occupancy and use of the Virginia Museum of Fine Arts that portion of the Robert Edward Lee Camp soldiers home grounds upon which the Museum is now being erected contained and embraced within the following described lines:

Chapter 184, Acts of 1934, was amended by Chapter 7, Acts of 1948, by adding a new section 1-a, as follows:

“Subject to all other reservations contained in this act there is hereby set apart and dedicated to the occupancy and use of the Virginia Museum of Fine Arts in addition to property heretofore so set aside and dedicated the following described portion of the Robert Edward Lee Camp Soldiers’ Home grounds.”

Chapter 184, Acts of 1934, was further amended by Chapter 61, Acts of 1954, by adding a new section numbered 1-b as follows:

“Subject to all other reservations contained in this act there is hereby set apart and dedicated to the occupancy and use of the Virginia Museum of Fine Arts in addition to property heretofore so set aside and dedicated all the following described portion of the Robert Edward Lee Camp Soldiers’ Home grounds to the extent not previously set apart and dedicated to the occupancy and use of the Museum.”

By Chapter 199, Acts of 1936, the 1934 Act (Chapter 184) was amended so as to provide that the management of the Museum should be in a board of trustees rather than a board of directors and to prescribe more fully the power and authority vested in said trustees. The trustees are vested with “full power and authority to manage, control, maintain and operate the Virginia Museum of Fine Arts, including the contents, furnishings and grounds thereof, and including the funds, property, endowments thereof * * *.” No powers of supervision of the Museum grounds and buildings are reserved to the Director of the Budget, and the Director is not made responsible in any way for the maintenance and upkeep of the Museum property located on the land described in the three Acts under which right to occupy and use the property, subject to the several reservations, was acquired by the Museum.

The several paragraphs herein quoted relating to the dedication of the three parcels to the occupancy and use of the Museum are substantially the same and the rights of the Museum to such parcels are equal.

I am of the opinion, upon the basis of the foregoing review of the several Acts pertaining to the Museum, that there is no responsibility upon the Division of the Budget to pay out of the funds appropriated for maintenance and operation of grounds and buildings any part of the cost of repair work or trees situated on any of the property dedicated to the occupancy and use of the Museum.

NOTARY PUBLIC—Should be commissioned for City of Clifton Forge.
F-246 (104) October 11, 1954.
HONORABLE MARTHA BELL CONWAY, Secretary of the Commonwealth.

This is in reply to your letter of October 7, 1954, in which you inquire whether persons living in the City of Clifton Forge should be commissioned
notaries public for the City or for the County of Alleghany. You point out that the City of Clifton Forge has a Circuit Court separate from the Circuit court of Alleghany County.

The General Assembly, by establishing a separate circuit court for the City of Clifton Forge, has made an exception to the general rule with respect to courts for a city of the second class as provided in § 15-96 of the Code. In the absence of such an exception I am of the opinion that notaries for such cities should be commissioned for the county in which the city lies.

Section 47-1 of the Code provides for the appointment of notaries for counties and cities and further provides that, where the appointment is for a city, qualification of such notary shall be in the corporation court of such city. The City of Clifton Forge does not have a corporation court, but I am of the opinion that the Circuit Court of such City has all the powers that would ordinarily be in a corporation court.

I am of the opinion, therefore, that notaries for the City of Clifton Forge should be commissioned for that City.

NURSES—Board of Examiners—No fee required for second examination.
F-294 (180)
December 23, 1954.

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

This is in reply to your letter of December 17, in which you state that during the last few years a great many applicants for the examination of the State Board of Examiners of Nurses have failed one or more of the individual subjects included in the examination. You indicate that no special fee for repeating the examination has been assessed by the Board and request an opinion on whether such an additional charge may be made.

Pertinent in this connection is section 54-349 of the Code of Virginia (1950), which prescribes as follows:

"The fees for examination and certification shall be as follows: For a professional nurse, fifteen dollars; for a tuberculosis nurse, fifteen dollars; and for a registered practical nurse, ten dollars. Fees shall be paid upon filing of applications."

I am constrained to believe that the brief language of the above quoted statute comprehends the payment of only one fee for the examination and certification of each applicant. Certainly, no specific provision is made for the charging of additional fees for the re-examination of unsuccessful or partially unsuccessful candidates. Moreover, the statute declares that the prescribed fees shall be paid "upon filing of applications", and it appears that a candidate for examination need file only one application with the Board, and that the filing of additional applications by unsuccessful candidates is not required. I am thus of the opinion that an additional charge for re-examination may not be imposed by the Board under the present applicable law.

OPTICIANS—May not offer discount to third person in order to obtain customers.
F-207 (284)
April 22, 1955.

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

This is in reply to your letter of April 21, 1955, to which is attached a letter from Baxter Optical Company of Petersburg, Virginia, dated January 20, 1955,
addressed to the Virginia State Board of Opticians. It is stated in this letter that the Baxter Optical Company has an arrangement with the Virginia State College at Petersburg under which the Optical Company fills prescriptions issued by a physician at the College to its students. Baxter Optical Company manufactures glasses in accordance with the prescription and delivers them to the students. The glasses are charged to the College and the student pays the College at the regular retail price for such glasses. Baxter Optical Company invoices the College on a monthly basis, and the College, through the State Comptroller's Office, pays the invoice after deducting 25%. It is stated in the letter to the State Board of Opticians that the 25% deduction is retained by the business office of the College to meet the costs of collecting from the students and to cover any losses which the College might suffer should the student fail to pay for his glasses.

The question presented is whether this practice by the Baxter Optical Company is in violation of subsection 5 of § 54-398.23 of the Virginia Code, which subsection reads as follows:

"The Board shall revoke or suspend the certificate of registration of any person for any of the following causes:

(5) If such person shall advertise or offer any gift or premium or discount in any form or manner in conjunction with the practice of an optician, or directly or indirectly advertise that any one class of duly licensed eye examiners is preferable to any other class qualified and authorized under the laws of Virginia to make visual or eye examinations and to prepare prescriptions for eyeglasses, or advertise in any manner that would tend to mislead or deceive the public, or engage in any form of house to house canvassing or soliciting for the sale of spectacles or other ophthalmic products or services."

In my opinion this practice is in violation of the statute. The Optical Company under this practice is offering a discount to the Virginia State College. I think that the purpose of the statute is to prohibit any person or firm engaged in the practice of an optician from offering any inducement in the form of a gift, premium or discount for the purpose of obtaining business, and that the statute is applicable whether the offer is made to the person for whom the glasses are manufactured or to some other purchaser.

ORDINANCES—Town may not prohibit Sunday movies. F-60a (342)

HONORABLE WENDO M. GODWIN,
Member House of Delegates.

June 20, 1955.

I am in receipt of your letter of June 15, 1955, in which you ask me for an opinion on the following question:

"Please advise me at your earliest convenience whether or not the Town Council of an Incorporated Town may pass an Ordinance prohibiting the showing of Sunday movies. As you know, the law pertaining to Sunday movies was amended in the Acts of 1954 as found in Chapter 131, but no reference is made to the prohibition of the showing of Sunday movies by a Town Council."

As you point out, § 18-329 of the Code (Chapter 131), relating to working or transacting business on Sunday, was amended in 1954 so as to remove the operation of motion picture theatres from the prohibition contained in the section. Therefore, the general law must be looked to for the answer to your inquiry.
The general rule is that a business may be prohibited if the public safety or the public welfare or public morals require its discontinuance. However, a person or corporation may not be prohibited from engaging in a lawful business not injurious to the community. The test as to whether or not a business or calling may be prohibited is the effect such business or calling has upon the public welfare. Whether or not the operation of a motion picture theatre is inimical to the public welfare is a question of fact and not of law. However, I find it difficult to say that the operation of a bona fide motion picture theatre is bad for a community, especially when the State recognizes it as a legitimate business by imposing a license tax thereon (§ 58-270 of the Code) and, in addition, the films shown in such a theatre are censored by a State agency.

My conclusion is that your question must be answered in the negative.

PHARMACY—Board has no authority at Washington National Airport. F-134 (28)

Mr. Ralph M. Ware, Jr.,
Secretary, Board of Pharmacy.

This is with reference to your letter of July 16, 1954, in which you ask to be advised as to the authority of the Virginia Board of Pharmacy to require registration in accordance with the laws of Virginia of the Airport Pharmacy, Washington National Airport.

Whether the laws and regulatory measures of the Commonwealth may be enforced within those areas in the State occupied or maintained by the Federal Government depends generally upon the extent of jurisdiction exercised by the Federal Government and ceded by the Commonwealth. With regard to the Washington National Airport, exclusive jurisdiction, with specified exceptions, is in the United States Government by virtue of section 7-9 of the Code of Virginia, 1950. Inasmuch as there is no specific reservation of power in the Commonwealth to exercise regulatory control over the professions or trades practiced at the Washington National Airport, I am of the opinion that the Virginia Board of Pharmacy does not have the authority to require registration of the pharmacy nor to require that the pharmacists therein be licensed to practice in this State.

PHARMACY—Dangerous Drugs—Dispensing of by veterinarians. F-134 (226)

Mr. Ralph M. Ware, Jr.,
Secretary, Board of Pharmacy.

This will reply to your letter of February 1, in which you present the following questions:

1. Should the sale of drugs marketed for veterinary use and classified as dangerous or prescription drugs under the laws of Virginia be restricted to licensed pharmacies?

2. Are licensed veterinarians prohibited from supplying veterinary preparations to patients, if such supply is made as a sale?

In connection with the first question raised in your communication, section 54-441 of the Virginia Dangerous Drug Law (Title 54, Chapter 15, Article 5, Code of Virginia (1950), as amended, provides that, with the exception of drugs...
of the sulfonamide group in their original packages and manufactured for use in the control of livestock and poultry diseases, no dangerous drug shall be sold or offered for sale by any person other than a licensed pharmacist. Drugs of the character described in the foregoing exception are the only type exempted by the Dangerous Drug Law with respect to the sale thereof, as distinguished from the dispensing of such drugs by practitioners lawfully practicing their profession in this State. I am, therefore, of the opinion that the sale of drugs classified as dangerous under the terms of this Article, other than those in the excepted class, should be restricted to licensed pharmacists.

Pertinent to the resolution of your second inquiry are sections 54-475 and 54-481 of the Code, which relate to the retailing of drugs generally. The former section proscribes the dispensing, compounding or retailing of drugs, medicines or poisons within this State except as authorized by law, while the latter section provides:

"This chapter shall not be construed to interfere with any legally qualified practitioner of medicine, dentistry, osteopathy or veterinary medicine, who is not the proprietor of a store for the dispensing or retailing of drugs, or who is not in the employ of such a proprietor, in the compounding of his own prescriptions, or to prevent him from supplying to his patients such medicines as he may deem proper, if such supply is not made as a sale." (Italics supplied).

In the light of the italicized condition, the clear import of this statutory language is that the benefits of the quoted provision accrue to practitioners supplying medicines to their patients only in those instances when no sale is made. This would appear to be consistent with the exemption specified in the terminal sentence of section 54-445, which permits practitioners only to dispense dangerous drugs "when licensed to prescribe or administer the same", but does not purport to allow the sale of such drugs. I am, therefore, of the opinion that licensed veterinarians are prohibited from supplying veterinary preparations to patients if such supply is made as a sale.

PHARMACY—Licenses—Practical experience cannot be obtained concurrent with school year. F-134 (91)

September 23, 1954.

MR. RALPH M. WARE, JR.,
Secretary, State Board of Pharmacy.

This is in response to your letter of September 17, 1954, inquiring as to the authority of the Board of Pharmacy to adopt Regulation 5-f which sets forth the method by which experience is to be gained by candidates for licensure with specific emphasis on paragraph 3 of the Regulation which stipulates that the required twelve months' practical experience in pharmacy under the supervision of a pharmacist must be gained non-concurrent with the school year.

Section 54-422 of the Code of Virginia, as amended, provides the requirement for "not less than twelve months' practical experience". It would appear that the main issue is the interpretation of the foregoing statutory requirement rather than the board's authority to adopt a regulation dealing with the subject as the board could not enlarge or decrease the statutory provisions on the subject. It would further appear that the twelve months' requirement reasonably means a full twelve months' practical experience with full time devoted thereto; otherwise the purpose of the experience would not be fulfilled as in the case where the applicant only worked part time and could not give his full attention to acquiring the required experience. Accordingly, while I am not advised as to the schedule of a school of pharmacy and the period of study required in and out of school,
it would be my thought that the applicant could not satisfy the twelve months' practical experience requirement while attending a school of pharmacy at the same time which it is assumed in itself requires the student's full time and effort. Therefore, it is my view that the required experience of twelve months could not be gained concurrent with the school year.

POLICE—Officers not entitled to any property confiscated. F-136e (57)

HONORABLE J. ELLIOTT DRINARD, City Attorney, Richmond, Virginia.

This is in reply to your letter of August 17, 1954, in which you ask my opinion regarding the right of police officers to claim money as "lost property" which was confiscated in conjunction with whiskey being stored in violation of the Alcoholic Beverage Control Law, inasmuch as no one arrested in conjunction with such confiscation has come forward to lay claim to such money.

I am aware of no provision in the laws of this State which would entitle police officials to any property confiscated while carrying out their official duties.

PROPERTY—Assignment for benefit of creditors—Supervision of trustee. F-273 (71)

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

This is in reply to your letter of August 30, 1954, in which you state the following:

"This court would appreciate your opinion concerning Sec. 55-161 of the Code of Virginia. Our specific question deals with how much discretion the trustee in these cases can use with regard to the distribution of the money. After the court enters its order directing that the trustee be appointed, can the trustee then distribute the money as he thinks is proper, or is the disbursement subject to orders by the court?"

Although a trustee appointed pursuant to provisions of section 55-161 of the Code of Virginia is authorized to exercise certain discretion in the distribution of a debtor's income, such distribution is subject to the supervision and approval of the trial justice or judge making the appointment. Not only does the language of section 55-161 provide for the supervision by the court, but the succeeding sections of the Code clearly provide that the actions of the trustee are subject to the approval of the court, and in the event the terms of the assignment are not being fairly administered, the court may declare the assignment null and void.

PUBLIC OFFICERS—Member of School Board may not serve as assessor. F-249 (110)

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

I am in receipt of your letter of October 15, 1954, in which you ask me to advise you "if a member of the County School Board of Charles City County
can also serve as a real estate assessor in a general re-assessment (appointed under Section 58-787-788 of the Code of Virginia) or whether such appointment would violate Section 15-504 of the Code of Virginia or any other provision of State law."

Section 22-69 of the Code provides that:

"No State or county officer, * * * shall be chosen or allowed to act as a member of the county school board * * *", subject to certain exceptions not applicable to the question under consideration here.

The answer to your question, in the main, depends upon whether or not an assessor is a county officer.

The assessors are appointed by the Judge of the Circuit Court of the County (Code Section 58-787). This section was formerly a part of Section 242 of the Tax Code of Virginia, and I find that the late Honorable Abram P. Staples, during his service as Attorney General, in an opinion rendered on May 27, 1940 (Reports of Attorney General 1939-40, page 168) expressed the opinion that an assessor appointed under the above section of the Tax Code would be considered a county officer.

It appears that the authorities generally support the view that assessors are officers and this view is apparently adhered to by the Supreme Court of this State in the case of Whitlock v. Hawkins, 105 Va. 242, at pages 253-4.

Accordingly, I am of the opinion that a member of a county school board is not eligible for appointment as an assessor under Section 58-787 of the Code.

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PUBLIC UTILITIES — Power of Fairfax County to condemn property of.

F-140 (319)


HONORABLE OMER L. HIRST,
Member of the House of Delegates.

This is in reply to your letter of May 12, 1955, in which you request my opinion as to whether Chapter 355 of the Acts of Assembly of 1954 is applicable to Fairfax County. That chapter of the Acts of Assembly gives certain powers of eminent domain to "the board of supervisors of any county adjoining a city with a population of more than two hundred and twenty-five thousand."

I am of the opinion that Chapter 355 of the Acts of Assembly of 1954 does not apply to Fairfax County. I do not feel that the phrase "adjoining a city with a population of more than two hundred and twenty-five thousand" refers to a city outside of the State of Virginia. I base this conclusion on the fact that in searching the statutes of Virginia for similar provisions, if they are intended to refer to cities outside of Virginia, the statutes are worded as follows: "adjoining and abutting any city, within or without this State." (For example, see § 15-10 of the Code of Virginia).

There is also some question as to whether Fairfax County adjoins the District of Columbia, as the word "adjoins" is used by the General Assembly. In § 15-10 of the Code of Virginia the boards of supervisors of certain counties are vested with the same authority as councils of cities and towns. That section reads, in part, 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, and has a density of population of five hundred or more to the square mile;"

Arlington County is the only county in Virginia which has a population density of five hundred or more to the square mile, and Fairfax County is the only
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county which adjoins Arlington County; therefore, clause (2) of § 15-10 of the Code can refer only to Fairfax County. If Fairfax County adjoined a city, within or without the State, having a population of one hundred and twenty-five thousand or more, to-wit, Washington, D. C., there would have been no necessity and no purpose in the General Assembly's enacting clause (2) of § 15-10 of the Code. Therefore, I must conclude that the General Assembly has not looked upon Fairfax County as adjoining the District of Columbia.

In arriving at the opinion that Chapter 355 of the Acts of Assembly of 1954 is inapplicable to Fairfax County, I have also considered the many decisions of our courts and of those of other jurisdictions which hold that the granting of the power of eminent domain is to be strictly construed, and any doubt as to whether the power has been granted is to be resolved against the authority to condemn and in favor of property owners.

In answer to your second question, there are several provisions in the Code under which Fairfax County may condemn privately owned water companies' facilities through the exercise of eminent domain; however, all of these provisions require the county to go before the State Corporation Commission if the property to be condemned is owned by a public service corporation which has the power of eminent domain. This proceeding before the State Corporation Commission is governed by § 25-233 of the Code of Virginia.

PUBLIC WELFARE—Cost of boarding children who have been committed—When can use Criminal Fund. F-239 (334) June 13, 1955.

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

I am in receipt of your letter of June 8, from which I quote below:

"As you know, committed children are returned to their communities by the State Board under the provisions of Section 16-172.77 of the Code of Virginia. It has been the policy of this Department to return these children for supervision either to the Juvenile Court committing them or to the welfare department in their counties or cities. When such child is returned and is unable to be placed in his own home, it has been our policy to use criminal funds for the boarding of such children only where there were no local resources available for this purpose, such as foster care funds in the welfare department.

"Honorable O. Raymond Cundiff, Judge of the Juvenile and Domestic Relations Court of Lynchburg, has raised the question that he should have the right to request use of the criminal fund where the child is returned to the Court for supervision and cannot be placed in his own home irrespective of the availability of funds for foster care being held by the local welfare department. He takes this position, he says, since the Court has no funds available to it for the placing and maintenance of such children.

"I would appreciate it very much if you would give me your written opinion as to your construction of Section 16-172.78 of the Code with reference to use of criminal funds by the Court when the child cannot be returned to his own home and some type of foster care must be found for him."

As you suggest, the statutes which are primarily applicable to your inquiry are Sections 16-172.77 and 16-172.78 of the Code. These sections are as follows:

"§ 16-172.77. Supervision of child or minor on parole.—When the Department returns a child or minor, who has been committed to its custody, to a local community for supervision the Director may return the
child or minor to either the local juvenile and domestic relations court or the local department of public welfare of the community. The agency to which the child or minor is returned for supervision shall accept responsibility for this service. When a child or minor is so paroled for local supervision, he shall be deemed to be still in the custody of the Department.

"The local supervising agency shall furnish such child or minor a written statement of the conditions of his parole and shall instruct him regarding the same. In the event it is determined by a court of competent jurisdiction that the child or minor has violated the terms of his parole, the said child or minor may then be returned to the Department."

"§ 16-172.78. Placing child on parole in foster home or with institution; how financed.—When the child or minor is returned to the court or the local department of public welfare for supervision and, after a full investigation, the court or the local department of public welfare is of the opinion that the child or minor should not be placed in his own home, and there are no funds available to board and maintain said child, the court or the local department of public welfare shall arrange with the Director of the Department of Public Welfare and Institutions for the boarding of said child or minor in a foster home or with any incorporated institution, society or association and the cost of maintaining such child shall be paid monthly, according to the schedules prepared and adopted by the Department by the State Treasurer, out of funds appropriated in the general appropriation act for criminal costs, on warrants of the Comptroller issued upon vouchers approved by the Director, or such other person as may be designated by the Director."

You will observe that part of Section 16-172.78 which states that, where the minor is returned to the court or local department of welfare for supervision and where, after a full investigation, the court or the local department is of the opinion that the child should not be placed in his own home, "and there are no funds available to board and maintain said child," the court or the local department shall arrange with the Director for the boarding of said child in a foster home, or with any incorporated institution, society or association, and the cost of maintaining such child shall be paid out of the funds appropriated in the General Appropriation Act for Criminal Costs. As I construe this section, it means that before the board of the child may be paid out of the appropriation for criminal costs there must be no funds available from other sources out of which this board may be paid. But you state in your letter that there are funds available for foster care out of which the board of this child may be paid. In this situation and as I construe the intent of the section, before the appropriation for criminal costs may be used the funds available from other sources must first be exhausted.

PUBLIC WELFARE—Docketing liens—Proper fee for clerk. F-116 (163)

Mrs. Annie B. Rolph,
Superintendent, Department of Public Welfare.

November 30, 1954.

This is in reply to your letter of November 29, 1954 in which you request my opinion as to the proper fee to be paid to a clerk of court for docketing liens under § 63-127 of the Code of Virginia. Section 63-127 of the Code contains the following provision:

"* * * The clerk of court shall docket this notice as a judgment is docketed, indicating the type of assistance received, in the current judgment lien docket, indexing it in the name of the recipient and in the name
of the local board, and shall mark the docket where the previous notice was docketed to indicate that it has been superseded. The clerk of the court shall receive for his services the regular fee allowed for docketing judgments in his office, and the Welfare Department is hereby authorized to pay such fee from its administrative fund. * * *

Section 14-123 of the Code reads, in part, as follows:

"A clerk of a circuit or other court of record shall, for services performed by virtue of his office, charge the following fees, to-wit:

* * * *

'(32) For docketing under Chapter 18 of Title 8 a judgment, decree, bond or recognizance, fifty cents."

In view of the two provisions in the Code quoted above, I am of the opinion that the proper fee to be paid by a department of welfare for docketing liens under § 63-127 of the Code is fifty cents.

GAME AND INLAND FISHERIES—Military personnel to have license to hunt and fish in Camp A. P. Hill. F-233 (164)

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

This is in reply to your letter of November 30, 1954 in which you request my opinion as to whether military personnel should have a hunting and fishing license for hunting or fishing in Camp A. P. Hill. You state that the Commonwealth of Virginia has not ceded its jurisdiction over this area to the United States of America. Section 29-51 of the Code of Virginia reads as follows:

"It shall be unlawful to hunt, trap or fish in or on the lands or inland waters of this State without first obtaining a license, subject to the exceptions set out in the following section."

I can find no exception in § 29-52 which would, in my opinion, exempt military personnel while hunting or fishing in Camp A. P. Hill from the license requirement found in § 29-51. Therefore, I must conclude that military personnel must have a license in order to hunt in Camp A. P. Hill. Military personnel who are stationed in Camp A. P. Hill are entitled, by § 29-57 of the Code, to purchase a county or State resident license.

PUBLIC WELFARE—Indigent Patients—Local Board to pay one-half of cost—Effective date of Act. F-268f (13)

MR. R. G. ERGBRIGHT,
Credit Manager, University of Virginia Hospital.

This is in reply to your letter of July 7, 1954 in which you enclosed a copy of a letter from the Department of Public Welfare of Nelson County under date of July 7, 1954, in which it is stated that the Department cannot authorize additional hospitalization for certain indigent patients in view of the policy limiting to fourteen days' hospitalization for any one patient in a twelve month period. You have asked to be advised as to your rights to recover the cost of such hospitalization from the county pursuant to the provisions of the recent statutory enactment.
Chapter 479, Acts of Assembly of 1954 (Senate Bill 64) has been codified as Section 32-293.2 of the Code of Virginia, 1950, as amended. It appears that the obvious intent of the Legislature in enacting this section was to impose upon the counties and cities which certify medically indigent persons for treatment at the Medical College of Virginia or University of Virginia the responsibility to pay one-half the cost of treatment just as if a formal contract existed between such counties or cities and such hospitals. This section implements Sections 32-293 and 32-293.1 of the Code of Virginia, 1950, as amended, in that under the last mentioned sections the contractual arrangement is permissive between the counties and cities and any approved hospital, without the provision contained in Section 32-293.2 for the method of collecting such cost as may be incurred in connection with the treatment of indigent persons.

Whether or not the provisions of Section 32-292.2 of the Code are applicable to the cases now in question is dependent upon the date of certification of such patients by the authorizing agent for Nelson County. Inasmuch as the effective date of this section was July 1, 1954, only those cases certified subsequent to that date are subject to the provisions thereof.

PUBLIC WELFARE—Local Boards—No authority to operate small children's boarding home. F-231 (158)
November 23, 1954.

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

This is in reply to your letter of November 18, 1954 in which you request my opinion as to whether a local board of public welfare has the authority to operate a small children's boarding home. I can find no provision in the Code of Virginia which, in my opinion, would give local boards of public welfare the authority to operate such homes for children. In the absence of explicit authority to operate such homes, I do not feel that the board may actually operate these homes, but that they may only supervise the operation and maintenance of private or charitable homes for children.

PUBLIC WELFARE—Old Age Assistance—No interest due on recovery from recipient's estate. F-231 (224)
February 15, 1955.

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

I am in receipt of your letter of February 11, which I quote below:

"Section 63-127 of the Code provides that all sums paid out by a County Welfare Department for public assistance shall constitute a lien against the recipient's estate. My question is, does this total sum paid out bear interest from the date of the last payment, or from the recipient's death, or from the date the notice of lien is recorded?"

"I have brought proceedings to enforce such a lien against real estate which was recorded over ten years ago, and shortly after the recipient died. The principal amount is around $2500.00, and the interest thereon for that period would be substantial."

The section to which you refer, providing for recovery from the estate of a recipient on account of old age assistance paid to such recipient during his lifetime, does not provide for the payment of interest from the estate. It is my opinion that it is the intent of the statute that only the principal amount paid as assistance
shall be recovered and that, in the absence of any provision for the payment of interest, no interest shall be collected. My information is that this is the administrative construction that has been followed by the State Department of Public Welfare. When the purpose of the statute is considered I feel that this is the proper construction.

PUBLIC WELFARE—Old Age Assistance—Recipient cannot be compelled to live in public home. F-231 (209)

January 28, 1955

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

This will acknowledge receipt of your letter of January 25, 1955, which reads as follows:

"I should like your opinion as to whether the availability of care in a district home or other similar public institution to an applicant for old age assistance is a sufficient basis for denial of the application for old age assistance.

"The question arises in connection with an appeal which is pending before the State Board. The local board rejected an application for aid to dependent children and suggested care of the applicant in the District Home instead. The record of the hearing held by a representative of this Department in accordance with the provisions of Section 63-132 of the Code shows that all eligibility requirements set forth in Section 63-115 exist. The appellant is living in the home of a grandson and wishes to continue to live there. The grandson is agreeable to this arrangement.

"I believe that Section 63-231 of the Code is of some significance in connection with this question."

Section 63-231 of the Code, to which you refer in your letter, reads as follows:

"Any such approved home may receive and care for such recipients of public assistance as voluntarily apply for admittance therein, and residence of any such recipient in an approved home shall in no way affect his right to receive such public assistance. All residents of approved homes who are otherwise eligible for public assistance may, notwithstanding any provisions of Chapters 5 to 9 of this title, apply for and receive such assistance as they are eligible to receive under such sections, provided that applications for such assistance must be made to and such assistance shall be paid by the county or city from which the applicant was approved for admission to the home. Nothing in this article shall be construed to require any persons eligible for public assistance to remain in any such home, nor to require the management of any home to retain any such person therein."

It will be noted that, under this section, the public homes established under §§ 63-228 and 63-229 "may receive and care for such recipients of public assistance as voluntarily apply for admittance therein, * * *." I am of the opinion that a recipient may not be compelled to enter a public home. The eligibility requirements necessary to be met by an applicant for assistance, as set forth in Code § 63-115, do not prescribe that the applicant shall be willing to accept admittance in such a home. In my opinion the State Board does not have authority to prescribe any conditions of eligibility not specifically contained in the statute.
Considering further the provisions of § 63-231, it is expressly provided therein that residents of such homes may not be deprived of any public assistance to which they may be eligible under Chapters 5 to 9, of Title 63, on account of residency in a public home. Furthermore, the section provides that:

"Nothing in this article shall be construed to require any persons eligible for public assistance to remain in any such home nor to require the management of any home to retain any such person therein."

Specifically answering your question, I am of the opinion that the eligibility of an applicant for old age assistance under the provisions of Chapter 6, Title 63 of the Code of Virginia, is in no way dependent upon the availability of care in a public home or similar public institution.

PURCHASE AND PRINTING—Comptroller to determine who is a responsible bidder. F-227 (150)

HONORABLE R. C. EATON,
Director, Division of Purchase and Printing.

November 16, 1954.

This will acknowledge receipt of your letter of November 12, 1954, which reads, in part, as follows:

"Please advise us if, in your opinion, we are within the meaning of the Code in accepting bids of individuals in competition with established firms, corporations and/or partnerships.

"Section 2-251 of the Code of Virginia, as you are aware, states in part, 'When purchases are made through competitive bidding, the contract shall be let to the lowest responsible bidder, taking into consideration the qualities of the articles proposed to be supplied, their conformity with specifications, the purposes for which required, and the times of delivery.' This, in my opinion, hinges around the word, 'responsible.'"

It will be observed that the statute provides that:

"When purchases are made through competitive bidding, the contract shall be let to the lowest responsible bidder, taking into consideration the qualities of the articles proposed to be supplied, their conformity with specifications, the purposes for which required, and the times of delivery."

Under this provision the bidder, if deemed responsible by the Comptroller, may be an individual, a corporation, a partnership or other entity. One of the tests of the qualification of a bidder is his responsibility. This can be determined in most cases, it would seem, by examining the business record of the bidder.

If the financial status of the bidder raises a question as to his responsibility, the Comptroller may, in his discretion, require a performance bond under § 2-252 of the Code.

The responsibility of determining whether or not a bidder qualifies under the provisions of § 2-251 rests solely upon the Comptroller.
HONORABLE TURNER N. BURTON,
Director, Professional and Occupational Registration.

This is in reply to your letter of January 6, 1955, which reads as follows:

"It is requested that you advise, if, in your opinion, the following conditions constitute a place of business in accordance with Section 54-733, Code of Virginia, 1950:

'John Jones applies for a real estate broker's license. In his application, he sets forth that his principal place of business in this State is 855 Smyth Avenue, Richmond, Virginia. A real estate broker's license is issued to him at the address of 955 Smyth Avenue.

'On inspection of 955 Smyth Avenue, it is found to be the office of Donald Doe, Attorney at Law. During an interview with Mr. Doe, he states that he had agreed to forward all mail directed to John Jones at the address of 955 Smyth Avenue to an out-of-town address. Mr. Doe further states that Mr. Jones did not have any provisions for desk space or telephone service.

'On inspection of the outside premises of the building in which Mr. Doe's office is housed, there is no sign conveying to the public that Mr. Doe's office is occupied by John Jones, Real Estate Broker.'"

A "place of business" generally implies the office or headquarters at which a person engaged in a business carries on his work. It may be a place at which the owner of the business may seldom be in person, but which is manned and operated by persons under his control. It may be the chief office or a branch office. Generally, it would seem, the term "place of business" implies an office or headquarters from which the owner of the business, either through his own efforts, or through his employees, regularly transacts the usual functions of his business, and one may occupy the business premises with another who is engaged in a separate enterprise or profession. A place of business may be termed a place where the owner of the business receives business calls and directs them to be made.

The office of Donald Doe, Attorney at Law, under the hypothetical facts stated by you, does not, in my opinion, constitute a "place of business" of the real estate broker within the meaning of that term as used in § 54-733 of the Code. The real estate broker does not, under the facts stated, conduct any business at the premises mentioned, but is obviously carrying on his business from headquarters located at another point.

REAL ESTATE—Commission—Type of license to be issued salesman. F-273 (111)

This is in reply to your letter of October 13, 1954 on behalf of the Virginia Real Estate Commission inquiring my view as to the correct type of license to be issued to an applicant (requesting a broker's license) who has a working arrangement (but not an association) with an individual broker entirely owning and controlling a real estate firm whereby the applicant negotiates sales on contracts of sale in the name of the individual broker specifying that the entire
commissions be paid to the individual broker. The applicant does not share in
the over-all profits of the firm but is paid a percentage of commissions on sales
made by him in an identical manner as are other persons employed by the in-
dividual broker holding licenses as salesmen.

The Legislature has established two categories, that of real estate broker,
as defined in Section 54-730, being a person who sells “for others”, and that of
real estate salesman, as defined in Section 54-731, being a person “who is em-
ployed either directly or indirectly by a real estate broker”.

It is my view that the applicant in the situation which you set forth would
be more correctly classified as a real estate salesman instead of real estate broker.
The applicant works under an identical arrangement as do other persons classified
as salesmen, is not a member of an association, does not share in the profits or
control of the firm and negotiates sales on contracts of sale in the name of the
individual broker specifying that the commissions are to be paid to the individual
broker. All of the factors mentioned fall into the category of salesmen rather than
that of brokers.

RECORDS—Deeds conveying real estate to or by State—Must have Federal
Revenue stamps. F-90 (338)  

HONORABLE H. ELMER KISER,
Clerk, Circuit Court of Tazewell County.

This is in reply to your letter of June 14, 1955, in which you ask to be
advised as to the authority for placing Federal Revenue Stamps on deeds con-
vveying real estate to the Commonwealth.

Prior to 1950, it had been the ruling of the Bureau of Internal Revenue that
conveyances of real property to or by a state or political subdivision thereof were
exempt from the documentary stamp required by Section 3482 of the Internal
Revenue Code. That ruling was revoked by a subsequent ruling of the Bureau
in 1950 [M. T. 39 (I. R. B. 1950-9.9)] to the effect that all conveyances to the
Commonwealth made on or after May 1, 1950, were not exempt from the docu-
mentary stamp required. The liability for the payment of this tax, of course,
rests upon the vendor.

RETIREMENT SYSTEM—Determining contributions when employee changes
employment. F-243a (189)  

HONORABLE CHARLES H. SMITH,
Director, Virginia Supplemental Retirement System.

This will acknowledge receipt of your letter of December 21, 1954, which
reads as follows:

“The Richmond-Petersburg Turnpike Authority is contemplating
taking the necessary action to become an employer under the Virginia
Supplemental Retirement System and the following questions have been
raised; therefore, your opinion is respectfully requested.

“1. If, after the Authority has adopted the resolution required by
Section 51-111.31 of the Code, and the same has been approved by the
Board of Trustees of the Retirement System, a person now in the employ-
ment of the State and presently a member of the System, who had either
more or less than fifteen years of creditable service, leaves the State’s em-
ployment and is employed by the Authority, will the annual retirement
allowance that such individual will be entitled to upon his retirement be computed by multiplying his total number of years of creditable service, both with the State and with the Authority, by one per centum of his average annual creditable compensation during his five highest consecutive years of creditable service whether with the State or the Authority, or a combination of both as the case may be?

"2. If the answer to the above question is 'YES', how would the burden of employer contributions required to meet the liability for his retirement benefits be divided as between the State and the Authority with respect to his period of creditable service with the State, both for prior service and membership service?"

In considering this matter, especially with respect to your first question, I feel that a review of the legislative history of the State Retirement System may be helpful.

The Virginia Supplemental Retirement System established by § 51-111.11 of the Code had its inception in Chapter 325 of the Acts of the General Assembly of 1942, being Chapter 105A of the Code (Michie) of 1942. The System as established at that time did not permit participation of counties, cities, towns and other political entities. By an act passed in 1944, being Chapter 344 of the Acts of 1944, the System was enlarged so as to permit voluntary participation by counties, cities and towns. This act became Section 2672(24a) of the Code of 1942 (1946 Cumulative Supplement) and is Article 4, Chapter 3 of the Code of 1950. All the provisions of Chapter 3, Title 51, were repealed, effective February 1, 1952. (Acts 1952, Chapter 1). Subsequently, by an act effective March 1, 1952, the Virginia Supplemental Retirement System was established by adding in Title 51 of the Code of 1950 a new chapter numbered 3.1. By this Act the provisions of the Virginia Retirement System which were repealed by Chapter 1, Acts of 1952, were re-enacted with certain revisions. Article 4 of the old or previous Act became Article 4 of the new Act, but with provisions permitting, in addition to counties, cities and towns, additional governmental agencies of the State to voluntarily participate in the State Retirement System.

From this historical review of the State Retirement System, it is clear that it has been the policy and objective of the General Assembly to extend the scope of its protection. I am unable to find anything in the legislative history to indicate that the General Assembly has ever contemplated restricting the retirement coverage of any group of employees brought under the System at any time. The legislation clearly reveals a design or plan to establish for the State and the political subdivisions or entities included in § 51-29.23 of the Code an integrated system for the participating agencies and for the employees thereof without any inhibitions attaching to any employees by reason of the place of their employment in the over-all system.

A comparison of the definitions contained in § 51-111.10, 1954 Cumulative Supplement, with the definitions in § 51-31 of the repealed system is helpful in arriving at a logical and satisfactory conclusion. It is clear that the definitions as contained in § 51-111.10 reveal a definite purpose to provide an equal participation in the System to the employees of the employers added to the System.

The conclusion is inescapable that there is no distinction, but uniformity of protection, with respect to all employees under the System, regardless of whether the service is rendered for the State or one of its political subdivisions.

There is nothing in the statute restricting the mobility of any employee. In arriving at the "creditable compensation" of any member of the System, the full compensation earned by him from any employer participating in the System must be taken into account. The employee may alternate his service between participating employers without restriction and without loss of credits for benefit purposes, so long as he does not forfeit credits as provided for in § 51-111.29.

Section 51-111.36 of the Code is a provision to require the Board of Trustees of the Virginia Supplemental Retirement System to cause the rate of contributions
for the political subdivisions to be computed from year to year so that their payments into the fund will be ample to meet the potential benefit load on account of the individuals employed by them.

Section 51-111.37 provides for the payment of benefits to employees of such political subdivisions based on the accumulated contributions paid by their employer but protects the State from liability for benefits for periods of service during which the political subdivision has defaulted in the payment of contributions.

These sections, I feel sure, are not designed to deprive an employee of retirement allowances earned while in the service of any other employer in the system for which contributions have been paid.

The retirement allowance of any employee covered by the System is fixed by § 51-111.55. There is only one account or fund from which retirement allowances may be paid. I can find nothing that would justify the computation of a retired worker’s retirement allowance by any other method than treating such person as though he had been employed by a single participating employer throughout his entire service.

Therefore, my answer to your first question is in the affirmative.

With respect to your second question, the statute does not contain any specific language which is designed to cover the situation. Upon consideration of the statute as a whole, bearing in mind that it should be construed so as to achieve its beneficient purposes, I am of the opinion that each employer is required to bear the burden of providing reserves for retirement allowances for all individuals in its service in direct proportion to the average number of years that the actuaries may determine its employees may remain in the retirement system.

The annual contribution of the Authority, the State and other political units, would be an amount equal to that percentage of the creditable compensation of the members of the System as determined by the actuary on actuarial bases as adopted by the Board. Section 51-111.36 which requires participating political subdivisions to pay contributions determined by an actuarial valuation of the retirement allowances payable on account of its employees, and § 51-111.37 which provides that the retirement system shall not be liable for benefits payable to employees of political subdivisions for which reserves have not been created by such employer or the members were, in my opinion, only intended to impose upon such employers the responsibility for retirement allowances created as a result of service rendered to them and were not intended to create responsibilities with respect to employees who had earned retirement benefits as members in the system because of employment with another unit in the System for a portion of their creditable service.

Therefore, in the question presented by you, the State, by virtue of the provisions of § 51-111.47, is responsible for the reserve needed because of the service, both membership and prior as defined in the statute, rendered by employees for the State prior to their entering the employment of a political subdivision.

Of course, certain reserves for such service would have been built up by contributions by the State while the employees were working for the State and these reserves remain in the System. The State will continue to make contributions for the account of its employees transferring to another until the accrued liability for the prior service for which they were given credit by the State has been discharged.

Also, since it is my opinion that the liability of each employer is in proportion to the average number of years its employees may work for it or for an employer in the System, irrespective of when he earns his highest average annual creditable compensation upon which his retirement benefits are computed, the State’s normal annual contribution rate may be affected to some extent, if the individual’s average increases while with the Authority to make up for the full reserve attributable to the period of service with the State. This would be one of the factors to be taken into account by the actuaries who, under § 51-111.22, are required to revise the actuarial bases of the rates of employer contributions required by the statute.
REPORT OF THE ATTORNEY GENERAL

RETIREMENT SYSTEM—Injury before effective date of new provisions does not bar benefits under. F-243a (133)

HONORABLE CHARLES H. SMITH,
Director, Virginia Supplenental Retirement System.

This will acknowledge receipt of your letter of October 29, 1954, in which you state as follows:

“A member of the State Police Officers Retirement System, now in service, who was injured in line of duty in 1929 has filed application for total disability retirement under Section 51-136(c), Code of Virginia, 1954 Cumulative Supplement.

“Assuming it is possible to establish the member is now totally disabled because of the injury, we request your opinion as to whether or not the member would qualify under this section which became effective July 1, 1954.”

Section 51-136 is a remedial statute and should be liberally construed so as to achieve the purposes for which the statute was enacted.

I am of the opinion that the fact the applicant for retirement under paragraph (c) of the above section was injured prior to July 1, 1954, is immaterial, provided he has first become totally disabled as a result of such injury subsequent to June 30, 1954. Such total disability, of course, must be the result of an injury compensable under the Virginia Workmen's Compensation Act. Whether or not the applicant would qualify in this and all other respects is a factual question to be determined by your Board.

RETIREMENT SYSTEM — Judge of County Court of Arlington eligible. F-136a (70)

HONORABLE S. C. DAY, JR.,
Assistant State Comptroller.

I am in receipt of your letter of August 20, in which you ask for my opinion on the following question:

“Honorable Hugh Reid, Judge of the County Court of Arlington County, receives his full salary from the County, and under the provisions of Section 10, Chapter 274, Acts 1954, a deduction of 3% is made from his salary each month, and check of the County to cover is sent to the Treasurer of Virginia to be credited to the Trial Justice Retirement Fund. Since no part of Judge Reid's salary is paid by the State, and since the title of his office, as set forth in the basic act, is 'Judge of the County Court', although also described as 'Trial Justice', would he be eligible to receive the benefits provided for trial justices by Chapter 274, payable out of the treasury?""
While the officer in Arlington County—performs the duties which the Trial Justices of the other Counties of the State perform, he is designated as "Judge of the County Court." However, as I have indicated, his jurisdiction is substantially the same as that of the Trial Justices of the other Counties, and he is also referred to in the statutes relating to the County Court of Arlington County as a "Trial Justice." See, for example, Chapter 196 of the Acts of 1954 and Section 16-50 of the Code.

It is true that the salary of this officer is paid by the County of Arlington while salaries of Trial Justices generally are paid by the State. Section 10 of the Trial Justice Retirement Act, which I have quoted above, recognizes this fact, and the effect of the section, in my opinion, is to render the Judge of the County Court of Arlington County eligible for retirement under the Act, provided its other requirements are met.


HONORABLE CHARLES H. SMITH,
Director, Virginia Supplemental Retirement System.

This is in reply to your letter of May 16, 1955, in which you inquire whether or not the Board of Trustees of the Virginia Supplemental Retirement System may invest the several trust funds for which it is responsible in bonds of public utilities and private corporations.

With respect to the type of securities in which funds created by the Virginia Supplemental Retirement Act may be invested, Section 51-111.24(a) of the Code of Virginia (1950), as amended, in pertinent part prescribes:

"The Board shall be the trustee of the several funds created by this chapter and of those resulting from the abolition of the Virginia Retirement System, and shall have full power to invest and reinvest such funds, subject to the limitation that no investment shall be made except, upon the exercise of bona fide discretion, in securities which, at the time of making the investment, are, by statute, permitted for the investment of reserves of domestic life insurance companies. Subject to such limitation, the Board shall have full power to hold, purchase, sell, assign, transfer or dispose of, any of the securities or investments in which any of the funds created herein have been invested, as well as of the proceeds of such investments and any moneys belonging to such funds."

In light of this language, it would appear that the authority of the Board of Trustees to invest retirement funds in the bonds of public utilities and private corporations is not subject to question, since obligations of this character (with certain specific qualifications) are among those which are permitted for the investment of reserves of domestic life insurance companies. See, Title 38, Ch. 5, Art. 2, Code of Virginia (1950). It has been suggested, however, that in so far as Section 51-111.24(a) purports to authorize the investment of retirement funds in the bonds of public utilities or private corporations, it is in conflict with Section 185 of the Constitution of Virginia (1902), which in part provides:

"Neither the credit of the State, nor of any county, city or town, shall be, directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation, nor shall the State, or any county, city, or town subscribe to or become interested in the stock or obligations of any company, association, or corporation, for the purpose of aiding in the construction or maintenance of its work;*

** *"
I am constrained to believe that this suggestion is not well taken. So far as is pertinent here, the initial clause of Section 185 forbids the granting of the credit of the State "to or in aid of" any person, association or corporation. The rule governing the interpretation of constitutional provisions of this nature is well stated in 81 C. J. S. 1168, States: Section 137, in the following language:

"In order to constitute a violation of the constitutional provision, it is essential that there be an imposition of liability directly or indirectly on the state, and unless the credit or faith of the state is obligated there is no violation. The giving or lending of credit of the state prohibited by the constitution occurs only when such giving or lending results in creation by the state of a legally enforceable obligation on its part to pay one person an obligation incurred or to be incurred in favor of that person by another person, and no giving or lending of the state's credit occurs when the state does nothing but incur liability directly to a person in whose favor an obligation is incurred." (Italics supplied).

It is clear that Section 51-111.24(a) does not authorize, and the Board of Trustees does not contemplate, any action which will result in the imposition of liability upon the State. On the contrary, if the proposed investments are made, the companies whose bonds are purchased will become liable to the State for the payment of the principal and interest on its indebtedness, and no legally enforceable obligation to pay anyone will be incurred by the State.

Further in this connection, the Supreme Court of Appeals of Virginia has had occasion to point out that whether or not a particular transaction contravenes this constitutional prohibition depends upon the object or purpose which the transaction is designed to effect. Thus, in Holston Corporation v. Wise County, 131 Va. 142, the Court considered a contract under the terms of which the county guaranteed the corporation payment for all crushed stone furnished by the latter to contractors performing certain road work for the county. Holding that the contract did not fall within the inhibition of Section 185 of the Constitution, the Court observed:

"The contract in question did not directly or indirectly in any way whatsoever grant 'the credit' of the county 'to or in aid of any person, association or corporation'. That would have been true if the object of the contract had been to benefit the contractors in any way, * * *. But the contractors were not expected and could not in the nature of the case derive any benefit from the contract, and it was not made for their benefit. It was made solely for the benefit to the county itself, and not for or in aid of any other." (Italics supplied).

To the same effect in U. S. Fidelity Company v. Carter, 161 Va. 381, where the contention was made that a deposit of public funds in a bank by the State or a county constituted a violation of Section 185. Noting that this might be true if the deposit was made as a device to lend the credit of the State or a county "for the purpose of aiding the bank", the Court declared that the clause in question was "not properly to be construed to prohibit the Commonwealth or a county from making a general deposit of public funds in a bank in the usual course of business for its own convenience". (Italics supplied).

Consistent with these decisions, it is manifest that the investments proposed to be made in the present instance are solely for the benefit of the Retirement System, in discharge by the Board of the duties enjoined upon it as trustee of the funds created by the Retirement Act; in no sense are such investments to be made as a device to lend the credit of the State to or in aid of private corporations or associations.

The second clause of the constitutional provision under consideration forbids the State to subscribe to or become interested in the stock or obligations of any company, association or corporation for the purpose of aiding in the construction...
or maintenance of its work. Properly speaking, a subscription may be defined as a contract to take and pay for shares of the stock of a corporation on its formation or to purchase stock from the corporation after its formation. 18 C. J. S. 766, Corporations: Section 283. In some jurisdictions a subscription to the stock of a corporation is regarded as a tri-lateral contract, an undertaking on the part of the subscriber not only with the corporation but with all other subscribers as well. This is the view which prevails in Virginia. See, O'Dell v. Appalachian Corp., 153 Va. 283. Manifestly, the contemplated investment of retirement funds in the bonds of a public utility or private corporation does not constitute a subscription contract. Furthermore, although the language "or become interested in" appears broad enough, standing alone, to comprehend the proposed investments, both this prohibition and that against subscriptions are qualified by the phrase "for the purpose of aiding in the construction or maintenance of its work". I believe that this concluding passage of the clause in question modifies the language "subscribe to or become interested in", and constitutes a limitation upon the general prohibition laid down. That is to say, the terminal language enunciates a qualification of the purposes for which the State is forbidden to subscribe to or become interested in the securities of private corporations, rather than a qualification of the purposes for which such securities are issued by the company. This interpretation is not only consistent with the grammatical construction of the provision under consideration, but is also consonant with the interpretation placed upon the preceding clause that the object or purpose of a transaction determines its legality. In the instant situation it would be difficult to contend that a purchase, in the open market, of the bonds of a corporation whose stability and earning capacity over the years has been such as to qualify its obligations for the investment of domestic life insurance reserves was a transaction entered into for the purpose of aiding that corporation in the construction or maintenance of its works.

In view of the foregoing, I am of the opinion that Section 51-111.24(a) of the Virginia Code is not antagonistic to the mandate of Section 185 of the Virginia Constitution, and that the proposed investment of retirement funds in the bonds of public utilities and private corporations is permissible. This conclusion obviates consideration of whether investments made by the Board of Trustees of the Virginia Supplemental Retirement System constitutes State action, within the purview of Section 185.

RETIREMENT SYSTEM—Member may resign after normal retirement age and withdraw contributions. F-243a (151)

November 17, 1954.

HONORABLE CHARLES H. SMITH,
Director, Virginia Supplemental Retirement System.

This will acknowledge receipt of your letter of November 9, 1954, which reads as follows:

"I have been directed by the Board of Trustees of the Virginia Supplemental Retirement System to request your opinion as to whether or not a member of the Virginia Supplemental Retirement System, who resigns from his position, after attaining the normal retirement age sixty-five and requests a refund of his accumulated contributions in the Retirement System rather than retirement under the provisions of the Virginia Supplemental Retirement Act, is entitled to a refund of his accumulated contributions.

"I would thank you to let me have your opinion."

Particularly pertinent to the resolution of this question is § 51-111.58 of the Code, which prescribes:
Withdrawal or death before retirement.—If a member has ceased to be an employee, otherwise than by death, or by retirement under the provisions of this chapter, he shall be paid, on demand, but not later than ninety days thereafter, the amount of his accumulated contributions reduced by the amount of any retirement allowances previously received by him under any of the provisions of this chapter or the abolished system. Should a member die at any time before retirement, the amount of his accumulated contributions reduced by the amount of any retirement allowance previously received by him under any of the provisions of this chapter or the abolished system shall be paid to such person, if any, as he shall have nominated by written designation signed and acknowledged by such member before some person authorized to take acknowledgments and filed with the Board, otherwise to his executors or administrators. Any person so designated may be changed by the written designation of some other person, signed, acknowledged and filed as aforesaid.

I am of the opinion that an employee of the State who has reached the normal retirement age may resign from the State service, and that he would be entitled to be paid the amount of his accumulated contributions, subject to the specified deductions.

There does not appear to be any ambiguity in the language of the above quoted provision. It declares that, if a member “has ceased to be an employee, otherwise than by death, or retirement under the provisions of this chapter,” he is entitled to withdraw his accumulated contributions. With respect to normal retirement, § 51-111.53 of the Code provides that a member in service at his normal retirement date (sixty-fifth birthday; Code § 51-111.10(19)) “may” resign at any time then or thereafter upon written notice to the Board setting forth the effective date of such retirement. An employee is not compelled to retire until he attains seventy years of age; at the age of sixty-five he merely has the right to retire, which right he is not forced to exercise.

I do not find that the statute, in its present form, contains any language which would justify the conclusion that, in giving an employee the right to retire upon reaching normal retirement age, the Legislature thereby intended to foreclose his right to resign from State service. Moreover, it is clear that, since the employee in question has not taken the prescribed statutory steps to effect his retirement, he has not retired “under the provisions of” Chapter 3.2. Thus, since he is still living, he does not fall within either of those classes excepted from the provisions of § 51-111.53.

Consideration of the language of § 51-111.43 tends to support this view. Under this section, when membership in the Virginia Retirement System ceases, except in the case of retirement, an employee thereafter loses all rights to any retirement allowance benefits arising from prior service. Since the instant employee’s membership has terminated otherwise than by retirement, he is, therefore, ineligible to receive the above mentioned benefits. Obviously, an employee who is denied the benefits of the Virginia Retirement System in such circumstances is entitled to a refund of his accumulated contributions.

It is, therefore, my conclusion that a member of the Virginia Supplemental Retirement System may resign upon receiving the normal retirement age and request a refund of his accumulated contributions.

RICHMOND—Petersburg Turnpike Authority—Officers, agents, employees, who are, contracts with prohibited. F-395 (34) July 29, 1954.

Mr. W. E. Wood,
Chairman, Richmond-Petersburg Turnpike Authority.

This is in reply to your letter of July 26, 1954 in which you request my opinion on the proper interpretation to be given to § 33-255.41(f) of the Code of
Virginia, which section is a part of the Richmond-Petersburg Turnpike Authority Act. That Act created the “Authority” as a political subdivision of the Commonwealth.

Your first inquiry is whether, under this Act, and more specifically under § 33-255.41(f), the Authority may borrow from or deposit funds in a bank of which a member of the Authority is a stockholder and director. In the two factual situations outlined in your letter neither member owned as much as two percent of the outstanding stock of the bank or banks concerned. Section 33-255.41(f) reads as follows:

“(f) Any member, agent or employee of the Authority who contracts with the Authority or is interested, either directly or indirectly, in any contract with the Authority or in the sale of any property, either real or personal, to the Authority shall be guilty of a misdemeanor and shall be subject to a fine of not more than one thousand dollars or by imprisonment in jail for not more than one year, either or both. Exclusive jurisdiction for the trial of such misdemeanors is hereby conferred upon the Hustings Court of the City of Richmond.”

Authorities, such as the one here, are considered to be either municipal corporations or quasi-municipal corporations. They are self-governing, political entities of the State. In most jurisdictions in this country they fall within the laws, both statutory and common, which apply to municipal corporations, unless the charter of the Authority provides otherwise. Section 33-255.41(f) is a criminal provision and, therefore, is to be strictly construed. I feel that to ascertain the declared public policy of the General Assembly in matters of this nature, there is ample justification to consider what it has enacted in regard to municipal officials in general.

Section 15-508 of the Code of Virginia contains the prohibitions against municipal officials having interest in contracts with their cities or towns. That section also contains certain exceptions to these prohibitions against contracts of this nature. In my opinion the public policy against such contracts, as proclaimed by the General Assembly in that section of the Code is analogous to that expressed in § 33-255.41(f). Section 15-508 provides, in part, as follows:

“* * * nor, shall they be interested, directly or indirectly, in any contract, subcontract, or job of work, or materials, or the profits or contract price thereof, or any services to be performed for the city, or town, for pay under any contract or subcontract; and no such councilman, officer or employee shall be interested, directly or indirectly in any contract, subcontract, or job of work, or materials or the profits or the contract price thereof, or services to be furnished or performed for the city or town for pay under any contract or subcontract; nor as agent for such contractor or subcontractor, or other person furnishing any supplies or materials. * * *

* * * *

“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.”

It is my opinion that the interpretation placed on the word “contract” in § 15-508 provides a definite guide as to the interpretation that should be given it in § 33-255.41(f). Therefore, it is my opinion that the prohibition contained in § 33-255.41(f) does not apply to transactions with those banks in which a member of the Authority may have a mere stock interest, but should be construed to apply to transactions with those banks of which the directors and officials are also members of the Authority.
If the two members of the Authority resigned as directors of the banks; in my opinion, there would be no prohibition against the Authority dealing with those two banks.

Your second inquiry is whether a firm of attorneys retained by the Authority is an "agent or employee of the Authority" within the meaning of § 33-255.41(f) of the Code. Section 33-255.27(i) authorizes and empowers the Authority:

"To employ, in its discretion, consulting engineers, attorneys, accountants, construction and financial experts, superintendents, managers and such other employees and agents as may be necessary in its judgment, and to fix their compensation; * * *"

Black's Law Dictionary defines "attorney" as follows:

"In the most general sense this term denotes an agent or substitute, or one who is appointed and authorized to act in the place or stead of another."

"-Attorney at Law. An advocate, counsel, or official agent employed in preparing, managing, and trying cases in the courts."

In 4 Words and Phrases, p. 789, several definitions of the word "attorney" may be found. Some of them are as follows:

"The word 'attorney' implies the functions of acting for another."

"'Attorney' is agent employed by party to case to manage it for him."

"'Attorney' is one who is put in place, stead and turn of another to manage his matters of law, and attorney in law court or solicitor in chancery is mere agent or representative of party, but not party himself."

The Supreme Court of Appeals of Virginia has on at least three occasions said that an attorney is the agent of his client. Virginia Electric and Power Co. v. Bowers, 181 Va. 542, 547; Singer Sewing Machine Co. v. Ferrell, 144 Va. 395, 402; Norfolk and Western Railroad Co. v. Cottrell, 83 Va. 512. In my opinion, then, an attorney is a limited agent. For attorneys of the Authority to be excluded from the phrase "agent or employee of the Authority" in § 33-255.41(f) there would have to be an expression of intent to the contrary by the General Assembly in the Act. I can find no such expression. In the Charter of the Old Dominion Turnpike Authority, Chapter 704 of the Acts of Assembly of 1954, the General Assembly expressly provided that the legal consultants and assistants retained by the Authority shall not be deemed to be agents or employees within the meaning of that Article. Section 33-255.49(i). The General Assembly did not enact a similar provision in the Charter of the Richmond-Petersburg Turnpike Authority. Therefore, I must conclude that attorneys of the firm are agents of the Authority for the purposes of § 33-255.41(f).

I do not feel that I can give a categorical answer to your third inquiry. Each situation would have to be answered after considering the factual situation involved.

SANITARY DISTRICTS—Are political subdivisions of the State. F-33 (168)

HONORABLE DOWNING L. SMITH,
Commonwealth's Attorney for Albemarle County.

This is in reply to your recent communication, the effect of which is to ask whether under Section 15-22 of the Code as amended the Board of Supervisors of Albemarle County may direct the investment of certain surplus funds of the County in bonds of the Crozet Sanitary District. The section in question so far as is pertinent here authorizes the Board of Supervisors of any County to direct the-
Treasurer of such County to purchase out of any money available in the general fund or in any sinking or special fund of such County bonds of the United States of America, or of the State or any political subdivision thereof. The real question presented is whether or not Crozet Sanitary District of Albemarle County is a political subdivision of the State. You have advised me that Crozet Sanitary District was created under the provisions of Chapter 2 of Title 21 of the Code of Virginia of 1950, and that the bonds in question were issued under the authority of that Chapter.

I have given the question a good deal of consideration and have reached the conclusion that a sanitary district created under the authority above mentioned may be said to be a political subdivision of the State within the meaning of Section 15-22 of the Code. It, therefore, follows that the Board of Supervisors may direct the purchase of the bonds of this district as specified in the section.

SCHOOLS—Amount of land which may be condemned for a school. F-203 (299)

HONORABLE DOWELL J. HOWARD,
Superintendent of Public Instruction.

This is in reply to your letter of May 2, 1955, which reads as follows:

"The School Board of Warwick City wishes to secure 30 Acres of land on which to erect a high school to accommodate approximately 2000 pupils, by condemnation if necessary, which would be sufficient acreage to meet the site requirements for a school of this size.

"In view of the provisions of Code Sections 22-97, Item 16, 22-149, and 25-232, the question has been raised as to the amount of land that a city school board can condemn for any one school.

"In view of the above provisions of the Code, what is the maximum amount of land that may be condemned within the corporate limits of a city by the City School Board for school purposes of one school?"

Section 25-232, Code of Virginia (1950) authorizes the trustees of any school district to acquire land for school purposes by condemnation. Although this section specifies no limitation upon the quantity of land which may be condemned, it must be read in connection with Sections 22-149 and 22-97(16), which impose restrictions upon the general power of condemnation. In pertinent part, these latter sections of the Code provide:

"Condemnation of land for school purposes.—The school board may condemn for school purposes land or other property, or any interest or estate therein, including dwellings, yards, gardens or orchards. If, in the judgment of the school board the public interest demands that particular land or any interest therein be acquired for school purposes, the school board shall cause the desired parcel of land to be surveyed by a county surveyor, city engineer or other competent surveyor and a plat of the same to be filed, together with a general statement of the case, with the clerk of the court in which proceedings to condemn such land will be instituted, and, thereupon, on application of the school board, the same proceedings shall be had as are prescribed by the laws relating to the exercise of the right of eminent domain, insofar as they are applicable and not inconsistent herewith; but such land or interest so condemned shall not exceed thirty acres for any one school." (Italics supplied).

"Acquisition of land.—City school boards shall, in general, have the same power in relation to the condemnation nor purchase of land, and to the vesting of title thereof, and also in relation to the title to and management of property of any kind applicable to school purposes, whether here-
tofore or hereafter set apart therefor, and however set apart, whether by gift, grant, devise, or any other conveyance and from whatever source, as county school boards have in the counties, and in addition thereto, they shall have the further right and power to condemn not in excess of fifteen acres of land for any one school when necessary for school purposes, except that when dwellings or yards are invaded no more than five acres may be condemned for any one school. (Italics supplied).

A review of the legislative history of the above quoted statutes discloses that they were embodied in substantially their present form in the Virginia Code of 1919. At that time the power of condemnation reposed in the city school boards was the same as that of the district or county boards. See, Code of Virginia (1919), Section 786, now 22-97(16), and Section 672, now 22-149. In 1923 the city school boards were granted the additional power to invade dwellings, yards, gardens and orchards for school purposes, a power expressly denied the county boards. Acts of Assembly (1923) ch. 154. In 1928 the statutory prohibition against county school board's invading yards, gardens, etc., was limited to apply only "in rural sections" and in 1936 was eliminated altogether. Acts of Assembly (1928) ch. 471; Acts of Assembly (1936) ch. 314.

Both statutes were again amended in 1948. At this time the power of the county school board to invade settled or cultivated areas was affirmatively expressed, and the amount of land which might be condemned was specified to be not in excess of "fifteen acres for any one school". At that time the city school boards were again granted, in general, the same powers as the county boards, "and, in addition thereto, * * * the further right and power to condemn not in excess of fifteen acres of land for any one school when necessary for school purposes, except that when dwellings or yards are invaded no more than five acres may be condemned for any one school". Acts of Assembly (1948) ch. 505 and ch. 511. Except for the 1952 amendment to Section 22-149, increasing to thirty acres the area which a county school board might condemn, the statutes exist today as they were amended and reenacted in 1948.

In light of the foregoing summary, I think it is manifest that, when the respective statutes were codified in 1919, it was the intention of the Legislature to make identical the powers of the city and county school boards; but that, since 1923, the Legislature has intended to grant to the city school boards a "further right and power" which the county school boards do not possess. When the clause embodying this additional grant first appeared, the additional power related to the type of land which might lawfully be condemned, and authorized the city boards to condemn certain types of land which the county boards, by express prohibition, could not. By subsequent amendments, the restrictions upon the type of land which the county boards might condemn was eliminated, and in 1948 the additional power delegated to the city boards involved the amount of land which might be condemned rather than the character or type thereof. In this connection, in addition to the general powers of the county boards, the city school boards were given the further right to condemn "not in excess of fifteen acres of land for any one school", the phrase "not in excess" being a limitation upon the additional rather than the general power conferred.

Certainly, it is clear that, at least since 1919 the general or base powers of the city school boards have been tied to that of the county boards. In light of this circumstance, it is manifest that any addition to the general powers of the county school boards would work an identical increase in the powers of the city boards. Furthermore, I think it not without significance that the last amendments to the statutes involving a substantial change in phraseology were both enacted at the same session of the General Assembly. At this time the Legislature not only amended Section 22-149 to authorize the condemnation of not in excess of "fifteen acres for any one school" but also rewrote the "further right and power" clause of what is now Section 22-97(16) to refer primarily to the amount of which might be condemned. I am, therefore, of the opinion that since the county may now-
condemn thirty acres of land, the city may condemn an equal amount, and, in addition thereto, not in excess of fifteen acres for any one school, except that when dwellings or yards are invaded no more than five acres may be condemned for any one school. Thus, the maximum amount of land which may be condemned by a city school board would be forty-five acres.

I am not unmindful of the fact that in many (or indeed most) cases forty-five acres would be an unnecessary amount of land for a public school. In this connection, I think we may assume that the Legislature was content to rely upon the discretion of the various school boards, the necessities of the situation and the amount of funds available to dictate the appropriate area to be condemned in a given case. However this may be, it is not the function of one who interprets the law to wrest the letter of the law from its plain meaning in an effort to rectify what may or may not constitute an oversight on the part of the Legislature; it is, rather, "to take the words which the Legislature has seen fit to employ and give to them their usual and ordinary signification, and having thus ascertained the legislative intent to give effect to it unless it transcends the legislative power as limited by the Constitution". Commonwealth v. Sanderson, 170 Va. 33. As thus interpreted, the statutes appear to authorize the condemnation of forty-five acres of land by a city school board.

SCHOOLS—Board—Authority to pay Mountain Empire Guidance Center for services rendered to pupils. F-13 (346)

HONORABLE JOHN M. GOLDSMITH,
Chairman, Board of Directors,
Mountain Empire Mutual Hygiene Services, Inc.

This is in reply to your letter of June 16, 1955, in which you refer to an opinion dated February 10, 1954, appearing in the Reports of the Attorney General of 1953-54, at page 176, rendered to Honorable Julius Goodman, Commonwealth’s Attorney for Montgomery County, with respect to the authority of the School Board of that county to appropriate funds to Mountain Empire Guidance Center of Radford for the purpose of expanding the services and facilities of such Center.

You state that the Clinic of which you are the President operates in the counties of Carroll, Giles, Grayson, Montgomery, Pulaski and Wythe, and in the cities of Radford and Galax, and you describe the functions and method of operation to be generally as follows:

"The Clinic is operated under the supervision of the Department of Mental Health and Hospitals of the Commonwealth of Virginia and receives matching funds under the law for such clinics and their budget each year must be approved by the Department of Mental Health and Hospitals. Dr. Joseph E. Barrett is Commissioner of the Department of Mental Health and Hospitals and Mr. George M. Brydon, Jr., is the Business Manager.

"The Clinic receives most of its referrals or patients from the public school system within the area served. The staff of the Clinic also helps train public school teachers and other public school personnel in detecting maladjustments in children. For this reason the Directors of the Clinic made it entirely optional with the participating units of government as to whether or not they would pay for this service by a direct appropriation from the Board of Supervisors or by an appropriation from the Board of Supervisors to the School Board and the School Board in turn to the Mental Health Clinic. Some units preferred to make the appropriations direct. Others preferred to make the appropriation through the School Board."
"The Superintendent of Schools preferred to use this service under one of two main classifications in the public school budget, as follows:

"(1) For special services rendered to the schools in helping correct difficulties which they were having with children.

"(2) Instructional costs in order to be assured that their teachers would receive instructions and training in how to detect maladjustments and other difficulties in the children.

"In either case we considered that the public schools were paying us for a very valuable service that has paid most handsome dividends to the schools and other individuals concerned during our years of operation.

"With regard to the payments made directly by the Board of Supervisors or the City Councils we considered that they were paying for valuable services received within their respective counties and cities.

"On February 10, 1954, you rendered an opinion in which you held that the School Board of Montgomery County may not 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.' Your opinion was given in reply to a request from Mr. Julius Goodman, Commonwealth's Attorney for Montgomery County, Christiansburg, Virginia.

"The Clinic has never contended and does not now contend that we are asking for money in order to expand the Clinic. We do contend that if either the counties or the cities receive these services that they should pay for them and the amount to be paid has been fixed each year in advance in order that the participating units of government could prepare their budget.

"In either case, whether the money is paid to us through the public school systems or directly by the Board of Supervisors we consider it a legal and justifiable appropriation and expenditure of public funds; just as legal and justifiable as a county appropriating money for the public health system or for the schools themselves.

"Due to your ruling on the very narrow question asked by Mr. Goodman of Christiansburg, some officials have taken the position that any appropriation, whether by the School Board or by the Boards of Supervisors or City Council, would be illegal. We believe that their contention is erroneous.

The governing bodies of counties and cities have the board general power to make appropriations for the support of public schools and this, I think, would apply to projects in connection with such schools which are designed to produce the results outlined in your letter. Moreover, the governing bodies have authority to adopt such measures as they may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of their respective counties.

The general purposes and objectives of the Clinic as delineated by you are manifestly promoting the health and general welfare of the children who are attending the schools.

The facts presented in your letter reveal that the scope of the services performed by the Clinic is broader than indicated when our opinion of February 10, 1954, was rendered. In the light of these additional facts, it is my opinion that the governing bodies of the counties and cities have the authority to participate in the work being done by the Clinic and to make appropriations in furtherance thereof.
SCHOOLS—Board—Authority to prohibit married students. F-203 (38)

HONORABLE J. E. POINTER, JR.,
Commonwealth’s Attorney for Gloucester County.

I have your letter of July 28, in which you ask if there is any prohibition, “against married males or females attending the public schools and if the School Board can legally adopt regulations denying admittance to such persons to the public schools.”

I find nothing in the statutes prohibiting married persons of school age attending the public schools, nor do I find any authority given to School Board to adopt a regulation denying admittance of such persons to the public schools.

SCHOOLS—Board—May borrow money from Superintendent’s father. F-203 (174)

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.

This will acknowledge receipt of your letter of December 13, 1954, to which is attached a letter dated December 7, 1954, from Mr. James O. Morehead, Division Superintendent of Bland County Schools. You ask for an opinion with respect to the questions raised in the following paragraphs of Mr. Morehead’s letter:

“The Bland County School Board has, from time to time, borrowed money for school purposes from my Father, O. G. Morehead. On July 1, 1953, I assumed my duties as Superintendent of Bland County School and a loan of $8,400.00 existed at the time I took office and payable to my Father. The School Board is in a position to retire the full amount of this loan, which is payable from the County School Fund, but Seddon District, in which a building program is in progress and additional funds will be required, wishes to re-borrow this amount from my Father.

“The point of concern is whether I as Superintendent of Schools and also Clerk of the Board would be within legal rights to enter into another and new contract involving my Father. There is also a similar case involving my uncle.”

Upon examination of section 22-213 of the Code, which relates to the type of contracts a division superintendent of schools is prohibited from being a party to or having any interest therein, I can find no inhibition against the type of contract referred to in Mr. Morehead’s letter. It is my opinion, therefore, that the School Board is not precluded from borrowing money from Mr. Morehead’s father or his uncle.

I note in Mr. Morehead’s letter that the School Board contemplates paying off a loan now held by Mr. Morehead’s father, and that Seddon School District in Bland County wishes to reborrow the money. I can find no provision authorizing a school district, as a separate political entity, to borrow money under any circumstances. In this connection, I wish to call attention to section 22-42 of the Code. This section provides that, for all purposes except for the purpose of representation, the county shall be the unit and the school affairs of such county managed as if the county constituted but one school district. The proviso in section 22-42 would not authorize Seddon School District to borrow this money.
SCHOOLS—Board—May repair road needed for pupil transportation. F-203 (188)

December 30, 1954.

HONORABLE DOWELL J. HOWARD,
Superintendent of Public Instruction.

This is in reply to your letter of December 28, 1954, in which you request my opinion as to whether the School Board of Falls Church has the authority to repair a dedicated street leading to a city school located in Fairfax County. It is my opinion that, under § 22-72 of the Code of Virginia, the School Board of Falls Church has the authority to repair this street leading to the city school if this street is needed and used in the transportation of pupils to and from the school and if the repair to the street will contribute to the efficiency of this transportation.

On September 2, 1942, the Honorable Abram P. Staples, then Attorney General, rendered an opinion to the Commonwealth's Attorney of James City County in which opinion he held that "if the school is of opinion that it is necessary, in providing for transportation of pupils, to repair the road which you mentioned, I am of the opinion that under the quoted language of § 656 [now § 22-72] it may do so out of any funds available for the purpose, and I am of the further opinion that the Board of Supervisors would have the authority to appropriate such funds to the School Board." No change in the statute has transpired since 1942 which would render this former opinion invalid.

SCHOOLS—Board—Procedure when tie breaker brought in. F-203 (12)

July 13, 1954.

JOHN M. SWETNAM, ESQ.,
Counsel for Page County School Board.

This is in reply to your letter of July 12, 1954, written on behalf of Page County School Board and which reads, in part, as follows:

"A week or such a matter ago the School Board voted on the enclosed resolution, which resulted in a tie vote. The tie-breaker was notified and now has the matter under advisement. Today he met with the School Board in order to ask certain questions and to familiarize himself with the problem.

"At the meeting the enclosed Amendment was offered and a tie vote resulted when the vote for adoption took place.

"As a result these questions have been raised:

"(1) Does a tie vote on an Amendment defeat the Amendment or should the tie-breaker be called in to break this tie?

"(2) Can an Amendment be made to a resolution after the resolution had been voted on and resulted in a tie, and placed in the hands of the tie breaker but not yet acted on by said tie-breaker?"

In my opinion the parliamentary situation presented by your letter is one which finds the original resolution in the process of being voted upon and, therefore, not in an amendable state. It would appear to me that any amendment to the original resolution would have to wait until the tie-breaker has acted upon the original resolution. An amendatory resolution could then be offered and the vote, including the vote of the tie-breaker if necessary, taken just as in the case of any other resolution.
SCHOOLS—Bond Referendum—Cost of conducting to be paid out of General Funds. F-100 (169) 

December 13, 1954.

HONORABLE GEORGE H. PARKER, JR., 
Commonwealth's Attorney for Southampton County.

I have your letter of December 6, in which you ask whether the cost of a special election, held for the purpose of having the electorate of a county pass on the question of whether or not school bonds should be issued, should be paid by the Board of Supervisors out of general county funds or by the School Board out of school funds.

The answer to your question is not found in terms in any statute that I can find. The cost of conducting elections is to be paid by the counties and cities. See Section 24-177 of the Code, but no statute, so far as I know, prescribes any special fund for the payment of the expenses of such an election as has been held in your county. Certainly the statute relating to school bond elections does not provide that the cost of these elections shall be paid out of the school funds.

It is, therefore, my opinion that the better view is that the cost of this election should be paid by the Board of Supervisors out of general county funds.

SCHOOLS—Budget—Transfer of funds from item for construction to operations. F-206 (263) 

March 24, 1955.

HONORABLE WILLIAM B. COCKE, JR., 
Clerk, Circuit Court of Sussex County.

I understand from your letter of March 21 that the School Board of your County has submitted to the Board of Supervisors a budget which includes an item for school construction. This item is not raised by a special levy. Indeed, there is no special levy in Sussex, the policy of the County being to make one general levy and provide for the school budget by an appropriation. You further state that the Board of Supervisors is concerned that the school budget may not include sufficient funds for operating the schools and desires to know whether or not the item in the budget for school construction may, if the necessity therefor should arise, be used in part to pay the operating expenses. In other words, your inquiry is whether or not a part of this item for school construction may be transferred to some other item.

In my opinion, your question may be answered in the affirmative. Section 22-72(9) of the Code contemplates that the School Board may, with the consent of the Board of Supervisors, transfer funds from one item in the school budget to another.

SCHOOLS—Budget—When should be reworked to conform with appropriation of Board of Supervisors. F-206 (250) 

March 9, 1955.

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

This is in reply to your letter of March 7, 1955, in which you request my opinion on the following matter:

"Where the Division Superintendent of Schools for the County has presented to the Board of Supervisors a proposed school budget which is larger than the Board of Supervisors feels is proper, does Section 15-577 require that the budget, a synopsis of which is required to be published,
shall include the school budget as originally presented by the Superintendent of Schools, or does it require that the budget, the synopsis of which is published, shall contain a reworked and cut-down County School budget? To put it another way, can the Board of Supervisors require that the Superintendent of Schools rework the proposed school budget before advertising the proposed budget, or can the Division Superintendent of Schools insist that the synopsis of the proposed budget to be published contain the school budget as originally presented and without any reworking?"

In view of the decision of the Supreme Court of Appeals of Virginia in the case of Board of Supervisors v. County School Board, 182 Va. 266, I am of the opinion that the Board of Supervisors cannot require the Superintendent of Schools to rework the proposed school budget before advertising it. If the Board of Supervisors, after holding a public hearing on the proposed county budget, should approve an amount for the total school budget which is less than that requested in the proposed school budget, then the Superintendent of Schools and the School Board should rework the school budget so as to make it conform with the total amount approved for school purposes and to conform with the school levy which was set by the Board of Supervisors. See Opinions of the Attorney General for 1952-53, page 210.

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SCHOOLS—Census—What lists and information to be made public. F-22 (260)

HONORABLE ROBERT C. FITZGERALD,
Commonwealth's Attorney for Fairfax County.

March 21, 1955.

This is in reply to your letter of March 17, 1955 in which you state that the County desires to have an official census taken by the Bureau of Census at the same time that the school census is taken. You further state that, by law or regulation, the Bureau of Census must keep the form census cards confidential and, in this regard, you request my opinion as to the interpretation to be given to § 22-226 of the Code of Virginia, which reads as follows:

"The lists required by §§ 22-223 and 22-225 shall be submitted for careful revision to the county school board or the city school board as soon as may be after their completion, and shall, at all times be open to the inspection of any citizen. When so revised they shall be submitted with any other information required or deemed necessary, to the division superintendent, who shall forthwith transmit same to the Superintendent of Public Instruction."

I am of the opinion that the word "list" as used in § 22-226 does not mean the actual information cards filled out by the person taking the census, but rather should be interpreted as meaning the list of information as to the names, addresses, ages, parents, etc., of children which is supplied to the School Board by the person taking the census. Therefore, I am of the opinion that the form census cards used by the Bureau of Census do not have to be made public under § 22-226, but the list of names and other information and statistics concerning children of school age compiled from the census cards should be open to the public.
SCHOOLS—Construction—May give contract to someone under low bid after rejecting all bids. F-252 (111)  

October 18, 1954.

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

This is in reply to your letter of October 15, 1954, in which you ask the following questions:

“1. Can a school board, after rejecting all bids for a construction project, give the contract to some one bidder or someone who has not submitted a bid, at a price lower than the lowest bid submitted, without giving other bidders an opportunity to re-submit their bids?

“2. Can a corporation whose stockholders include a member or members of the architectural firm furnishing the plans for a public school construction job be the general contractor for that job, or take a sub-contract under the general contractor? Would the amount of stock in the contracting corporation owned by the member of the architectural firm affect the right of such corporation to take the contract or a sub-contract in the above case?”

With respect to question No. 1, Section 22-72 of the Code, relating to the powers and duties of a local School Board, gives the Board authority, among other things, to “provide for the erecting, furnishing and equipping of necessary school buildings and appurtenances and the maintenance thereof.” We are unable to find any provision of the statutes which requires a School Board to advertise and ask for bids on contracts for the erection of school buildings. Therefore, I am of the opinion that your Board, since it has rejected all the bids submitted to it, may proceed to let its contract for the construction of the proposed project without submitting the matter to competitive bidding. This conclusion seems to be in accord with an opinion furnished you by this office on July 5, 1951, and which is published in the Report of the Attorney General for 1951-52, page 142.

Section 15-504 prohibits members of a County School Board and other County officers from participating in certain contracts in which they have an interest. However, I do not know of any statute that would prohibit a member of an architectural firm which furnishes the plans for a school construction project from having an interest as a stockholder, in any amount, in a corporation engaged to construct the project, either as general contractor or sub-contractor.

This opinion is predicated upon the assumption that the corporation or firm engaged or to be engaged to act as general contractor or sub-contractor in the construction of such building will not furnish any building material, supplies or equipment of any character whatsoever.

I wish to call your attention to Section 15-710 of the Code, which expressly prohibits the County from purchasing any building material, supplies or equipment from any business enterprise, whether a sole proprietorship or other legal entity, in which the architect is an officer, director or stockholder or in which he is financially interested.

SCHOOLS—Construction—May not give contract to architect who prepared plans if State funds used. F-252 (156)  

November 20, 1954.

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

This will acknowledge receipt of your letter of November 19, 1954 in which you refer to my opinion of October 18, 1954 in response to the questions presented
in your letter of October 15, relating to contracts for the construction of county school buildings.

The opinion of October 18 was based on the assumption that the project you referred to was being financed solely out of local or county funds. There was no suggestion in your letter that this is a "State-aid project" as that term is defined in § 22-166.8 of the Code. If this is a State-aid project, then the provisions of § 22-166.12 apply and the contract would have to be let to the lowest bidder in order to conform to the provisions of Chapter 4 of Title 11 of the Code.

With respect to question 2 in your letter of October 15, I am of the opinion that, if this is a State-aid project, the corporation whose stockholders include a member or members of the architectural firm furnishing the plans for the project would be ineligible to bid on the contract.

As I have already indicated in this letter, I am of the opinion that § 22-166.12 of the Code does not apply where the project is being financed solely out of local and county funds.

SCHOOLS—New London Academy—Approval of budget for. F-268L (203)

HONORABLE A. A. RUCKER,
Attorney for the Commonwealth of Bedford County.

I have your letter of January 18 in which you inquire as to the authority of the School Boards and the Boards of Supervisors of Bedford and Campbell Counties over the budget of New London Academy. I assume you refer to the operating budget.

I had occasion to discuss some phases of this question in a letter to the Honorable S. J. Thompson, Commonwealth's Attorney for Campbell County, under date of February 14, 1951, and I quote below from that communication:

"I have your letter of January 29, in which you ask several questions dealing with the management and operation of the New London Academy, which is a school located in Bedford County and supported jointly by Bedford and Campbell Counties. This school occupies a somewhat unique status and its operation is largely controlled by Chapter 475 of the Acts of 1926. Some of your questions are more practical than legal, but I shall do the best I can with them from such study as I have been able to make.

"Your first question is: 'Is it necessary that a copy of the budget of the Board of Managers of New London Academy be submitted to the School Boards of Bedford and Campbell Counties and to the Boards of Supervisors of Bedford and Campbell Counties?'

"This inquiry should, I think, be answered in the affirmative. Certainly the School Boards of the two Counties are entitled to all pertinent information relative to the expense of operation of the School, and it would appear that the Boards of Supervisors are entitled to this information also, which they can obtain in the manner that I shall indicate in my reply to your second question.

"Your next ask: 'Is it necessary that the budget for New London Academy be set up in the budget of the County School Boards of Bedford and Campbell Counties item by item, or is it proper that the amount estimated to be necessary to operate New London Academy be set up as a lump in the budgets of the respective School Boards?'

"It seems to me that the best method to be pursued by the two County School Boards in making up their budgets is for each Board to include in its budget submitted to the Board of Supervisors under the appropriate items set up in the annual budget form its part of the expense of the New
London School. There can be attached to the budget as an exhibit for the information of the Board of Supervisors a copy of the budget which has been submitted by the Board of Managers of the School. The method I suggest I think is preferable to simply setting up a lump sum in each budget for the support of the School."

Your inquiry is not answered in terms by the Act of Assembly governing New London Academy. However, since the Board of Managers of the Academy is "vested with all the rights, power and authority now or hereafter conferred by law upon county school boards", I question the authority of the school boards of the two counties to control or reduce the budget submitted by the Board of Managers. But in my opinion the Boards of Supervisors of the two counties do have this authority just as they have the authority to reduce the budgets submitted by the school boards of the two counties. I cannot believe that it is the intention of the act controlling the operation of the Academy that its Board of Managers can, in effect, ask for and receive from the appropriating body a blank check for its operation. This would be the result if the Board of Supervisors has no control.

SCHOOLS—Safety regulations for buses—Authority of Board of Education to adopt. F-201 (213)

February 2, 1955.

HONORABLE DOWELL J. HOWARD,
Superintendent of Public Instruction.

This will acknowledge receipt of your letter of February 2, 1955 in which you enclose a copy of regulations pertaining to pupil transportation. These regulations were adopted by the State Board of Education at its meeting on January 28, 1955. With respect to these regulations you make the following statement:

"Some questions have arisen in regard to regulations Nos. 6 and 7, especially in regard to the use of the school bus warning lights which are required on school buses under Section 22-280 of the Code of Virginia. In order that the meaning of these regulations and the section of the code may be clarified, I am requesting your opinion in regard to the following questions:

1. Does Section 22-280 mean that the school bus warning lights would burn only when the bus is at a standstill?
2. Is there any conflict between this statute and State Board Regulations Nos. 6 and 7 which would render the regulations invalid?

"Your expression in regard to this matter will be appreciated and will help to emphasize our regulation of the safe operation of school buses."

Section 22-276 of the Code authorizes the State Board of Education to enact certain regulations; said section being as follows:

"The State Board may make all needful rules and regulations not inconsistent with law relating to the construction, design, operation, equipment, and color of school buses, and shall have the authority to issue an order prohibiting the operation on public streets and highways of any school bus which does not comply with such regulations, and any such order shall be enforced by the Division of Motor Vehicles through the State police."

It will be noted from this section that the State Board "may make all needful rules and regulations not inconsistent with law relating to the operation of school buses, and shall have the authority to issue an order prohibiting
the operation on public streets and highways of any school bus which does not comply with such regulations, and any such order shall be enforced by the Division of Motor Vehicles through the State police."

Section 22-280 of the Code is as follows:

"County and city school boards operating any school bus, or for whom any school bus is operated, shall have each such school bus equipped with a warning device of such type as may be prescribed by the State Board, which shall indicate when such bus is stopped, and when it is taking on or discharging school children.

"Any person operating such bus who fails or refuses to equip such vehicle being driven by him with such equipment, or who fails to use such warning devices in the operation of such vehicle shall be guilty of a misdemeanor, and shall, on conviction be fined not less than five dollars nor more than twenty-five dollars."

The regulation, and particularly §§ 6 and 7 thereof, may, in my opinion, be enforced by the State Board of Education to the extent that said Board may require the drivers or operators of such school buses to comply with the directive pursuant to such regulations. This opinion is based upon the general rule with respect to the relationship of employer and employee. I understand that the local school boards, at the direction of the State Board of Education, require the drivers and operators of these buses to comply with the rules and regulations promulgated by the State Board of Education with respect to the operation of such buses.

Inasmuch as §§ 6 and 7 of the regulations make requirements not specifically contained in § 22-280 of the Code, I am of the opinion that in case of a violation thereof by an operator or driver of the bus, such violation would not be subject to the penalties prescribed in § 22-280. This section, in my opinion, does not restrict the State Board in promulgating regulations such as under consideration here which have the obvious purpose of providing further means for the safety of the school children being transported.

SCHOOLS—Superintendent—Serving as chairman of political party. F-258 (8)

MR. J. P. SNEAD,
Superintendent of Schools, Fluvanna County.

This is in response to your inquiry of July 8 relative to the construction to be placed on section 22-35 of the Code of Virginia, as amended by Chapter 334, Acts of Assembly, 1954. This section provides, in so far as here material, that "no chairman of any political party shall be eligible to the office of division superintendent of schools."

The facts material to your inquiry are substantially as follows:

The division superintendent of schools was appointed for a four-year term beginning July 1, 1953.

The Constitution requires that the State Board of Education shall certify to the local school board a list of persons "having reasonable academic and business qualifications for division superintendent of schools."

The local board is required to select one of such persons from those certified to it by the State Board, who shall hold office for four years.

In the instant matter, when the superintendent in question was appointed, he was chairman of a local political committee. At the time of his appointment he met all qualifications prescribed by law. It is my opinion that the amendment to section 22-35 does not affect his qualifications to hold the office of division superintendent for the period of four years beginning prior to the effective date of the Act of Assembly as amended.
The Act, in my opinion, renders a chairman of a political party ineligible to appointment to the office of division superintendent of schools. It cannot, in my judgment, be construed to render the office of division superintendent vacant, or to affect the eligibility of a person to hold the office whose term of office began prior to the amendment, and whose tenure was in effect on the effective date of the amendment.

SCHOOLS—Superintendents—Travel expenses—Reimbursement for actual expenses only. F-114 (147)

November 18, 1954.

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

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

"During the past few years several county and city school boards have approved lump sum travel expense allowances for division superintendents of schools. We have not encouraged such practice, in fact we have discouraged it, but we have recognized that it is sometimes impractical for the division superintendent to keep a record of the miscellaneous travel between schools and on short official business trips within the county or city in which the superintendent operates.

"Sections 14-5 and 14-5.2 as amended at the 1954 session of the General Assembly read as follows:

"Section 14-5. Traveling expenses on State business; public or private transportation; provisions of Section 14-30 not affected.—Any person traveling on State business shall be entitled to reimbursement for such of his actual expenses as are necessary and ordinarily incident to such travel. If conveyance is by public transportation, reimbursement shall be at the actual cost thereof. If conveyance is by private transportation, reimbursement shall be at the rate of seven cents per mile. The provisions of this section shall not, however, affect the provisions of Section 14-30.

"Section 14-5.2. Traveling expenses on business of town, city or county.—Any person traveling on business of any town, city or county wherein no part of the cost is borne by the State may be reimbursed by such city, town or county on a basis not in excess of that provided in Section 14-5."

"I will appreciate it very much if you will advise me as to whether or not Sections 14-5 and 14-5.2 will permit a continuation of lump sum travel allowances for division superintendents or do the two sections, particularly Section 14-5.2, prohibit such lump sum payments and require a detailed mileage accounting and reimbursement at the rate of seven cents per mile."

It appears to me that your inquiry is answered in terms by Section 14-5.2 of the Code, which was added thereto by Chapter 709 of the Acts of 1954. That section provides, as will appear from your letter, that any person traveling on business of any town, city or county may be reimbursed by such town, city or county on a basis not in excess of that provided in Section 14-5. Section 14-5 provides that a person shall be entitled to reimbursement for his actual traveling expenses. In so far as transportation expenses are concerned, he shall be reimbursed at the actual cost thereof, but, if he uses his own car, the reimbursement shall be at the rate of seven cents per mile.

Construing these two sections together, it is my opinion that the division superintendent of schools should submit for reimbursement his actual traveling expense account and that he should be reimbursed on this basis. I do not think that the sections contemplate that a lump sum travel expense allowance shall be made.
This is in reply to your letter of March 1, 1955, which reads as follows:

"Mr. Rawls Byrd, Superintendent of Schools of James City County and Williamsburg City, has raised the following question:

'This is the case of Charlotte St. Clair, age 15, who has always lived in James City County with her parents who in turn made their home with the child’s grandparents (the parents of Charlotte’s mother). Last October the parents moved into a new home which they had purchased in York County. Charlotte continued living with the grandparents and going to school with the assumption that James City County was responsible for her schooling. The James City County School Board took the same position in this case which it had taken in other cases where the parents of pupils did not live in the county and billed the parents for tuition. Eventually the Board agreed not to require any tuition in this case for the first half of the 1954-55 school year but to charge tuition from the beginning of the second half of the school year.

"The parent claims that since the daughter has always lived in James City County and did not move with the family that the county should provide her with free schooling. The parents further state that the child is needed to assist with taking care of the grandparents who are in declining years and that the child is supported in part by the parents.’

"The question is: ‘What is the obligation of James City County, if any, for the schooling of this girl?’"

Section 22-194 of the Virginia Code is as follows:

“County and city school boards may charge, under regulations prescribed by the State Board, tuition for pupils from one county or city, attending high school in some other county, or city.”

It is my view that the phrase “pupils from one county” means pupils having their place of residence in one county. A pupil residing in one county may be charged tuition if he attends high school in another county.

The term “residence”, in this instance, should, in my judgment, be construed in a liberal sense as meaning an inhabitant of a county, as distinguished from the narrower term of being domiciled in a county. However, this student is apparently domiciled in and a resident of James City County.

A child’s residence is not necessarily the residence of its parents, but it may be where the person in loco parentis resides. In this case the grandparents, with whom the child has always lived, are the persons in loco parentis.

Inasmuch as the child in question actually resides in James City County and has never resided in any other county, and apparently expects to continue to reside in said county, I am of the opinion that the James City County School Board does not have the right to charge tuition for attendance of the child in the high schools of said county.

SEARCH AND SEIZURE—No search warrant necessary to search house for felon.

F-129 (212)
Where a sheriff or other officer holds a warrant for the arrest of a person alleged to have committed a felony, may such officer by force enter the dwelling house of another person for the purpose of apprehending and arresting the accused?

I have not been able to find any Supreme Court of Virginia case on the point raised in your letter. I am of the opinion, however, that where an officer holds a warrant against a person alleged to have committed a felony, and such officer knows, or has reasonable cause to believe that the alleged offender is in the house of another person, the officer may force an entry into the home for the purpose of searching for and arresting the accused. The officer should, of course, show the warrant to the owner or occupant of the house and first make a request for peaceable entry.

If the warrant is for a misdemeanor, unless the officer has been in actual pursuit of the alleged misdemeanant and has seen him enter the house, I believe it would be advisable and prudent for the officer to obtain a search warrant before making forceable entry.

SEARCH AND SEIZURE—Warrant to search particular person. F-381 (22)

HONORABLE ERNEST W. GOODRICH,
Commonwealth’s Attorney for Surry County.

This is in reply to your letter of July 19, 1954, in which you ask to be advised as to the legality of a search warrant which designates a particular person to be searched.

The statutory authority for the issuance of search warrants is codified in chapter 3 of Title 19, Code of Virginia, 1950. It is to be noted that no provision is therein made for the issuance of a warrant to search a person, the primary objective being to authorize the search of a described house, place, vehicle or baggage. I am, therefore, of the opinion that another mode of search should be employed when a person is to be searched unless such person be on the premises described in a search warrant.

SERGEANTS — Deputy must be resident of city at time of appointment. F-136 (5)

MR. B. HARRISON WALKER, JR.,
City Sergeant, Denbigh, Virginia.

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

"Please give your opinion on the ruling regarding the residence of a citizen prior to appointment as Deputy to the City Sergeant. A well qualified man residing in the City of Newport News (adjacent city to Warwick) has applied for an open position existing at present in my department. He is anxious to become a deputy and I am anxious to have a man of his caliber with me. He desires to make his permanent residence in Warwick. I shall appreciate your kindness in giving this request your attention and letting me hear from you at your earliest convenience."

A deputy city sergeant appointed pursuant to section 15-485 of the Code is undoubtedly a public (city) officer. Section 15-487 of the Code provides, among other things, that every city officer shall at the time of his appointment have resided one year next preceding his appointment in the city. I must con-
clude, therefore, that in so far as the general law is concerned the person you mention is not eligible for appointment as a deputy city sergeant under the provisions of section 15-485 of the Code.

As I have indicated above, the opinion expressed is based upon the general law. I have not examined your city charter and consequently do not know whether there is anything therein contrary to general law. On this point I suggest that you seek the advice of your city attorney.

SHERIFFS AND CITY SERGEANTS—May not require prisoners or employees of owner to assist in execution of writ of eviction. F-212 (131)

HONORABLE EDGAR L. WINSTEAD,
City Sergeant, City of Roanoke.

This is in reply to your letter of October 26, 1954, in which you state that you have adopted the policy that the owners of property or the rental agent of such property should furnish the labor necessary in connection with evictions under writs in your hands for execution for the possession of premises. You state that it has been your practice in the past to use prisoners to assist in evicting tenants from premises in accordance with the writ.

I can find no statute which would authorize an officer to require prisoners to assist him in the execution of any such writs. The officer, of course, if it is necessary in order to make the eviction, or otherwise execute the writ, may utilize the services of one or more deputies.

Moreover, I can find no statutory authority requiring owners of the property or the rental agent of such property to furnish the labor for these evictions. I am of the view that such owners or the rental agents of such property may voluntarily furnish such labor at their expense. However, while the eviction is taking place and the tenants and the property of the tenant, if any, are being removed from the premises, it would be necessary for the officer to whom the court has directed the writ, or one of his deputies, to be present during the entire operation and to be in charge thereof.

SLOT MACHINES—Definition of—Whether gum machine is. F-123 (40)

HONORABLE HAROLD B. SINGLETON,
Member House of Delegates.

I have before me your letter of July 31, 1954, in which you ask to be advised whether the Virginia Slot Machine Laws are being violated by the operation in public places of machines in which a penny is inserted for the purpose of obtaining a ball of chewing gum. On occasion, over which the purchaser has no control, a small plastic ball or image of some description will also drop from the machine upon the insertion of the coin.

Sections 18-291 through 18-296 of the Code of Virginia, 1950, are pertinent to your inquiry. Section 18-291 prohibits the owning, storage, keeping, possessing, etc., of the slot machines as defined in section 18-292 of the Code. That section, in so far as germane, provides as follows:

"Any machine, apparatus or device is a slot machine or device within the provisions of the preceding section if it is one that is adapted, or may readily be converted into one that is adapted, for use in such a way that, as a result of the insertion of any piece of money or coin or other object such machine or device is caused to operate or may be operated, and by
reason of any element of chance or of other outcome of such operation unpredictable by him the user (a) may receive or become entitled to receive any piece of money, credit, allowance or thing of value, or any check, slug, token or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance or thing of value, or which may be given in trade, * * *.

To bring a machine within this definition requires the co-existence of three elements; namely, a machine or apparatus designed for the insertion of a piece of money or other object whereby by reason of chance the user may receive a piece of money, allowance or thing of value, etc. As applied to the machine in question the only element with respect to which there may exist some doubt is that of value. If the small plastic ball or other image is considered a thing of value there is no question but that the machine comes within the definition set forth in section 18-292 and is thus prohibited.

SLOT MACHINES—Pin ball machine which awards free games is illegal. F-123 (283) April 21, 1955.

HONORABLE DANIEL W. McNEIL,
Commonwealth’s Attorney, Rockbridge County.

This is in reply to your letter of April 19, 1955, in which you request my opinion as to whether a pin ball machine which awards free games for the players attaining a certain score is legal in Virginia.

A pin ball machine, such as the one described by you, 'comes within the definition of a slot machine as set forth in § 18-292 of the Code of Virginia. That section provides, in part, as follows:

"Any machine, apparatus, or device is a slot machine or device within the provisions of the preceding section if it is one that is adapted, or may readily be converted into one that is adapted, for use in such a way that, as a result of the inserting of any piece of money or coin or other object, such machine or device is caused to operate or may be operated, and by reason of any element of chance or of other outcome of such operation unpredictable by him the user * * * may secure additional chance or rights to use such machine, apparatus or device, irrespective of whether it may, apart from any element of chance or unpredictable outcome of such operation, also sell, deliver or present some merchandise, indication of weight, entertainment or other thing of value. * * *"

Sections 18-290 and 18-291 make it a misdemeanor for any person to manufacture, own, store, keep, possess, sell, rent, lease or permit the operation of any slot machine in any space of any kind owned, leased or occupied by him.

In view of these three sections of the Code, I can come to no other conclusion but that a pin ball machine which awards free games may not be legally operated in Virginia. I am returning the letter which you enclosed with your letter.


HONORABLE DOWELL J. HOWARD,
Superintendent of Public Instruction.

This will acknowledge receipt of your letter of January 27, 1955, which reads as follows:
"Governor Stanley under date of December 28, 1954, wrote me as follows:

"Mrs. Oveta Culp Hobby, Secretary of the Department of Health, Education, and Welfare, has called attention to recent amendments to the Social Security Act and requested the designation of a Virginia agency to make disability determinations for purposes of the old-age and survivors insurance law.

"I hereby designate the State Board of Education as the Virginia agency to make such determinations, with authority to enter into an agreement with the Department of Health, Education, and Welfare relating to administration of the program.

"The Department of Health, Education, and Welfare has requested us to furnish them with an opinion as to the State Board's authority to proceed as set forth in the Governor's letter which is quoted above."

Under Chapter 15, Title 22 of the Code of Virginia, the State Board of Education is delegated to act as the State Board of Vocational Education. This Board is established "for the purpose of cooperating with the federal board in carrying out the provisions and purposes of the federal act providing for the vocational rehabilitation of persons disabled in industry or otherwise and is empowered and directed to cooperate with the federal board in the administration of such Act of Congress; to prescribe and provide such courses of vocational training as may be necessary for the vocational rehabilitation of persons disabled in industry or otherwise and to provide for the supervision of such training."

Code § 22-327.

At the Federal level the program of vocational training and rehabilitation referred to in Chapter 15, Title 22 of the Code of Virginia, is now administered by the Department of Health, Education, and Welfare, which Department also administers the federal social security system, as established under the Social Security Act.

The Social Security Act, as amended by the 83rd Congress in 1954, provides for a method of cooperation between the Department of Health, Welfare, and Education and the states with respect to the making of disability determinations under the Social Security Act. These provisions are, in part:

"Sec. 221. (a) In the case of any individual, the determination of whether or not he is under a disability (as defined in section 216(i) and of the day such disability began, and the determination of the day on which such disability ceases, shall except as provided in subsection (g), be made by a State agency pursuant to an agreement entered into under subsection (b). Except as provided in subsections (c) and (d), any such determination shall be the determination of the Secretary for purposes of this title.

"(b) The Secretary shall enter into an agreement with each State which is willing to make such an agreement under which the State agency or agencies administering the State plan approved under the Vocational Rehabilitation Act, or any other appropriate State agency or agencies, or both, will make the determinations referred to in subsection (a) with respect to all individuals in such State, or with respect to such class or classes of individuals in the State as may be designated in the agreement at the State's request."

"Sec. 222. It is hereby declared to be the policy of the Congress in enacting the preceding section that disabled individuals applying for a determination of disability shall be promptly referred to the State agency or agencies administering or supervising the administration of the State plan approved under the Vocational Rehabilitation Act for necessary vocational rehabilitation services, to the end that the maximum number of disabled individuals may be restored to productive activity."
The Governor has designated the State Board of Education (which acts as the State Board of Vocational Education) as the Virginia agency to make disability determinations and has authorized said Board to enter into an agreement with the Department of Health, Welfare and Education setting forth the details and methods of administration.

The expenses incident to the State's activities in connection with the matter will be borne by the Federal government either by way of advances or by reimbursements.

It is obvious from the language of the federal statutes quoted herein, that the social security provisions with respect to the elimination of disability periods from consideration in determining the average earnings of an individual eligible for benefits under the Social Security Act are closely related to and integrated with the vocational and rehabilitation program at the federal level. It is also clear that Congress contemplated that the applications made to local social security offices for disability determinations should be referred to, and processed by, the State agency currently cooperating with the federal agency in the administration of the vocational and rehabilitation program.

The State statutes with respect to the extent of cooperation by the State Board of Education with the federal agencies in connection with the vocational training program should be liberally construed so as to achieve their beneficient purposes. I think that the General Assembly contemplated full and complete cooperation by the State Board with the federal government in the vocational and rehabilitation program then in effect or as thereafter enlarged by Congress.

Since the disability determinations are to be made as a part of the vocational and rehabilitation program carried on jointly by the State and the federal government, I am of the opinion that the State Board of Education has the authority, under Chapter 15 of Title 22 of the Code, to proceed under the Governor's designation as set forth in his letter to you under date of December 28, 1954.

SOCIAL SECURITY—Judges of Courts of Record—Not employees of local subdivision. F-161a (208)

HONORABLE FRANK A. KEARNEY,
Circuit Court, City of Hampton.

This is in reply to your letter of January 21, 1955, in which you inquire concerning your eligibility for social security protection under the provisions of Chapter 3.1, Title 51 of the Code of Virginia, as amended.

I am of the opinion, and have so advised the Governor orally, that the judges of the various courts of record may be brought under social security coverage under the procedure set forth in the 1954 amendments to § 218(d) of the Federal Social Security Act. You, I believe, are familiar with that procedure and, as you state, a Committee has been appointed by the Judicial Conference to explore the feasibility of the matter. This type of coverage will require the Governor's approval.

In your letter you state that you consulted the Manager of the Federal Social Security Office in your City and that he expressed the opinion that the City of Hampton could include you as an employee of that political subdivision.

While it is true that the City of Hampton supplements the salary paid to you by the State, I am unable to conclude that you are an employee of the City. I do not think that you are an employee of the City under the usual common law rules applicable in determining the employer-employee relationship, and so if you are an employee of the City it would have to be as a result of a statutory definition of the term "employee". In § 51-111.2 of the Code the term "local employee" is defined as "any employee of a political subdivision, and shall include a 'special
employee' which means a county or city treasurer, commissioner of the revenue, Commonwealth's attorney, clerk of court, sheriff, sergeant or constable and a deputy or employee of any such officer."

You will note that judges are not included within the above definition.

The term "State employee" is defined in subsection (e) of Code § 51-111.2 as "any person who is employed in the service of and whose compensation is payable in whole or in part, by the Commonwealth or any department, institution or agency thereof, and shall include trial justices, the Auditor of Public Accounts, the Director of the Division of Statutory Research and Drafting, the Clerk of the House of Delegates and the Clerk of the Senate, but not (1) any officer elected by popular vote, and (2) a county or city treasurer, commissioner of the revenue, Commonwealth's attorney, clerk of court, sheriff, sergeant or constable and a deputy or employee of any such officer."

Subsection (c) of the same Code section states that "the term 'employee' includes an officer of the State, or one of its political subdivisions." Judges, in my opinion, are officers of the State, having been elected to their office by the General Assembly. I am unable to conclude that the Judges are employees of a political subdivision in their respective circuits merely because such political subdivision supplements their basic salaries payable by the State. They are, of course, employees of the State.

In the agreement provided for in Code § 51-111.3 (1) between the State and the Federal Social Security Agency it is provided that:

"The term 'employee' means an employee as defined in § 210(k) of the Social Security Act and shall include an officer of the State or one of its political subdivisions."

Section 210(k) of the Social Security Act is, in part, as follows:

"The term 'employee' means—

** * * *

"(2) Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee ** **."

As I have already stated herein, I do not think you would be an employee of the City of Hampton under the common law rule. The statutory definitions, in my opinion, fail to bring you within that category.

I am furnishing Honorable C. H. Smith, Director of the Virginia Supplemental Retirement System, a copy of this opinion so that he will be aware of my views in regard to this matter.

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SOCIAL SECURITY—Regional Free Library—Not separate political subdivision.
F-161a (149)

HONORABLE CHARLES H. SMITH,
Director, Virginia Supplemental Retirement System.

This is in reply to your letter of November 11, 1954 in which you request my opinion as to whether a regional free library system, as provided for in Chapter 2 of Title 42 of the Code, is a political subdivision for social security purposes as defined under § 51-111.2 of the Code. Section 51-111.2(i) provides as follows:

"The term 'political subdivision' includes an instrumentality of the State, or one or more of its political subdivisions, or of the State and one or more of its political subdivisions, but only if such instrumentality is a juristic entity which is legally separate and distinct from the State or a
political subdivision and only if its employees are not by virtue of their relation to such juristic entity employees of the State or a political subdivision."

I am of the opinion that neither a county free library system nor a regional free library system, as provided for in Chapter 2 of Title 42 of the Code, is a separate juristic entity so as to constitute it a political subdivision of the State or of a political subdivision of the State.

Section 42-6 of the Code provides that the expenses of regional free library systems shall be apportioned between the political subdivisions concerned, and that a treasurer of one of the counties or cities which is a member of the system shall have custody of the funds of the regional free library system. Section 42-10 of the Code provides that the governing body or bodies of the governmental subdivision or subdivisions for which the library was established shall appropriate money annually for the support of the library. Because of these provisions which are found in Chapter 2 of Title 42 of the Code concerning regional free libraries, I feel that these libraries are mere agencies of the counties or cities concerned and that the employees of these regional libraries are, in fact, employees of the counties or cities which are members of the regional library system. The county free library systems and regional free library systems, as they exist in Virginia, are not separate juristic entities from the counties or cities but are directly under the control of the governing bodies of the counties or cities concerned.

SOCIAL SECURITY—Steps necessary to cover new groups under State agreement. F-161a (173)

HONORABLE THOMAS B. STANLEY,
Governor of Virginia.

December 14, 1954.

This will acknowledge receipt of your letter of December 3, 1954, which reads as follows:

"The Social Security Act has recently been amended, effective January 1, 1955, to permit service performed in positions covered by a State or Political subdivision retirement system to be covered under a Federal-State Social Security agreement, provided a referendum is conducted under the supervision of the Governor, or an Agency, or individual designated by him, and a majority of the eligible employees vote in favor of including service in such positions under an agreement.

"Your opinion is requested as to whether or not Chapter 3.1, Sections 51-111.1 through 51-111.8, Code of Virginia, 1954 Cumulative Supplement, provides

"(1) the necessary authority for conducting a referendum with respect to service performed in positions covered by a State and/or Political subdivision retirement system.

"(2) Would the Governor have authority to modify the Federal-State Social Security agreement without further legislation to include, after a favorable referendum, service performed in positions covered by a State Retirement System such as Teachers Insurance Annuity Association at the University of Virginia?"

Section 51-111.3 of the Code of Virginia, 1954 Cumulative Supplement, provides, in part, as follows:

"(a) The State agency, with the approval of the Governor, is hereby authorized to enter on behalf of the State into an agreement with the federal agency, consistent with the terms and provisions of this Chapter, for
the purpose of extending the benefits of the Federal Old-Age and Survivors Insurance System to employees of the State or any political subdivision thereof, with respect to services specified in such agreement, which constitute 'employment' as defined in § 51-111.2. Such agreement may contain such provisions relating to coverage, benefits, contributions, effective date, modification and termination of the agreement, administration, and other appropriate provisions as the State agency and federal agency shall agree upon, but, except as may be otherwise required by or under applicable federal law as to the services to be covered, such agreement shall provide in effect that: ** ** **.

This section, in my opinion, is sufficiently broad to authorize the Virginia Supplemental Retirement System, with your approval, to take advantage of the 1954 amendments to § 218(d) of the Social Security Act. These amendments become operative on January 1, 1955.

The State agency, as that term is defined in § 51-111.2 of the Code, has heretofore entered into an agreement with the federal agency, as that term is defined in said Code section. The existing agreement contains the following provision:

"This agreement will be modified at the request of the State to include political subdivisions or coverage groups, or both, in addition to those political subdivisions or coverage groups listed in the appendix, or to include additional services not now included in this agreement, such modification to be consistent with the provisions of § 218 of the Social Security Act.

This provision was made a part of the existing agreement under authority of the last sentence of that portion of § 51-111.3 quoted above, in which it was contemplated a modification might be desirable.

In my opinion the Governor, without further legislation, has the authority to authorize an agreement between the State agency and the federal agency for the purpose of revising or modifying the original agreement so as to extend coverage to eligible State employees in accordance with the provisions of the 1954 amendment to § 218(d) of the Social Security Act.

I am advised that the Teachers Insurance Annuity Association at the University of Virginia is composed of State employees who perform service in positions covered by a State retirement system. Therefore, they are eligible to obtain the coverage permitted under the amendment to § 218(d) of the Social Security Act.

As a condition precedent to the federal agency entering into an agreement revising or modifying the original agreement, the Governor must certify to the Secretary of Health, Education and Welfare of the federal government, that the conditions of paragraph (A) (B) (C) (D) and (E) of subsection (3) of § 218(d) of the Social Security Act have been met. In connection with these conditions, it is necessary that the Governor conduct under his supervision, or under the supervision of an agency or individual designated by him, a referendum in order to determine whether a majority of the employees who would be covered by the revision or modification desire to come under the system. This function of the Governor, in my opinion, may be exercised without the enactment of further legislation. The acts to be done by the Governor are purely administrative, and within the scope of the Governor's inherent executive powers. It is merely a method by which the Governor may determine the wishes of the specific group of State employees.
SOCIAL SECURITY—Turnpike Authorities—Are political subdivisions of State.
August 16, 1954.

HONORABLE CHARLES H. SMITH,
Director, Virginia Supplemental Retirement System.

This is in reply to your letter of August 11, 1954 in which you request my opinion as to whether the Richmond-Petersburg Turnpike Authority and the Old Dominion Turnpike Authority qualify as political subdivisions for purposes of Federal social security for State and local employees and, if so, whether the governing bodies of these Authorities qualify as employees.

The Richmond-Petersburg Turnpike Authority was created by Chapter 705 of the Acts of the General Assembly of 1954 and it is expressly stated in § 33-255.27 that the Authority shall constitute a political subdivision of the Commonwealth. The Old Dominion Turnpike Authority was created by Chapter 704 of those Acts, and § 33-255.48 expressly provides that this Authority shall constitute a political subdivision of the Commonwealth. In neither have I been able to find any language of the Acts which would eliminate these Authorities from the Federal social security provisions and I, therefore, conclude that they are political subdivisions for that purpose.

With respect to whether the members of the governing bodies of these Authorities would be considered employees, it is my opinion that, under § 51-111.2 of the Act, the answer to your question must be in the affirmative. Under subsection (f) of that section it is provided that the term "local employee" means any employee of a political subdivision, and subsection (c) defines "employee" to include any officer of a political subdivision.

SOIL CONSERVATION—Districts—Authority to enter into agreement with Federal Government for flood control structures. F-172 (132)

November 1, 1954.

HONORABLE JACK DANIELS,
Member House of Delegates.

This is in answer to the questions submitted by you to this office on October 27, 1954 in which you ask several questions concerning the Watershed Protection and Flood Prevention Act, Public Law 566, 83rd Congress. Section 5 of that Act provides as follows:

"That, except as to the installation of works or improvement on federal lands, the Secretary shall not construct or enter into any contract for the construction of any structure unless there is no local organization authorized by State law to undertake such construction, or to enter into such contract."

In view of this provision in the Act, I am of the opinion that the local organization would be the one to control the expenditures, wages, rates and other matters relating to the contract for construction and not the United States Department of Agriculture.

Paragraph 3 of § 4 of Public Law 566 reads as follows:

"* * * make arrangements satisfactory to the Secretary for defraying the cost of operating and maintaining such works or improvement, in accordance with regulations presented by the Secretary of Agriculture."

This provision of the Act seemingly gives the Secretary of Agriculture authority to perfect regulations governing the operation of the structure once it has been completed.
In my opinion a public water supply can be developed using the Act for construction of impoundment facilities so long as the public water supply aspect is incidental to the primary purpose of these facilities, that is flood prevention and soil conservation.

Article 5 of Chapter 1 of Title 21 of the Code of Virginia gives local soil conservation districts the authority to meet all conditions required in § 4 of Public Law 566. Soil conservation districts in Virginia are eligible to contract for public retention structures and other works or improvement as provided in Public Law 566 under the specific authority and powers given these districts in §§ 21-56, 21-57, 21-58, 21-60 and 21-63. There is no authority, however, for the State Soil Conservation Committee to contract for these structures under the provisions of the Code of Virginia. The actual contract for the structures under our laws must be let by the local soil conservation districts. It is my opinion that, in addition to the local soil conservation districts, counties and cities of this State would have authority under the laws of Virginia to contract for the construction of such water retention structures and other works of improvement for the purpose of flood prevention incidental thereto for the purpose of public water supplies. I can find no authority for any State agency entering into such a contract unless the structure or work of improvement would be on and of direct benefit to State owned property.

Revenue collected by the State Soil Conservation Committee, under §§ 21-11 and 21-65 of the Code of Virginia, could not be used for carrying out the provisions of Public Law 566, as these sections specifically provide that this revenue is to be used only for the purchase, repair and replacement of machinery and equipment to be used in soil conservation work. The equipment purchased with this revenue, however, could be utilized in constructing and maintaining water retention structures and other works or improvement as provided for in Public Law 566.

STATE POLICE—To arrest under State law if one applicable.
TRIAL JUSTICE—Changing warrant from violation of State law to that of county ordinance. F-353b (200)

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

This will acknowledge receipt of your letter of January 5, which reads as follows:

"Several years ago our Board of Supervisors adopted an ordinance against driving while under the influence of alcoholic beverages, pursuant to authority granted in the Code, which ordinance parallels the State statute.

"My inquiry is whether as Commonwealth's Attorney I have the right to insist that driving complaints be written on County warrants charging a violation of a County ordinance, and if the charges have been preferred on State warrants, whether I can insist that they be amended or re-written before a plea or hearing, to charge a violation of the County ordinance.

"Our State Troopers advise me that they have been instructed to prefer such charges under the State law and to have the Justices of the Peace write them on State warrants. However, it seems to me that the Commonwealth's Attorney, who has charge of all such prosecutions, should have the right to determine whether he will prosecute under the State statute or the County ordinance, and your advice will be appreciated."

With respect to the question posed in the first part of paragraph two of your letter, I call attention to § 52-22 of the Code which reads as follows:
“The Superintendent of State Police, his assistants, and the State troopers, patrolmen and police officers appointed by him, shall have authority to execute warrants of arrest for violations of ordinances of counties, cities and towns when requested so to do by the county, city or town authorities. Such arrests may be made upon information transmitted as provided in § 52-20, as well as in cases where the officer is in possession of the warrant.

“The execution of any such warrant shall rest entirely in the discretion of the Superintendent and other officers who may be requested to execute the same, and no such officer shall execute the same in any case where it will in any way interfere with, delay or hinder him in the discharge of his official duties.”

Under this section the State police may, in their discretion, execute warrants of arrest for violation of ordinances of counties, cities and towns when requested so to do by the local authorities.

Under § 52-8 of the Code the State police officers are vested with the powers of a sheriff for the purpose of enforcing all the criminal laws of this State, and it is their duty to use their best efforts to enforce such laws. In the performance of their duties they may appear before a Justice of the Peace and prefer charges. If they, either upon instructions from the State Superintendent of Police, or on their own initiative, elect to prefer charges for violation of a State law rather than a local paralleling ordinance, I am of the opinion that neither the Commonwealth's Attorney nor any other local authority may require them to act otherwise.

With respect to the second question presented by you in the latter portion of the second paragraph of your letter, I am of the opinion that the local authorities are without the power to amend or rewrite the warrant in the manner suggested by you. In my opinion the Trial Justice may amend a warrant so as to cure apparent defects, but that it is extremely doubtful that he could rewrite or amend the warrant so as to make a substantive change.

STATE PROPERTY — Conveyance of right of way over. Authority for.

F-222 (293)


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

This is in reply to your letter of April 25, 1955, inquiring if the Board of Agriculture and Immigration is legally authorized to enter into an agreement to deed an easement or right of way to a public utility across the property of the State Lime Grinding Plant near Staunton.

Kindly be advised that it is my opinion that you have legal authority to convey right of way easements to public utility companies in accordance with the provisions of section 2-4.2, Code of Virginia, which is hereinafter quoted:

“Any State department or agency, or State institution through its governing board, is authorized, after having first obtained the consent of the Governor in writing, to convey to public utility companies right of way easements over property owned by it for such consideration as it shall deem proper, when such conveyance is deemed expedient, and to execute the instruments necessary to effectuate such conveyance, such instruments to be subject to the approval of the Attorney General as to form.

“All funds received from any such conveyance shall be paid into the State treasury to be expended as provided by law.”
HONORABLE MARTHA BELL CONWAY,  
Secretary of the Commonwealth.

This will acknowledge receipt of your letter of May 20, 1955, which reads as follows:

"I have recently received a letter from the Honorable Willis E. Cohoon, in which he states that your office gave him oral permission to use a facsimile of the State seal on stock certificates of The Old Dominion Investor's Trust, Incorporated. "This decision would appear to be in conflict with a letter from your office dated March 7, 1955, stating that the seal of Virginia should not be used on stock certificates of the Kentucky Flooring Corporation of Virginia.

"I would appreciate your reviewing these decisions, and letting me know how I should treat such inquiries in the future.

"Also, in this connection, The Virginia Society of Public Accountants wishes to use the State seal on their letterheads. They were advised by this office recently that such use should be discontinued because it tended 'to give an official color to the Society and was misleading.'

"Please let me know if this is sufficient reason for requesting their discontinuance of the use of the Seal."

This office did advise Honorable Willis E. Cohoon that, in our opinion, the use of a facsimile of the State seal on certain stock certificates would not be in violation of the provisions of Article 2, Chapter 10, Title 18 of the Virginia Code. It was stated in that case that a facsimile of the obverse would be in one upper corner of the certificate and a facsimile of the inverse in the opposite upper corner of the certificate, both facsimiles being detached from all other engraving or printing and free from any alteration in design whatsoever.

It is true, and we have held, that the seal is an integral part of the Flag of Virginia and that the provisions of Article 2 are applicable thereto. However, upon a review of the decisions issued by this office and a careful examination of the statute as a whole, I am of the opinion that the use of the seal on stock certificates in the manner stated is not in violation of the Uniform Flag Act.

Section 18-357 of the Code is a part of Article 2, and reads as follows:

"This article shall not apply to any act permitted by the statutes of the United States or by the laws of this State, or by the United States army and navy regulations, nor shall it apply to any printed or written document or production, stationery, ornament, picture or jewelry whereon shall be depicted such flag, standard, color, ensign or shield with no design or words thereon and disconnected with any advertisement."

A corporate stock certificate is a printed document issued to a stockholder merely as evidence of the extent of his interest in the corporation. It is a private, personal document, usually showing the identity of the person to whom it is issued and the number of shares owned by the holder. A certificate showing that a person is the owner of an interest in a corporation is not an advertisement within the meaning of that term as commonly used.

Therefore, where the seal is used on a certificate of stock in a corporation, with no design or words placed thereon, and the stock certificate contains only the customary language showing the name of the corporation, the identity of the holder, the number of shares represented by the certificate, and the face or par value of each share, if any, such use of the seal does not, in my opinion, violate the statute, but comes clearly within the exceptions contained in § 18-357.
With respect to the use of the seal on the stationery of the Virginia Society of Public Accountants, if the seal has no design or words thereon, and the printed matter on the stationery contains no words of advertisement, but is confined to the name of the organization, its address, and the names of any officers desired to be placed thereon, such use of the seal would not, in my opinion, be in violation of the statute, but would come within the exceptions set forth in § 18-357.

SUPPORT ACT—Illegitimate Child—Father's statement on military allowance or tax report not under oath. F-278 (39)

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

This is in reply to your letter of July 29, 1954, in which you request my opinion as to whether, under § 20-61.1 of the Code of Virginia, the father's statement on an income tax return or a military service allotment would be the same as a voluntary writing under oath admitting paternity of an illegitimate child.

In order for there to be an oath, in the legal meaning of the term, the statement must be sworn to before a proper person. In my opinion a statement on a federal income tax return is not verified by an oath. 26 U. S. C. A. § 3809 (c) provides as follows:

"(c) Verification in lieu of oath. The Commissioner, under regulations prescribed by him with the approval of the Secretary, may require that any return, statement, or other document required to be filed under any provision of the internal revenue laws shall contain or be verified by a written declaration that it is made under the penalties of perjury, and such declaration shall be in lieu of any oath otherwise required."

Section 58-27 of the Code of Virginia provides, in part, as follows:

"No return of income, intangible personal property, tangible personal property, machinery and tools of merchants' capital need be verified by the oath or affirmation of the person or persons who are required by law to sign the same, but the signature of such person or persons to any such return shall be sufficient. ** **"

From the information which I have been able to obtain from the various branches of the armed services, military personnel do not verify allotment and allowance requests by an oath. Therefore, I must conclude that the father's statement on income tax returns or military allotment requests do not constitute voluntary writing under oath as prescribed in § 20-61.1 of the Code of Virginia.

TAXATION—Assessors—No State or county officer may serve as. F-249 (271)

HONORABLE ERNEST W. GOODRICH,
Commonwealth's Attorney for Surry County.

I am in receipt of your letter of March 31, in which you ask for my opinion on the following questions:

"1. May a member of the School Board of Surry County serve on the Board of Real Estate Assessors?"
REPORT OF THE ATTORNEY GENERAL

"2. May the Deputy Commissioner of Revenue be employed by the Board of Real Estate Assessors to perform the clerical work incident to a reassessment of the real estate in Surry County?

"These questions arise because of the language of Title 15, Section 381 of the Code of Virginia."

I call your attention to the fact that Section 15-381 of the Code is in the Article dealing with counties having the County Board form of government and so, unless Surry County has this form of government, the section is not applicable.

Assuming that your County does not have the County Board form of government, I am of opinion that your first question must be answered in the negative because of the provisions of Section 22-69 of the Code, the first sentence of which provides in part that "No state or county officer * * * shall be chosen or allowed to act as a member of a county school board * * * ."

Replying to your second question, it is my opinion that a Deputy Commissioner of the Revenue who has been appointed and qualified pursuant to Section 15-485 of the Code is a paid officer of the County, and, therefore, under the provisions of Section 15-504 of the Code, such officer would be prohibited from being employed by the Board of Real Estate Assessors.

TAXATION—Authority of city to set payment date for property taxes. F-273 (36)

HONORABLE ARMISTEAD L. BOOTHE,
Member of House of Delegates.

This is in reply to your letter of July 20, in which you ask for my opinion on the following questions:

"1. Can the City of Alexandria set due dates for the payment of personal property and real estate taxes on or about May 1st of each year with penalty attaching at that time and interest beginning shortly thereafter?

"2. Can the City of Alexandria set the rate for personal property and real estate taxes at any time during a calendar or fiscal year?"

Taking up your first question, it is my opinion that the Council of the City of Alexandria does not have the power to change the last date for the payment of taxes on real estate and personal property without penalty (fixed by Section 58-961 and 58-963 of the Code as of December 5) unless such power is granted to it by the Charter of the City. I can see how it can be argued that, under Sections 5.20 and 5.21 of the Charter dealing with the authority of the Council to impose penalties for non-payment of City taxes, these sections do give the City authority to fix a date for the payment of City taxes other than the date fixed by general law. However, I feel that, if it had been the intention of the General Assembly to give the City this power, it would have done so in more specific language. It is my view, therefore, that the considerable doubt which exists as to the power of the City in this respect renders it unwise for the Council to act upon the authority of these sections of the Charter.

I see from your letter that you are familiar with Section 58-847 of the Code authorizing the Council of any City to provide for the collection of city taxes on property "in instalments at such times and with such penalties for non-payment in time as may be fixed by ordinance." I presume that it is the desire of the City to secure some of its tax revenue as early as possible and I should think that this purpose could be accomplished by exercising the authority contained in Section 58-547. I happen to know that this is the practice followed in the City of Richmond.
Turning to your second question, again I find that it is not answered in terms by general law or in charter provisions that I can find. Certainly, the normal practice is to fix the tax rate prior to the beginning of the tax year. This would seem to be the intent of the Charter for the City of Alexandria, especially when Sections 6.01, 6.02, 6.07 and 6.12 are considered. However, I cannot categorically advise you that, if the City Council should fix the tax rate at a meeting held after the beginning of a fiscal year, such action would be invalid.

I regret that I am unable to give you direct yes or no answers to your inquiries. They primarily involve construction of Charter provisions and I am always reluctant to express opinions on such provisions in view of the fact that the City Attorney is so much more familiar with the Charter of a City and its background than I, and I would certainly suggest that he be consulted in these matters. If either you or he desires to go into these questions any further, I should be most happy to have a personal conference with you both.

TAXATION—Capitation—Tribal Indians subject to. F-254 (118)

October 22, 1954.

HONORABLE W. W. RICHARDSON, JR.,
Commonwealth's Attorney for New Kent County.

This is in reply to your letter of October 21, 1954, in which you direct attention to the amendment to Section 24-120 of the Code enacted at the 1954 Session of the General Assembly, with respect to the publication of the poll tax list by the county treasurer, wherein it is provided that:

"* * * The treasurer shall, in such list, designate as a tribal Indian any person who requests to be so designated and who shall have furnished the treasurer with an affidavit made by the Chief of any Indian tribe existing in this State, that such person is a member of such tribe and to the best knowledge and belief of the Chief is a tribal Indian as defined in Section 1-14 of the Code of Virginia."

You have requested my opinion as to whether or not members of the Chickahominy Indian Tribe are assessable for poll taxes.

In the passage of the amendment the General Assembly was evidently of the opinion that tribal Indians are citizens subject to the payment of State capitation taxes assessable under the State Constitution and Section 58-49 of the Code. We are unaware of any provision exempting tribal Indians from the assessment of such taxes.

Without passing upon the question of the power to assess capitation taxes against tribal Indians residing on a recognized reservation, I am of the opinion that Indians who reside outside of any such reservation are citizens who are subject to the payment of capitation taxes.

TAXATION—Collection of interest on unpaid taxes. F-262 (175)

HONORABLE VICTOR P. WILSON,
State Senator.

I am in receipt of your letter of December 11, in which you ask for my opinion on the following question:
"I have been requested by one of the officials of the City of Newport News for interpretation of Section 58-964 of the Code of Virginia, 1950, with amendments.

"The question is shall the City Treasurer collect interest at the rate of six per cent (6%) per annum 'upon the principal and penalties of all such taxes and levies then remaining unpaid' beyond the day when payment is made?"

The section to which you refer, in so far as it is pertinent to your inquiry, reads as follows:

"Interest at the rate of six per centum per annum from the thirtieth day of June of the year next following the assessment year * * * shall be collected upon the principal and penalties of all such taxes and levies then remaining unpaid, which penalty and interest shall be collected and accounted for by the officers charged with the duty of collecting such taxes or levies, along with the principal sum thereof. But this section shall not apply to local levies in any city or town when penalty or interest on such levies is regulated by its charter or by other special provisions of law."

In my opinion, it is entirely plain from the foregoing section that interest at the rate of six per centum per annum shall be collected upon unpaid taxes and penalties from June 30 next following the assessment year * * * shall be collected upon the principal and penalties of all such taxes and levies then remaining unpaid, which penalty and interest shall be collected and accounted for by the officers charged with the duty of collecting such taxes or levies, along with the principal sum thereof. In other words, the section does not authorize the collection of interest for a period beyond the date of the payment of the taxes.

I call your attention, however, to the provision in the section that it shall not apply to local levies in any city or town when penalty or interest on such levies is regulated by its charter or by other special provisions of law. The opinion I am expressing, therefore, is not to be construed as passing upon the charter provisions of any city or town or valid ordinances adopted pursuant thereto.

TAXATION — County licenses — Authority to proceed under for enacting.

F-60a (179) December 22, 1954.

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

This will acknowledge receipt of your letter of December 20, 1954, in which you ask the following question:

"Under what authority should Henrico and other counties classified under Section 15-10 of the Code of Virginia of 1950 enact or amend Ordinances imposing a County License Tax on Motor Vehicles and on Business or Professions?"

The General Assembly of the 1954 Session amended § 15-8 of the Code pertaining to the general powers of boards of supervisors by adding the fourth and succeeding paragraphs of subsection (6), being the italicized portion of Chapter 529, Acts of 1954. This amendment provides as follows: "No County governing body shall adopt or amend any ordinance imposing * * * a county motor vehicle license tax, county license tax on professions or business * * * except under the conditions hereinafter set forth, and any ordinance adopted without compliance with such conditions shall be void and of no effect." The conditions are contained in paragraphs (a), (b) and (c) which I will not quote herein.

Although the 1954 amendment is contained in a section pertaining to the general powers of boards of supervisors, I call attention to the fact that not all
of the counties have the power to impose all of the license taxes enumerated therein. This, in my opinion, would indicate that the General Assembly did not intend to exempt those counties which are given special powers under § 15-10 of the Code.

I am of the opinion, therefore, that Henrico County and other counties which come under the classification set forth in § 15-10 are required to proceed under § 15-8 of the Code in the enactment or amendment of ordinances imposing the license taxes mentioned in the question presented by you.

TAXATION—Delinquent Real Estate—Procedure for collecting—Waiving purchase by county. F-262 (24)

Mr. N. WESCOTT JACOB,
Attorney at Law.

I am sorry that my reply to your letter of July 10 has been delayed. I quote from your letter as follows:

"I have been appointed by the Board of Supervisors of Accomack County, under Section 58-1102 of the Code of Virginia, to collect delinquent real estate taxes in Accomack County. A question has arisen regarding Section 58-1070 and I would like your opinion as to same.

"The property in question is delinquent for the years 1936, 1937 and 1938. This land was not sold by the Treasurer at a tax sale until December 13th, 1943. Therefore, there was some five to seven years interest on the taxes included in the purchase price, the land in each instance being purchased at the December, 1943, sale in the name of the Commonwealth. If the property owners were to redeem under Section 58-1073, they would be paying interest on a sizeable amount of interest. The Board of Supervisors would like to know if, in your opinion, they would have the right to waive this method of collection under Section 58-1070 and collect from the land owners the amount of taxes, plus interest, from the year they were returned delinquent until paid, plus the costs of advertising for the tax sale.

"If this could be done, in your opinion, I would like to know whether or not it could only be done after suit has been brought by me as attorney for the Board of Supervisors to subject the lands to sale."

Section 58-1070 of the Code reads as follows:

"In any suit in equity, instituted for the collection of taxes and levies due on any real estate purchased, as aforesaid, in the name of the Commonwealth for the benefit of the State, county, city or town, respectively, the complainant in such suit, whether it be the Commonwealth or any county, city or town, may waive the benefit of the purchase and any claim to the title to the real estate so purchased under section 58-1067, and rely solely upon the lien on such real estate for the payment of taxes and levies imposed thereon as provided by section 58-762."

It is my opinion that under the authority of this section in any suit for the collection of taxes on real estate purchased in the name of the Commonwealth the benefit of the purchase may be waived and reliance placed solely upon the lien on such real estate for the payment of the taxes, penalty and interest which would have been assessed if the real estate had not been purchased. I think this section is clear authority for this procedure.

Replying to your second question, I think that to follow the procedure outlined above that the suit in equity for the collection of the taxes must first be brought. This also appears clear from the first line of the section I have quoted.
REPORT OF THE ATTORNEY GENERAL

TAXATION — Equalization Board — Notice of meetings — Continuing meeting.
F-242 (262)  

March 22, 1955.

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

I have your letter of March 18, from which I quote below:

"The Circuit Court of Brunswick County has recently appointed an Equalization Board prescribed under Chapter 9, Title 58 of the Virginia Code of 1950, and question has been raised as to the manner in which notice shall be given for its sittings as prescribed by Section 58-903 of the Virginia Code.

"This section provides that ten days' notice shall be given for each sitting by publication in a newspaper of general circulation in the County, and also by posting notice at the Courthouse and in each voting precinct; stating that 'Such notice shall inform the public that the Board shall sit at the place * * * on the days named therein * * *'

"From present indications the Board will have numerous complaints to consider; and it will be substantially impossible for it to anticipate the exact number of days necessary to dispatch its business. Accordingly, if it selects too few for its sittings and finds that the business cannot be completed within the advertised time, without the authority to adjourn from day to day, it will be necessary for it to suspend its operations until another notice can be given for additional sittings. On the other hand, if it advertises for more days than necessary to complete the business at hand, the interested taxpayers would have the right to select any advertised day that meets with their convenience, and under these circumstances the Board may be required to sit on days in which no matter are brought before them for consideration. Both of these instances would entail additional expense to the County. On the one hand, there would be the cost of giving the additional notice; and on the other, there would be the per diem expense of the Board, which would not be incurred if they were not sitting.

"Accordingly, I will thank you to give me an opinion as to whether or not the Board would be authorized to adjourn from time to time throughout its tenure of operation. It occurs to me that if its notice is to the effect that it will sit on certain days, and days thereafter by adjournment, announced at the sittings would certainly expedite its task to a great extent."

Pursuant to the section of the Code to which you refer, the notice should undoubtedly name the days when the Board will sit, and the Board should unquestionably attempt to fix a sufficient number of days to hear all the complaints. However, if at the completion of the hearings on the days named there are still taxpayers who have not been heard, I see no reason why the Board should not then notify those persons present who have not been heard that their cases will be taken up on the following day. I do not think that the Board should adjourn over for a longer period, for this I believe would constitute a new sitting, of which statutory notice should be given; nor do I think it advisable that the original notice of the hearing should mention the possibility of the Board's sitting after the days named, for then the taxpayer would be in doubt as to whether or not it is necessary for him to be present on the named days.
HONORABLE MAJOR M. HILLARD,
County Clerk of Norfolk County.

I acknowledge receipt of your letter of January 31, 1955, which reads as follows:

"Section 58-1141 under the title "Application to Commissioner of Revenue for Correction" provides that tax assessments may be corrected by the Commissioner of Revenue any time within five years from the thirty-first day of December of the year in which they are assessed.

"The following section 58-1142 provides for the exoneration of the taxpayer on an erroneous assessment and provides 'A copy of any correction made under this section shall be certified by the Commissioner of the Revenue to the Treasurer of his county or the treasurer or city collector of his city.'

"The section first mentioned when first enacted provided that the erroneous assessment could be corrected in three years, but the 1952 session of the Legislature changed this to five years.

"My problem is inasmuch as this procedure is strictly statutory, it provides for a certification to the treasurer, but the treasurer does not have the delinquent taxes after three years, they are sent to the Clerk's Office and the section does not provide for the Commissioner of Revenue certifying same to the Clerk. My question is whether under these two sections the Commissioner of Revenue can properly certify to the Clerk an erroneous assessment when the delinquent tax assessment is in the hands of the Clerk, and if so, should I honor such correction and relieve the taxpayer in accordance therewith?"

I find that § 58-1131 originally provided that the application for correction should be filed within one year. The section was amended in 1952 by extending the time for filing to three years, and in 1954 another amendment extended the time to five years.

The delinquent list provided for in subsection (2) of § 58-978 will have been recorded under § 58-984 in the clerk's office in about two and one-half years subsequent to the year for which the taxes are due, and, hence, after that time the delinquent taxes will not be payable to the treasurer. When the delinquent list is lodged in the clerk's office there will have been a sale of the properties involved and the Commonwealth or someone else will have become the purchaser. Such sale, at that time, will have been confirmed by the court pursuant to § 58-1038.

Section 58-1092 sets out the procedure for relief after a sale has been confirmed. This section provides that "upon a showing that the taxes and levies assessed upon such real estate for which the same has been sold are not from any cause justly due * * *, such court may set aside and annul such sale and exonerate such real estate from the taxes and levies and order the restitution of the purchase money to the purchaser." The power of the Commissioner of the Revenue to make correction under § 58-1132, in my opinion, does not exist after a sale has been confirmed by the court, due to the rights vested in the purchaser at the sale. Therefore, I am of the opinion that, to the extent § 58-1141 of the Code purports to avail a method of relief from an erroneous assessment of real estate subsequent to a sale and confirmation, it is inoperative.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Exemption—Grower and seller of nursery stock not exempt as farming. F-5a (95)

September 24, 1954.

HONORABLE HARRY F. BYRD, JR.,
State Senator.

This is in reply to your letter of September 14, 1954, which was with further reference to yours of September 10 in which you ask for my opinion as to the following:

"Is a person engaged in agriculture in the State of Virginia when he grows and sells ornamental nursery stock; and if he is engaged in agriculture, then is he a farmer if he follows that work for a living?"

You further state that the purpose of such inquiry is to obtain clarification of the statute for tax purposes. It is assumed you have reference to Section 58-413 of the Code of Virginia of 1950.

"Agriculture", as generally used in the broad sense, is inclusive of all branches of the art and science of cultivating the soil and producing plants and animals for the benefit of man. While it appears that this broad definition is inclusive of the growing of ornamental nursery stock, I am of the opinion that such a business is not to be construed as the "business of farming" within the meaning of that term in Section 58-413, Code of Virginia of 1950, which exempts certain professions and the business of farming from the tax imposed on business capital by Section 58-418 of the Code of Virginia.

As stated by the Supreme Court of Florida, in the case of Florida Industrial Commission v. Growers Equipment Co., 12 So. 2d 889, 893, 152 Fla. 595:

"The word 'agriculture' as used in the broad sense in statutes, includes farming, horticulture, forestry, butter making, cheese making, and sugar making, and is broader than the term 'farming'."

Inasmuch as Section 58-413 is an exception to the tax generally imposed, the exemptions therein must be strictly construed. I, therefore, feel that the exemptions on the "business of farming" should be confined strictly to those persons actually engaged in what is generally considered as the "business of farming".

TAXATION—Exemption—From local—County cannot grant without legislative authority. F-33 (281)

April 20, 1955.

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

This will acknowledge receipt of your letter of April 19, 1955, in which you inquire whether the Board of Supervisors of Campbell County may exempt a manufacturing plant from local taxation for a period of years for the purpose of off-setting an expenditure made by such plant for the purpose of building a road to such plant.

The only statute now in effect with respect to exemptions of such plants from taxation is Code § 58-17, which would not be applicable to your county. There was a statute, which you alluded to, that would probably have been applicable in a situation such as presented by you, but the statute was repealed in 1944. I have reference to § 435 (b) of the Tax Code—Michie's Code of 1942.

Section 189 of the Virginia Constitution clearly contemplates that there must be legislative authority for the granting of exemptions to the localities. In the absence of such legislation it is my opinion that the Board of Supervisors is powerless to grant an exemption to the plant as suggested in your letter.
REPORT OF THE ATTORNEY GENERAL

TAXATION — General Re-assessment — Effect when not completed in time.
F-261 (257)

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

March 16, 1955.

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

"Our last general assessment of real estate in Smyth County was made in the year 1948, as provided in Section 58-784 of the 1950 Code of Virginia, as amended in 1954. In this general reassessment the assistance of the Department of Taxation was utilized.

"Under the above section another reassessment was to have been made in the year 1954. The Judge of the Circuit Court duly appointed three men to make this assessment, with the help of the Department of Taxation.

"On December 31, 1954, due to weather conditions, the reassessment was not completed as required by Section 58-792 of the Code. The Judge of the Circuit Court extended the time for completing the reassessment for sixty days from the 31st of December, 1954. This sixty days expired on March 2, 1955, and the reassessment was not complete and is not complete as of the date of this letter. About ninety per cent of the reassessment was completed by March 2, 1955, and about ten per cent remains incomplete.

"The Board of Supervisors would like to know the following: Would it be legal to use the ninety per cent of the reassessment that was complete by March 2nd, the end of the sixty day extension period and is there any provision in the law to finish the reassessment and make the remaining incomplete ten per cent legal and valid?

"If the incomplete ten per cent is not legal, what disposition could the Board of Supervisors make of that ten per cent as to 1955 taxation?"

Section 58-792 of the Code requires that the general re-assessment shall be completed by December 31 of the year of such re-assessment, and that the provisions of Section 58-791 requiring, among other things, that the original of such re-assessment shall be filed in the office of the Clerk of the Court shall be accomplished not later than that date. Section 58-792 also authorizes the Judge of the Court to extend the time for completing the general re-assessment for a period of not exceeding sixty days. However, your letter states that, although the sixty-day extension period was granted, the general re-assessment has not been completed as of the date of your letter.

The pertinent statutes contemplate a general re-assessment of real estate and I know of no authority which allows the assessors to continue their work after the expiration of the period of extension. In other words, the situation by which your County is confronted is that a partial re-assessment of real estate has been made. In my opinion, this does not constitute a general re-assessment as contemplated by the statutes and, consequently, cannot be accepted as such. The statutory requirements not having been complied with, it is my opinion that there has been no general re-assessment in your County for 1954, and none can now be made.

The opinion expressed above is in accordance with a previous opinion of this office to the Attorney for the Commonwealth of Middlesex County under date of March 17, 1941.

I call your attention to Section 58-784.3 of the Code, as amended, which provides that there may be a general re-assessment of real estate in any county in any year if the governing body so directs. Under this section the Board of Supervisors may direct a general re-assessment for 1955, and I know of no reason why the Judge should not, if he so desires, appoint the same persons to make this assessment and these persons may, of course, use the data which they accumulated in 1954 in making the 1955 assessment.
REPORT OF THE ATTORNEY GENERAL

TAXATION — General Re-assessment — Must be made at least every six years.
F-261 (115) October 19, 1954.

HONORABLE SAMUEL H. ALLEN,
Commonwealth's Attorney for Lunenburg County.

I am in receipt of your letter of October 18, 1954, in which you state that the County of Lunenburg has a population of less than 17,000; that there was a general re-assessment of real estate in that County in the year 1949 in which the assistance of the Department of Taxation was utilized. You desire an opinion as to whether the Board of Supervisors of your County may postpone a general re-assessment of real estate for a period of three years under the provisions of Section 58-784.2 of the Code.

Section 58-784.2, as amended in 1954, is as follows:

"Notwithstanding the foregoing provisions of this article the governing body of any county may postpone any general reassessment hereafter for a period of not exceeding three years; provided, however, that in any county against which annexation proceedings are now pending a general reassessment shall not be required for an additional four-year period, and that the period between general reassessments shall not exceed six years in any other case."

Assuming that no annexation proceedings were pending against your County at the time this amendment became effective, I am of the opinion that it is mandatory upon the County to provide for a general reassessment in 1955. The section specifically provides "that the period between general reassessments shall not exceed six years in any other case."

Since the last re-assessment was made in 1949, any postponement beyond the year 1955 would be in excess of six years between general re-assessments.

TAXATION—General Re-assessment—No authority to postpone. F-261 (182)

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

I am today in receipt of your letter of December 20, which I quote below:

"Due to an oversight, the Board of Supervisors of Russell County, Virginia failed to have a general re-assessment of real estate in the year 1951, as provided in Paragraph 58-780 of the 1954 Supplement to the Code of Virginia. Also, due to an oversight, the Board of Supervisors failed at that time to enter an order postponing said re-assessment for three years, as provided in Paragraph 58-784.2 of the 1954 Supplement to the Code of Virginia.

"Our Board of Supervisors is having a meeting on Monday, December 27, for consideration of this matter, and would like to have an opinion from you as to when a general re-assessment should be held in this County, and if it would be possible to continue said re-assessment until 1957, which would be the regular time for re-assessment, as provided by Paragraph 58-780 of the 1954 Supplement to the Code.

"For your further information, Russell County had its last general re-assessment in the year 1948."

My further information is that the assessment which was had in 1948 was without the assistance of the Department of Taxation.
It is rather difficult for me to advise you as to what action should be taken when the County did not have a general re-assessment in 1951, which it should have had. In this situation the provisions of Section 58-780 of the Code as amended do not now fit your County's case. I direct your attention to Section 58-784.3 of the Code as amended, which authorizes any county to have a general re-assessment of real estate in any year that the governing body so directs. Not having complied with the statutory requirement as to a general re-assessment in 1951, and in view of the authority contained in Section 58-784.3, I should think that it would be a continuing duty of the Board of Supervisors to direct a general re-assessment of real estate in Russell County. If I am correct in this conclusion, then it would appear that the Board should direct a general re-assessment in 1955. I do not think that the Board has authority to postpone the general re-assessment until 1957 under Section 58-784.2 of the Code, for such postponement would result in there being more than six years between general re-assessments.

I may say that I have conferred with Honorable C. H. Morrissett, State Tax Commissioner, in regard to your inquiry and he concurs in the view I am expressing herein.

TAXATION—Issuance of Building Permits—Duty may not be transferred from Commissioner of Revenue. F-58 (238)

March 1, 1955.

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

I have your letter of February 22, the effect of which is to ask if under Section 58-766 of the Code the Executive Secretary of your County may be substituted for the Commissioner of the Revenue. The section in question provides that in certain counties, I presume including yours, no one shall commence the construction, repair or improvement of any building, if the cost exceeds the sum of five hundred dollars, until there shall have been first obtained "a permit in writing signed by the Commissioner of the Revenue." The purpose of the section, I assume, is to inform the Commissioner of the Revenue of new construction so that he may enter it upon his assessment books. I have carefully considered the section and I must advise that I can find no authority therein to substitute the Executive Secretary of the County for the Commissioner of the Revenue for the purpose of issuing these permits.

TAXATION—Peddler's License—Solicitors of magazine subscriptions not subject to. F-218 (336)

June 14, 1955.

HONORABLE L. H. MEARS,
Commonwealth's Attorney for Northampton County.

I have your letter of June 8, in which you present the following situation:

"During the past several months several of our citizens have been very much annoyed, and in at least one instance insulted, by itinerant magazine subscription salesmen who have attempted to conduct such business in this county, and our Board of Supervisors is very anxious to prevent any recurrence of such incidents.

"I have examined Section 58-340, Article 9, Chapter 7, Title 58 of the Code defining peddlers, but I am not sure that persons soliciting magazine subscriptions could be classified under the definition since they do not usually carry with them any of the goods that they are offering
REPORT OF THE ATTORNEY GENERAL

for sale. I wish to inquire, therefore, whether you might be able to cite to me any statute that would prohibit the operations of those soliciting magazine subscriptions unless and until a required license tax is paid.

"Although the Board of Supervisors has requested me to prepare an ordinance prohibiting the operations of such persons, I have some doubt as to the legality of such a proposed ordinance since the Board of Supervisors would not have the power to impose a license tax, and it further occurs to me that the conduct of such business would not in itself constitute a violation of any criminal statute for which those soliciting such subscriptions would be subject to a fine.

"Of course, if in your opinion such solicitations can be classified under the peddler statute, that would seem to be a complete answer to our problem."

I am generally in accord with the views expressed by you. A person who solicits orders for magazines is clearly not a peddler within the meaning of Section 58-340 of the Code and is not subject to a State license tax as a peddler, nor do I know of any other section of the tax laws which imposes a license tax upon this business. Futhermore, in the absence of statutory authority, and I can find none, I know of no authority which the Board of Supervisors of your County has to impose a local license tax on this business.

While I can understand and appreciate the annoyance caused by some of the persons engaged in this business, I can think of no relief to suggest to you unless a particular individual conducts himself in such a way as to violate one of the criminal statutes.

TAXATION—Persons residing on Federal property—When subject to personal property tax. F-79 (165)

December 2, 1954.

MRS. ROBERTINE H. JORDON,
Commissioner of Revenue, Montgomery County.

This is in reply to your letter of November 30, 1954 in which you request my opinion as to whether civilian personnel living on a Federal government reservation are subject to the tangible personal property tax.

The answer to your question depends solely on the fact of whether the State has ceded exclusive jurisdiction over the property to which you refer to the Federal government. If the Commonwealth of Virginia has reserved concurrent jurisdiction over this property, then these persons living on the property are subject to our personal property tax. If, however, the Federal government has exclusive jurisdiction over the property, the State is without power to impose this personal property tax on these persons. See the case of Standard Oil Company v. California, 291 U. S. 242, and also see page 278 of the 1952-51 opinions of the Attorney General. If there has been a deed ceding exclusive jurisdiction over this property to the Federal government it should be recorded in the Clerk's Office of Montgomery County, and you may also consult your Commonwealth's Attorney, as he would probably know if there has been such a granting of exclusive jurisdiction to the Federal government by the State.

TAXATION — Planing Mill Operators — To be taxed as manufacturers. F-65 (205)


HONORABLE R. E. TRICE, JR.,
Commissioner of the Revenue of Louisa County.

I refer to your recent communication, from which I quote as follows:
REPORT OF THE ATTORNEY GENERAL

"As you will recall I have a ruling from you, saying, all planing mill operators are subject to state tax on capital.

"I have a letter from the Clerk of the Board of Supervisors of Louisa County, instructing me to assess all planing mill operators as wholesale merchants.

"I have also been instructed by the Department of Taxation to assess planing mill operators as manufacturers on Capital Not Otherwise Taxed.

"I am now asking you for a ruling as to whose instructions I am to carry out, the instructions of the Supervisors of the County, or the instructions of the Department of Taxation."

The question of the proper way in which to tax a planing mill is one of law, depending upon the nature of the business. The State Tax Commissioner has expressed an opinion that under the pertinent statutes a planing mill operator is subject to the State tax on capital. The Attorney General concurs in this opinion. If the State Tax Commissioner and the Attorney General are correct, then a planing mill operator is not taxable as a merchant.

You state, however, that your Board of Supervisors has instructed you to "assess all planing mill operators as wholesale merchants." I know of no authority which a Board of Supervisors has to instruct a Commissioner of the Revenue as to how the State tax laws shall be construed and administered and, in my opinion, the Commissioner of the Revenue is not bound by such instructions. On the other hand, Section 58-857 of the Code provides that: "The State Tax Commissioner shall, by letter, printed circular or otherwise, give instructions to the commissioners of the revenue in respect to their duties as to him shall seem judicious."

While the State Tax Commissioner and the Attorney General may have erroneously construed the law, yet, in view of the section to which I have referred, I am of opinion that you would be justified in following the instructions of the State Tax Commissioner until they have been determined to be incorrect by a court whose decision would be binding.

TAXATION — Re-assessment — Action of assessors in adopting 1948 values.

F-261 (249)

March 8, 1955.

HONORABLE DOWNING L. SMITH,
Commonwealth's Attorney for Albemarle County.

This is in reply to your letter of March 4, from which I quote below:

"I request your opinion as to the effect of the action taken by the Board of Assessors of Albemarle County at their meeting on March 1, 1955. Enclosed herewith is a copy of the minutes of that meeting. Senator McCue, Mr. Clark and I discussed this matter with Mr. Martin of your office on March 2, 1955.

* * * * * * *

"Albemarle County is required to have a general reassessment of real estate in 1954 under provision of Section 58-784 as amended in 1950. The Board of Supervisors appointed three free holders of Albemarle County, Mr. A. G. Fray, Mr. F. L. Clark and Mr. Hugh N. Clark, to make the general reassessment in 1954. The Board of Supervisors employed two technical assistants to assist the Board of Assessors. The Board of Assessors made an appraisal of the real estate in Albemarle County based on the fair market value as of January 1, 1954. This information was placed on cards in the office of the Board of Assessors. On December 7, 1954, the Judge of the Circuit Court of Albemarle County was requested to
grant an extension of time for the completion of the reassessment under Section 58-792. An order was entered granting a sixty day extension from December 31, 1954, for completion of the reassessment. On January 3, 1955, the Board of Assessors met and adopted a resolution fixing the assessed value of property as 18% of the appraised fair market value as of January 1, 1954. Postal cards were sent to all land owners in Albemarle County stating that the 1954 general reassessment of real estate had been completed and listing the assessed values. The Board of Assessors met from February 15 to February 28 to hear any complaints, and to review any assessment. On March 1, 1955, as a result of a considerable number of complaints, they took the action as set forth in the minutes hereto attached."

The pertinent portion of the minutes of the meeting of March 1 is as follows:

"On motion of Mr. A. G. Fray and seconded by Mr. F. L. Clark, the former action of this Board on January 3, 1955, is hereby rescinded: and be it resolved by the Board that the basis for the 1955 Reassessment of Albemarle County, Virginia, shall be as set out in Section 58-759, 1950 Code of Virginia, as follows: Taxes for each year on real estate subject to the reassessment shall be extended on the basis of the last general reassessment made prior to such year, subject to such changes, as may have been lawfully made."

I am advised that it was the intention of the assessors, in taking the action they did at their meeting on March 1, to adopt as their reassessment the values fixed by the last general reassessment, made in 1948, subject to such changes as had been made in those values by reason of new construction, improvements, additions, destruction, etc. It is my opinion that the language quoted from the minutes carries out this intention. In other words, the assessors, as the result of their study of the real estate in Albemarle County, have finally determined that in their best judgment the fair market value of such real estate in 1954 was the same as it was in 1948. I must assume, of course, that in reaching this conclusion, and no evidence has been presented or suggestion made to the contrary, the assessors acted in good faith. At the time of the action on March 1 the matter of the final determination of the values was still before the assessors, since, as you state, they had been granted a sixty-day extension of time to complete their work. I am further advised that prior to the meeting on March 1 the assessors had not filed any reassessment in the Clerk's office, as provided in Section 58-791 of the Code.

While the action of the assessors is somewhat unusual, if, as I have previously stated, in their best judgment they finally determined the value of the real estate in 1954 was the same as it was in 1948, in my opinion, they had the power so to declare, and so, as a matter of law, my conclusion is that the action taken on March 1 is valid.

TAXATION—Recordation—Proper amount of tax where only one deed recorded on several transactions. F-90a (247)

March 8, 1955.

HONORABLE H. ELMER KISER,
Clerk, Circuit Court of Tazewell County.

This is in reply to your letter of March 3, 1955, which reads as follows:

"A question has arisen in my office as to the proper recordation tax on a deed in which A sold real estate to B for a stated consideration, and before B received a deed for the property he sold it to C for five hundred dollars more than he paid for it, and then A and his wife B and his wife joined in a deed to C for the property. The deed really included two separate transactions and two separate considerations, the second being five hundred dollars more than the first."
In order to give B protection on general warranty as against A, A conveyed the property to B with covenants of general warranty, and in the second paragraph of the deed B conveyed the property to C with covenants of general warranty. If the title is bad and C recourses against B, then B will have a general warranty from A and can recourse on him, otherwise B would not have a general warranty as against A, and might not have the right to recourse on him. The warranty is what caused the transaction to be handled in two paragraphs of the one deed.

"As stated above I shall appreciate your opinion on the matter as to the base to be used by me in calculating the tax for recordation on this deed."

Section 58-54 of the Virginia Code, is, in part, as follows:

"On every deed, except a deed exempt from taxation by law, which is admitted to record, the tax shall be fifteen cents on every hundred dollars or fraction thereof of the consideration of the deed or the actual value of the property conveyed, whichever is greater."

Under the state of facts presented by you, it appears that there was only one deed admitted to record. The amount paid by C for the property was, in my opinion, the actual consideration that passed. C, in order to have this title properly registered, presented the deed for recordation and the limit of the amount of tax chargeable against him is, in my opinion, the consideration paid by him for the property, or its actual value, whichever is greater.

This office has previously ruled that where A sells to B and, before B obtains a deed, he sells to C and, at the request of B, A executes a deed to C, the amount paid C is the consideration upon which the tax shall be based.

The case presented by you is not, in my judgment basically distinguishable from the case previously ruled upon.

TAXATION—Refund of Penalties—Authority of General Assembly to enact Enabling Statute. F-270 (51)

August 12, 1954.

HONORABLE HARRISON MANN, Member of House of Delegates.

This is in reply to your recent communication which I quote below:

"The Arlington County Board has requested its members of the General Assembly to advise them with respect to the possibility of our sponsoring legislation at the next session of the General Assembly which would provide for refunding the penalties paid on real estate taxes which were delinquent on August 15, 1954 (1954 taxes), but which were paid on or before December 5, 1954.

"It will be recalled that the General Assembly advanced the date of the payment of real estate taxes in Arlington to August 15 at the 1954 Session. (Page 359, 1954 Acts of Assembly.)

"We should like to have your opinion as to the legality of legislation of the nature requested by the County Board."

I have given this matter consideration and it is my opinion that the General Assembly may enact a valid general law which would authorize the Arlington County Board to refund the penalties paid on 1954 real estate taxes which were delinquent on August 15, 1954, but which taxes were paid on or before December 5, 1954.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Retail Merchant's License—County to follow State classification—Vending machines.  F-123 (26)

HONORABLE SAMUEL W. SWANSON,
Commissioner of Revenue.

July 26, 1954.

I regret that my reply to your recent communication has been unavoidably delayed. I quote from your letter as follows:

"Title 58, Section 355, The Code of 1950, levies a State license on slot machines as therein defined. Title 58, Section 361, confers the authority upon the localities to parallel this license on slot machines.

"Title 58, Section 362, provides that persons engaged in selling goods, wares and merchandise through the use of coin operated vending machines shall be classified as retail merchants and pay a tax as for the same. Title 58, Section 366, says that this license tax shall be in lieu of any tax on individual machines, but Title 58, Section 368 declares that Article 12 does not apply to vending machines upon which the individual license is paid under Title 58, Section 355.

"Title 58, Section 367.2 allows the localities to parallel the merchants license provision of Title 58, Section 362. Your opinion is requested as to whether or not the Board of Supervisors of Pittsylvania County can levy a license tax on each individual vending machine in Pittsylvania County without making provision for a retail merchants tax as provided in Title 58, Section 367.2. Your consideration of this matter would be greatly appreciated."

Your inquiry involves the interpretation of Section 58-367.2 of the Code which authorizes the localities to parallel the State retail merchants license tax imposed upon certain persons, firms and corporations engaged in the selling of merchandise through the use of coin operated vending machines. Whether the section authorizing the local paralleling ordinance is mandatory or not is not entirely clear and is difficult to answer categorically. Since the General Assembly has authorized the locality to impose a specific type of tax I should think that it was intended that it impose this tax and no other. I think this conclusion is the better one upon reason and principle and also upon the authority of Hill v. City of Richmond, 181 Va. 744. That case held that "Where the State has made its own classification of a business that is generally well known as that of 'wholesale merchandise broker' the city is bound to follow the State, if it desires to require a license for that particular business".

TAXATION—Retail Merchant’s License—Religious and charitable organizations subject to.  F-277 (279)

HONORABLE E. GLENN JORDAN,
Commissioner of the Revenue, City of Richmond.

April 15, 1955.

This is in reply to your letter of April 14, 1955 in which you request my opinion as to "whether religious organizations, such as churches, the Y. M. C. A. and the Y. W. C. A. come under the classification of retail merchants, and are to be assessed the usual Retail Merchant's License tax."

Section 58-321 of the Code of Virginia reads as follows:

"Every person, firm and corporation engaged in the business of a retail merchant shall pay a license tax for the privilege of doing business in this State to be measured by the amount of sales made by him or it during the next preceding year."
I am of the opinion that your question has been answered by our Supreme Court of Appeals in the case of Commonwealth of Virginia v. Wytheville Knitting Mills Employees Welfare Association, 195 Va. 663. In that case our Court held that a voluntary unincorporated organization, composed exclusively of fellow employees of a knitting mill were subject to the State Retail Merchants License for the operation of a canteen at which it dispensed articles of food and drink to its members exclusively. In this case the Court held as follows:

"The Legislature has not exempted charitable organizations engaged in business as retail merchants from taxation, and there is nothing to indicate that it is intended to exempt an association similar to that of the petitioner."

In view of this decision of our Supreme Court of Appeals, I can come to no other conclusion but that, where a charitable or religious organization is engaged in business in such manner that if it were a private individual or concern it would be subject to the State's Retail Merchants License, such charitable organization is subject to this license. There is nothing in the Constitution of Virginia or the Code of Virginia which would provide an exemption from this license for charitable or religious organizations.

TAXATION—Sale of delinquent land—When clerk to execute deed. F-262 (170)

HONORABLE H. ELMER KISER,
Clerk, Circuit Court of Tazewell County.

December 13, 1954.

I am in receipt of your letter of December 6, from which I quote as follows:

"A tract of land was sold by the Treasurer of Tazewell County on April 6, 1954 to the Commonwealth for delinquent taxes assessed in the year 1951.

"An application has been filed with me by a prospective purchaser for the purchase of the real estate from the Commonwealth. Section 58-1083 of the Code provides in part: 'When real estate so purchased in the name of the Commonwealth is not redeemed by the previous owner, his heirs or assigns or some person having the right to charge the same with a debt, within three years from the date of such purchase, any person desiring to purchase it shall sign an application ***.'

"Section 58-1073 provides in part: 'The previous owner of any such real estate, his heirs or assigns or any person having the right to charge the same with a debt, until further sale thereof under Sections 58-1038 to 58-1097 or 58-1101 to 58-1106 or under other Court proceedings redeem such real estate by paying to the Clerk ***.'

"Reading the two sections together I am not certain whether I should execute the deed before the expiration of three years from the date of the sale or does § 58-1073 grant me the power to execute the deed prior to the elapse of the three year period referred to in § 58-1083?"

Section 58-1083 of the Code reads as follows:

"When real estate so purchased in the name of the Commonwealth is not redeemed by the previous owner, his heirs or assigns or some person having the right to charge the same with a debt, within three years from the date of such purchase, any person desiring to purchase it shall file an application with the clerk of the circuit court of the county or corporation court of the city wherein it is situated, for the purchase of such real estate for the amount for which it was purchased in the name of the Common-
wealth and the taxes and levies due the city, town, county or district in which the land is situated, together with such additional sums as would have accrued from taxes, levies, penalties and interest if such real estate had not been so purchased, with interest on the amount for which the sale was made at the rate of six per centum per annum from the day of sale."

As I construe the section, it means that those persons having the right to redeem real estate purchased in the name of the Commonwealth for delinquent taxes have three years from the date the land is purchased by the Commonwealth to redeem it, and that the Clerk should not receive an application for the purchase of the land within such three-year period. Even after the application is received, the Clerk should not execute a tax deed until the things required to be done by the sections following Section 58-1083 have been accomplished. I refer especially to Sections 58-1084 to 58-1092 inclusive.

TREASURERS—Public access to records. F-130 (190)

HONORABLE PHILIP P. BURKS, Treasurer of Bedford County.

I am in receipt of your letter of December 20, 1954, from which I quote as follows:

"In section 58-919 of the Code of Virginia (1950) it is stated in part as follows:

"The treasurer shall keep the books, papers and moneys pertaining to his office at all times ready for inspection of * * * any taxpayer of the county * * *.

"Under the above section of the Code, it appears that any taxpayer of Bedford County has a right under the law of Virginia to inspect the books, etc., in the county treasurer's office except the records which are expressly stated to be confidential, such as state income records. Kindly advise me as to your opinion in this matter.

"Under the above-quoted section of the Code, can there be any question about the right of a county treasurer to inform the taxpayers of the figures contained in the official public records in the treasurer's office?"

In connection with your first question, I may say that I agree generally with your understanding, however, I call your attention to the following from an opinion of this office relating to inspection of public records which I think is applicable here.

"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."

Answering your second question, I am of opinion that a county treasurer may, as a matter of accommodation, furnish a taxpayer with a statement or compilation of figures taken from his official public records, but I do not think that there is any duty upon him to do so. In other words, the right of inspection does not carry with it the right to require the custodian of public records to prepare and furnish special statements taken from these records which any taxpayer may desire.

December 31, 1954.
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TREASURERS—Purchasing of supplies through Division of Purchasing and Printing—City not subject to. F-130 (204)


HONORABLE WALTER B. GENTRY,
Treasurer, City of Richmond.

I acknowledge receipt of your letter of January 17, which reads as follows:

"I would appreciate it very much if you would advise me why it is necessary that my purchases for the office of the Treasurer of the City of Richmond should be made through the State Purchasing Department.

"Until recently the policy of the office has been that the budget prepared by me in estimation of the coming year's needs has been approved or disapproved by the State Compensation Board and the purchases were made as needed by me, chargeable to the various allotments set up in the budget and paid by the State Compensation Board.

"A ruling from you in the matter will be appreciated."

I can find no statute expressly authorizing the State Compensation Board to require your office to make purchases through the Division of Purchase and Printing of the State. Section 14-77 of the Code, as amended at the 1954 session of the General Assembly and which becomes effective July 1, 1956, will, when it becomes effective, require "each county and city treasurer except a city treasurer who neither collects nor disburses local taxes or revenue" to pay no greater price for certain office furniture, office equipment and office appliances in excess of the prices available to the State if such purchases were made through the Division of Purchase and Printing. However, this provision apparently excepts your office, inasmuch as I understand that you do not collect nor disburse local taxes or local revenues.

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TREASURERS—Records—Board of Supervisors may not destroy originals. F-43 (269)

April 4, 1955.

HONORABLE ERNEST P. GATES,
Acting Commonwealth's Attorney for Chesterfield County.

This is in reply to your letter of March 29, 1955, which reads as follows:

"The Board of Supervisors of Chesterfield County is considering the microfilming and the destruction of records that are required to be kept by the County Treasurer.

"Under the provisions of Section 15-5.1, Code of Virginia 1950, the governing bodies of any city or town is authorized to provide for the microphotographing of records. Chesterfield County falls within the requirements of Section 15-10, Code of Virginia 1950, which vests in the Board of Supervisors of Chesterfield County 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.

"Your opinion is respectfully requested as to whether these records could be microphotographed and subsequently destroyed."

The county treasurer, as you know, acts as an agent of the State in the collection of certain State taxes. His records, therefore, are State records as well as county records. I am of the opinion, therefore, that the Board of Supervisors of your county does not have authority to destroy the original records of the Treasurer.
In connection with this matter, I wish to direct attention to § 42-59 of the Code which provides that no agency of the State government may destroy records of "value as financial records" without the consent of the State Librarian and the State Comptroller.


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

This is in reply to your letter of September 2, 1954, in which you state the following:

"Section 29-169 of the Code of Virginia provides that no person shall be deemed guilty of trespass upon uninclosed mountain lands not used for cultivation, with certain exceptions.

"Some constituents of mine in Henrico County own uninclosed mountain land which is not covered by the exceptions, and they are wondering if one strand of wire around their property would constitute an enclosure. I would appreciate your letting me have your official opinion on this question."

While there may be various definitions lent to the word "enclosed", I believe that it is generally understood, when referring to enclosed property, that enclosed land is that set apart by some visible obstruction. A fence is the commonly accepted method for setting apart enclosed lands, and, as was pointed out by the Virginia Supreme Court of Appeals in Kimball and Fink v. Carter, 95 Va. 77, 83,

"Enclosed lands, therefore, are lands surrounded by a fence; and a fence is a visible or tangible obstruction, which may be a hedge, ditch, wall, or a frame of wood, or any line of obstacle interposed between two portions of land so as to part off and shut in the land, and set it off as private property."

The extent to which one must go in order to erect a fence sufficient to place others on notice that the land is enclosed would, of course, vary with the nature of the property involved. I am inclined to feel that in the majority of cases one strand of wire would be sufficient.

TRIAL JUSTICES—Board of Supervisors to furnish office and office equipment. F-136a (103) October 8, 1954.

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

I acknowledge your letter of October 1, 1954 in which you request that I render an opinion "* * * as to what costs of the Trial Justice's Office are properly allocated to the county and what costs are properly allocated to the State."

You state that, under the provisions of § 16-77 of the Code, "some of the Boards of Supervisors have taken the position that the only burden placed upon the county in connection with the office of Trial Justice is that the county shall furnish suitable quarters." You enclosed a copy of a resolution pertaining to the matter which was adopted by the Board of Supervisors of Charlotte County on
September 13, 1954, in which that Board takes the position that, by the amend-
ment of 1954 to § 16-77 of the Code, "it was the intent of the General Assembly
of Virginia to require the State to furnish the Trial Justice with everything
necessary for the proper administration of the office."

Section 16-77 of the Code, as amended at the 1954 session of the General
Assembly, is as follows:

"Each trial justice shall keep a docket. The dockets shall be made
uniform and furnished by the State and paid for out of such funds in the
general fund as are not otherwise specifically appropriated and shall be
approved by the Auditor of Public Accounts, as to form. All causes tried
and prosecuted and all matters coming before the trial justice and the final
disposition of the same, together with an account of costs and fines, shall
be entered in such dockets. The board of supervisors or other governing
body of each county and the council of each city and town within the
jurisdiction of each trial justice shall provide suitable quarters for the
court of such trial justice at the places designated as aforesaid, within
their respective counties, towns and cities. The State shall provide necessary
books, stationery and supplies. Such books and supplies shall be kept by
the trial justice subject to the supervision of the circuit court of each of
the counties in which he is the trial justice."

Under this section it is clear that the board of supervisors or other governing
body of each county is required to provide suitable quarters for the court of its
trial justice; the State, in addition to a docket, is required to provide for each trial
justice "necessary books, stationery and supplies."

The answer to your question depends upon

(1) What constitutes "suitable quarters."

(2) What is included in "supplies."

I think that the term "suitable quarters" contemplates that a trial justice
shall be provided with a reasonably adequate place or places in which to transact
his official duties. In order to efficiently perform his duties, it is obvious that he
must be provided with adequate facilities for the operation of his court, which
would be a place to hold court and to do the work incident thereto. His office,
therefore, must of necessity be provided with such furniture and other equipment
necessary and usual to the operation of an office of that type. In this connection,
I find that the former Attorney General, the Honorable Abram P. Staples, in
construing a part of § 2854 of the Code (now §15-689 of the Code) wherein the
board of supervisors of each county is required to provide offices for the Common-
wealth's Attorney and other county officers, expressed the opinion in 1941
(Report of Attorney General, 1940-41, p. 26) that bookcases are necessary equip-
ment for the Commonwealth's Attorney's office, and that the board of supervisors
could expend money for the purchase thereof as a necessary incident in providing
an office. The Board would likewise have authority to provide all other equipment
needed by a trial justice.

In attempting to arrive at a rational conclusion with respect to the obligations
intended by the General Assembly to be borne by the counties, I have considered
the provisions of the Code relating to judges of juvenile courts. Section 16-172.4
provides for such courts and permits the appointment of the same individual
(if otherwise qualified) to serve as judge of the juvenile court as has been
designated to serve as trial justice. It is my understanding that it has been the
practice in most instances for the same person to be appointed to both offices.
Assuming that this understanding is correct, the question as to what the county
shall provide for the office of a trial justice is to an extent answered by the pro-
visions of § 16-172.19 of the Code wherein it is expressly stated that the governing
body of a county shall provide for the juvenile judge "in the manner to be
determined by the governing body of the locality a suitable court-room and offices
for the court, and shall furnish all necessary furniture, filing cabinets, * * *" and other articles, such as dockets, books, stationery, et cetera, which latter articles, with respect to trial justices, are expressly made obligations of the State.

I think it is the generally accepted rule that the word "supplies" when used in statutes of the nature under consideration, connotes pencils, paper, rubber bands, blanks, ink and articles of that description (as distinguished from equipment) required and constantly used in the operation of an office of the character under consideration here.

I am of the opinion, therefore, that in order for a county to meet the requirements of providing suitable quarters for the court of its trial justice, it should provide all necessary facilities except those required to be provided by the State. The State's obligation is limited to necessary books, stationery and items coming within the definition of supplies, as set forth in the preceding paragraph of this opinion.

TRIAL JUSTICES—Counties to share office expense if serves more than one county. F-136a (314) May 20, 1955.

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

This is in reply to your letter of May 19, 1955, which reads as follows:

"At the April meeting of the Board of Supervisors in Middlesex County the Board was requested to pay office rent for an office at Gloucester where the records of the Trial Justice Court for Middlesex County have been kept and where it is proposed they shall be kept. I enclose copy of letter from the Trial Justice of Gloucester, Mathews and Middlesex Counties which gives the reasons for the request.

"Our Board of Supervisors requested me to ask for a ruling by you on the question of whether the Board has a right to pay rent for an office at Gloucester for the keeping of Middlesex Trial Justice Court records. Section 16-77 of the Code (as amended 1954) requires the Board of Supervisors or other governing body to provide 'suitable quarters for the Court of such trial justice at the places designated as aforesaid, within their respective counties, towns and cities.' But while Article 3, Title 16, of the Code provides for one Clerk of the Trial Justice Court for all the Counties in which the Trial Justice may hold courts, nothing is said about a Clerk's Office or place for keeping the records the Clerk is required to keep.

"The question seems to be if the Board is not required to furnish a clerk's office for the Trial Justice Court, does the Board have the right to pay a part of the rent for a Clerk's Office for the Court?"

I have heretofore expressed the opinion that, under the provisions of § 16-77 of the Code, the board of supervisors is required to provide suitable quarters for the court of a trial justice. Where there is a single trial justice for three counties, I can see no reason why the counties in his jurisdiction may not each contribute to the maintenance of a single office to be located at a point agreeable to each of the counties.

While the statute does not specifically provide that an office shall be provided a clerk appointed by a trial justice, it is clear that the clerk is a member of the staff of the trial justice, charged with official responsibilities connected with the office of the trial justice. If a trial justice appoints a clerk under § 16-60 of the Code, the office space and facilities used by the clerk in his official capacity is the office of the trial justice. In my opinion the Board of Supervisors would have the right to pay a part of the rental for such office in connection with the other counties being served by the trial justice and his clerk.
HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts.

This is in reply to your letter of July 8, 1954, in which you ask to be advised as to whether a trial fee may be charged by a trial justice court for dismissing the case without prejudice when the sheriff's return shows that he was unable to serve process on the defendant.

The statutory provision allowing a trial justice to charge a trial fee is set forth in section 14-133(3) of the Code of Virginia of 1950, as amended, as follows:

"For continuing or 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 granting a continuance or trying the action, provided, that only one such fee shall be charged and collected in the same action or proceeding."

On prior occasion this office has expressed the opinion that a trial fee may not be charged by a trial justice for dismissing the case without prejudice before the trial is held. (See Opinions of Attorney General, 1938-39, page 286). This conclusion is even more obvious when the reason for dismissing the action is due to the lack of service of process on the defendant, for in such instances there has been no jurisdictional basis established in order to place the defendant before the court for trial.

HONORABLE S. C. DAY, JR.
Assistant Comptroller.

This is in reply to your letter of July 13, 1954, which reads as follows:

"Chapter 360, Acts of Assembly of 1954, amends Code Section 16-77 and directs that the State shall provide necessary books, stationery and supplies to trial justice courts.

"Several trial justices have asked us whether or not this included desks, chairs, typewriters, adding machines, and other equipment ordinarily used in an office; also whether it includes postage.

"Will appreciate it if you will let us have your opinion on this subject.

"We believe it was the intention of the Legislature for the locality to pay for equipment and postage as they are not mentioned in the Act."

I have carefully examined the provisions of Chapter 360 of the Acts of Assembly of 1954 and it is my opinion that the obligation imposed upon the State by § 16-77 of the Code as amended by that Act is to provide the dockets necessary for use by the trial justices and to provide books, stationery and supplies. None of these terms would include such items as desks, chairs, typewriters, adding machines or other office equipment, since the term "supplies" as used in its ordinary sense does not include equipment. Likewise, I am advised that, in its ordinary sense, the word "supplies" does not embrace the item of postage. It is, therefore, my opinion that you have correctly determined that the State is not required to furnish either equipment or postage under the provisions of the amended section.
This is in reply to your letter of July 29, 1954, which reads, in part, as follows:

"Section 16-77, before the recent amendment, provided that the localities 'shall provide necessary books, stationery, and supplies'. The only pertinent change in the amendment of 1954 was to eliminate the above quoted and in place inserted the words 'the State shall provide necessary books, stationery, and supplies'. Our Board of Supervisors had accepted the word 'supplies' to cover postage and therefore paid such bills. I do not know what provision of the Code would be their authority for paying for postage in view of the change in the statute. Therefore, I anticipate that when we bill the Counties for stamps, we will be asked by the Board of Supervisors to show a provision of the law permitting them to pay this item. I would be grateful if you would give this matter some thought and let me have your opinion."

Upon receipt of your letter I made inquiry and found that several boards of supervisors have given the word "supplies" the same effect that your Board had given to it. Further, I learned by searching our files that the former Attorney General, the Honorable Abram P. Staples, in an opinion to the Trial Justice of Albemarle County on August 17, 1942, had likewise held that the word "supplies" in § 16-77 probably included postage.

Upon consideration of these facts I must conclude that the General Assembly in amending § 16-77 intended the word "supplies" to include postage. Since that has been the meaning given the word by many of the boards of supervisors and that meaning has been approved by the Attorney General, I conclude that my opinion to Mr. Day on July 16, 1954, was in error in so far as it relates to postage and that, in view of the amendment to § 16-77, the State should bear the expense of postage in the Trial Justice's office.

TRIAL JUSTICES—Space for clerk of and records to be provided for by Board of Supervisors. F-136e (85)

August 6, 1954.

Honorable James H. Jones,
Trial Justice for Grayson County.

I am in receipt of your letter of September 13, in which you present the following question:

"Here in Grayson County the office of the Trial Justice is not in the Court House, but is in a county-owned building. A question has arisen as to the rent to be paid by the Trial Justice for the office. "Section 16-77 of the Code of Virginia says that the Board of Supervisors shall provide suitable quarters for the court of such Trial Justice. It was my contention that the office occupied by the clerk of the Trial Justice Court would be covered by this section, as it seemed to me that the space occupied by the clerk and by the records of the court are just as much a part of the court as the courtroom where the cases are tried."

Section 16-77 of the Code as amended provides, among other things, that "the board of supervisors or other governing body of each county * * * within the jurisdiction of each trial justice shall provide suitable quarters for the
courts of such trial justice * * *. Space for the clerk and the records of the court is an essential part, it seems to me, of "suitable quarters for the court" and I must concur in your view that the Board of Supervisors should furnish such space. I do not see how any other conclusion could be reached but that this is the sense of the statute.

TRUST—Charitable—If Commonwealth accepts trust property, must administer trust property. F-40 (328)

HONORABLE THOMAS B. STANLEY,
Governor of Virginia.

June 2, 1955.

I acknowledge receipt of your letter of May 23, 1955, in which you refer to my letter of May 18, and state as follows:

"You refer to the deed dated February seventeenth, 1942, contained in the Acts of the General Assembly of 1942, Chapter 437, and the acceptance, through that Act, of the gift 'Belmont'. I shall appreciate your further advice as to the authority of the Commonwealth, in view of the 1942 acceptance, to dispose of the original gift, either by sale or gift; and, if the Commonwealth has such authority, whether it would require further action by the General Assembly."

The deed from Corinne Lawton Melchers, as published in chapter 437, Acts of Assembly, 1942, recites that the grantor "doth, subject to said estate for life so reserved, hereby give, grant and convey unto the Commonwealth of Virginia, to be perpetually held and maintained by it as a memorial to the memory of Gari Melchers, subject, however, to the terms and conditions hereinafter expressed, the following described real estate, consisting of four tracts, together known as 'Belmont', situate in the County of Stafford, Virginia". The deed further recites:

"The terms and conditions to which this gift, grant and conveyance shall be subject, are:

"First. This deed shall be of no effect unless and until it shall have been approved and accepted on behalf of the Commonwealth of Virginia, by an Act of the General Assembly;

"Second. The Memorial shall be managed, controlled, operated and maintained by the Board of Trustees of the Virginia Museum of Fine Arts, or their successor or successors, under the same power as conferred upon the said board in the management of the Virginia Museum of Fine Arts;

"Third. Subject to such reasonable rules and regulations as said Board of Trustees may adopt, the Memorial shall be kept open to the public, upon such terms and conditions as may from time to time be laid down by said board, and provided that any income received therefrom shall not be used for any purpose, other than to meet the expenses of maintaining and providing a Memorial, and the purchasing of such works of art as may be suitable for exhibition therein."

The Act (at page 703) contains the following language:

"Whereas, according to the terms and provisions of said deed, it is not effective unless and until it shall have been approved and accepted on behalf of the Commonwealth of Virginia, by an Act of its General Assembly; and
"Whereas, the Commonwealth of Virginia, represented by its General Assembly, is grateful to the grantor for her generous gift, and is willing to accept said gift and to preserve it in perpetuity as 'The Gari Melchers Memorial', in honor of her distinguished husband, who spent his last years at 'Belmont'; now, therefore,

"1. Be it enacted by the General Assembly of Virginia:

"Section 1. The Commonwealth of Virginia doth hereby approve and accept a deed of gift from Corinne Lawton Melchers of the land described in the deed, together with improvements thereon and the appurtenances thereunto belonging, constituting the estate at Falmouth, in the County of Stafford, Virginia, known as 'Belmont', such conveyance being made subject to a retained life estate in the grantor.

"Section 2. The management and control of the property and estate, both real and personal, which is now or may hereafter be donated by the grantor to the Commonwealth of Virginia as 'The Gari Melchers Memorial', including any funds, property and endowments thereof, shall, when possession is vested in the Commonwealth of Virginia, be managed, controlled, maintained and operated by the Board of Trustees of the Virginia Museum of Fine Arts; and in the conduct and management of the Memorial, the said Board of Trustees shall have all the powers, authority and discretion it now exercises or hereafter may be given in the conduct and management of the Virginia Museum of Fine Arts."

The property described in the deed was given to the Commonwealth to be held in trust. When the gift was accepted by the General Assembly, the Commonwealth, in my opinion, became the trustee of a public charitable trust, amenable to the law applicable to charitable trusts generally, one of which is to administer the trust in accordance with the terms thereof as expressed by the grantor in the deed. Maxcy v. City of Oshkosh, (Wis.), 128 N. W. 899.

By the enactment of Chapter 437, Acts of 1942, the General Assembly authorized the Commonwealth to act as trustee in this particular trust. The property having been accepted under this Act, the trust was not established under the provisions of the general law (Chapter 2, Title 55 of the Code) and, as a consequence, the rights reserved to the General Assembly under sec. 55-34 of the Code do not apply and may not, in my opinion, be invoked. The Act by which this trust was established is a valid exercise of power by the General Assembly. Roller v. Shaver, 178 Va. 467.

The offer made by Mrs. Melchers to the Commonwealth and its acceptance by the Commonwealth, subject to every condition stipulated by the donor, constitutes a contract between the parties, which, in my opinion, the Commonwealth is obligated to perform. The Constitution of the United States ordains that "No state shall * * * pass any * * * law impairing the obligation of contracts * * *." Art. 1, sec. 10 of the Constitution of the United States. Similarly, sec. 58 of the Virginia Constitution provides that "The General Assembly shall not pass * * * any law impairing the obligations of contracts * * *." These provisions, in my opinion, are applicable to contracts with respect to public charitable trusts to which the State by legislative enactment becomes a party. McGehee v. Mathis, 4 Wall. 143 (U. S. Supreme Court) ; Cary Library v. Bliss (Mass.), 7 L. R. A. 765.

Under the principles herein set forth, I am of the opinion that the Commonwealth does not have the power, either with or without legislative action, to dispose of the property in question, either by sale or gift.

This trust, in my opinion, like all other charitable trusts, is properly subject to the jurisdiction of a court of equity with respect to the obligation of the Commonwealth in connection with its administration.
UNEMPLOYMENT COMPENSATION—Eligibility for benefits—Maximum time.

HONORABLE GEORGE H. HILL,
Member House of Delegates.

This is in answer to your letter of August 13, 1954 concerning the 16-week limitation imposed by the recent session of the General Assembly with respect to claims for unemployment compensation benefits.

Since the exact nature of your inquiry is not clear from your letter, I will attempt to give you a general explanation which I hope will cover the questions that you might have in mind.

The amendment, which may be found in Section 60-45 of the Code, was designed to prevent a claimant from drawing more than 16 times his weekly benefit amount for any one period of unemployment. The old law limited a claimant to 16 times his weekly benefit amount in any one benefit year. Because of the change in benefit years, it was possible for a claimant to draw 16 weeks in one benefit year and, without having returned to work, draw another 16 weeks in the new benefit year during the same period of unemployment. For example, a claimant who became unemployed on January 1, 1954 and who was eligible for the maximum duration could draw 16 weeks of benefits through the latter part of April in the benefit year 1953-1954. On May 1, 1954 a new benefit year would begin and the claimant would be entitled to another 16 weeks without having returned to work for even one day. This result was obviously not intended by the General Assembly when it originally passed the Unemployment Compensation Act.

The possibility of dovetailing benefit years so as to extend maximum duration from 16 weeks to 32 weeks became a rather popular practice in recent years to the detriment of the unemployment trust fund and to the program in general. Claimants were not seeking work at the expiration of the first 16 weeks realizing that they would become entitled to another 16 weeks with the beginning of a new benefit year. The law was unquestionably encouraging indolence. You, of course, will appreciate the fact that unemployment compensation is not a relief measure but is intended only as a stop-gap to provide temporary benefits for one who is unemployed through no fault of his own and who is willing, anxious and ready to obtain employment.

In addition to discouraging idleness, a second reason for the amendment to Section 60-45 was to protect the solvency of the fund. I am sure you can easily see the serious threat that the fund for payment of benefits might be exposed to during an extended period of unemployment where a number of claimants involved draw 16 weeks and then become immediately eligible for an additional 16 weeks. This would create a potential duration of 32 weeks. No state in the union has such a duration.

You will notice that the new law does not change the maximum duration to which a claimant may be entitled in any one benefit year, but merely provides that after a claimant has drawn 16 weeks of benefits he can not again become eligible until he returns to work for some covered employer for as many as 30 days. It might interest you to know that one proposal under consideration was to prevent a claimant from drawing any further benefits until he returned to work and built up certain monetary credits. This would have meant far more than the 30 day period which the Unemployment Compensation Commission recommended to the General Assembly.

The new law was passed with an emergency clause making it effective March 11, 1954. A case is now pending before the Unemployment Compensation Commission in which the constitutionality of the law has been challenged. It appears certain that the case will be carried into court regardless of the decision of the Commission. The constitutional question involved has to do with the...
deprivation of a vested right. In this connection it is my opinion that there is no vested right to unemployment compensation benefits and the legislature is free to amend the law in any particular as it so desires. To make it eminently clear that it reserved this right, the legislature amended Section 60-118, which reads as follows:

"§ 60-118.—The General Assembly reserves the right to amend or repeal all or any part of this act at any time; and there shall be no vested private right of any kind against such amendment or repeal. All the rights, privileges, or immunities conferred by this act or by acts done pursuant thereto shall exist subject to the power of the General Assembly to amend or repeal this act at any time."

UNEMPLOYMENT COMPENSATION—Maximum benefits payable for a year.

F-161 (119)

HONORABLE JOHN L. WHITEHEAD,
Member of House of Delegates.

This has reference to your letter of October 16, 1954 in which you pose an inquiry as follows:

"A man was laid-off of work from a company, he applied for unemployment compensation and received it for fourteen weeks and was then called back to work. After working for thirty-two days he was laid-off again. Now, is he entitled to draw unemployment compensation for another sixteen weeks?"

I call your attention to § 60-45, as amended, of the Code of Virginia 1950, which reads as follows:

"§ 60-45. Duration of benefits.—The maximum total amount of benefits payable to any individual during any benefit year shall be determined from the "Benefit Table" shown in § 60-42, but in no case shall such maximum for any one separation from any employer deemed responsible for the individual's current period of unemployment as defined in § 60-68, regardless of the benefit year, exceed sixteen times such individual's weekly benefit amount. Such determination shall be based only upon wages earned in insured work during such individual's base period. The Commission shall maintain a separate account for each individual who subsequent to January first, 1937, earns wages in insured work. After the expiration of each calendar quarter the Commission shall credit each individual's account with the wages earned by him in insured work in such calendar quarter."

The "benefit year" is defined in § 60-8 of the Code as follows:

"§ 60-8. Benefit year.—'Benefit year', with respect to any individual, means the twelve months period beginning with May first and ending with April thirtieth. When the last day of a benefit year falls within a week of compensable unemployment, the benefit year shall be extended until the completion of such week."

The "base period" is defined in § 60-6 of the Code as follows:

"§ 60-6. Base period.—'Base period' means the calendar year immediately preceding the beginning of a benefit year."

The calculation of the benefits payable to a claimant in the present benefit year (May 1, 1954 - April 30, 1955) is based on wages earned in insured work during his base period (January 1, 1953 - December 31, 1953). A table ("Benefit
Table") is provided in § 60-42 for this calculation. Examination of the benefit table reveals that a claimant’s wages during his base period may entitle him to a duration of benefits ranging from six to sixteen weeks and in a weekly benefit amount ranging from six to twenty-four dollars depending on the amount of those wages. You will observe, however, that regardless of the amount of wages earned in the base period a claimant can receive no more than twenty-four dollars in any one week and no more than sixteen weeks of benefits in any one benefit year.

Therefore, since the person you refer to in your letter of October 14 has drawn fourteen weeks of benefits; and since, as you explained in your letter of October 19 they were drawn subsequent to May 1, 1954, his maximum possible duration limits him to two more weeks in the present benefit year.

VETERINARY EXAMINERS—Copy of examination—Must be filed with Secretary of Commonwealth after given. F-147 (291)

April 28, 1955.

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

This is in response to your letter of May 28, 1955, inquiring if:

"In accordance with section 54-1, is it mandatory for the Virginia State Board of Veterinary Examiners to file a copy of the basic examination with the Secretary of the Commonwealth; or would the Board be permitted to file annually the fifteen per cent (15%) of the questions of the basic examination that are deleted?" (The proposal is a 15% annual deletion).

Section 54-1 provides:

"Every State agency authorized at any time to conduct examinations of applicants for admission to practice or pursue any profession, vocation, trade, calling or art shall file a copy of each examination within a period of ten days after it is given with the Secretary of the Commonwealth where it shall be lodged and preserved for a period of at least one year as a public record accessible to any person desiring to examine it during usual business hours; provided, however, that if the same examination is also given outside of the State of Virginia, a copy of such examination need not be filed until ten days after the date on which it was last given anywhere. After the expiration of one year from the time of the filing of each copy, the Secretary of the Commonwealth may withdraw and destroy it."

It is my opinion that section 54-1 calls for the filing of "a copy of such examination" within ten days after the date on which it was last given anywhere, and that "a copy" means a complete copy of the examination given each year, or however often new examinations are given. To permit any other method of filing would negate the clear intent of the section to lodge and preserve the examination as a public record accessible to any person desiring to examine it.

VIRGINIA 350TH ANNIVERSARY COMMISSION—Cannot create corporation with power to borrow money. F-99 (315)

May 20, 1955.

MR. PARK ROUSE, JR.,
Executive Director, Virginia 350th Anniversary Commission.

This is in reply to your letter of May 12, 1955, in which you ask, first, if the obligations of the Virginia 350th Anniversary Celebration Corporation would
be tax free, and second, whether the Corporation is actually empowered to borrow money. I will answer your second question first, as I feel that my answer to that question will make it unnecessary to consider the first question.

The Commission is empowered to form a nonprofit corporation as an instrumentality for assisting in details of the administration of the 350th Anniversary Celebration by Chapter 449 of the Acts of Assembly of 1954. The Commission is a special State agency which has been created by the General Assembly and as such has only those powers expressly given to it by Chapter 449 of the Acts of Assembly of 1954. The Corporation formed by the Commission is in reality a government-owned and controlled corporation. The corporation is an instrumentality of the Commission and of the Commonwealth of Virginia, and as such instrumentality it, in my opinion, has no greater powers than those given to the Commission. The Commission is not authorized by the General Assembly to borrow money.

The Supreme Court of Appeals has consistently held that a political subdivision or arm of the State does not have the power to borrow money or issue negotiable notes unless the General Assembly has by statute granted such power. Richmond & Co. v. West Point, 94 Va. 668. The Supreme Court of Appeals held that their right to borrow money and to bind themselves to its payment by commercial securities, unless authorized to do so by the General Assembly, is expressly denied. The Court has held that the powers of public corporations, such as this, are limited to those granted in express terms, and those indispensably essential to the declared objects and purposes of the corporation. Lynchburg etc., Ry. v. Dameron, 95 Va. 545.

The two cases referred to above relate to municipal corporations. As to corporations in general Fletcher Cyclopedia Corporations contains this statement:

"The statement sometimes found in the cases that the powers of a corporation are defined and limited by its articles must be taken with caution, for the law of the sovereign state from which the corporation's powers are derived and not its articles of incorporation must determine what powers have been lawfully granted, and whether the certificate of incorporation confers such rights and powers as are authorized is a matter for judicial determination." § 2477, Vol. 6, p. 243, 1950 Ed.

In a case involving a special corporation, such as we have here, the Supreme Court of Colorado held:

"Since the corporation was not formed under the general corporation laws, but under the special act conferring limited powers on companies organized thereunder, we need not look to its charter to ascertain what powers it may exercise, but to the legislative act under which it was created." International Service Union Co. v. People, 70 P. 2d. 431.

I am of the opinion that the General Assembly in the use of the phrase "to do all things proper and necessary for the proper celebration of such landing" did not authorize or intend to authorize the Commission to borrow money. The Commission is expressly empowered to receive and expend gifts, grants and donations, but there is no mention anywhere in the Act of the authority to borrow money.

In § 2 of the Act creating the Commission there is appropriated from the general fund the sum of $100,000 for each year of the biennium "for expenses and operations of the Commission." In the absence of any express authority to borrow money, this appropriation indicates that the General Assembly felt that it was making sufficient provision for the financial needs of the Commission.

I am of the opinion that the Commission cannot create a corporation with powers greater than those which the General Assembly has given the Commission. Anything in the Charter of the Corporation which is in conflict with Chapter 449 of the Acts of 1954 or which confers powers upon the Corporation not given to it or the Commission by Chapter 449 of the Acts of Assembly is void and of no effect.
HONORABLE LEWIS A. McMURRAN, JR.,
Chairman, Virginia’s 350th Anniversary Commission.

This is in reply to your letter of March 25, 1955, relating to the Virginia 350th Anniversary Celebration Corporation, a nonprofit organization formed pursuant to the provisions of paragraph 5(b) of Chapter 449, Acts of Assembly, 1954, which provides:

“The Commission is hereby authorized to form a nonprofit corporation as an instrumentality for assisting in details of the administration of the celebration.”

You state that several months ago the State Corporation Commission issued its order granting a charter to the corporation in question, and you request a ruling on the following proposition set out in your letter.

“As we understand it, the nonprofit corporation has the power to carry on any activity authorized by its charter and its authority stems from its charter, independently of the Act establishing the Commission. It is also our understanding that the Commission can assign the corporation any duty, function, or power granted the Commission by the Act, so long as in the opinion of the Commission the thing assigned the Corporation is ‘for assisting in details of the administration of the celebration.’”

“Inasmuch as we may not be wholly right in our conclusions, it would be appreciated if you would give the Commission a ruling at your earliest convenience, advising as to the correctness of our understanding and as to whether there is any function of the Commission which cannot be assigned by it to the nonprofit corporation ‘for assisting in details of the administration of the celebration’.”

It is clear that the authority of the Commission is derived solely from the Act by which it was created. Under § 5(b) of this Act the Commission is empowered to form a nonprofit corporation to serve as an instrumentality of the Commission. The stated purpose of this corporate instrumentality is to assist in the “details of the administration” of the prospective anniversary celebration. Manifestly, the Act contemplates that this corporation shall have a subsidiary status and function as an agency of the Commission.

Although specifying the purpose for which the corporation may be formed, the Act does not undertake to define its powers. In the absence of any recital of its express powers, I am of the opinion that the corporation has only those powers which are reasonably necessary and conducive to effectuating the special purpose assigned to it by the Legislature. In this connection it is fundamental that the law of the State, not the charter of the corporation, determines the powers which may be lawfully granted. A charter may not invest a corporation with powers which are not authorized by law. The Act in question does not purport to grant to the corporation in question the full range of powers permitted under the general corporation laws of the Commonwealth. If such had been the intention of the Legislature, it could easily have made provision to that effect. I am, therefore, of the opinion that the power of the corporation may be said to stem from its charter only as limited by the Act authorizing its creation, not “independently” of that Act. To hold that the corporation’s authority stems from the provisions of its charter independently of the Act would be tantamount to asserting that the corporation’s charter takes precedence over the Act authorizing the corporation’s existence. No such pre-eminence can be accorded the corporate charter.

Finally, I am of the opinion that the Commission’s authority to assign its functions to the corporation is subject to the same limitation. The corporation may exercise only such powers of the Commission as are reasonably necessary “for assisting in details of the administration of the celebration.”
This is in further reference to your letter of July 13, 1954 to which I replied on July 29, 1954.

In answer to your letter I stated that legislative members of the Virginia 350th Anniversary Commission were entitled to a per diem for those days in which they are engaged in the business of the Commission and entitled to mileage for necessary travel, but that they could not be reimbursed for other expenses.

The question has arisen as to whether a legislative member who desires to do so could elect to be reimbursed for his expenses in lieu of receiving a per diem in those cases in which the actual expenses would be less than the per diem.

In cases where the expenses are less than the per diem I do not see that there could be any objection to the legislative member receiving actual expenses in lieu of the per diem payment to which he would be entitled.

This is in reply to your letter of July 13, 1954, which reads, in part, as follows:

"The General Assembly of 1954, under Chapter 449, created the Virginia 350th Anniversary Commission. The Commission is composed of a number of members of the General Assembly and certain members of the public. The Commission meets from time to time and the members incur expenses in connection therewith. I will appreciate your advising me upon the following questions:

"1. Can the nonlegislative members be paid their expenses in connection with meetings of the Commission or other duties in connection therewith?

"2. Can those members of the General Assembly who desire so to do be paid their expenses in the same manner as nonlegislative members under the preceding paragraph?

"3. Can the legislative members who desire so to do be paid a per diem, and mileage at the return of 7½ a mile, in lieu of any other reimbursement for their attendance upon meetings of the Commission and their duties in connection therewith?"

In view of paragraph 2 of Chapter 449 which appropriates to the Commission a sum of money "for the expenses and operation of the Commission" it is my opinion that the answer to your first question must be in the affirmative and that the nonlegislative members of the Commission may be paid their expenses in connection with their duties on the Commission.

Your second question is answered, I believe, by reference to § 14-30 of the Code of Virginia as amended in 1954, which provides, in short, that members of legislative committees shall receive as their mileage for every mile of necessary travel to and from the place of meeting 7½, and continues, "but shall not be reimbursed for other expenses." In view of that language, I do not believe that members of the General Assembly serving on this Commission can be paid in the same manner as are the nonlegislative members.
As to your third question, § 14-29.1 of the Code provides a per diem for members of legislative committees which may sit during any recess of the General Assembly. In view of the fact that certain members of this Commission are required to be appointed from the membership of the Senate and House of Delegates, it would appear to me that this is a legislative commission on which such members are serving as one of their duties as members of the General Assembly, and that they are entitled to the per diem provided in the said section.

VIRGINIA STATE BAR—Proper to publish and distribute certain informational pamphlets. F-190 (308)  
MR. R. E. BOOKER,  
Secretary-Treasurer, Virginia State Bar.  
This will acknowledge receipt of your letter of May 11 requesting my opinion as to whether or not it would be proper to use funds of the State Bar to publish and distribute certain pamphlets. You submit material for a pamphlet which will be entitled “Have You Made a Will,” and material for a pamphlet entitled “So You’re Going to be a Witness.”

I have carefully examined the materials submitted in the light of the provisions of section 54-52 of the Code of Virginia and the Rules for Integration of the Bar promulgated by the Supreme Court of Appeals.

I think it might be said that the pamphlet “So You’re Going to be a Witness,” which gives advice and direction to prospective witnesses relative to the duty, manner and effectiveness of testimony in Court would tend to facilitate administration of justice and is thoroughly consistent with the powers of the Council in the administration of the affairs of the Virginia State Bar. In my opinion the publication of this pamphlet would not conflict with the restrictive provisions of section 54-52.

The proposed pamphlet “Have You Made a Will” does not, in my judgment, constitute advertisement inconsistent with any canon of ethics of which I am apprised, but, if the advice given is followed, would tend to circumvent difficulty and litigation which might otherwise ensue in the disposition of estates.

In my opinion, neither of these publications comes within the excepted classification of law magazines, and, therefore, do not offend the provisions of section 54-52.

VITAL STATISTICS—Birth certificates—Local registrars may not copy information relative to illegitimacy. F-141 (60)  
MISS ESTELLE MARKS,  
State Registrar, Bureau of Vital Statistics.  
This has reference to your letter of July 27, 1954, in which you ask to be advised as to whether the provisions of chapter 429 of the Acts of Assembly of 1954, which amended section 32-337 of the Code of Virginia of 1950, affects the provisions of section 32-335(c) of the Code, pertaining to the duties of the local Registrar. That section provides as follows:

“He shall also make a complete and accurate copy of each birth, each death, and each stillbirth certificate registered by him in a record book supplied by the State Registrar to be preserved permanently in his office, and transferred to his successor, as the local record in such manner as directed by the State Registrar, except that in copying cer-
Your question emanates from an uncertainty among some of the local registrars as to whether the 1954 amendment to section 32-337 of the Code authorizing local registrars to issue birth and death certificates repeals the provision of section 32-335(c), which prohibits a local registrar's copying into his books the information on an original birth certificate pertaining to illegitimate births.

You will recall at the time of introducing the legislative bill which was enacted as chapter 429 this office, as well as the office of the Bureau of Vital Statistics, was consulted by members of the Legislature in an effort to formulate a legislative enactment which would permit local registrars to perform the services of issuing birth and death certificates, and at the same time not deprecate the system of recording and disseminating vital statistics which has long been established in this State. At that time we advised that the greatest danger in allowing the release of birth certificate copies from any office other than the State Registrar was that with respect to illegitimate births. Inasmuch as a great percentage of such certificates are subsequently amended by adoption, legitimation or change in name, none of which amendments are available to the local registrars, it was felt that proper safeguards should be erected for the protection of such unfortunates. I believe I can say without fear of contradiction that all parties interested agreed that such certificates could best be handled in the central office for the State. For this reason when subsection (d) of section 32-335 and section 32-337 of the Code were amended by the General Assembly nothing was done which would in any manner change the provision of subsection (c) of section 32-335 relating to the information which the local registrar is to copy from the original certificate of birth.

In view of the foregoing I am of the opinion that local registrars must continue the established practice of refraining from the copying of information from original birth certificates relative to illegitimacy.

WATER—Sub-surface waters—Landowner may lawfully use to detriment of adjacent owners. F-33 (344)

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

June 22, 1955.

This is in reply to your letter of May 31, in which you state that a housing development, which will ultimately contain some 1200 homes to be financed through the FHA or VA, was recently undertaken near Manassas. You further state that the filling of a large capacity storage tank from a well on the site of the development resulted in the drying up of several wells and the lowering of the water level in many others in the vicinity. You inquire what steps, if any may be taken by the Board of Supervisors of Prince William County to remedy the situation thus presented.

Particularly pertinent in this connection are the opinions of the Supreme Court of Appeals of Virginia in Miller v. Black Rock, etc. Co., 99 Va. 747, Heninger v. McGinnis, 131 Va. 70; and Couch v. Clinchfield Corp., 148 Va. 455. An interesting annotation on the subject of subterranean waters generally, with citation of case authorities from various jurisdictions including Virginia, may also be found in 29 A. L. R. (2d) 1594 et seq. Cumulatively the Virginia decisions are supportive of the following propositions:
There is a definite distinction between *subterranean streams* which flow in permanent, distinct and well defined channels from the lands of one proprietor to those of another, and *sub-surface waters* which, without any permanent, distinct, or definite channel ooze or filter from the lands of one owner to those of another.

In the absence of affirmative proof that underground water flows in a defined or known channel, it is presumed to be percolating water.

Water percolating beneath the surface, without a definite channel, or in courses which are unknown and unascertainable, is not subject to the settled laws governing the rights of riparian owners, but belongs to the realty in which it is found.

In the absence of malice or negligence, a landowner may lawfully utilize subsurface percolating waters of his own realty even if, in so doing, he destroys the subsurface supply of his neighbor.

Illustrative of this last stated proposition are the following excerpts from two of the above mentioned opinions:

"The rule that a man may freely and absolutely use his property, so long as he does not directly invade that of his neighbor or consequently injure his clearly-defined rights, is applicable to the interruption of sub-service supplies of water or of a stream, and the damage resulting therefrom is not the subject of legal redress. The landowner may, therefore, make a ditch to drain his land, or dig a well thereon, or open and work a quarry upon it, or otherwise change its natural condition, although by so doing he interrupts the underground sources of a spring or well on his neighbor's land. The only remedy for the latter is to sink his own well deeper." (Miller v. Black Rock, etc., Co., 99 Va., at 754, 755).

"The owner of land, who in the use of his property for mining purposes, interferes with the subterranean flow of water and thus destroys a spring in his neighbor's land, is not liable for the damages thus done unless he is guilty of malice or negligence.

"The owner of land may dig ditches or sink wells, or in any other manner exercise his dominion over his own land, without being liable at law for the interception or diversion of any underground percolating waters consequent upon such use of his own property." (Couch v. Clinchfield Corp., 148 Va., at 462, 463).

On the basis of these authorities, it is manifest that no analogy may be drawn between the rights of the owners of land riparian to well defined streams and those of the owners of land containing percolating sub-surface waters. Subterranean waters may be the subject of riparian rights only when flowing in defined or known channels. Moreover, since it appears from your letter that the well in question is being appropriately utilized to provide water for the various homes in the development in question, no suit for injunction or action for damages may be successfully maintained.

If the situation under consideration should become sufficiently critical to affect the welfare of the county as a whole, it is possible that the Board of Supervisors could regulate water usage in the county pursuant to the authority conferred upon the Board by Section 15-8(5), Code of Virginia (1950) as amended. Moreover, in an extreme situation, the county might condemn the facility in question on the ground that the water produced thereby was "necessary to be taken and used for the purposes of the * * * county * * *". See, Section 25-232, Code of Virginia (1950). However, I am of the opinion that neither of these procedures would be available to the Board of Supervisors except in a case of necessity and unless required for the general welfare of the county and not the welfare of various individual inhabitants thereof.
REPORT OF THE ATTORNEY GENERAL


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

This is in reply to your letter of October 22, 1954, in which you request an opinion concerning the propriety of your department's charging fees in adoption cases to finance the social studies required by law in these instances. You state that you have been requested to investigate whether it might not be practical and desirable—in order to expedite the required inspections and reports in proposed adoption cases—to utilize the services of specified social workers selected by you on a part-time case fee basis, with all expenses deposited in advance by the prospective parents.

Pretermting all considerations of the practicality and desirability of such a proposal, I am of the opinion that the Department is without authority to impose the exactions in question. I have found no provision of the Code of Virginia which expressly empowers the department to make such charges, nor do I believe that those sections of the Code which permit the Director to engage necessary agents and employees, and the Board of Welfare and Institutions to promulgate rules and regulations, may reasonably be construed to confer such authority upon the Department. See Code of Virginia, 1950, sections 63-10, 63-11 and 63-25. With certain specific exceptions, the charging of fees in welfare cases generally is prohibited (Code of Virginia, 1950, sections 63-103, 63-139, 63-203 and 63-219), and I should think that a similar prohibition would apply with even more stringency in adoption cases, where the agencies of the Department are not acting in their individual capacity but occupy an ancillary status in conjunction with and under the direction of the court in which a petition for adoption is pending.

On the whole I am constrained to believe that, in the absence of express legislative sanction, the proposed procedure would not be permissible.


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

I am in receipt of your letter of January 26, in which you declare that, in administering the various public assistance programs of the State, the Board of Welfare and Institutions has adopted a policy which permits local boards awarding such assistance to include an item covering expenses for "medical care" of qualified recipients. You state that a question has arisen as to whether or not the services rendered to various recipients by osteopaths and chiropractors should be honored and paid out of such extra allowances, or whether the term "medical care" should be limited to include only such services as are performed by medical practitioners. Specifically, you inquire whether there is any legal basis for the exclusion of osteopaths and chiropractors from the benefits of this policy; and, if not, whether the Board has authority to prescribe such an exclusion under its rule making authority.

With regard to the first aspect of this question, I am of the opinion that no legal basis exists for the exclusion of osteopaths and chiropractors from the operation of the regulation. Both osteopathy and chiropractic are well defined branches of the healing arts which are recognized and regulated by the Commonwealth. From a strictly legal point of view, no statutory differentiation or proscription is enunciated with respect to practitioners of these professions which would require their segregation in the situation you describe.
REPORT OF THE ATTORNEY GENERAL 259

Pertinent in connection with the latter phase of your inquiry is section 63-25, Code of Virginia (1950), which provides:

"The Board shall make such rules and regulations, not in conflict with this title, as may be necessary or desirable to carry out the true purpose and intent of this title."

It is manifest from the language of this section of the Code that the rule making authority of the Board is limited to the promulgation of such regulations as may be necessary or desirable to effectuate the beneficient purposes of the State Welfare Laws. It would thus appear that the propriety of the Board's adopting a rule eliminating these two classes of practitioners from consideration would depend upon whether or not a regulation of this character would be necessary or desirable in furthering the purposes of the welfare laws. If a reasonable basis for such exclusion exists, it would be permissible. However, unless factual circumstances demonstrate that the exclusion would better enable the Board to carry out its functions, I am of the opinion that its adoption may not properly be predicated upon the rule making authority of the Board.

WELFARE AND INSTITUTIONS — Hospitalization of indigent patients—
Authorization by county. F-231 (78)

September 10, 1954.

Mr. R. Granville Ergenbright,
Credit Manager, University of Virginia Hospital.

I have your letters of September 1, 1954 relative to Rosemary Whitlock and Dorsey William Shifflett, indigent patients.

In connection with Rosemary Whitlock the Board of Supervisors of Spottsylvania County has refused to pay hospitalization costs beyond the seven day period originally authorized for such patient. In connection with Dorsey William Shifflett it appears that the county of Greene has refused to authorize assistance for hospitalization costs on the ground that the Department of Welfare has no SLH funds with which to pay the county's share of such costs.

Please refer to my letter to you under date of August 16, 1954 in which I discussed at some length the provisions of the "State and Local Hospitalization" law as amended by the 1954 session of the General Assembly. You will note that I there stated that discretion which had formerly rested in the counties with reference to length of stay for indigent persons certified to the University of Virginia Hospital and the Medical College of Virginia has apparently been limited by the enactment of section 32-293.2 of the Code of Virginia. With regard to such hospitals it appears that once an indigent person has been certified by the political subdivisions as eligible for hospitalization under section 32-294 of the Code, such political subdivision becomes liable for sharing the cost for such person's hospitalization. I also suggested that you treat "certification" as being synonymous with "authorization".

With the foregoing in mind it appears that the county of Spottsylvania authorized hospitalization for Rosemary Whitlock subsequent to the effective date of section 32-293.2 of the Code and thus became responsible for sharing the cost of such hospitalization even though the period of confinement exceeded the seven day period originally authorized by such county. While it appears that the county attempted to place a condition on its authorization for this patient, as pointed out in my letter of August 16, section 32-293.2 of the Code provides a contract for the county and hospital without limitation once an indigent person is certified for treatment. The University of Virginia Hospital would thus be entitled to proceed to collect such costs as is provided in section 32-293.2 of the Code.
With regard to Dorsey William Shifflett it appears that the county of Greene has not authorized such patient's admittance to the hospital as being eligible for hospitalization under section 32-294 of the Code. While such patient has been determined to be indigent the authorizing agent for the county of Greene has made it clear that the county will not accept responsibility for hospitalizing such person. I am, therefore, of the opinion that the county of Greene has not brought itself within the terms of the statute authorizing the hospital to treat such indigent person at the joint expense of the county and State.

WELFARE AND INSTITUTIONS—Hospitalization of indigent patients. Locality liable for part of cost. F-231 (54)

August 16, 1954.

Mr. R. Granville Ergenbright,
Credit Manager, University of Virginia Hospital.

This is in reply to your letter of August 3, 1954, which was with reference to my letter to you under date of July 13 relative to the cost of hospitalization of indigent persons. You ask to be advised as to what constitutes certification under the provisions of sections 32-293.2 and 32-294 of the Code of Virginia of 1950, as amended, and what recourse the hospital has where the authorizing agent as mentioned in section 32-294 fails to respond or gives inadequate response to requests for public assistance.

The provisions of chapter 15, Title 32, of the Code of Virginia of 1950, as amended, are not free from doubt as to the intent of the Legislature. As originally enacted it appears clear that the purpose of such legislation was to authorize the political subdivisions to enter into contracts with the various hospitals for the care of indigent persons, the cost of which was to be borne in part by the State. However, in subsequent amendments to this chapter it appears that the Legislature intended to impose upon the political subdivisions a greater responsibility in connection with such persons. Although the sharing of the cost of such hospitalization continues to be the joint responsibility of the State and political subdivisions, some of the discretion as to the length of stay appears to be withdrawn from the political subdivisions.

With regard to the Medical College of Virginia and the University of Virginia Hospital, the provisions of section 32-293.2 of the Code make it clear that no formal contract is necessary between the hospital and political subdivisions in order to impose the burden upon the political subdivision to share the cost of hospitalization for indigent persons, provided certain conditions have been met. The first such condition is that the authorizing agent for the political subdivision must certify that an indigent person is eligible for hospitalization under section 32-294 of the Code. The latter section defines an indigent person and provides for an authorizing agent to determine when such indigent persons are eligible for hospitalization at public expense. It appears clear that once an indigent person is certified by an authorizing agent to a hospital as being eligible for hospitalization at public expense, the political subdivision becomes liable for one-half the cost of such hospitalization, provided the notice as required in section 32-293.1 is given. It might be of some aid to you in determining when a patient has been certified if you treat "certification" as being synonymous with "authorization".

With regard to your second inquiry, I am of the opinion that the hospital has no recourse if an authorizing agent refuses to certify the eligibility of an indigent person. It is to be noted that the Legislature has not imposed upon the political subdivision the duty to certify indigent persons for hospitalization at public expense, but only the duty to bear one-half the cost of such hospitalization. Once the eligibility of such persons has been certified to the hospital.
WILLS—Probate taxes—Not imposed on joint bank accounts or property passing by survivorship. F-157 (311)

May 18, 1955.

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

This is in reply to your letter of May 13, 1955, from which I quote below:

"Section 58-66 of the Code of Virginia 1950 deals with the tax on wills and administration. I desire to propound to you two questions: (1) where a husband or wife dies leaving real estate and the deed conveying the property to them provided for survivorship; and (2) where husband or wife are the parties of joint bank accounts or owns stock in joint name with right of survivorship, should the clerk collect probate or administration tax in any of the above cases?"

Section 58-66 of the Code imposes a tax on the probate of every will or grant of administration based upon the value of the estate "passing by such will or by intestacy of the decedent." In the two cases you put, while I have not seen the instruments involved, I assume that neither the real estate nor the bank account or stock passed by the will or the statutes relating to descents and distribution. It is my opinion, therefore, if my assumption is correct, that the probate tax is not applicable.
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